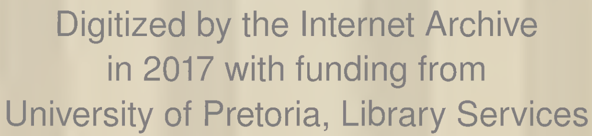
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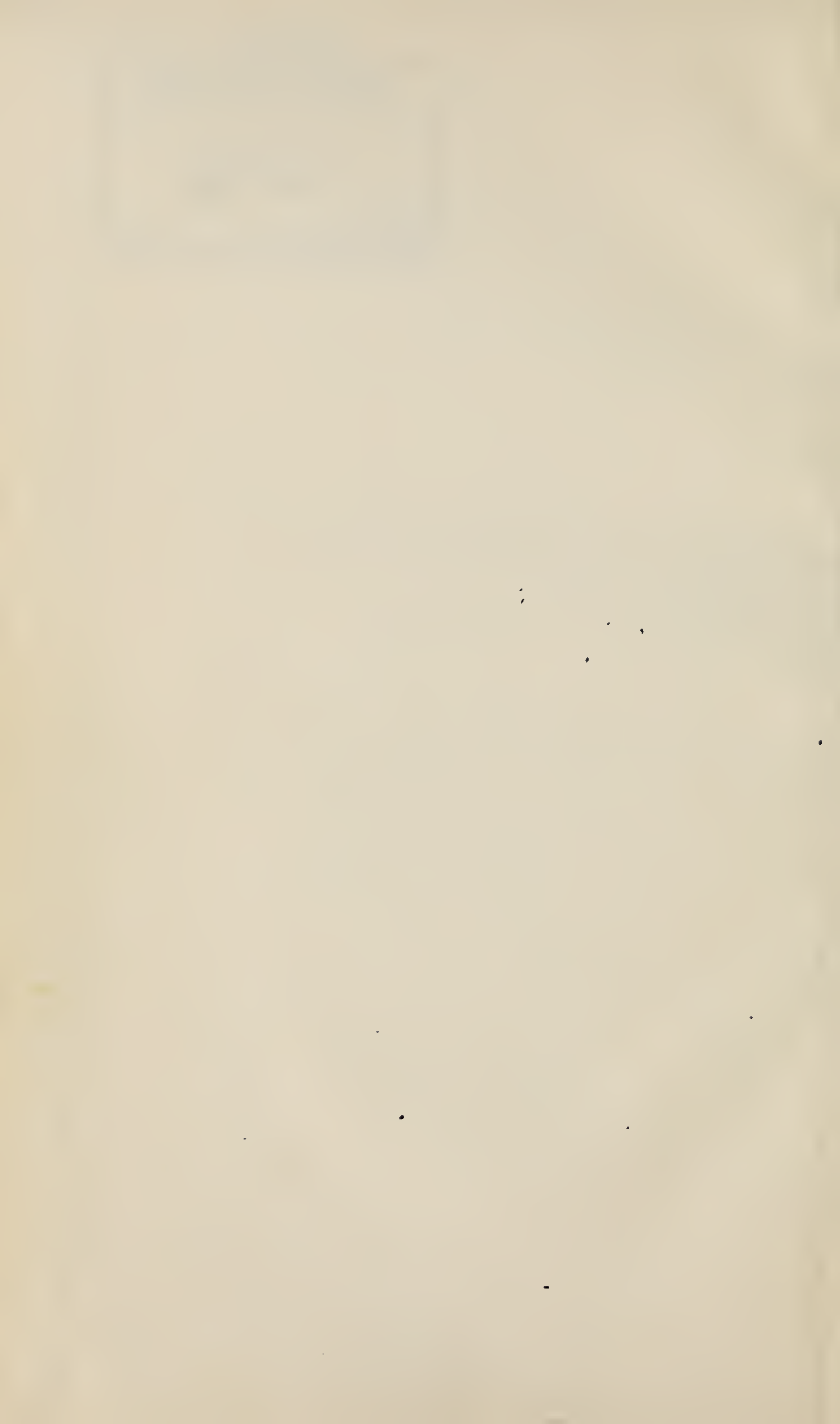

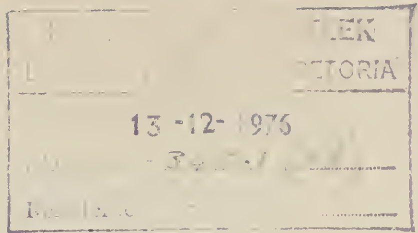

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Negatiewe Interesse en Kontrakbreuk

D J Joubert

Universiteit van Pretoria

Die algemene reël vir die berekening van enige skadevergoeding waarop die skuldeiser in die geval van kontrakbreuk aanspraak kan maak, is dat hy geregtig is om geplaas te word in die posisie waarin hy sou gewees het as die kontrak reëlmatig nagekom is.[1] Daar word dan gesê dat hy geregtig is op sy positiewe of vervullingsinteresse.

Nieteenstaande dit die algemene reël is, vind ons ook in die regspraak *dicta* waarvolgens die howe te kenne gee dat die eiser se skadevergoeding op 'n ander grondslag bereken kan word. In *Inhambane Oil & Mineral Development Syndicate Ltd v Mears & Ford*[2] kanselleer die koper 'n kontrak en hr De Villiers sê:

> "They are entitled now to say that the contract be rescinded, but 'let us be placed in the position in which we would have been if no such contract had been entered into'".

In *Whitfield v Phillips*[3] sê ar De Villiers in sy minderheidsuitspraak ten aansien van die skadevergoedingsaanspraak van die kopers:

> "They are, at least, entitled to be in no worse position than if they had never entered into the contract."

Uiteindelik laat regter MacDonald hom soos volg uit in *Reid v L S Hepker & Sons (Pvt) Ltd:*[5]

> "In both contract and delict the basic award of damages is to bring about, as far as possible, *restitutio in integrum* . . ."

Dit is die voorneme om die houdbaarheid van al hierdie stellings te ondersoek. Ter aanvang sal die aandag bepaal word by die kansellasie van die kontrak, daarna by besondere gevalle, die *actio redhibitoria,* die ontwikkelingsgang van die vermelde opvattings en ten slotte by die ontleding van die opvatting.

---

[1] *Victoria Falls & Transvaal Power Co v Consolidated Langlaagte Mines* 1915 AD 1; *Campagne D'Elevage et D'Alimentation du Katanga v Rhodesia Railways* 1956 1 SA 243 (SR); *Whitfield v Phillips* 1957 3 SA 318 (A); *Novick v Benjamin* 1972 2 SA 842 (A).
[2] (1906) 23 SC 250.
[3] supra.
[4] te 351.
[5] 1971 2 SA 138 (RAD).

I

Die kansellasie van 'n kontrak het tot gevolg dat die verpligtings van die onderskeie kontrakspartye om te presteer soos wat daar in die kontrak onderneem is tot 'n einde kom. Die partye kan dan nie op prestasie aandring nie en ook nie om te mag presteer nie.

Waar die partye miskien reeds presteer het, is hulle geregtig op die teruggawe van dit wat hulle reeds presteer het. In die geval van die onskuldige party wat die kontrak kanselleer na aanleiding van die kontrakbreuk van die ander party is dit opvallend want hy is vanselfsprekend geregtig op die teruggawe van dit wat hy aan die ander party gepresteer het. Dit is egter ewe waar in die geval van die ander party na aanleiding van wie se gedrag en kontrakbreuk die kontrak gekanselleer word. Hy is ook geregtig op die teruggawe van dit wat hy presteer het.[6] Sy aanspraak sal nie altyd opvallend wees nie omdat die onskuldige party 'n eis vir skadevergoeding mag hê wat daarteen in berekening gebring mag word. Gestel dat die skuldige 'n som geld betaal het, dan mag sy aanspraak op die terugbetaling daarvan verminder of uitgewis word deur die aanspraak van die skuldeiser op die betaling van skadevergoeding.

Herstel kan nie plaasvind waar dit onmoontlik is nie, maar dit mag wees dat die party wat nie in staat is om dit wat hy inderdaad ontvang het terug te gee nie die geldelike ekwivalent daarvan moet herstel aan die ander party.

In sommige gevalle word die verpligting om dit wat ontvang is aan die ander party terug te gee, opgehef of verskoon. Dit slaan nie alleenstaande op die geval waar teruggawe onmoontlik is nie, want in so 'n geval moet die geldwaarde van die prestasie teruggegee word, maar op die verskoning of opheffing van die verpligting om die geldwaarde van die prestasie terug te gee. Dit kan ook betrekking hê op die verpligting van die een party en nie van die ander nie sodat dit kan gebeur dat die een party tot teruggawe verplig is terwyl die ander party nie daartoe verplig is nie.

Die feit dat die partye elkeen moet teruggee wat hulle ontvang het, behoudens uitsonderingsgevalle, beteken dat hulle elkeen teruggeplaas moet word in die toestand waarin hulle was voor die lewering van prestasie ingevolge die kontrak of, volgens die meer opvallende afleiding, dat hulle teruggeplaas moet word in die toestand waarin hulle was voor die sluiting van die kontrak. In werklikheid het die teruggawe van prestasies nie onvermydelik die gevolg dat die partye teruggeplaas word in die toestand waarin hulle was voor die kontraksluiting nie. Dit kan alleen afdoende bewerkstellig word deur die toekenning van skadevergoeding wat bereken word om hulle in daardie toestand te plaas. Volgens Mulligan[7] word die skadevergoeding wel so bereken want hy skryf:

> "restitutional damages are inconsistent with a keeping alive of the contract, and compensatory damages inconsistent with its destruction."

---

[6]Sien J C de Wet en J P Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (3de uitgawe 1964) 157.
[7]1950 *SALJ* 347.

In breë trekke gesien, kom sy standpunt daarop neer dat daar na die kansellasie van die kontrak restitusie moet plaasvind en dat die skuldeiser bykomstig skadevergoeding kan vorder bereken om hom te plaas in die posisie waarin hy was voor die kontraksluiting. As hy die kontrak in stand hou, is hy geregtig op skadevergoeding bereken om hom te plaas in die vermoënsposisie waarin hy sou wees indien die kontrak nagekom is. Die juistheid van hierdie opvatting is tans ter sprake.

Daar moet in die besonder gewaak word dat twee faktore 'n mens nie mislei om verkeerde gevolgtrekkings te maak nie:

1. Die gedagte dat die partye elkeen moet teruggee wat hulle ontvang het, kan aanleiding gee tot die afleiding dat daar *restitutio in integrum* moet plaasvind en dat die partye dus noodwendig geplaas moet word in die posisie waarin hulle was voor die kontraksluiting. In werklikheid is *restitutio in integrum* 'n besondere regsmiddel wat aanwending vind in geval van terugtrede uit 'n kontrak vanweë wanvoorstellings, vreesaanjaging en ander faktore in verband met die kontraksluiting, maar nie vanweë kontrakbreuk nie. Die eiser is in die geval van kontrakbreuk slegs geregtig op herstel in die vorige toestand in soverre dit die teruggawe van prestasies betref en daar word gewaarsku teen die verdere gevolgtrekking dat hy daarom ook aanspraak kan maak op skadevergoeding bereken om hom te plaas in die vermoënstoestand waarin hy was voor die kontraksluiting.

2. Die gedagte dat die handhawing van die kontrak die partye nie van prestasie verskoon nie en dat die party wat nie ooreenkomstig die kontrak presteer nie dan skadevergoeding moet betaal om die ander party te plaas in die vermoënstoestand waarin hy sou gewees het indien die kontrak behoorlik nagekom is, kan aanleiding gee tot die gedagte dat skadevergoeding aldus bereken moet word slegs waar die verpligting om te presteer voortbestaan. Kansellasie van die kontrak beëindig slegs die verpligtings om daadwerklik te presteer en nie noodwendig die onskuldige se verwagting om in 'n sekere vermoënstoestand geplaas te word nie.

Die werklike vraag is dus of die skuldeiser wat die kontrak kanselleer na aanleiding van die kontrakbreuk van die ander party geregtig is om sy skadevergoeding te bereken ten einde hom te plaas in die posisie waarin hy was voor die kontraksluiting. Vir hierdie doel is dit nie nodig om aandag te gee aan die posisie ten aansien van gevolgskade nie. Gevolgskade is skade wat voortvloei uit die lewering van gebrekkige prestasie of uit die feit dat daar glad nie gepresteer is nie. Indien daar geen kontrak gesluit was nie, sou die eiser nie gevolgskade vanweë gebrekkige prestasie gely het nie en indien daar behoorlik gepresteer was, sou hy ook nie hierdie skade gely het nie. Die gevolg is dat die skuldeiser in beide gevalle, of hy nou nie sou gekontrakteer het nie en of hy geregtig is op behoorlike prestasie, geregtig is op die vergoeding van gevolgskade. Daar moet egter aandag gegee word aan die posisie ten aansien van gederfte wins, of *lucrum cessans*, omdat gederfte wins iets is wat in die besonder verband hou met die bestaan van die kontrak. As die eiser geregtig is om geplaas te word in die vermoënstoestand waarin hy was voor die kontraksluiting kan hy nie gederfte wins vorder nie omdat hy nie enige wins kon gemaak het as hy nie die kontrak

gesluit het nie. Dit kom wel ter sprake waar hy geregtig is op die behoorlike nakoming van die kontrak en nou daardie wins verloor as gevolg van die feit dat daar kontrakbreuk gepleeg is. Daar moet egter in aanmerking geneem word dat gederfte wins nie in iedere geval van kontrakbreuk verhaal kan word nie, òf omdat die bepaalde verlies nie gely is nie òf omdat die bepaalde verlies wat wel gely is, nie voorsien of voorsienbaar was nie.

Na aanleiding van die bovermelde oorwegings kan daar gelet word op die posisie ten aansien van besondere gevalle en besondere skadevergoedingsaansprake.

II

Verskeie besondere gevalle kan ter sprake kom.

1. Die koste van die koper in verband met die vervoer van goedere

Dit kan gebeur dat die partye afspreek dat die goedere op 'n sekere plek gelewer word en dat die koper, wat daarna die koop kanselleer, onkoste aangaan om die goedere vanaf die plek van lewering na 'n ander plek te vervoer. In die normale geval sal die koper aanspraak kan maak op die verskil tussen die waarde van die gelewerde goedere, soos bereken op die tyd en plek van lewering, en die prys.[8] Die onderliggende gedagte is dat hy die goedere op die plek vir lewering bepaal sal ondersoek en die kontrak daar kanselleer as die goedere nie aan die vereistes van die kontrak voldoen nie. Sy skade is dan die bedrag bokant die ooreengekome prys wat hy moet betaal indien hy dieselfde goedere daar wil ontvang of wat hy kon gekry het indien hy goedere wat aan die vereistes van die kontrak voldoen daar verkoop het. Volgens rp De Villiers:

> "If he chooses not to reject at the place of delivery, he cannot by removing the goods elsewhere, place the seller in a worse position than if the goods had been examined and rejected at the place of delivery."[9]

Die gevolg is dat die koper wat die goedere eers na 'n ander plek vervoer het en dit dan daar ondersoek en verwerp, nie die koste verbonde aan die vervoer van die goedere kan vorder nie. Die howe het egter in 'n aantal gevalle die koper toegelaat om hierdie uitgawes te verhaal waar dit vooraf geblyk het dat die goedere eers na 'n ander plek vervoer sou word voordat dit ondersoek sou word.[10] Waar die goedere verwerp word op grond van 'n gebrek wat by 'n gewone ondersoek nie sigbaar sou wees nie, behoort dieselfde te geld.

Met die eerste oogopslag wil dit voorkom asof die howe hier die koper terugplaas in die posisie waarin hy sou gewees het indien hy nie die kontrak aangegaan het nie, omdat hy nie hierdie onkoste sou aangegaan het as daar geen kontrak was nie. Indien die kontrak behoorlik nagekom was, sou hy in iedere geval hierdie uitgawes aangegaan het met die gevolg dat hy oënskynlik nie geplaas word in die posisie waarin hy sou gewees het indien die

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[8] *Greenshields v Chisholm* (1884) 3 SC 220 en die skrywer se artikel insake die markprysreël in 1973 *THRHR* 46.

[9] In *Jordaan v Symon* 1925 OPD 207 te 209. Vgl ook *Meyers v Marks Ltd* 1916 CPD 716.

[10] *Natal Shipping & Trading Co Ltd v African Madagascar Agencies Ltd* 1921 TPD 350; *Auteniqua Produce Agency v Machanick* 1924 CPD 315.

kontrak behoorlik nagekom is nie. Die vraag is egter of hierdie indrukke korrek is of nie. Wanneer die koop ontbind word, ontvang die koper die verskil tussen die prys en die waarde sodat daar gepoog word om hom te plaas in die vermoënstoestand waarin hy sou gewees het indien die kontrak behoorlik nagekom is.[11] Die feit is egter dat die koper die koop gekanselleer het en tans sonder die koopsaak is. Indien hy weer koop vir lewering op die plek vir lewering in die gekanselleerde kontrak bepaal, sal hy die betrokke uitgawe om die goedere te vervoer, moet herhaal indien hy daarna die goedere vervoer na die plek waarheen hulle vervoer is voor die kansellasie van die kontrak. Die onkoste in verband met die vervoer is dus koste wat verkwis is as gevolg van die kontrakbreuk van die verkoper. Alvorens hierdie onkoste verhaal kan word, moet daar egter aangetoon word dat dit voorsien of voorsienbaar was en verder dat die skade nie opgeloop het vanweë die sorgeloosheid van die koper nie.

Die posisie is dus dat die hof wat hierdie onkostes aan die koper toeken, in werklikheid besig is om die koper te probeer plaas in die posisie waarin hy sou gewees het indien daar nie kontrakbreuk gepleeg was nie, dit wil sê om hom te plaas in die posisie waarin hy sou gewees het indien die verkoper nie presteer het nie met die oog daarop om hom te kan plaas in die posisie waarin hy sou gewees het indien die kontrak behoorlik nagekom is. Die koper word toegelaat om onkoste wat hy gehad het terug te vorder om hom te plaas in die posisie waarin hy sou gewees het indien geeneen van die partye gepresteer het nie. Daarna kan hy skadevergoeding vorder bereken volgens die normale beginsels.

2. Uitgawes van die koper ten aansien van die koopsaak

Die geval wat hier ter sprake kom, is waar die koper onkoste aangaan met betrekking tot die koopsaak ten einde:

a) die waarde daarvan te verhoog of

b) om dit aan te wend ten einde 'n wins te maak daarmee.

'n Voorbeeld sou wees waar die koper van grond dit omhein en dan landerye voorberei ten einde 'n oes daarop te plant.

Wanneer die koop gekanselleer word na aanleiding van die verkoper se kontrakbreuk, moet die koper die koopsaak soos verander aan die verkoper terugbesorg en kan hy nie die voordeel van sy uitgawes geniet nie. Sy verhaalsreg met betrekking tot sy uitgawes kom dan ter sprake. Indien ons die koper se verhaalsreg sou beperk tot die verskil tussen die markprys van die prestasie waarop hy geregtig was op die tydstip vir lewering bepaal en die prys, is dit duidelik dat hy hierdie uitgawes eenvoudig verloor. Een oplossing sou wees om die koper 'n aanspraak te gee op die waardevermeerdering van die koopsaak sodat die verkoper nie deur die ontbinding sonder rede ten koste van die koper verryk word nie en die koper die ekonomiese voordeel wat hy uit sy onkostes sou getrek het, indien die kontrak in stand gehou was, kan behou. Dit laat egter die vraag of hy enige verhaal het

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[11]supra.

in verband met uitgawes aangegaan ten einde 'n wins te maak onbeantwoord.

Hierdie vraag kom ter sprake in *Whitfield v Philips*.[12] Verskeie uitsprake word gegee. Die minderheid van die regters sou so 'n eis toegestaan het. Ar De Villiers verklaar:

> "Their claim to be reimbursed what they had fruitlessly spent on the defendant's undertaking to hand over the farm to them is not based on the supposition that they got the farm but paid £40,000, but on the supposition that they did *not* get the farm, retained the £40,000 but were out of pocket in respect of their expenses in clearing and preparing the ground.
>
> "They are, at least, entitled to be in no worse position than if they had never entered into the contract."[13]

Ar Hoexter laat hom soos volg uit:

> "The plaintiffs have however proved that they lost the value of the work done by them on Thorn Park in reliance on the defendant's unfulfilled promise to deliver the farm . . . [T]his amount is awarded for what was clearly a capital loss on the part of the plaintiffs."[14]

In antwoord op hierdie minderheidsopvattings kan opgemerk word dat hulle nie die algemene maatstaaf vir die berekening van skadevergoeding aangewend het nie en dat hulle verder nie die goeie newewerking van die kontrakbreuk in aanmerking geneem het nie.[15] Die meerderheidsbeslissing was dat die eiser geregtig was om geplaas te word in die posisie waarin hy sou gewees het indien die kontrak nagekom was. In die bepaalde geval het dit beteken dat hy geregtig was op die wins wat hy sou gemaak het as die koop deurgegaan het. Die uitgawes wat hy aangegaan het, word hierby in berekening gebring en word gevolglik nie afsonderlik verhaal nie.

Die resultaat is dat die eiser nie in hierdie geval aanspraak het op vergoeding ten opsigte van uitgawes met betrekking tot die koopsaak indien hy hulle aangegaan het met die oog om 'n wins daaruit te behaal nie, maar dat hy op die wins as sodanig geregtig is.

3. Onkostes van die verkoper in verband met die uitvoering van die kontrak

Die verkoper mag uitgawes aangaan in verband met die uitvoering van sy kant van die ooreenkoms, byvoorbeeld met betrekking tot die aflewering van die koopsaak. In *Acton v Lazarus*[16] beslis wr Gane (soos hy destyds was) dat hierdie onkostes na die kansellasie van die kontrak op grond van die kontrakbreuk van die koper verhaal kon word. Hy verklaar:

> "It is undoubted that the out-of-pocket expense to which the seller has been put by the repudiation may be claimed as one item of damage in an action; . . ."

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[12]supra.
[13]te 351.
[14]te 328.
[15]Sien die uitspraak van ar Steyn te 336.
[16]1927 EDL 367 te 372. MacKeurtan *Law of Sale* (4e uitg) 296 praat net van *expenses*.
[17]Sien ook *Ward v Mehnert* 1908 EDC 296. Vgl *Trichardt v Van der Linde* 1916 TPD 148; *Clarke v Durban & Coast SPCA* 1959 4 SA 333 (N).

In die onderhawige geval was die onkoste aangegaan om die goedere te vervoer vanaf die verkoper se tuiste na die plek van lewering en het die verkoper dit weer daarvandaan vervoer nadat lewering ten onregte geweier was.

Hierdie beslissing is skynbaar in stryd met die markprysreël waarvolgens die verkoper wat die koop kanselleer geregtig is op die verskil tussen die prys en die waarde van die saak op die tyd en plek van lewering (waar eersgenoemde meer is). Die basiese gedagtegang is dat as die verkoper die saak behou in die plek van die prys, hy slegter daaraan toe is indien die saak minder werd is as die prys en dat hy geregtig is op vergoeding van die verskil. Die verkoper moet op die plek vir lewering bestem die koopsaak verkoop en indien hy dan swakker daaraan toe is as wanneer die kontrak behoorlik nagekom is, kan hy die verskil eis. Indien hy die saak van die plek vir lewering bestem wegneem, eerder as om dit daar te verkoop, is dit sy eie privaat besluit en moet hy vir die onkostes daarvan self instaan. Die onkoste om die saak na daardie plek te vervoer, is deel van die onkostes verbonde aan die uitvoering van die kontrak wat hy in elk geval sou moes gedra het indien die kontrak behoorlik nagekom is, met die gevolg dat hulle ook nie verhaalbaar is nie. Dit wil gevolglik voorkom asof hierdie beslissing nie geregverdig kan word nie.

Dit sou anders gewees het indien die verkoper nie die kontrak gekanselleer het nie. Waar die kontrak nog bly voortbestaan, is die vraag of dit vir die verkoper redelik was om die saak na sy woonplek (of stoorplek) terug te vervoer. Indien die antwoord positief is, kan die verkoper aanspraak maak op die verkwiste koste van die lewering (wat nou herhaal moet word) en die koste verbonde aan die terugvervoer van die koopsaak omdat dit voortvloei uit die koper se kontrakbreuk en nie aangegaan sou word indien die kontrak behoorlik nagekom is nie.

4. Verkoopskommissie waarvoor die verkoper aanspreeklik is

Die verkoper kan van die dienste van 'n agent of makelaar by die sluiting van die kontrak gebruik maak en die voorwaardes van sy kontrak met die agent of die makelaar mag hom verplig om 'n sekere vergoeding of kommissie aan daardie makelaar of agent te betaal nieteenstaande die feit dat hy die kontrak kanselleer vanweë die kontrakbreuk van die koper.

In *Van der Watt v Louw*[18] is daar beslis dat die verkoper geregtig is op die vergoeding van enige kommissie wat hy moes betaal met betrekking tot die verkoping. Die kommissie is beslis 'n skade wat die verkoper ly as gevolg van die feit dat die koop nie deurgaan nie. In die normale geval sal die verkoper die kommissie moet betaal wanneer die kontrak deurgevoer is. Dit is 'n uitgawe wat hy aangaan om die koop bewerkstellig te kry om sodoende die prys te bekom. Ons sou kon sê dat die prys gelyk is aan die waarde van die saak plus die kommissie wat betaal moet word ten einde die

[18] 1955 1 SA 690 (T): "[T]his, I think, is an item of damages which is the natural and contemplated result of the breach of contract by the defendant". In *Tierfontein Boerdery (Edms) Bpk v Weber* 1974 3 SA 445 (K) word verklaar dat dit dalk vanweë ander oorwegings as kousale verband onopvorderbaar mag wees.

prys te bekom. Wanneer die koop gekanselleer word, bly die verkoper sit met die saak van 'n sekere waarde. As hy dit later weer verkoop, moet hy 'n tweede kommissie betaal ten einde die prys te bekom. Die kommissie is duidelik 'n verlies wat voortspruit uit die kontrakbreuk en die kansellasie van die kontrak na aanleiding daarvan.

III

Volgens die Romeinse reg beoog die *actio redhibitoria* herstel in die vorige toestand asof daar nooit gekoop is nie.[19] Die koper van 'n saak met 'n verborge gebrek is hiervolgens geregtig om geplaas te word in die vermoënstoestand waarin hy sou gewees het as hy nooit die gebrekkige saak gekoop het nie. Verskillende aansprake word erken ten einde hierdie toestand te weeg te bring,[20] maar die koper kan met die aksie geen vergoeding van gevolgskade verhaal nie.[21] Die gevolg is dat die koper, nieteenstaande die verklaarde oogmerk van die aksie, nie geregtig is om ten volle in daardie toestand geplaas te word nie.

'n Vername feit in hierdie verband is dat die *actio redhibitoria* langs 'n buitengewone weg tot stand gekom het en ten spyte van pogings om die aksie te verklaar, steeds gesien word as 'n besondere regsmiddel met ietwat anomaliese eienskappe wat hy het, of behou het, as gevolg van die besondere ontwikkeling van die aksie.[22] In die moderne Suid-Afrikaanse reg word hierdie aksie toegestaan beide ten aansien van eise gebaseer op kontrakbreuk[23] sowel as eise gebaseer op onregmatige optredes (naamlik wanvoorstellings).[24] Hieruit blyk weer eens die anomaliese karakter van die aksie in die moderne reg. Dit sou daarom gevaarlik wees om algemene beginsels met betrekking tot die kontraktereg bloot van hierdie aksie te wil aflei. Verder kan dit aangevoer word dat daar, by 'n behoorlike ontleding van die aksie, slegs gepoog word om die koper terug te plaas in die posisie waarin hy sou gewees het indien die verkoper nooit ingevolge die kontrak 'n saak met 'n verborge gebrek gelewer het nie.[25]

Die verklaring in *D* 19 1 11 3 dat "redhibitionem quoque contineri empti iudicio" is nie teenstrydig met die gedagte dat die *actio redhibitoria* 'n besondere regsmiddel is nie. Dit beteken slegs dat indien die gronde waarop 'n koper die *actio redhibitoria* kan aanstel aanwesig is, die koper die regshulp van hierdie aksie kan verkry ook waar hy met die *actio empti* ageer.[26] Dit beteken nie dat die koper in ander gevalle waar die aedilisiese aksies nie ingestel kan word nie, soos waar die koper ageer op grond van 'n versuim om die koopsaak te lewer, die regshulp van die *actio redhibitoria* kan vorder nie. Die teks bied dus geen ruimte vir die afleiding dat daar in

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[19] *D* 21 1 23 1, 7; Voet 21 1 4.
[20] Sien Pothier *Traité de Vente* par 218 vir voorbeelde.
[21] *Hacket v G & G Radio & Refrigeration Corporation* 1949 3 SA 664 (A).
[22] Mostert *et alii Die Koopkontrak*.
[23] D w s waar die aksie ingestel word op grond van *promissa* in die sin van waarborge.
[24] D w s waar die aksie ingestel word op grond van *dicta* in die sin van wanvoorstellings – sien *Phame v Paizes* 1973 3 SA 397 (A). Vgl *Inhambane Oil & Minieral Development Syndicate Ltd v Mears & Ford* (1906) 23 SC 250 te 261.
[25] Sien die bespreking wat volg.
[26] *Hacket v G & G Radio & Refrigeration Corporation* supra.

die kontraktereg 'n algemene aksie is waarmee die skuldeiser herstel in die vorige toestand asof hy glad nie gekontrakteer het, kan vorder nie.[27]

IV

Vervolgens kom die ontwikkeling van die reël van die regspraak dat 'n skuldeiser moontlik op sy negatiewe interesse geregtig mag wees, ter sprake.

Die eerste saak wat in dié verband genoem word, is *Stent v Gibson Brothers*[28]. 'n Argitek het planne vir 'n kompetisie ingestuur en die karweier het die planne verloor. Die hof moes toe die skadevergoeding waarop die argitek geregtig was bepaal. Dit blyk dat die hof van mening was dat die argitek geregtig was op die waarde van die planne. Ten einde dit te bepaal sê rp Lawrence:

> "we must take . . . the cost of production as the measure of damages in the event of its loss."[29]

Die beslissing word daarna in die koopstuk soos volg saamgevat:

> "[T]he damages were . . . the value of the time, labour and skill employed in the preparation of the plans and specification."

Die hof verwerp die argument dat die skade beperk moet word tot die bedrag van die prys wat die argitek kon gewen het as die planne afgelewer was. Selfs al sou die eiser die kompetisie gewen het, sou hy nog die eienaar van die planne gewees het en, indien hulle daarna verlore gegaan het, die waarde daarvan kon vorder. Die hof ken dan die waarde van die planne aan die eiser toe ten einde hom te plaas in die posisie waarin hy sou gewees het as daar nie kontrakbreuk gepleeg was nie.

Die volgende beslissing wat te doene gehad het met die verhaal van onkostes is *Wood v Oxendale & Co.*[30] Die agent het pas begin om sy opdrag uit te voer toe die prinsipaal dit herroep. Die gevolg was dat die agent ten spyte van onkostes en moeites om die opdrag uit te voer, nie langer die geleentheid gehad het om sy beloning ingevolge die kontrak te verdien nie. Die hof kon nie vasstel wat hy sou kon verdien het nie en r Maasdorp verklaar:

> "But the damages upon all the authorities, must not be measured by an estimate of commission he might probably have earned but by the labour actually devoted to, and the expenses actually incurred in, the part performance of the agency."[31]

Die posisie was dat indien die agent sy opdrag suksesvol uitgevoer het hy sy vergoeding of kommissie sou verdien het en dat hy tans die geleentheid daartoe ontneem is. In die omstandighede is hy geregtig op skadevergoeding bereken om hom te plaas in die vermoënstoestand waarin hy sou gewees het as die kontrak nagekom is. Dit kon nie vasgestel word nie, waarskynlik

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[27] *Bonne Fortune Beleggings Bpk v Kalahari Salt Works (Pty) Ltd* 1973 3 SA 739 (NK).
[28] (1883) 5 HCG 148.
[29] te 152.
[30] (1906) 23 SC 674.
[31] te 685.

omdat dit spekulasie sou vereis, en die hof moet gevolglik sy skadevergoeding anders bereken so goed as wat hy kan. Die hof bepaal sy aandag by die onkostes van die agent en die arbeid wat hy sonder vrugte spandeer het. Aangesien hy nie sy onkostes sou kon verhaal het indien die kontrak behoorlik uitgevoer was nie, wil dit dus voorkom asof die hof dit in gedagte gehad het dat die agent geregtig is om terug geplaas te word in die posisie waarin hy sou gewees het as hy nie met die uitvoering van die kontrak begin het nie (dit wil sê asof hy geen kontrak aangegaan het nie). Dieselfde kan gesê word ten aansien van die arbeid verkwis op die uitvoering van die agentskap. Die agent sou geen loon ten opsigte daarvan ontvang het nie en deur hom vergoeding daarop toe te ken, wil die hof die indruk skep dat hy geregtig is om teruggeplaas te word in die vermoënstoestand waarin hy was voordat hy ingevolge die kontrak gepresteer het: dit wil sê dat hy op *restitutio in intergrum* geregtig is.

Vervolgens kom ons by die beslissing in *Trichardt v Van der Linde*[32] waar daar beslis is dat die koper van 'n reisiesperd wat nie gelewer is nie niks ten opsigte van verlore wengelde kon vorder nie omdat hy nie kon bewys wat die perd kon gewen het nie. Die hof vind dit gevolglik moeilik om die skadevergoeding te bereken. Daar word verwys na *Stent v Gibson*[33] en gesê:

> "That seems to me very much to say that the actual loss inflicted on the plaintiff, namely his losing all his time and labour, is the right estimate in the case where you cannot estimate the value of a chance."[34]

Regter Mason vervolg later:

> "[A]nd there are a large number of cases . . . in which expenditure made by a party for the purpose of carrying out the performance of the contract is allowed as the measure of damages where it is impossible to determine exactly or properly what the loss of profits might be. Now, that seems to me, speaking generally, an equitable and a right doctrine."[35]

Die beslissing kom dan daarop neer dat waar dit nie moontlik is om te bepaal in welke vermoënstoestand die eiser sou gewees het as die kontrak behoorlik nagekom is nie[36] die eiser in so 'n geval sy onkostes in verband met die kontrak kan verhaal.[37]

Die houdbaarheid van hierdie gevolgtrekking is nie duidelik nie. Die hof het skynbaar *Stent v Gibson* verkeerd verstaan want dáár is nie beslis dat as die eiser nie sy werklike verlies kan bewys nie hy dan sy onkostes in verband met die uitvoering van die kontrak kan vorder nie. Die beslissing was dat waar die eiser nie die waarde van 'n saak andersins kan bewys nie hy dit kan doen met verwysing na die moeite om dit te skep. Daar was nie sprake van 'n alternatiewe metode om skadevergoeding te bereken nie sodat die eiser óf sy werklike skade óf sy onkostes sou kon verhaal nie.

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[32] 1916 TPA 148.
[33] supra.
[34] te 153.
[35] te 154.
[36] De Wet & Yeats 161 meen dit was wel moontlik om dit te bereken.
[37] *Goedhals v Graaff-Reinet Municipality* 1955 3 SA 482 (K).

Waar die uitgawes in elk geval gemaak sou gewees het sonder dat die verweerder daarvoor aanspreeklik sou wees, is die vraag of die eiser deur die nakoming van die kontrak ten minste daardie uitgawes sou kon verhaal het. Indien die antwoord bevestigend is, dan beloop sy skade minstens die omvang van sy onkostes. Waar die voordeel van die uitgawes die verweerder toegekom het, sou die eiser op die vergoeding daarvan aanspraak kon maak ooreenkomstig die beginsels van ongeregverdigde verryking.

Vervolgens *Hoets v Wolf*.[38] 'n Argitek het planne opgestel vir 'n gebou wat ontwerp moes word sodat dit vir 'n sekere prys gebou kon word. Die eienaar laat hoeveelhede op die argiteksplan uitwerk deur 'n bestekopnemer en vra vir tenders. Selfs die laagste tender oorskry die minimumprys en die eienaar eis skadevergoeding van die argitek. Regter Jones verklaar:

> "In the present case the architect has in breach of his contract, whether through want of skill or negligence, held out to the building owner that the work planned by him could be executed at a cost of £1,700 and relying on this the building owner has incurred expenses in obtaining quantities on plans which are useless to him. If we apply the principles applied in the case of *Columbus Co v Clowes* (supra)[39] it follows that the building owner is entitled to recover the amount fruitlessly spent."[40]

Die skuldenaar het wanpresteer en die skuldeiser het onkostes aangegaan wat hy nooit sou aangegaan het nie as die skuldenaar glad nie presteer het nie en wat hy wel sou aangegaan het as die skuldenaar behoorlik presteer het. Die koste is verkwis omdat hulle weer aangegaan sou moes word as die eienaar van die skuldenaar (of van iemand anders) planne ontvang het wat aan die bepalings van die kontrak voldoen het. Dit wil dus voorkom asof die beslissing daarop gemik is om die skuldeiser te plaas in die posisie waarin hy sou gewees het as daar glad nie gepresteer is nie, dit wil sê die posisie waarin hy was voor prestasie. Dit wil nie voorkom asof daar gepoog word om die skuldeiser te plaas in die posisie waarin hy sou gewees het indien daar geen kontrak was nie.

Die beeld wat uit die voorgaande oorsig van die regspraak vloei is nie besonder duidelik en skerp omlyn nie. Dit blyk dat daar 'n misverstand was waarvolgens 'n beslissing dat die onkostes aangegaan om 'n saak te skep, beskou kan word as 'n aanduiding van die waarde daarvan aangewend is vir die regverdiging van die stelling dat 'n kontraktant (in sekere omstandighede) geregtig is op die uitgawes wat hy aangegaan het met die oog op die die uitvoering van die kontrak. Dit kan maklik aanleiding gee tot die opvatting dat die eiser in die geval van kontrakbreuk aanspraak kan maak op

[38] 1927 CPD 408.
[39] (1903) 1 KB 244.
[40] te 415.
[41] In *Clarke v Durban & Coast SPCA* supra verklaar r Jansen: "Where a party cancels a contract on breach by the other, damages awarded to the former are on occasion apparently assessed on a basis of restoring the actual losses (e g disbursements) incurred by the former in respect of the broken and now useless contract." Ter stawing word daar onder andere verwys na *Stowe v Scott* 1929 TPD 450 waar die koste om 'n put te sink verhaal kon word van 'n verweerder wat, verkeerdelik – so blyk dit, gewaarborg het dat die eiser water van 'n sekere sterkte op 'n bepaalde diepte sou aantref. Hierdie skade beskou die hof as skade "flowing from the breach of his contract". Verdere motivering ontbreek.

sy negatiewe interesse en kan eis om terug geplaas te word in die vermoënstoestand waarin hy was voor die kontraksluiting.[42] Uit die ontleding van die gevalle hierbo behandel, blyk dit egter dat die regspraak as 'n geheel hom nie tot so 'n gevolgtrekking leen nie en dat daar slegs gesê kan word dat die eiser in die geval van die kansellasie van die kontrak geregtig is om teruggeplaas te word in die posisie waarin hy was voordat die kontrakbreuk plaasgevind het. In sommige gevalle sal dit beteken dat hy onkostes wat hy aangegaan het vir die uitvoering van die kontrak kan terugvorder van die skuldenaar.

Ten einde die houdbaarheid van die bewering te toets dat die skuldeiser wat die kontrak kanselleer geregtig is om geplaas te word in die vermoënstoestand waarin hy was voor die kontraksluiting, word die onderwerp ten slotte op 'n beginselgrondslag ondersoek.

V

Volgens die teorie kan skadevergoeding bereken word om 'n kontraktant te plaas in die vermoënstoestand waarin hy sou gewees het indien die kontrak wat hy gesluit het behoorlik nagekom is of om hom te plaas in die vermoënstoestand waarin hy sou gewees het indien daardie kontrak nooit deur hom aangegaan is nie. In die eerste geval word daar gepraat van positiewe interesse (*compensatory damages*) en in die tweede van negatiewe interesse (*restitutionary damages*).

Die afleiding mag miskien dan gemaak word dat die eiser se positiewe interesse bereken moet word asof 'n bepaalde handeling wel plaasgevind het terwyl sy negatiewe interesse bereken moet word asof 'n bepaalde handeling nie plaasgevind het nie. Hierdie aanname sou vervolgens lei tot 'n soeke na die handeling na aanleiding waarvan die berekening gemaak moet word. Drie moontlikhede kan ter sprake kom, naamlik (i) 'n handeling wat die kontraksluiting voorafgaan (soos die maak van 'n wanvoorstelling), (ii) die sluiting van die kontrak en (iii) die behoorlike nakoming van die kontrak. Die toepassing van hierdie drie moontlikhede bied egter spoedig probleme. In die geval van kontrakbreuk het ons te doen met 'n handeling wat na kontraksluiting plaasvind sodat dit onsinnig sou wees om te werk met die eerste twee moontlikhede wat slaan op iets wat plaasgevind het voor die relevante handeling. Die berekening sou dus gemaak moes word met verwysing na die behoorlike nakoming van die kontrak of die handeling wat in die plek daarvan kom, naamlik die kontrakbreuk. Ten aansien van kontrakbreuk wil dit voorkom asof daar geen regverdiging daarvoor is om die kontraktant se skadevergoeding te bereken met verwysing na die kontraksluiting nie. Die negatiewe interesse wat ter sprake kom, kan nie wees skadevergoeding om hom te plaas in die vermoënstoestand waarin hy sou gewees het as die kontrak nooit gesluit was nie.

Indien 'n mens dan heengaan en die toetse van positiewe en negatiewe interesse gaan toepas ten aansien van die relevante handeling, naamlik

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[42]Afgesien van die standpunt van Mulligan supra kan daar ook verwys word na die 16de uitgawe van Wille & Millin se *Mercantile Law of South Africa* deur J E Coaker v W P Schutz te 103–4.

kontrakbreuk, dan loop die onderskeid op 'n onsinnigheid uit. Volgens die toets van die positiewe interesse is die eiser geregtig om geplaas te word in die vermoënstoestand waarin hy sou gewees het indien die kontrak behoorlik nagekom is. Waar daar gepresteer word en die prestasie is gebrekkig, sal hy die prestasie met skadevergoeding kan laat aanvul om hom te plaas in die posisie waarin hy sou gewees het indien volle prestasie ontvang is. Somtyds sal hy hiervolgens geregtig wees op die aanvulling van wat hy ontvang het met die ontbrekende waarde van die beloofde prestasie en andersins met 'n geldbedrag bereken om die nadelige gevolge van die wanprestasie uit te wis. Hy is dus geregtig om geplaas te word in die posisie waarin hy sou gewees het as die kontrak behoorlik nagekom is of, anders gestel, as daar geen kontrakbreuk was nie. Waar hy die kontrak ontbind, vind daar feitelik restitusie van die onderskeie prestasies plaas, maar die eiser is nog steeds geregtig om geplaas te word in die vermoënstoestand waarin hy sou gewees het as die kontrak behoorlik nagekom is. Dit gaan nie oor daadwerklike prestasie nie, maar oor 'n vermoënstoestand. Hy is geregtig op die verskil tussen die waarde van die prestasie waarop hy geregtig was minus die waarde van die prestasie wat hy verskuldig was asook vergoeding vir enige nadelige gevolge wat hy ly as gevolg van die feit dat die kontrak nie daadwerklik uitgevoer word nie. Hieronder sou val verlies van winste wat hy kon gemaak het indien die kontrak behoorlik uitgevoer was. Pas ons die toets van die negatiewe interesse op die geval toe, moet ons die eiser gaan terugplaas in die posisie waarin hy was voor die begaan van die kontrakbreuk (die relevante handeling). Hiervolgens is die posisie dat hy 'n bepaalde vorderingsreg gehad het voor die kontrakbreuk. Hy het alreeds 'n gedeeltelike prestasie ontvang en as hy dit behou, is hy geregtig om die waarde van die ontbrekende deel van die vordering wat nie voldoen is nie. Voor die kontrakbreuk het hy ook miskien geen gevolgskade gely nie en hy sou dan nie aanspraak kon maak op die vergoeding daarvan nie. Besluit hy om uit die kontrak terug te tree, dan beëindig hy sy reg op daadwerklike prestasie maar bly nog steeds geregtig om geplaas te word in die vermoënstoestand waarin hy voor kontrakbreuk was. Hy het toe 'n bepaalde vorderingsreg met 'n bepaalde waarde gehad en 'n besondere teenverpligting sodat hy die voordelige verskil tussen die waardes kan vorder. Juis vanweë die feit dat hy nie daadwerklike nakoming kan vorder nie, kan hy ook skade ly en hierdie skade ontstaan as gevolg van die feit dat sy vorderingsreg geskend is. Hieruit blyk dit dat die resultate wat 'n mens behaal met die toepassing van albei toetse op dieselfde resultaat uitloop.

Die gevolgtrekking waartoe daar gekom moet word, is dat daar geen beginselverskille tussen negatiewe en positiewe interesse bestaan nie. Beide "toetse" lewer ooreenstemmende resultate as hulle ten aansien van een bepaalde handeling of gebeurtenis toegepas word. Dit wil egter nie sê dat daar nie 'n verskil is tussen die toetse soos hulle in die praktyk en die regspraak gebruik word nie. Daar is inderdaad 'n verskil, maar die verskil is geleë in die moment of handeling of gebeurtenis na aanleidibg waarvan die berekening gemaak word. Tradisioneel word negatiewe interesse bereken met verwysing na 'n onregmatige daad (wat die kontraksluiting voorafgaan) terwyl positiewe interesse bereken word met verwysing na kontrakbreuk. Negatiewe interesse word bereken om die persoon te plaas in die vermoëns-

toestand waarin hy sou gewees het as daar nie voor die kontraksluiting 'n bepaalde handeling gepleeg is nie terwyl positiewe interesse bereken word om die eiser in die vermoënstoestand te plaas waarin hy sou gewees het indien daar nie na die kontraksluiting 'n bepaalde handeling plaasgevind het nie. Die terme is gevolglik moontlik verwarrend en moet daarom liewer vermy word. Dit sou veel meer nut hê om die feit na aanleiding waarvan die berekening van skadevergoeding gemaak word, te indentifiseer. En indien daar 'n verskil van mening oor die betrokke feit bestaan, dan gaan dit om die regverdiging daarvan sonder dat die debat deur ander nie-tersaaklike oorwegings vertroebel word nie.

Dit volg uit die bovermelde dat dit by die berekening van skadevergoeding na aanleiding van kontrakbreuk daarom gaan of die berekening met verwysing na die kontraksluiting dan wel die kontrakbreuk moet plaasvind. Hierbo is alreeds ten gunste van die laasgenoemde feit standpunt ingeneem. Diegene wat wel anders meen, gebruik slegs die eersgenoemde feit ten aansien van gevalle waar die kontrak gekanselleer word. Hieruit blyk dit dat die kansellasie van die kontrak vir hulle 'n relevante faktor is. In werklikheid beëindig die kansellasie slegs die verpligtings om te presteer en gee dit aanleiding tot regshulp om die partye te plaas in die posisies waarin hulle voor prestasie was. Hiervoor is daar voldoende steun in die regspraak. Daar is egter geen steun vir die afleiding dat die partye daarna geen aanspraak het op vergoeding van skade wat hulle ly as gevolg van die feit dat die kontrak nie in so 'n geval daadwerklik nagekom word nie. □

BUTTERWORTHS VAN SUID-AFRIKA SE HULPTOELAE VIR STUDIEREISE IN DIE BUITELAND

Aansoeke om die 1977-hulptoelae word ingewag van voltydse regsdosente aan enige Suid-Afrikaanse of Rhodesiese universiteit. Die hulptoelae bedra R1 000 en word al om die ander jaar toegeken. Die beursgeld mag slegs vir studiereise na die vasteland van Europa en die Verenigde Koningkryk gebruik word; die verblyf aldaar moet minstens vier maande duur.

Aansoeke om die hulptoelae moet op of voor 30 Junie gerig word aan die Besturende Direkteur, Butterworth, Posbus 792, Durban 4000, met uitdruklike vermelding van die besondere redes vir die besoek aan die buiteland, die plekke wat besoek gaan word, die jaar waarin die studiereis onderneem gaan word en hoe lank die aansoeker voornemens is om in die buiteland te vertoef. 'n Besluit sal voor die einde van Julie geneem en die benoemde aansoeker kort daarna in kennis gestel word.

Variation of Trusts - The Need for Reform

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The principle *voluntas testatoris servanda est* has been enforced as a matter of public policy throughout the development of Roman-Dutch law.[1] The application of the principle in our law of trusts has given rise to a fine-strung tension. For on the one hand there has been the call to give full effect to the settlor's intention.[2] On the other, there has been the call to rescue beneficiaries from petrified trusts caught in circumstances vastly different from those prevailing at the time of inception.[3] As in English and American law,[4] the settlor's intention has been regarded as the rule, to which an uneven trickle of exceptions has been allowed. This is scarcely a surprising picture if the origin of the trust in English common law is borne in mind.[5] As an outgrowth of the ancient and sclerotic use, it could hardly help being something of a child of tired loins. The feoffee to uses (precursor of the trustee) had only negative duties and no implied powers and duties. Those duties which were explicitly imposed did not extend beyond the feoffor's clear intention.[6] And so the principles of the Roman-Dutch law of succession have been powerfully reinforced by the original nature of the trust or *Treuhand* institution at common law in the entrenching of the settlor's intention.

This makes it easier to understand the long judicial aversion to the variation of trusts, and the unevenness of that trickle of exceptions to the rule.

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[1]See for instance *D* 28 1 3, 29 3 5, 32 19; Sande *Decis* 4 5 15; Voet 35 1 12; Vinnius *Quaes Sel* 1 8; *Ep Kelly* 1943 OPD 76 at 82; *Bydawell v Chapman* 1953 3 SA 514 (A) at 521; *Robertson v Robertson's Exors* 1914 AD 503 at 507.

[2]*Ep Trustees Estate Loewenthal* 1939 WLD 79 at 81; *Ep Richards* 1934 NPD 170; *Ep Burstein* 1941 CPD 87; *Ep Jewish Colonial Trust*: *in re Est Nathan* 1967 4 SA 397 (N) at 404F, 406A-E, 407-409.

[3]Honoré *SA Law of Trusts* (1st ed) 352. For a recent example of such a change of circumstances involving a *fideicommissum* see *Ep Stranack* 1974 2 SA 692 (D).

[4]"[A]s a rule, the court has no jurisdiction to give, and will not give, its sanction to the performance by trustees of acts with reference to the trust estate which are not, on the face of the instrument creating the trust, authorised by its terms" *per* Romer LJ *in re New* (1901) 2 Ch 534 at 544. See further, as to English law, Pettit *Equity and the Law of Trusts* (3rd ed) 294; Keeton *Law of Trusts* (9th ed) 348. For American law see Scott *Trusts* (2nd ed) § 164 and 164 1; Bogert *Trusts and Trustees* § 561.

[5]Scott *op cit* § 1 2 and 164.

[6]See generally Scott *op cit* § 165-167 1, Pettit *op cit* 294.

By statutory reform[7] applied in a series of recent cases,[8] English law has come to confer on the court a wide discretionary power to approve on behalf of any of four classes of beneficiaries[9] any arrangement varying or revoking all or any of the trusts upon which property is held, or enlarging the powers of the trustees of managing any of the property subject to the trusts. Such a "very wide, and indeed, revolutionary discretion"[10] naturally provokes the questions: is there a need in South African law for a similar discretion to vary trusts; if so, can it be achieved by interpretation of existing grounds for variation or is statutory reform necessary?

This requires a brief examination of those circumstances in which variation has already been allowed by our courts. For present purposes the circumstances may be grouped in four main categories: where variation is by the settlor, where variation is by the beneficiaries, variation under s 3 of the Immovable Property (Removal or Modification of Restrictions) Act,[11] and variation by a court on considerations of necessity.[12]

The first differs according to whether or not the settlor has reserved a right to revoke or vary the trust *inter vivos*.[13] The setting up of a trust *inter vivos* by a contract in favour of third persons complicates the position. According to one construction of the *stipulatio alteri*,[14] even where the trust is expressed as being irrevocable the settlor may revoke the right of the beneficiary by unilaterally releasing the trustee from his obligation towards the beneficiary.[15] This view has not been followed by the appellate division on two occasions.[16] Thus unilateral revocation of an expressly irrevocable trust is not possible.

What if the trust is neither expressly revocable or irrevocable? The answer would seem to depend on the vexed question whether the relationship created by a *stipulatio alteri* between settlor and trustee is fully contractual. If so, it can only be varied by agreement. If not, it can be varied unilaterally. In *CIR v Est Crewe*[17] Watermeyer CJ inclined towards the

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[7]s 53 and 57(1) of the *Trustee Act* 1925, s 64 of the *Settled Land Act* 1925, and the *Variation of Trusts Act* 1958.

[8]*Chapman v Chapman* 1954 AC 429; *Re Ball's Settlement* 1968 1 WLR 899; *Re Holt's Settlement* (1969) 1 Ch 100; *Re Weston's Settlements* (1969) 1 Ch 587; *Re Remnant's Settlement Trusts* 1970 Ch 560.

[9]Defined in s 1(1) of *Variation of Trusts Act* 1958.

[10]Evershed MR in *Re Steed's Will Trusts* 1960 Ch 407 at 421.

[11]Act 94 of 1965.

[12]See generally Honoré *op cit* ch 11. Variation *cy-près* of charitable trusts falls into this category. It is omitted from this discussion for the sake of brevity and because it is not disputed as a ground for variation.

[13]As Honoré *op cit* p 331 notes, there seems no reason why he also cannot expressly reserve such a right for his executor after his death *sed quaere Crookes v Watson* 1956 1 SA 277 (A) at 288.

[14]De Wet *Ontwikkeling van die Ooreenkoms ten Behoewe van 'n Derde* 141; De Wet and Yeats, *Kontraktereg en Handelsreg* (3rd ed) 94-5. See also *CIR v Est Crewe* 1943 AD 656 at 674-5.

[15]Honoré *op cit* p 331-2.

[16]*Crookes v Watson* supra and *CIR v Est Merensky* 1959 2 SA 600 (A).

[17]1943 AD 656 at 673-6.

former view. But this was with seeming reluctance[18] and immediately followed by the words

> "and he [the beneficiary] can probably also be deprived of it [his right] by the donor unilaterally releasing the trustees from the obligation which they have contracted towards him".[19]

On either approach revocation is impossible once the beneficiary has accepted his inchoate right[20] and acceptance has been communicated to the settlor. Hence the importance of prompt acceptance by the beneficiaries.[21]

The second area where our courts have recognised revocation or variation is where it is done by, or with the consent of, the beneficiaries. This exception to the rule is similar to that in English law, where the rule in *Saunders v Vautier*[22] applies. All the beneficiaries of full age and capacity must agree.[23] Where there are minor or unborn beneficiaries, the consent of the court on their behalf is required.[24] It has been emphasised that consent of this sort[25] will not be lightly given:

> "Na my mening sal die toets waaraan 'n aansoek gemeet word, hemelsbreed verskil waar 'n bevel aangevra word met toestemming en ondersteuning van alle belanghebbendes . . . en waar sulke toestemming nie verkry word nie, soos hier. In laasgenoemde gevalle sal die Hof slegs transaksies magtig wat . . . buite alle twyfel voordelig vir alle belanghebbendes sal wees."[26]

This cautious exercise of jurisdiction can only be welcomed. Unfortunately there are cases involving family arrangements in which the courts have refused declarations that such arrangements are valid, on the ground that they have no jurisdiction beyond approval on behalf of minor beneficiaries.[27] As Honoré points out,[28] this is clearly too narrow a view. But where is one to draw the line? For Honoré validity[29] of the arrangement should be the primary hurdle: thereafter

> "the testator may be presumed to have intended them [the beneficiaries] to be able to deal fully with their shares, so that the contract is valid and may presumably be declared so."[30]

This is a generous presumption – a considerable inroad on the rule *voluntas testatoris servanda est*. Unfortunately it underestimates the strength

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[18]"It may be that the series of decisions of the Appellate Division culminating in the case of *McCullogh v Fernwood* (1920 AD 204) precludes this court from accepting his [De Wet's] contention . . ." (at 674).
[19]675. Honoré *op cit* 332 discounts the significance of this dictum.
[20]But as to the disputed nature of the right see De Wet and Yeats *op cit* 95, Wylie 1943 *THRHR* 94.
[21]Honoré *op cit* § 273 and 274.
[22](1841) Cr & Ph 240.
[23]*Ep Stein* 1948 4 SA 763 (W); *Ep Sieberhagen* 1946 CPD 83 at 110. See generally Honoré *op cit* § 279.
[24]Honoré *op cit* § 279 and the authorities there cited (p 343), also § 282; s 33(1) of General Law Amendment Act 62 of 1955.
[25]The transaction involved the sale of land subject to a usufruct, not a trust.
[26]*Ep Sem* 1970 4 SA 403 (NK) at 405 *per* Van den Heever J.
[27]*Ep Trustees Est Loewenthal* supra at 80-1; *Ep Trustees Est Adam* 1927 NPD 314 at 318.
[28]Honoré § *op cit* 280 p 344.
[29]e g it does not purport to dispose of the rights of beneficiaries, born or unborn, who are not parties to it, or to vary provisions contrary to the terms of the trust.
[30]Honoré § 280 p 344.

of the rule in our case law. It is doubtful whether our courts would be satisfied with the secondary hurdle Honoré suggests, like the *absence* of some indication that the testator intended to *prohibit* the particular kind of arrangement. In *Bydawell v Chapman*[31] Van den Heever JA indicated that the *onus* is the other way around. In other words, the natural presumption is that the testator intended what he wrote: if he did not expressly authorise the beneficiaries "to deal fully with their shares", then clearly he did not want them to do so. According to this traditional approach, then, some indication must be *present* to show that the testator intended to *allow* an arrangement. For Van den Heever JA, the practice of family pacts aimed at varying provisions in wills was a Natal custom of mysterious origin.[32] It was in direct conflict with the paramountcy of the wishes of the testator and, as such, no inducement for the court to "fill the role of fairy godmother and scatter as largesse"[33] the testator's estate according to a scheme not his own.

Certainly this makes the prospect of an enforceable family arrangement to vary a trust precarious in the extreme. Although, as already noted, declarations of validity have geen granted in some cases,[34] the severity of the dicta in *Bydawell v Chapman* indicates that variation under family arrangements has proved to be far more narrowly circumscribed than Honoré suggests.

Variation under the Immovable Property (Removal or Modification of Restrictions) Act – our third category – is the only statutory power of variation. The act followed disparate debate by the Law Revision Committee.[35] It enables any beneficiary to apply to the court for removal or modification of any restriction on immovable property on the ground that such a variation would be to the advantage of all the beneficiaries, born or unborn, certain or uncertain. The court must in general be satisfied that the variation would be in the public interest or that of the beneficiaries.[36] It is regrettable that the act is confined to immovables but at least the court's jurisdiction has been widened to include either the public interest or that of the beneficiaries. This is highly significant for our fourth category discussed below – variation by a court *ob causam necessarium*. Nor have the courts shrunk from a bold interpretation of "public interest". In *Ex parte Wallace* it was held to be–

> "ook in die openbare belang dat mense nie verplig moet word om 'n bedrywigheid voort te sit waarvoor hulle geen lus of begeerte het nie en verhinder word om die dinge te doen wat hulle voel hulle graag wil doen. Hulle lewens moet nie deur die 'dooie hand' in 'n rigting gestuur word waarin hulle voel dat hulle nie gewillig is om te gaan nie."[37]

The last sentence is particularly significant in its averment that the public interest as well as the welfare of the beneficiaries may often be served

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[31]1953 3 SA 514 (A) at 520H-521A.
[32]at 521A.
[33]522A.
[34]See the cases cited by Honoré *op cit* p 344 note 8.
[35]Legislative reform was first formally mooted in 1954 – 13th report 1962 p 2.
[36]s 3(1) of Act 94 of 1965.
[37]1970 1 SA 103 (NK) at 106E *per* De Vos Hugo JP.

only at the cost of the settlor's original scheme. The act, then, has been applied as a direct statutory inroad on the literal terms of the original trust of immovables.

This brings us to the last and most shadowy category of exceptions to the non-variation rule – those limited circumstances in which a court will vary on considerations of necessity.[38] Like the house of lords in *Chapman v Chapman*,[39] our courts have repeatedly denied an inherent jurisdiction to alter wills, contracts or other trust instruments.[40] The reason of course is the traditional rule of serving the public interest by enforcing such instruments; here too the interests of the beneficiaries have been treated as a distinctly secondary concern. This is oddly in contrast with the flexible concept of "public benefit" introduced, as we have seen, by statute.[41] Instead necessity has been narrowly restricted to matters like upkeep of buildings forming part of the estate, payment of the testator's debts etc.[42] Similarly impossibility or impracticability of execution has been very narrowly construed – and even more so, a change of circumstances for which the settlor has not provided.[43] Indeed, most recently Caney AJP in the *Jewish Colonial Trust* (*Est Nathan*) case denied the existence of such a ground altogether:

> "There is no general principle that a change of circumstances from those existing when the testator made his will (or when he died) justifies a departure from the provisions of the will. For that, the case must be either one in which it is proper to imply that the testator intended a departure, and indeed the departure contended for, in the event of changed circumstances, or it must have become impossible or impracticable to carry out the provisions of the will."[44]

Forty years earlier Schreiner J was at least prepared to allow variation where a change of circumstances made the effect of the instrument "utterly unreasonable".[45]

Ex parte Hugo[46] marks the high water mark of this aversion to the invoking of changed circumstances unforeseen by the settlor. The fact that both English[47] and American[48] courts felt impelled to recognise such a jurisdiction even before statutory provision was made had no impression on Claassen J. Without elaboration he pronounced the idea "foreign to the concepts of our law".[49]

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[38]See generally Honoré *op cit* § 284-294. As to variation of charitable trusts *cy-près* see note 12 supra.
[39]1954 AC 529 (HL).
[40]Honoré *loc cit* and the authorities quoted at p 351 notes 66 and 67.
[41]See note 34 and 35 supra.
[42]*Ep Jewish Colonial Trust: in re Est Nathan* supra; *L Ferera* (*Private*) *Ltd v Vos* 1953 3 SA 450 (A) at 463G-H; *Ep Milton* 1959 3 SA 426 (C); *Est Issroff v Isroff* 1948 2 SA 414 (E); *Ep Loewenthal* supra; *Ep Hirschowitz* 1946 TPD 563.
[43]Honoré *op cit* § 289 p 354-5 and the authorities cited there.
[44]409G.
[45]*Ep Grusd* 1937 WLD 94 at 97-8.
[46]1960 1 SA 773 (T).
[47]*Re New* supra.
[48]Scott *op cit* § 168.
[49]at 776D. But the decision appears with respect to be correct in view of the finding on the facts that the terms of the will could still be carried out.

Running through all these cases is that crabbed conflict between the beneficiaries' interests and the literal application of the settlor's original scheme; in every instance the latter wins through. The English and American experience shows how difficult it is to mitigate by case law the harsher effects of the traditional rule even where there is a gradual judicial inching in that direction. Where there is no such movement, the prospects of an expanding judicial capacity to vary trusts on broad grounds of necessity are infinitely remote. As Schreiner J summed up the prevailing approach in *Loewenthal's* case:

> "It is not merely the rights of the beneficiaries that are involved but the right, if it can be called such, of the testator to have his plan carried out."[50]

It is submitted that this approach can no longer be sustained. The principle *voluntas testatoris servanda est* must be rendered less rigid in its application to trusts. In all the decisions on variation on grounds of necessity mentioned above, it does not seem once to have been considered that a trust is an *ongoing* institution brought to life by a will or contract; it is not the instrument itself.[51] Our law not knowing a rule against perpetuities, a trust may endure for generations. Is it reasonable to expect a psychic omniscience about the future from a settlor, and to presume that what he has not specifically protected his beneficiaries against, he has – with equanimity – clearly envisaged? The weakness of this "must have intended" reconstruction is illustrated by the *Jewish Colonial Trust* (*Est Nathan*) case. The elaborate reasoning was that:

> "He [the settlor] had lived through the Great War of 1914-18, concluded six years before his death, and so he must have appreciated the changing circumstances in the world, political, economic and sociological. Although the war was over, there were 'alarms (sic) and excursions', disturbances, warlike and economic, and it would be unrealistic to suppose that he held the view that conditions during the period of 50 years and at the end of that time remained static . . . in particular, he must have known that the value of money was prone to change . . ."[52]

This concept of the settlor as a Superman on the Clapham bus must be seriously questioned. Must a settlor in the 1930's for instance, who with memories of the Great Crash etched on the matrix of his mind, invests in low-yield government securities, be credited with spurning for all time higher interest rates for the sake of greater security? Is he to be ascribed a determination to restrict trust investments to a particular type suitable at the time of settlement, come what may 40 years later?

The case for a broad judicial discretion to vary trusts is based on a simple precept: that a settlor cannot be expected to foresee the limitless variety of possible changes of circumstances. Clearly some will be minor. But others may make the trust as it stands undermine both the interests of the beneficiaries and the whole intention behind the settlor's original act. There is a distinction between best serving the intention of the settlor and a primal obeisance to the dead hand.

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[50]supra at 81.
[51]Honoré *op cit* § 35.
[52]1967 4 SA 397 (N) at 406B-E. *Bydawell v Chapman* supra at 522A.

As we have seen, this has not been recognised by our courts. Running through the decisions is a constant assumption that the alternative to the literal implementation of the settlor's scheme is a sort of unrestrained Bacchalian revel by the beneficiaries.[53] This is unwarranted. The simplest approach which could have been adopted would be to require the court to be satisfied that a variation is necessary in the interests of all the beneficiaries or in the interest of the public. If a bold court would be prepared to beat against the drift, distinguish *Bydawell v Chapman* or at least its narrow interpretation in the *Jewish Colonial Trust* (*Est Nathan*) case, invoke the strong parallel of our suggested formulation with that in the Immovable Property (Removal or Modification of Restrictions) Act[54] and its application in *Ex parte Wallace*[55] it might yet be done.

Since this prospect is at best remote, the need for statutory reform is obvious. This could be effected most simply along the lines mentioned above: in effect, an enlargement of the court's powers by introducing a jurisdiction – with regard to movables as well as immovables[56] – with alternative legs of the public interest or that of the beneficiaries.[57] The need is rendered all the more urgent by the fact that our law knows no limitation on the duration of a trust. This is surely ill-considered in view of the limitation imposed ten years ago on the lives of *fideicommissa*.[58] Significantly enough for this discussion, in a memorandum to the Law Revision Committee opposing a statute against perpetuities on the English model, C P Joubert suggested:

> "'n bevredigender oplossing om die gemeenregtelike bevoegdhede van die howe *ob causam necessariam* uit te brei deur aan die howe 'n wye diskresie te verleen om billikheidshalwe op goeie gronde toe te stem tot die opheffing van *fideicommissa* . . . [D]it geld ook die trust."[59]

Both these persisting areas of rigidity and uncertainty could be eliminated by a composite provision giving the courts a discretion to vary or discharge trusts.

There is no reason to believe that such a reform would move the courts from their traditionally sceptical enquiry to a profligate "scattering of largesse". More important, the present position is undesirable. It is based on a simplistic equation of a settlor – whether *inter vivos* or *mortis causa* – with a testator, attributing to him a foresight beyond the dreams of most mere mortals. And it petrifies at one arbitrary moment in a tumultuous age what should be a supple, living institution. □

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[53]See for instance the remarks in the *Jewish Colonial Trust* (*Est Nathan*) case supra at 408A and E.

[54]See note 34 supra.

[55]See note 35 supra.

[56]As opposed to the present jurisdiction under s 3(1) of Act 94 of 1965 limited to immovables.

[57]See Honoré *op cit* § 314 p 371.

[58]s 8 of Act 94 of 1965.

[59]13th report of the Law Revision Committee (1962) annexure B p 8-9.

Proprietary Consequences of Marriage and the Conflict of Laws

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IMMUTABILITY AND UNITY

Position in general

According to the conflict of laws of South Africa the matrimonial property regime is governed once and for all by the law of the husband's domicile at the time of marriage,[1] it being immaterial whether or not there was then an intention of acquiring another domicile immediately or within a reasonable time after marriage.[2] This so called immutability principle applies to all kinds of property, movable and immovable alike[3] (unity principle).

Divorce

English[4] and South African[5] courts apply in divorce proceedings their own municipal divorce law. In other words conflict of laws does not here exist. But how far does this principle, if it is one, extend? According to Prof Kahn[6] the court would apply its own law not only to determine the ground of divorce, but also to decide ancillary claims such as those relating to property rights, maintenance and custody. For example, as the learned Professor goes on to say, our courts should decide whether to grant a forfeiture of benefits arising from the marriage by South African law, treating the issue as distinct from the marital property regime. In England the problem of the range of the applicable English municipal law is largely academic because the courts have now specific powers to make ancillary orders for financial provision, including transfers or settlement of property?

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[1]See eg *Brown v Brown* 1921 AD 478 482 per Innes CJ.
[2]*Frankel's Estate v The Master* 1950 1 SA 220 (A).
[3]*Schapiro v Schapiro* 1904 TS 673 677 per Innes CJ; *Union Government* (*Minister of Finance*) *v Larkan* 1915 CPD 681 685 per Kotzé J.
[4]Dicey and Morris *Conflict of Laws* 9th ed (London 1973) 312-3; Cheshire *Private International Law* 9th ed by North (London 1974) 369-71; Graveson *Conflict of Laws* 7th ed (London 1974) 286-7. See also Ehrenzweig and Jayme *Private International Law* vol II (Leiden 1973) 174.
[5]Prof Kahn in Hahlo *The South African Law of Husband and Wife* 3rd ed (Cape Town 1969) 623-6.
[6]ibid 624.

In the recent case *Sperling v Sperling*,[8] all the judges, no less than the parties, must have taken it for granted that the conflicts rules relative to the proprietary consequences of marriage also apply in divorce proceedings. This is probably correct as long as the court is not vested with a specific discretion to deal with the proprietary consequences of marriage in divorce proceedings as it deems fit or in any particular way.

NEW LAW SUPERSEDING

Does the immutability principle imply that subsequent changes in the law of the husband's domicile are relevant for all times? This point arose crisply for decision in *Sperling v Sperling*[8] where the facts were briefly as follows:

East German nationals married in East Germany while being domiciled there on 15 May 1954, apparently without entering into an ante- or post-nuptial contract. At that time such marriage was according to the law of East Germany out of community and without marital power of the husband. After first having settled in West Germany for a few years, under the authority of a permit issued in East Germany, the spouses left for the Transvaal during 1957 and acquired there a new domicile prior to 1965. On 20 December 1965 the law governing the matrimonial property regime was changed in East Germany, more particularly in that on marriage the property of the spouses remained their separate property whereas things, rights and savings acquired by one or both spouses during the marriage, through work or through income from work belonged to both spouses. On termination of the marriage the common property and assets had to be divided in equal shares, but if the parties failed to arrive at any agreement in regard to the division of the common property, the court was free to award it to one or other of the parties or in such proportions as seemed to it fair and equitable in the circumstances. Although the expert on the law of East Germany was not particularly explicit in this respect, he appeared to express the view that according to East German law, the 1965 amendments would be applicable to the marriage of the parties despite their prior adoption of a domicile elsewhere, both counsel seemingly accepting this as being the position.[9]

The trial court[10] (as also, for that matter, the appellate division[11]) held that the law which it was required to apply was the law as altered by the 1965 amendment and made, inter alia, certain awards in the exercise of the discretion therein contained. The appeal against that award was dismissed with costs by the appellate division.

The problem with which the appellate division thought to be confronted was whether the property rights of the parties were governed by the law as it was in East Germany before the 1965 amendment or by the law as amended.

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[7]Matrimonial Proceedings and Property Act 1970 (c 45) s 4.
[8]1975 3 SA 707 (A).
[9]at 715B. See also 717A.
[10]at 715G.
[11]at 724D.

After briefly referring to the principle of immutability and the principle of unity as obtaining in South Africa,[12] rejecting three South African cases as being not in point,[13] quoting two South African writers[14] and finally turning to some English and American cases and authorities,[15] Corbett JA, who delivered the judgment, Rumpff CJ, Holmes JA, Muller JA and Galgut AJA concurring, arrived at the conclusion[16] that when the South African rule of private international law prescribed that the proprietary consequences of a foreign marriage had to be determined in accordance with the law of the matrimonial domicile, that reference should, in general, be to the whole of the *lex causae*, including its transitional law. As it appeared to the learned appeal judge,[17] virtually all exponents of that view conceded that there were limitations to this, particularly in cases where a limitation was imposed under the general rubric of public policy which indeed operated generally as an overriding check upon the application in the courts of South Africa of the rules of a foreign *lex causae*. But public policy was, according to the learned appeal judge,[18] not the only restricting criterion. He then continued:[19]

> "Where, as in this case, there is no clear authority upon the point, it is, I consider, proper to have regard to the consequences of deciding the issue the one way or the other and to take into account which course appears to have in its favour 'the balance of justice and convenience' (cf *Starkowski's* case, *supra*[20] at p 172); see also *Frankel's Estate and Another v The Master and Another, supra*[21] at pp 221, 239)."

Turning to the specific and upon a review of the position as a whole, the learned appeal judge, however, held finally:[22]

> "that there is no decisive consideration of public policy which impels one, in a case such as this, to ignore changes in the *lex causae*, enacted with retroactive effect, after the parties have acquired a new domicile in this country; and that in fact the balance of justice and convenience favour an adherence to the general principle that a reference to a foreign *lex causae* includes the transitional law thereof."

In the result, the trial judge had correctly approached the proprietary claims of the parties on the basis that the 1965 law applied.

CRITICISM

In the event the learned appeal judge not only accepted the mandate of a foreign legislator (East Germany) to exercise his discretion where the parties could not agree, but also ignored the view that changes of the foreign law regarding the matrimonial property regime could be considered only

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[12]at 716F-H. See also *ante ad notas* 1-3.
[13]at 717-8 (*Black v Black's Executors* (1884) 3 SC 200; *Anderson v The Master* 1949 4 SA 660 (E); *Ex parte Evans et Uxor* 1943 OPD 7).
[14]at 718E and F (Prof Kahn and Dr Spiro).
[15]at 718-21.
[16]at 721D and E.
[17]at 722C and D, quoting *Weatherley v Weatherley* 1879 Kotzé 66 83-5; *Seedat's Executors v The Master* 1917 AD 302 307-8.
[18]at 722D.
[19]at 722D and E.
[20]*Starkowski v Attorney-General* 1954 AC 155.
[21]See *ante* note 2.
[22]at 724C and D.

so long as the connecting factor attracting the foreign law – here domicile – continued to exist. On a more positive note, the learned appeal judge only considered whether the reference to the foreign law included its transitional law and whether on a balance of justice and convenience such transitional law should be excluded, which he denied. But, although thus recognizing the necessity of a determination on a balance of justice and convenience, the learned appeal judge failed, in my respectful submission, to pay any attention to the nature of the immutability principle and the effects of new foreign legislation, coming about after a change of the connecting domicile, on the law of the new domicile, particularly if that new domicile happens to be in South Africa.

Nature of immutability principle

The immutability principle implies, as set out earlier,[23] that the proprietary consequences of marriage are governed by the law of the husband's domicile at the time of marriage, including subsequent changes of that law if they purport to affect the issue. However, after a change of the connecting factor – here domicile – changes in or under the law of the matrimonial domicile, whether they are intended to operate *ex tunc* or *ex nunc*, cannot be given effect to in the country of the new domicile: whereas the matrimonial property law may be dynamic for the duration of the connecting factor, it becomes static after a change of the latter.[24] The underlying idea of the immutability principle is that the husband must not be in a position to affect the wife's condition by a transaction for which he does not require her consent.[25] A change of the law after the change of the connecting factor is not due to a transaction of the husband, and there is therefore no need for the recognition of such change of the law.

From a comparative point of view it is interesting to note that the view taken here is lately gaining ground on the continent of Europe, more particularly in West Germany (where now the connecting factor is nationality). If the law which governs the matrimonial property changes after the connecting factor has changed, then such governing law remains applicable as it was at the time of the change of the law (so called petrification of the matrimonial property regime). The principle has been followed in a number of cases,[26] even by the highest court (federal court)[27] (though obiter) and also the government accepted it when introducing certain special legislation.[28] Gamillscheg[29] makes the point that it cannot be ignored that after a change of the connecting factor the husband has no longer any direct or indirect opportunity of influencing the development of the law of the former

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[23]*ante ad notas* 1 and 2.
[24]Spiro *Conflict of Laws* (Cape Town 1973) 26 (reprint of an article of 1960).
[25]*Chiwell v Carlyon* (1897) 14 SC 61 67-8 per De Villiers CJ, followed by the chancery division in *Chiwell v Carlyon* which is not reported in England (see Cheshire (note 4) 580 note 3). See also *Reichsgericht* (1882) Official Collection vol 6 p 225 (when also in Germany domicile was still the connecting factor).
[26]I refer here to Gamillscheg *Internationales Privatrecht* vol II (Berlin 1973) 620.
[27]*Bundesgerichtshof* Official Collection vol 40 p 32.
[28]See Gamillscheg (note 26) 621.
[29](note 26) 622.

country – which as it appears to me, is only another way of emphasizing the total loss of any contacts with that country. There are also some French decisions in favour of the principle of "petrification".[30]

Effects of the particular new law

Even if the new East German matrimonial property regime were applicable – which, in my respectful submission, it is not – it would still have to run the gauntlet of the public policy of the forum.

Policy[31] (*residual discretion*[32]). The country where the spouses now live is not a wholly disinterested party. Their matrimonial property regime has somewhat become its concern, at least in as much as the interests of third persons may have to be protected. At any rate, the spouses are now subject to the legislative powers of the country of their new domicile. These and similar considerations may well justify the repudiation of the legislative interference of the country of the former domicile of the spouses after they have abandoned it.

Repugnancy.[33] It is a special feature of the South African law of husband and wife that donations between husband and wife and postnuptial contracts are prohibited. Although a statutory change of the matrimonial property regime is not as such a donation (which presupposes a voluntary act on the part of the donor) its effect may well be indistinguishable from a donation, particularly in as much as one spouse is gratuitously enriched at the cost of the other. The position may also be approached as being practically the same as if the legislative change had been brought about by entering into a postnuptial contract at the time the spouses were domiciled in South Africa.[34] Seen in this light, what does the balance of justice and convenience really favour? □

Maitland in critisizing Bracton for extensively using the writings of Azo of Bologna: "*That an English writer of the time of Henry III should have been able to put off on his countrymen as a compendium of pure English law a treatise of which the entire form and a third of the contents were directly borrowed from the Corpus Juris, and that he should have ventured on this experiment in a country where the systematic study of the Roman law was formally prescribed, will always be among the most hopeless enigmas in the history of jurisprudence.*"

Maitland Ancient Law (Pollock's ed 87)

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[30]See Gamillscheg (note 26) 621.
[31]See Holder in (1968) 17 *ICLQ* 926-52 950-1.
[32]See Dicey and Morris (note 4) 74-5.
[33]See Holder (note 31) 949.
[34]See also *Union Government v Larkan* 1916 AD 212; *Ex parte Marx* (2) 1936 CPD 499.

Majority Rule and the New Statutory Derivative Action

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The rule in *Foss v Harbottle*[1] is the guardian of two principles of company law. It secures the principle of majority rule by denying the court jurisdiction[2] to interfere in a matter that the majority may settle; it secures the corporation principle by insisting that the company, and the company alone, enforce its rights.[3] Its protection of majority rule is absolute.[4] Its protection of the corporation principle is, however, qualified by a number of exceptions,[5] all of which seek to protect the minority shareholder. The most important of these exceptions is that which permits a member to institute action when a type of wrong known as a "fraud on a minority" has been com-

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[1](1843) 2 Hare 461. The classical statement of the rule is that of Lord Davey in *Burland v Earle* (1902) AC 83 at 93 (PC): "It is an elementary principle of the law relating to joint stock companies that the Court will not interfere with the internal management of companies acting within their powers, and in fact has no jurisdiction to do so. Again, it is clear law that in order to redress a wrong done to the company . . . the action should prima facie be brought by the company itself. These cardinal principles are laid down in the well-known cases of *Foss v Harbottle* and *Mozley v Alston* (1948) 1 Ph 790." On the rule generally, see K W Wedderburn "Shareholder's Rights and the Rule in *Foss v Harbottle*" 1957 *Camb LJ* 194, 1958 *Camb LJ* 93; A J Boyle "The Minority Shareholder in the Nineteenth Century" 1965 *MLR* 317; R R Pennington *Company Law* (2nd ed 1967) 534–48; L C B Gower *Principles of Modern Company Law* (3rd ed 1969) 581–95; S J Naude *Die Regsposisie van die Maatskappydirekteur* (1970) 167–200; H S Cilliers and M L Benade *Company Law* (2nd ed 1973) 387–94.

[2]See *Burland v Earle* (1902) AC 83 (PC); *Heyting v Dupont* (1963) 3 All ER 97, affirmed (1964) 2 All ER 273.

[3]On the history and nature of the relationship of these two principles in *Foss v Harbottle* see Boyle 1965 *MLR* 318–20; Wedderburn 1957 *Camb LJ* 194–99; Naude *op cit* 169–72.

[4]"Absolute" in the sense that the courts will not interfere where the majority have acted within their powers and have exercised their powers lawfully.

[5]Wedderburn 1957 *Camb LJ* 203 lists these exceptions as follows: (i) where the act complained of is *ultra vires* or illegal; (ii) where the matter is one which could validly be done or sanctioned only by some special majority of the members; (iii) where the personal and individual rights of the plaintiff as a member have been invaded; (iv) where what has been done amounts to a "fraud on the minority" and the wrongdoers are themselves in control of the company. See also *Edwards v Halliwell* (1950) 2 All ER 1064 at 1066–7. Gower *op cit* 585 adds a fifth exception, namely "any other case where the interests of justice require that the general rule, requiring suit by the company, should be disregarded." In *Pavlides v Jensen* (1956) 1 Ch 565 the existence of this fifth requirement was denied; but see *Heyting v Dupont* (1964) 2 All ER 273 and Boyle "A Liberal Approach to Foss v Harbottle" 1964 *MLR* 603. On the exceptions generally, see Pennington *op cit* 539–48; Gower *op cit* 584–6; Naude *op cit* 174–95.

mitted against the company;[6] and the most important consequence of this exception is the member's right to enforce certain duties owed to the company by its directors when they, the directors, have "control" of the company.[7] Unfortunately, this right, in spite of its relative importance, has not been of much assistance to the minority shareholder, and this for three reasons: (a) the majority is competent to ratify effectively breaches of certain of the directors' duties, and the principle of majority rule therefore denies a member the right to enforce these duties; (b) there is uncertianty as to the duties which a member can enforce; and (c) the form of the member's action – the common law derivative action[8] – is both complex and cumbersome.

THE NEW STATUTORY DERIVATIVE ACTION

The Commission of Enquiry into the Companies Act thought it unwise to attempt to extend the shareholder's protection by building upon the common law derivative action.[9] Both its concept and its procedure, the commission found, "bristle" with too many difficulties.[10] Instead, the commission recommended the introduction of a statutory derivative action,[11] and this action is now contained in sections 266–8 of the new Companies Act.[12]

Section 266 provides that where a company has "suffered damage or loss or has been deprived of any benefit as the result of any wrong, breach of trust or breach of faith committed by any director", and the company has not itself instituted action, any member may initiate proceedings on behalf of the company; and he may do so "notwithstanding that the company has in any way ratified or condoned any such wrong, breach of trust or breach of faith or any act or omission relating thereto."[13] The member must first call upon the company to institute action.[14] Should it then fail to do so within one month, he may apply to court for the appointment of a *curator ad litem* to bring the proceedings on behalf of the company.[15] If the court is satisfied (a) that the company has not instituted proceedings, (b) that there are *prima facie* grounds for bringing them, and (c) that an investigation into the grounds for and the "desirability"[16] of the proceedings is justified, it will appoint a provisional *curator ad litem* and direct him to conduct the investigation.[17] On the return day the court may either discharge the pro-

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[6]See Pennington *op cit* 542–4; Gower *op cit* 562–78; Naude *op cit* 180–91.

[7]See Wedderburn 1958 *Camb LJ* 96–106; Pennington *op cit* 544–6; Gower *op cit* 564–7; Naude *op cit* 180–91.

[8]The action is called a "derivative" action because the individual member sues to enforce a claim whcih belongs to the company and his right is therefore derived from the company. On the derivative action, see Pennington *op cit* 537–9; Gower *op cit* 587–92; Naude *op cit* 172–4; Cilliers and Benade *op cit* 391–4.

[9]Main Report (RP 45/1970) paras 42 10–13.

[10](RP 45/1970) par 42 13.

[11](RP 45/1970) paras 42 14–18.

[12]The Companies Act, 61 of 1973.

[13]s 266(1).

[14]s 266(2)(a).

[15]s 266(2)(b).

[16]"wenslikheid" in the Afrikaans text, which is the signed text.

[17]s 266(3).

visional order or confirm the curator's appointment and issue directions as to the institution and conduct of the proceedings; and "it may order any resolution ratifying or condoning the wrong, breach of trust or breach of faith or any act or omission in relation thereto shall not be of any force or effect."[18]

THE INROAD UPON MAJORITY RULE

Clearly section 266 does more than introduce a new procedure. It also makes an inroad upon majority rule for now no ratification is, as such, sufficient to bar a member's action. The extent of this inroad is therefore perhaps the most important question of substantive law to which the section gives rise. However, before attempting to answer this question, we must try to formulate it more precisely. Although section 266(4) appears to give the court a discretion to allow an action to proceed without first setting aside a resolution ratifying the director's breach of duty,[19] logic does not permit this. It is submitted therefore that no action will be allowed to proceed until the court has set aside any such ratification or, if there has been no ratification, until the court is satisfied that no subsequent ratification could deprive the company of its action. If this is correct, the question to be answered is: When will the court set aside a ratification of a director's breach of duty in order to allow the action against him to proceed?[20] It should be noted that our question is not merely "When will the court set aside a ratification of a director's breach of duty?" for a court might well set aside a ratification in order to refer the matter back to the general meeting for reconsideration,[21] and where this is done no inroad will be made upon majority rule. Nor is our question merely "When will the court allow an action to proceed?" for to allow an action to proceed where the majority have no power to ratify (e g because the director's breach of duty is an illegal act) is not to make an inroad upon majority rule.

An Extensive Interpretation of Section 266

It can be argued that majority rule has been completely abolished in so far as it applied to the enforcement of directors' duties and that the final decision whether to enforce these duties now rests with the court. As we have seen, the provisional *curator ad litem* must investigate not only the grounds for the action, but also its "desirability". Now the word "desirability" is unqualified, and it must therefore include a consideration of the desirability of the action as a matter of business policy. Therefore, if, in the light of the curator's report, the court decides that the action would be in the interests of the company, it will allow the action to proceed even if a

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[18]s 266(4).

[19]For the sake of brevity I shall use the word "ratify" to mean both "ratify" and "condone"; and I shall use the term "breach of duty" to mean "wrong, breach of trust or breach of faith".

[20]Where there has been no ratification the question will be: When will the court allow the action to proceed in spite of the fact that it is within the power of the majority to ratify? The question stated in the text must be understood to include this quiestion.

[21]See infra notes 60, 65 and 69.

disinterested and fully informed[22] majority has ratified. And therefore a member may question a ratification on grounds of business policy alone; and every ratification is, in the final analysis, subject to the approval of the court.

Support is lent to this interpretation by one theory of the member's common law right to enforce directors' duties. According to this theory, all exceptions to *Foss v Harbottle* "lie along the boundaries of majority rule",[23] and these boundaries are, for all exceptions alike, the outer limits of the powers of the majority.[24] Therefore, just as a member could restrain a company from acting *ultra vires* because no majority had the power to ratify an *ultra vires* act,[25] so too those director's duties that a member can enforce, he can enforce because no majority (not even a disinterested majority) has the power to ratify a breach of them[26] The rule that a member has no action unless the wrongdoers (the delinquent directors) have control of the general meeting[27] is, therefore, an additional requirement.[28] That is to say, the member must establish both that the directors have committed an unratifiable breach of duty and that they have control of the general meeting. Some difficulty has been experienced in determining exactly which duties can

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[22]The reason usually given for taking the power to ratify from the majority is the fact that shareholders are often unable to make an informed decision upon such matters. Yet once the power to decide such matters is conferred upon the court, it follows that the court must draw its own conclusions from the facts.

[23]Wedderburn 1957 *Camb LJ* 198.

[24]See Wedderburn 1957 *Camb LJ* 194, 1958 *Camb LJ* 93; Naude *op cit* 167–95 196–7.

[25]The Companies Act, 1973 has undoubtedly affected the member's right to institute action on behalf of the company to restrain acts beyond its objects; but just how this right has been affected is uncertain. S 33(2) (if the main business actually carried on falls within an ancillary object, it is deemed to be the main object) and s 36 (the abolition of the *ultra vires* doctrine) must, to say the very least, have altered the legal basis of this right. On these sections, see Naude "Company Contracts: The Effect of Section 36 of the New Act" 1974 *SALJ* 315.

[26]Thus Naudé *op cit* says: "Die strekking van die Reël in say moderne vorm kan só *saamgevat* word: een of meer minderheidslede kan nie 'n aksie instel op grond van òf 'n interne onreëlmatigheid in die bestuur van die maatskappy, òf 'n onreg wat die maatskappy aangedoen is, indien die onreëlmatigheid of onreg deur die meerderheidslede op 'n algemene vergadering geratifiseer kan word nie (171–2) . . . Die inherente verwantskap tussen die Reël en 'fraud on the minority' is onmiskenbaar. Die een verbied die instel van 'n aksie deur 'n lid oor 'n aangeleentheid wat binne die magsfeer van die meerderheid op 'n algemene vergadering val; die ander defineer sekere perke van daardie magsfeer" (182–3). See also Wedderburn 1957 *Camb LJ* 198–9, 1958 *Camb LJ* 96–8.

[27]See for eg *Atwool v Merryweather* (1867) LR 5 Eq 464; *Russel v Wakefield Waterworks Co* (1875) LR 20 Eq 474; *Mason v Harris* (1879) 11 Ch D 97; *Alexander v Automatic Telephone Co* (1900) 2 Ch 56; *Cook v Deeks* (1916) 1 AC 554; *Pavlides v Jensen* (1956) Ch 565; *Birch v Sullivan* (1958) 1 All ER 56; *Heyting v Dupont* (1963) 3 All ER 97, affirmed (1964) 2 All ER 273.

[28]Thus Naude *op cit* says: "Wat die Reël betref sou 'n lid 'n afgeleide aksie teen die onregpleger kon instel bloot op grond van die ongeldige ratifikasie van sy onratifiseerbare onreg teenoor die maatskappy; so 'n ratifikasie is immers buite die magsfeer van die meerderheidslede, en die geval staan derhalwe buite die perke van die Reël. Die vereiste dat die onregpleger die maatskappy ook moet *beheer* voorday 'n afgeleide aksie ingestel kan word, word dus addisioneel opgelê – uit die Reël self is dit nie af te lei nie" (at 191). See also Wedderburn 1958 *Camb LJ* 94–6; Boyle 1965 *MLR* 325–6 who says that here "the notion of the company as the 'proper plaintiff' has acquired a force of its own quite independent of the majority's power to ratify"; Gower *op cit* 589–90.

never be ratified.[29] The most widely held view is that they are (a) the duty to act *bona fide* in the interests of the company and (b) the duty not to appropriate the company's property,[30] i e property belonging to the company and property to which the company is entitled other than incidental profits and damages for which the directors are liable as a result of their negligent management of the company's affairs.[31]

This theory of unratifiable wrongs raises one obvious question. If a disinterested majority purports to ratify such a breach of duty, where is the majority oppression?[32] The answer to this question, although a logical deduction from the theory, is, nevertheless, a little surprising. It is said that we are not concerned here with true majority oppression. The term "fraud on the minority" is misleading. True majority oppression is committed when, as in *Menier v Hooper's Telegraph Works*,[33] the majority themselves, acting in their capacity as shareholders, appropriate the company's property.[34]

This answer raises a further question. Why, if it is not to protect him from majority oppression, is a member given the right to enforce these duties? Is it to protect him from oppression at all? It cannot be to protect shareholders from oppression by directors. That would be achieved by ensuring that members are able to bring the matter of the director's breach of duty before the general meeting, and not by taking the power to ratify from the majority. Various unsuccessful attempts have been made to base the member's right to institute action on one or other of the fundamental principles of company law, e g the principle of maintenance of capital[35] and (before its abolition) the *ultra vires* doctrine.[36] It appears now to be accepted

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[29]See for e g Wedderburn 1958 *Camb LJ* 98–106; Naudé *op cit* 180–91.

[30]See Pennington *op cit* 542–44; Gower *op cit* 564–7; Wedderburn 1958 *Camb LJ* 98–106; Naudé *op cit* 180–91.

[31]The term "the company's property" is therefore given an extended meaning here. In English law, if a director appropriates property that he was under a duty to obtain for his company, that property belongs to the company in equity, see *Cook v Deeks* (1916) 1 AC 554. In *Robinson v Randfontein Estates GM Co* 1921 AD 168 at 179–80 Innes CJ said that in our law the "director . . . intends to acquire the property for himself alone; he has no idea of acquiring the equitable ownership for the company. No such *animus* enters into the transaction . . . But the law refuses to give effect to that intention: it treats the acquisition as one made in the interests of the company." See also Naudé *op cit* 129, 187. An "incidental profit" is a profit which a director makes as a result of his position as such, but which he was under no duty to acquire for the company. (We may, I think, safely ignore the fact that in English law certain incidental profits also belong to the company in equity.) A director is under a fiduciary duty to account for all incidental profits; but, if he appropriates such a profit, he may exercise his majority vote in the general meeting to ratify the appropiration, see *Regal* (*Hastings*) *Ltd v Gulliver* (1967) AC 134. So too may he ratify a breach of his duty to exercise reasonable care and skill in the management of the company's affairs, see *Pavlides v Jensen* (1956) Ch 565.

[32]If they are mistaken, and the ratification is not in the interests of the company, they suffer along with the minority.

[33](1874) 9 Ch App 350.

[34]See Wedderburn 1958 *Camb LJ* 101.

[35]See B H McPherson "Limits of Fraud on the Minority" 1960 *SALJ* 297 at 299; and for criticism of this approach, see Naudé *op cit* 185–6.

[36]See Gower *op cit* (2nd ed 1957) 511 and Naudé *op cit* 189–90; but see Gower *op cit* (3rd ed 1969) 565. McPherson (*loc cit* 35), Gower and Naudé were all concerned only with the member's right to enforce the duty not to appropriate the company's property.

that a rule which denies the majority the power to ratify a director's breach of duty must be an independent rule of company law; and its aim must be to take the enforcement of the duty out of the hands of the majority.[37] In other words, it must constitute an attack upon majority rule as such and not merely an attack upon abuse of majority rule. The reasons given for so restricting majority rule are these. A decision to enforce or ratify a director's breach of duty may involve complex questions of law and policy and shareholders – at least when there are many of them and they are widely dispursed – are usually not in a position to decide such questions. Thus it may be unfair to a dissenting minority to leave the decision in the hands of the majority. And to give the individual member the right to sue will, moreover, make it more likely that a director who has breached a duty will be made to pay for his sins.[38]

This theory of unratifiable wrongs lends a threefold support to the extensive interpretation of section 266. First, the theory maintains that the common law itself is in favour of taking the enforcement of directors' duties out of the hands of the majority. Thus the extensive interpretation can be said to be no more than a development of an already established policy. Secondly, if shareholders are not competent to ratify, the enforcement of all directors' duties should be taken from the majority.[39] Thus the power conferred upon the court by section 266(4) to set aside *any* ratification is explained. Thirdly, although it is better to permit the member to sue than to allow the majority to ratify, clearly this solution is not entirely satisfactory for a member, in his ignorance, may sue contrary to the company's interests.[40] Therefore the court ought to have (a) the power to make an investigation to determine whether the action is in the company's interests and (b) the power to refuse or to allow an action on grounds of business policy alone. And, according to the extensive interpretation, section 266 does confer these powers.

A Restrictive Interpretation of Section 266

The extensive interpretation of section 266 suffers, however, from a number of weaknesses; and these not only diminish its force, they also suggest another more restrictive interpretation. In the first place, it has always been a fundamental principle of company law that "[i]t is not part

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Naudé finds another basis for the right to enforce viz the duty of good faith, see infra n 38. It is submitted, however, that there is no separate right to enforce the duty of good faith, see infra n 60.

[37]See Naudé's explanation of the member's right to enforce the duty of good faith, *op cit* 188–9; and R N Leavell's explanation of the member's right in American law to enforce director's duties generally, "The Shareholders as Judges of Alleged Wrongs" 1961 *Tulane LR* 331; and see infra n 38.

[38]See Naude *op cit* 188–9 and Leavell 1961 *Tulane LR* 346–355. Both stress the point that in large companies where there are many members and they are widely dispersed, the majority usually are not in a position to make an informed decision upon such matters. Leavell is also of the opinion that in small, closely held companies the majority, although more likely to be properly informed, are seldom disinterested.

[39]See Leavell 1961 *Tulane LR* 356–360.

[40]But see Leavell 1961 *Tulane LR* 354–5 who considers that the best solution is simply to give the individual member his action.

of the business of a Court of Justice to determine the wisdom of a course adopted by a company in the management of its own affairs".[41] To abolish this principle, if only in the area of directors' wrongs, would be to introduce a new policy of far-reaching social and philosophical importance. It would not merely be to redistribute, or even to restrict, the powers of shareholders; it would be to take from them the power to administer certain of their own affairs, and to place that power in the hands of the court. There is not the slightest hint in the commission's report that the commission intended this. On the contrary, its report begins with what amounts to a reaffirmation of the principle of non-interference in the management of companies.[42] And a consideration of the provisions of the report dealing with the introduction of the statutory derivative action reveals that the commission's sole concern was to protect shareholders from the director who abuses his office.[43] Of course it is true that shareholders are often (but by no means always) unable to make an informed decision upon such matters. But to confer the power to make these decisions upon the court is not the only possible solution to this problem, nor is it necessarily the solution that the legislature had in mind. It is submitted that, if satisfied that a disinterested majority has ratified on insufficient information, the court could set aside the ratification and call a general meeting for the members to reconsider their decision in the light of the report of the provisional *curator ad litem*.[44] This solution would be in accordance with the philosophy of disclosure which underlies the Companies Act.

Secondly, there is little or no authority for the theory of unratifiable wrongs to be found in the cases.[45] And without its support the extensive

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[41]This is Lord Loreburn's well-known statement of the principle in *Poole v National Bank of China Ltd* (1907) AC 229 at 236; see also *Levin v Felt & Tweedes Ltd* 1951 2 SA 401 (A). For a critical view of this principle see R W Parsons "The Director's Duty of Good Faith" 1967 *Melbourne Univ LR* 395 417.

[42](RP 45/1970) paras 13 02 & 07.

[43](RP 45/1970) paras 41 03–4, 42 10–18.

[44]s 183 of the Companies Act, 1973 empowers the court to call a general meeting "if for any . . . reason the court thinks fit to do so". It is submitted that in spite of the fact that s 266(4) appears to empower the court only to refuse or allow the action, the section does not exclude the courts power to call a general meeting under s 183.

[45] Sometimes the "fraud on the minority" exception to *Foss v Harbottle* is stated in a way that appears to confirm the theory of unratifiable wrongs. For instance, in *Edwards v Halliwell* (1950) 2 All ER 1064 at 1067 Jenkins LJ said: "It has been further pointed out that where what has been done amounts to what is generally called in these cases a fraud on the minority and the wrongdoers are themselves in control of the company the rule is relaxed in favour of the aggrieved minority . . . The reason for this is that, if the were denied that right their grievance could never reach the court because the wrongdoers themselves, being in control, would not allow the company to sue." However, it is submitted that by "fraud on the minority" his lordship meant "that type of wrong that an interested majority cannot ratify". That is clearly what Lord Davey meant when he gave the "fraud on the minority" exception to *Foss v Harbottle* its first formulation in these terms, see *Burland v Earle* (1902) AC 83 at 93. And if it is not what Jenkins LJ meant then he was guilty of an obvious inconsistency. If no majority can ratify, a member should have the right to sue in spite of the fact that the majority is disinterested – and not because the majority is interested. See also *Pavlides v Jensen* (1956) 1 Ch 565 where Danckwerts J's reference to the principle that an interested shareholder may vote would be meaningless if his lordship had not meant that "fraud on the minority" constitutes an exception ot this principle. What *Pavlides's* case decided was that,

interpretation of section 266 is weakened considerably. There is no authority for the proposition that a disinterested majority cannot ratify a director's breach of his duty to act *bona fide* in the interests of his company or his appropriation of the company's property.[46] The rule is that a member may institute action if the wrongdoers have "control" of the general meeting. This requirement of "control" causes the theory of unratifiable wrongs much embarrassment for, according to that theory, this requirement serves only to permit a disinterested majority to do *de facto* what it cannot do *de jure*, namely, to ratify the wrong.[47] Thus Boyle says that it is "unjustifiably restrictive",[48] and Wedderburn tries to emasculate it.[49]

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although an interested majority cannot ratify a fraud, it can ratify negligence. That is why Gower's submission, *op cit* 589–90, that an interested majority will abuse its powers if it ratifies its own negligence, is not correct. If it were correct, *Pavlides's* case would have been differently decided.

[46]In *Atwool v Merryweather* (1867) LR 5 Eq 464 Page Wood V–C did suggest, by way of obiter, that no majority could have ratified the fraud in that case. The case, however, involved the fraudulent sale of a mine to a company incorporated to purchase it; and his lordship reasoned that to allow ratification – even if by a disinterested majority – would be to allow the majoriyt to compel the minority to accept a very different bargain from that which induced them to purchase their shares in the company. In *Fraser v Whalley* (1864) 2 Hem & M 10 and *Parker v McKenna* (1874) 10 Ch App 96 the courts did not require proof of control by the wrongdoers and, therefore, these cases might be thought to be authority for the view that no majority could have ratified. But these cases have never been cited as authority for this proposition and, as Pennington points out (*op cit* 547), in neither case was the rule in *Foss v Harbottle* even mentioned. In fact, in *Whalley's* case the wrong complained of would have enabled the wrongdoers to command a majority vote and *Parker's* case did not involve a derivative action. In *Cook v Deeks* (1961) 1 AC 554 at 564–5 Lord Buckmaster L C was clearly of the opinion that a disinterested majority can ratify; provided they did not act *ultra vires* the company.

[47]Thus Naudé *op cit* 190–1 says: "Slegs waar die algemene vergadering 'n onratifiseerbare onreg teenoor die maatskappy 'ratifiseer' en die onregpleger die maatskappy beheer, kan 'n lid die hof teen behowe van die maatskappy nader . . . Hieruit spuit die belangrike gevolgtrekking dat waar 'n onafhanklike meerderheid 'n onratifiseerbare onreg teenoor die maatskappy 'ratifiseer' . . . 'n lid nie 'n afgeleide aksie kan instel nie."

[48]1965 *MLR* 317 327.

[49]1958 *Camb LJ* 93 at 94–6. Wedderburn maintains that the member need merely explain why the company itself has not instituted action; and that proof of actual wrongdoer control is merely one such explanation. He cites *Russel v Wakefield Waterworks Co* (1875) 20 Eq 474 in support of this. He says that in *Russel's* case Jessel MR accepted that "control" is established: "where (i) the wrongdoers have a majority of votes, or (ii) there has been approval of the 'fraud' by the majority, or (iii) the corporation has otherwise shown that it is not willing to sue." But what Jessel MR said was this: "Another instance [where a member may institute action] occurred in the case of *Atwool v Merryweather*, in which the corporation was controlled by the evil-doer, and would not allow its name to be used as Plaintiff in the suit. It was said that justice required that *the majority of the corporators should not appropirate to themselves the property of the minority, and then use their own votes at the general meetıng of the corporatıon to prevent their being sued by the corporation, and consequently in a case of that kind* the corporators who form part of the minority might file a bill on their own behalf to get back the property or money so illegally appropirated. It is not necessary that the corporation should absolutely refuse by vote at the general meeting, if it can be shewn either that the wrong-doer had command of the majority of the votes, so that it would be absurd to call the meeting; or if it can be whewn that there has been a general meeting substantially approving of what has been done; or if it can be shewn from the acts of the corporation as a corporation, distinguished from the mere act of the director of it, that they have approved of what has been done, and have allowed a long time to elapse without interfering, so that they do not intend and are not willing to sue" (at 482). The italics are mine.

As we have seen, those who hold this theory of unratifiable wrongs have had difficulty in finding a legal basis for it, and they have been driven to the conclusion that it must be based upon an independent rule of company law. But this only raises a further difficulty. It requires us to assume that the courts have gone far beyond the accepted bounds of judicial lawmaking and have arrogated the power to determine what powers of administration should be vested in the majority. In fact there is nothing in the cases to suggest that the courts have ever contemplated doing this. On the contrary, they have always stressed that the member's right to sue exists to protect him from oppression.[50] That is to say, the courts have intervened, not to determine the powers of the majority, but to prevent the majority from abusing their powers. However, even if we were to assume that the courts have arrogated this power, would it really make sense to grant the individual member a right to sue because shareholders are often unable to make an informed decision upon such matters?

It is therefore submitted that the courts may well place a more restrictive interpretation upon section 266 and, at least as a general rule, set aside a ratification in order to allow an action to proceed only when to do so will relieve a minority from oppression. If this is correct, then the answer to our question as to when the court will so set aside a ratification is to be found in the principle or principles which determine what constitutes "oppression" in these circumstances. And as section 266 is silent as to these principles, we must reconsider the member's common law right to enforce certain directors' duties in order to see whether these principles do not already exist within the common law.

A RECONSIDERATION OF THE MEMBER'S COMMON LAW RIGHT TO ENFORCE CERTAIN DUTIES OF DIRECTORS

We must begin, it is submitted, by considering the principle applied in that case which all agree involved true majority oppression, namely *Menier v Hooper's Telegraph Works*,[51] and by considering its place among the other principles affecting the member's powers. The fundamental principles affecting the member's powers are (a) the principle that a member may, unlike a director, vote upon a matter in which he has a personal interest[52] and (b) the principle that a member may, as a general rule, vote to advance his own interests even if they are opposed to those of the company.[53] The doctrine of "fraud on a minority", to protect the minority shareholder, creates an exception to the latter principle.[54] This it does not by limiting the extent of

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[50] See for eg *Foss v Harbottle* (1843) 2 Hare 461; *Russel v Wakefield Waterworks Co* (1875) 20 Eq 474; *MacDougall v Gardiner* (1875) 1 Ch D 13; *Cook v Deeks* (1916) 1 AC 554; *Pavlides v Jensen* (1956) Ch 565.

[51] (1874) 9 Ch App 350.

[52] *North West Transportation Co v Beatty* (1887) 12 App Cas 589; *Burland v Earle* (1902) AC 81.

[53] *Menier v Hooper's Telegraph Works* (1874) 9 Ch App 350; *Pender v Lushington* (1877) 6 Ch D 70.

[54] "[A]lthough it may be quite true that the shareholders of a company may vote as they please, and for the purpose of their own interests, yet the majority of the shareholders

the member's powers, but by placing a restraint upon the majority when acting within their powers: the majority may not exercise their powers so as to commit a fraud on the minority. A fraud on a minority is therefore an abuse of a power.[55]

This restraint is placed both upon the majority's power to alter the personal rights of the minority[56] and upon the majority's power to administer the company's business. We are concerned here with the operation of this restraint upon the latter power. In *Menier v Hooper's Telegraph Works*[57] it was held that the majority abuse this power – i e they commit a fraud on the minority – when they use it to appropriate property belonging to the company. Later the concept of "the company's property" was extended to cover all property to which the company is entitled other than incidental profits and damages for which its directors are liable as a result of their negligent management of the company's affairs.[58] When the majority commit a fraud on the minority, they breach a duty which they owe to the company for they abuse the company's powers and deprive it of its property. But, of course, it is the minority who are defrauded. Because a fraud on a minority is an abuse of a power, and not an act beyond the majority's powers, a resolution in fraud of a minority is voidable rather than void, and it is therefore valid until successfully attacked.[59]

We turn now to consider the member's right to enforce the duty of directors not to appropriate the company's property,[60] i e the duty not to appropriate property belonging to the company and property to which it is entitled other than incidental profits and damages for which the directors are liable as a result of their negligent management of the company's affairs[61] It is submitted that this right is merely one consequence of the principle in *Menier's* case. What the majority cannot do directly they cannot do indirectly: therefore they cannot, as directors, appropriate the company's property and then, in their capacity as shareholders, ratify that breach of

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cannot sell the assets of the company and keep the consideration", per Mellish LJ in *Menier v Hooper's Telegraph Works* (1874) 9 Ch App 350 at 354. See also *Burland v Earle* (1902) AC 81; *Pavlides v Jensen* (1956) 1 Ch 565.

[55]See Gower *op cit* 563–4.

[56]As to the restraint on the majority's power to alter the personal rights of the minority, see Wedderburn 1957 *Camb LJ* 209–15; Gower *op cit* 567–70; Naudé *op cit* 175–178.

[57]supra.

[58]*Cook v Deeks* (1916) 1 AC 554.

[59]See Gower *op cit* 563 n 18.

[60]It is submitted that it is not correct to say that a member can enforce both the director's duty of good faith and his duty not to appropriate the company's property. In the first place, where the wrongful act has caused no loss to the company no action is permitted, see *Heyting v Dupont* (1963) 3 All ER 97, affirmed (1964) 2 All ER 273. In the second place, the cases usually cited for the view that the member can enforce bad faith as such are all cases where eith the minority's personal rights were altered (*Cannon v Trask* (1875) 20 Eq 669; *Ngurli Ltd v McCann* (1954) 90 CLR 425) or the company's property was appropriated (*Atwool v Merryweather* (1867) LR 5 Eq 464n; *Mason v Harris* (1879) 11 Ch D 97; *Alexander v Automatic Telephone Co* (1900) 2 Ch 56; *Millers* (*Invercargill*) *Ltd v Maddams* (1938) NZLR 490). Cases such as *Atwool v Merryweather* do not merely involve a director's failure to disclose the profit he is to make from a contract with his company; the company is actually defrauded.

[61]See supra note 31.

duty. Thus it is that a member has no action unless the wrongdoers have control of the general meeting. If a disinterested majority raitfy because they think that the action will not be in the interests of the company, or because they wish to donate the property to the director, their ratification cannot be, as such, a fraud on the minority.[62] As Lord Buckmaster LC put it in *Cook v Deeks*:[63]

> "Even supposing it be not ultra vires of a company to make a present to its directors, it appears quite certain that directors holding a majority of votes would not be permitted to make a present to themselves. This would be to allow a majority to oppress the minority . . . In the same way, if directors have acquired for themselves property or rights which they must be regarded as holding on behalf of the company, a resolution that the rights of the company should be disregarded in the matter would amount to forfeiting the interest and property of the minority of the shareholders in favour of the majority, and that by the votes of those who are interested in securing the property for themselves. Such use of voting power has never been sanctioned by the courts, and, indeed, was expressly disapproved in *Menier v Hooper's Telegraph Works*."

THE STATUTORY DERIVATIVE ACTION AND THE COMMON LAW PRINCIPLE

There can be no doubt that the protection which the common law affords the minority shareholder is incomplete. The majority will often abuse their powers when they, as directors, appropriate an incidental profit or cause the company damage by their negligence and then, in their capacity as shareholders, ratify their breach of duty. It is submitted that the inroad that section 266 makes upon majority rule it makes by extending the minority shareholder's protection under the principle in *Menier's* case to include protection against such abuses of majority power. In other words, although a member may initiate action whenever the company has suffered "damage or loss or has been deprived of a benefit" as the result of a director's breach of duty,[64] the court will not set aside a ratification of that breach of duty in order to allow the action to proceed unless the wrongdoer controls the general meeting. Where a disinterested majority has ratified but the court is of the opinion that the decision to ratify was made upon insufficient information, it will set aside the ratification and call a general meeting for the shareholders to reconsider their decision in the light of the report of the provisional *curator ad litem*. Only if the general meeting then decides in favour of the action, will the court allow the action to proceed.[65]

Although by restricting the member's right to sue the common law affords him but incomplete protection, there is nevertheless a good reason

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[62]Which is not to say that their ratification will never be voidable or void; but if it is this will be a consequence of some other principle, e g the ratification may be illegal.

[63](1916) 1 AC 554 at 564–565; see also *Russel v Wakefield Waterworks Co* (1875) 20 Eq 474; *Burland v Earle* (1902) AC 83.

[64]s 266(1).

[65]See supra n 44. It is submitted that where there has been no ratification and the majority is disinterested, the court should call a meeting to decide the question, see *Hogg v Cramphorn* (1966) 3 All ER 420. See n 69 infra where the exercise of the court's discretion under s 266(4) is discussed.

why the common law imposes this restriction.[66] At common law the member's right to sue is a right to commit his company to the action. The power to ratify is taken from the majority, and the power to sue placed in the hands of the individual member. This causes few difficulties where the majority have appropriated the company's property – the majority have abused their powers, and they could hardly be permitted to plead that the action to recover the property would not be in the interests of the company. But if directors appropriate an incidental profit or cause the company damage by their negligence, they do not necessarily abuse their powers as shareholders if they ratify their breach of duty; and therefore the right to enforce these duties cannot simply be conferred upon the individual member. The facts of two well-known cases illustrate this point. In *Regal (Hastings) Ltd v Gulliver*[67] directors, acting *bona fide* in the interests of their company, purchased shares in another company. (Their company did not have sufficient funds to purchase the shares itself.) Later the shares of both companies were sold, and the directors made an incidental profit from the sale of the shares they had purchased in the other company. It was held that they were liable to account for this profit – though they had held a majority of their company's shares and could therefore have ratified their action. It is submitted that a ratification of such an appropriation would not be set aside under section 266 because it would not amount to an appropriation of an incidental profit that the minority could fairly claim to be entitled to share. In *Pavlides v Jensen*[68] it was alleged that the directors had, by their negligence, caused the company damage "somewhere in the neighbourhood of £1 000 000". It is submitted that a ratification of such a breach of duty will not necessarily be set aside under section 266. The ratification is not simply part of a single scheme to defraud the minority – as it is when the directors appropriate property and then, in their capacity as shareholders, ratify their breach of duty. Nor is the ratification alone necessarily an abuse of power. So vast a claim for damages might, in the particular circumstances of the case, serve only to give the company bad publicity and to ruin its directors and major shareholders.

It follows therefore that if the member's action was to be extended to cover incidental profits and negligence, it was necessary both (a) to provide the court with the power and the means to investigate the probable consequences of the action and (b) to confer upon the court a discretion to refuse to allow an action to proceed where the ratification of an interested majority is not in fact an abuse of power. And section 266 does both these things.[69]

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[66]But see Pennington *op cit* 544–5 who considers that the only plausible explanation why a derivative action cannot be grought against a director who has been guilty of negligence is that at the time when the Court of Chancery invented the representative action, an action for negligence had to be brought in the common laws courts, and they did not permit representative suits.

[67](1967) 2 AC 134n.

[68](1956) Ch 565.

[69]It is respectfully submitted that when exercising its discretion under s 266(4) the court should proceed as follows:

(1) *If the majority is disinterested*, the court should not allow the action to proceed unless the majority of the members favour this. If there has been no ratification, or the ratification was made upon insufficient information, the court should therefore call a general

A final question: Does section 266 provide complete protection against the use of majority power to defraud the minority? It is submitted that it does not. Even when fully developed, the common law principle is too narrow. It is not enough to ensure that the majority do not deprive the company of property to which it is legally entitled. The majority have the power to release directors from certain of their duties.[70] And therefore directors who hold a majority of their company's shares can, by exercising this power, enable themselves to appropriate property without breach of duty which they would otherwise have had to share with the minority. Section 266 should therefore permit a member to initiate proceedings when a director has so appropriated such property, it should empower the court to declare any such release to be of no force or effect. □

> "*Verder is daar Brunneman . . . maar Brunneman kan tog seker nie as Romeins-Hollandsregtelike gesag geld nie. Dit help nie om eenvoudig skrywers se name te noem sonder dat hulle as gesagsbron gewig dra nie*".
>
> *per r Hiemstra in*
> De Beer v Sergeant 1975 1 SA 246 (T)

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meeting so that the disinterested majority may consider or reconsider the question in the light of the report of the provisional *curator ad litem*. If the majority are in favour of the action, or the wrongdoers turn the scale in favour of ratification, the action should be allowed to proceed. But if a disinterested majority ratify, that should be the end of the matter.

(2) *If the majority is not disinterested*, the court should first consider whether it would, if all the allegations against the director were established, nevertheless relieve him of liability under s 248 because "having regard to all the circumstances of the case . . . he ought fairly to be excused". It is submitted that a director may be excused under s 248 even although the action against him would be in the interests of the company.

(3) *If the majority is not disinterested and the director is not excused under s 248*, the court should consider whether the majority's refusal to sue is an abuse of power. Here the most important considerations will be whether the minority could fairly claim to be entitled to share the benefit and whether the action against the director would be in the interests of the company. If it is an abuse of power, the ratification (if these is one) should be set aside and the action allowed to proceed. If it is not an abuse of power, the provisional order should be discharged.

[70] The general meeting can permit a director to enter into contracts with the company, to profit from his office and otherwise to place himself in a position where his interests conflict with his duty, see Gower *op cit* 566. As Gower (*op cit* 566 n 36) points out, it seems never to have been argued that such an *ad hoc* resolution would be a provision exempting the director from any "liability which by law would otherwise attach to him" and therefore avoided by s 247. S 247 provides that no provision in a company's articles or a director's contract may exempt him from, or indemnify him against, any such liability attaching to him in respect of "any negligence, default, breach of duty or breach of trust". Indeed, and this is far more important as far as s 266 is concerned, the affect of s 247 on the majority's power to ratify has never been judicially considered. Gower suggests that there may be a distinction between "exempting" and "indemnifying" on the one hand, and resolving not to sue on the other, *op cit* 567; see also Wedderburn 1958 *Camb LJ* 97–8.

Disclosure and Evaluation of Potential Evironmental Impact of Proposed Governmental Administrative Action

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Formerly University of South Africa

Most of the important decisions relating to the physical environment in South Africa are made by government, usually by the central government, and most frequently by central government departments[1] and by bodies such as Escom, the National Transport Commission, the National Parks Board, the Atomic Energy Council and Iscor. Apart from the vital task of enforcement of environmental legislation which is entrusted to some government departments at national, provincial and local level, some of these departments and bodies mentioned above are directly responsible for the management of natural resources. It should therefore be clear that adequate conservation of natural resources and pollution control is dependent to a very large degree on these institutions.

Almost without exception environmentalists have been to a greater or lesser extent dissatisfied with the environmental performance of government departments, agencies and other similar bodies. Fisher[2] well articulated the frustrations of environmentalists with administrative agencies in the USA. After having stated that there would be little cause for concern if the agencies would do the job they should be doing anyway, he goes on to say:

> "They are timid where they should be forceful but arrogant where they should listen; they act upon momentary political pressures from industry where they should stand on principles; they are frequently staffed by incompetents and led by knaves; they are secretive where they should be open; they treat new ideas as a threat to civilization; they resent citizen activities and lawyers representing citizens' interest as a threat to their prerogative. Many agencies are exceptions to these general truths, but

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[1]Among central government departments which administer our natural resources and control pollution are Agriculture, Bantu Administration and Development, Community Development, Defence, Forestry, Health, Industries, Mines, Planning and the Environment, Transport and Water Affairs.

[2]Quoted by Robie "Recognition of substantive rights under NEPA" 1974 *Natural Resources Law* 393.

I am talking about most of the agencies most of the time, and probably all of the agencies at least some of the time."[3]

South African environmentalists have also had reason to be critical of government departments' performance (or lack of it) in the environmental field. Clarke[4] documents some instances:

"The National Transport Commission (at the moment of writing) is being begged not to put a six-lane highway through the Garden Route and through a 400-hactare remnant of the Tsitsikama Forest . . . The Department of Bantu Administration was responsible for breaking up the world's biggest game reserve, Etosha, and that same department is now presiding over the fate of Zululand's world famous reserves . . . St Lucia, the beautiful lake and estuary in Zululand, has been ecologically wrecked by the activities years ago of the Department of Water Affairs which allowed dams to go up almost willy-nilly; by the Department of Forestry which, again a few years ago, planted pine trees on the natural sponge on the Eastern Shores and so robbed the lake of fresh water; and by the Department of Defence which used the northern end of the lake for rocket firing."

Another source of disappointment and frustration among environmentalists, also in South Africa, is the lack of adequate enforcement of environmental legislation by the various responsible government departments.[5]

Since effective enforcement of environmental legislation was not forthcoming, and, particularly since administrative decision-making was frequently insensitive towards the environment, this has led to efforts, mainly in the USA, aimed at controlling administrative agencies and at stimulating them towards greater environmental sensitivity. The main need for reform appeared to be the control of administrative bodies' decision-making as far as the environment is concerned. There is some controversy, raging mainly in the USA, as to the most satisfactory method of such control. Sax[6] believes that environmental conservation cannot be accomplished through the administrative process. He contends[7] that "the administrative process tends to produce not the voice of the people, but the voice of the bureaucrat – the administrative perspective posing as the public interest." He argues that the bureaucratic middleman does not have the necessary direct stake in the outcome to fight the battle satisfactorily, and he all too frequently reflects the view of businessmen in the industry he is charged to regulate. His central thesis is that the public interest should not be left to "hired hands", that there is a need to reassert citizen initiative in the management of our environment and that this can be accomplished only by allowing citizen access to the courts in defending the environment.[8] A direct outcome of his view

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[3]See also Large "Is anybody listening? The problem of access in environmental litigation" 1972 *Wis L Rev* 62 *et seq.*

[4]*Our Fragile Land: South Africa's Environmental Crisis* (1974) 103, 104.

[5]See generally Rabie "Legal remedies for environmental protection" 1972 *CILSA* 278 *et seq*, "South African air pollution control legislation" 1973 *CILSA* 76 *et seq*, "Wildlife conservation and the law" 1973 *CILSA* 190 *et seq* and "South African soil conservation legislation" 1974 *CILSA* 271 *et seq* and 277 *et seq.*

[6]*Defending the Environment* (1971).

[7]56.

[8]He mentions several virtues which the judiciary has and which have been largley lacking in the administration (108 *et seq*). Although it is generally agreed that administrative agencies have on the whole failed as far as environmental conservation is con-

has been the promulgation of an Environmental Protection Act in Michigan in 1970, and later also in some other states,[10] in terms of which a public right to a decent environment has been recognized as an enforceable legal right by private citizens suing as members of the public.

The federal legislature, however, has opted for reform at the administrative level, by enacting the National Environmental Policy Act which, in effect, broadened the grounds for judicial review of administrative action relating to the environment.

The National Environmental Policy Act[11] (NEPA), hailed by many as one of the most important environmental statutes ever to have been passed, was signed into law on the first day of 1970 ushering in what has now become known as "the environmental decade".

NEPA was enacted to provide federal agencies with a legislative mandate and responsibility to consider the consequences of their actions on the environment.[12] Federal agencies were to be stimulated towards decision-making which would be more responsive towards environmental conservation.[13] The basic purpose of the act accordingly is to declare a national policy which will encourage productive and enjoyable harmony between man and his environment.[14]

Prior to NEPA federal agencies had no general responsibility to consider the environmental impact of their decisions unless this duty was spe-

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cerned, there has been considerable scholarly opposition to the view that decision-making authority should be shifted from the administrative agencies to the courts. (Cf Jaffe Review of Sax *Defencing the Environment* in 1971 *Harv L Rev* 1562 *et seq*, Jaffe "Ecological goals – the ways and means of achieving them 1973 *Environmental Law Review* 3 *et seq*, Jaffe "The administrative agency and environmental control" 1970 *Buffalo L Rev* 231 *et seq*, Cramton & Boyer "Citizen suits in the environmental field: Peril or promise?" 1972 *Ecology LQ* 410 *et seq*, Muskie & Cutler "A national environmental policy: Now you see it, now you don't" 1973 *Maine L Rev* 183–5). It must be pointed out, however, that according to Sax "the role of the courts is not to make public policy, but to help assure that public policy is made by the appropriate entity, rationally and in accord with the aspirations of the democratic process" (151).

[9]Mich Comp Laws 691 1201–7 (Supp 1970).

[10]See McLennan "State legislation to grant standing: Questions, answers and alternatives" 1972 *Environmental Law* 313 *et seq* and Lutz & McCaffrey "Standing on the side of the environment: A statutory prescription for citizen participation" 1971 *Ecology LQ* 602 *et seq*.

[11]42 USC 4321 *et seq*. For the full text of the act, see Anderson *NEPA in the Courts* (1973) 293–7.

[12]Yannacone "National Environmental Policy Act of 1969" 1970 *Environmental Law* 8. For NEPA's effect on private law, see Coleman "Possible repercussions of the National Environmental Policy Act of 1969 on the private law governing pollution abatement suits" 1970 *Natural Resources Law* 647 *et seq*.

[13]Cramton & Berg "On leading a horse to water: NEPA and the federal bereaucracy" 1973 *Mich L Rev* 511; Delogu *United States experience with the preparation and analysis of environmental impact statements: The National Environmental Policy Act* IUCN Environmental Policy and Law Paper No 7 (1974) 10.

[14]s 2. This section provides three further purposes, i e to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the nation and to establish the Council on Environmental Quality. As to the purpose of NEPA, see also the discussion of judicial review, infra.

cified in the enabling statute of the agency in question.[15] And even where the authority and responsibility to take environmental considerations into account was provided for in some statutes, environmental considerations were restricted to a narrow range of agency actions and the agencies were required to consider environmental effects to only a limited extent.[16] Moreover congress believed that the policies and programmes of the federal government, traditionally designed "to enhance the production of goods and to increase the gross national product" were not designed to avoid environmental pollution and destruction.[17] As one commentator stated:

> "NEPA is the manifestation of the federal government's recognition of itself as a major polluter and its attempts to rectify the situation."[18]

Some states have also enacted legislation similar to NEPA in order to control the environmental management activities of their administrative agencies.[19]

For obvious reasons, it was thought more appropriate to remedy the situation through enactment of a single uniform statute rather than through amending all statutes affecting the government and the environment.[20]

NEPA'S PROVISIONS

On the whole NEPA is rather generally and vaguely worded. It has, however, been supplemented by the President's executive order implementing NEPA and by guidelines issued by the Council on Environmental Quality, which guidelines have themselves been supplemented by guidelines and rules issued by individual federal agencies.[21] The flesh that now clothes the bare bones of the statute has been added mainly by the courts which have decided several hundred cases under the act since its promulgation in 1970.[22]

NEPA consists of two titles: Title I is concerned with the declaration of a national environmental policy, while title II establishes the Council on

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[15]Kessler & Porter "Recent Decisions" 1972 *Geo Wash L Rev* 560.
[16]Nielsen "Environmental law: Strict compliance with procedural requirements of NEPA – the agencies must play by the rules" 1972 *U Fla L Rev* 814. See also Yannacone 20.
[17]Yannacone 9.
[18]Small "The National Environmental Policy Act: What standard of judicial review?" 1973 *J Air L* 643.
[19]Yost "NEPA's progeny: State Environmental Policy Acts" 3 *ELR* 50090 *et seq*; "Environmental Quality" *5th Annual Report of the Council on Environmental Quality* (1974) 401 *et seq*; Trzyna "A comparative Review of State Environmental Impact Laws within a Federal System" 1975 *Earth LJ* 133 *et seq.*
[20]Kessler & Porter 561.
[21]See generally Stevens "The Council on Environmental Quality's Guidelines and thei, influence on the National Environmental policy Act" 1974 *Catholic U L Rev* 547 *et seq,* Yarrington "The National Environmental Policy Act" *Environment Reporter* – Monograph No 17 1974 6–10; the *5th Annual Report of the Council on Environmental Quality* (1974) Appendix D 506 *et seq* and 382 *et seq* and Deutsch "The National Environmental Policy Act's first five years 1975 *Env Aff* 8 *et seq.*
[22]By 1974 over 500 lawsuits had been filed under NEPA.

Environmental Quality (CEQ).[23] This study is concerned with title I. This title basically ventures to provide general directives and a broad delegation of authority to federal administrative agencies to ensure that environmental conservation will be given adequate attention in agency decision-making.

S 101(a) establishes the basic substantive policy of the act by requiring the federal government to make use of all practicable means and measures to create and maintain conditions in which man and nature can exist in productive harmony.[24]

S 101(b), which sets out the specific goals towards which this general policy is aimed, provides that in order to carry out NEPA's policy it is the continuing responsibility of the federal government to use all practicable means consistent with other essential considerations of national policy to improve and co-ordinate federal plans, functions, programmes and resources for the attainment of certain enumerated substantive goals.[25]

S 101(c) is a declaration that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment.[26]

In summary s 101 sets out NEPA's general substantive policy, which policy is intended to be flexible, leaving room for discretion on the part of federal agencies in balancing environmental interests against the needs to

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[23]The CEQ's duties and functions are set out in s 204. Among other functions, it is intended to be a watchdog body as well as an environmental policy-formulating body charged with advising and capable of consulting directly with the President.

[24]s 101(a) provides: "The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognising further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in co-operation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

[25]These goals are, to:

(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;
(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
(4) preserve important historic, cultural, and natural aspects of our national heritage, and maintain, wherever possible, an environment which supports diversity, and variety of individual choice;
(5) achieve a balance between population and resource use which will permit high standards of living and wide sharing of life's amenities; and
(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

[26]This subsection stops short of stating that NEPA establishes a right to a healthful environment.

be served by the proposed action. It should be noted that environmental conservation is not established as the only goal or consideration for federal agencies; rather congress had in mind a re-ordering of priorities in agency decision making so that environmental conservation could at least be considered as one of the goals, on an equal footing with traditional considerations.[27]

S 102, on the other hand, which contains the so-called "procedural" provisions of NEPA, demands strict compliance since its purpose is to ensure that federal agencies will in fact exercise the mandate given them.[27] S 102 contains the so-called "action forcing" procedures required in order to insure that the policies of s 101 are implemented.

S 102(1) provides that to the fullest extent possible[29] the policies, regulations and public laws of the USA must be interpreted and administered in accordance with NEPA's policies.

S 102(2) imposes a number of specific obligations on federal agencies, by far the most important of which is contained in s 102(2)(C).[30] This subsection – which has been called "the heart of NEPA" – provides that agencies must include in every recommendation or report on proposals for legislation and other major federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on:

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[27]*Calvert Cliffs' Co-ordinating Committee v AEC* 449 F 2d 1109 (D C Cir 1971).
[28]*Calvert Cliffs'* supra at 1112 1114 1115.
[29]These words which qualify the whole of s 102 do not make NEPA's procedural duties discretionary – *Calvert Cliffs'* supra at 1112 1114 1115. Cf Anderson 49 *et seq.*
[30]Apart from s 102(2)(C), the other subsections are s 102(2)(A), (B), (D), (E), (F), (G) and (H), which read as follows: "The Congress authorizes and directs that, to the fullest extent possible all agencies of the Federal Government shall–
(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's enivronment;
(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;
(D) study, develop, and describe appropirate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;
(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international co-operation in anticipating and preventing a decline in the quality of mankind's world environment;
(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in restoring, maintaining, and enhancing the quality of the environment;
(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and
(H) assist the Council on Environmental Quality established by title II of this Act.
As to the courts' views on some of these subsections, see Anderson 265–71, and Yarrington 30–2.

(i) the environmental impact of the proposed action;

(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented;

(iii) alternatives to the proposed action;

(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity; and

(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making this statement the official concerned must consult with and obtain the comments of any federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate federal, state and local agencies, which are authorised to develop and enforce environmental standards, must be made available to the President, the CEQ and to the public, and must accompany the proposal through the existing agency review process.

The primary purpose of s 102 is to provide for an assessment of potential environmental effects of governmental actions. The CEQ has explained that–

> "NEPA was enacted out of a concern that environmental considerations were not being fully assessed before action was taken. When an agency proposes to go ahead despite adverse environmental consequences, the 102 statement must identify the other interests that justify going ahead. Of course, NEPA's purposes would not be served if the statement were to deteriorate into a promotional document in favour of the proposal, at the expense of thorough and vigorous analysis of environmental risks."[31]

When an agency wishes to go forward with an environmentally detrimental action it must now prove either that the proposed action will not impair the environment or that the social benefits outweigh the social costs, and that no alternatives exist that would eliminate or, respectively, minimize environmental damage.[32]

By far the greatest amount of litigation and interest relating to NEPA has been focussed on this requirement of the submission of a so-called environmental impact statement (EIS) and it has dealt almost exclusively with federal actions affecting the quality of the environment.[33] Consequently a great deal of case law is concerned with deciding when an action is a major

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[31] *Environmental Quality* – the third annual report of the CEQ 1972 245.

[32] Cf Peterson "An analysis of title I of the National Environmental Policy Act of 1969" 1 *ELR* 50040.

[33] Anderson 125 *et seq* points out that although very few impact statements which have to be submitted also with the legislative proposals that federal agencies submit to congress have so far been filed, this provision of s 102(2)(C) is potentially very useful "because congressional review of impacts which proposed legislation may have can be much more useful than agency attempts to mitigate impacts after an ill-conceived statute has been enacted" (at 130). Cf also Cramton & Berg "On leading a horse to water: NEPA and the Federal bureaucracy" 1973 *Mich L Rev* 521–3.

federal one and when it will significantly affect the environment, since these are the threshold issues that must be resolved before s 102(2)(C) will apply.[34] For the rest, most of the decided cases deal with the preparation and content of the EIS[35] and the consequences of failure to comply with s 102(2)(C).[36]

A vexed problem with which a great deal of NEPA case lase has been concerned – but which should become less important as time goes by – is whether the act applies with retrospective effect, in other words whether it applies to actions which were only partly completed at the time of the act's introduction.[37]

NEPA only applies to federal agencies; the actions of states, local governments or private enterprize are not subject to the act, unless of course a federal agency is so involved in the project in question that it has become a major federal action.[38] NEPA applies in principle to all federal agencies[39] and contains no exemption from any of its provisions. However, there is some uncertainty whether NEPA should apply to agencies whose very function it is to protect the environment.[40] This uncertainty concerns mainly the Environmental Protection Agency (EPA), but Porter,[41] Neuman[42] and Anderson[43] argue convincingly that NEPA should apply to EPA.[44] At any rate, EPA has now voluntarily prepared impact statements on a variety of activities.[45]

ENFORCEMENT OF NEPA

NEPA itself is silent on how and by whom it is to be enforced. According to the legislative history it was apparently originally contemplated

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[34]See generally Karp "NEPA: Major federal action significantly affecting the quality of the human environment" 1974 *Am Bus LJ* 209 *et seq* and Anderson 56 *et seq*. See also Green *The National Environmental Policy Act in the Courts* (1972) 8 *et seq*.

[35]See generally Anderson 179 *et seq;* Hoffman "Evolving judicial standards under the National Environmental Policy Act and the challenge of the Alaska pipeline" 1972 *Yale L Rev* 1597 *et seq*.

[36]infra. On the EIS generally see D'Amato & Baxter "The impact of impact statements upon agency responsibility: a prescriptive analysis" 1973 *Iowa L Rev* 195 *et seq*.

[37]See generally Anderson 142 *et seq*. He points out, in summary (at 282), that the courts have generally applied NEPA to the fullest extent, stinting only where re-appraisal of the basic course of action was virtually impossible.

[38]Bevil "The National Environmental Policy Act of 1969: Analysis and judicial interpretation" 1973 *Baylor L Rev* 81.

[39]However, it allows some flexibility in its application to different agencies. See "Environmental law – The National Environmental Policy Act of 1969 – The influence of agency differences on judicial enforcement" 1974 *Tex L Rev* 1227 *et seq*.

[40]See generally "Applicability of NEPA's impact statement requirement to the EPA" 1974 *Duke L J* 353 *et seq*; Porter "A fight between friends: EPA v The National Environmental Policy Act of 1969" 1974 *Geo L J* 913 *et seq* and Anderson 106 *et seq*.

[41]935.

[42]"Implementation of the Clean Air Act: Should NEPA apply to the Environmental Protection Agency?" 1973 *Ecology LQ* 597 *et seq*.

[43]116 *et seq*. Cf also Cramton & Berg 535–6.

[44]Cf contra Friedman "The National Environmental Policy Act of 1969 – The brave new world of environmental legislation" 1973 *Natural Resources Law* 65–7. See generally Yarrington 35–7.

[45]Cf *The 5th Annual Report of the Council on Environmental Quality* 1974 388 and Wood "Co-ordinating the EPA, NEPA, and the Clean Air Act" 1974 *Tex L Rev* 531.

that the Office of Management and Budget (OMB) should have enforced the act and have policed the EIS procedure.[46] NEPA, however, makes no reference to the OMB, nor has the OMB seemed willing to undertake the task.[47] The Council on Environmental Quality is probably the closest analogue to an enforcement agency, but since its powers are merely consultative and admonitory, it cannot compel compliance with NEPA.[48]

Although no enforcement agency exists to enforce compliance with the act, the courts have taken it upon themselves to see to it that agencies comply with the provisions of NEPA, particularly the provisions relating to the EIS. The remedies in terms of judicial review are the ones mainly utilized by the courts. The courts' rôle was made possible by the tremendous interest in environmental conservation that became evident in the USA, especially since the time the act was passed, and by the fact that many conservation organisations and individuals[49] were willing and able to take environmental issues to the courts, particularly since the rules relating to standing were liberalized. The courts have displayed a sensitivity to environmental conservation which federal agencies notoriously lack.

Standing

Since environmental law often protects non-economic, non-physical interests of persons or groups who are often only indirectly affected, the issue of standing has become important to conservationists, especially in view of the traditional strict requirements.

The requirement of standing has, however, not presented any real difficulty to environmentalists seeking judicial review in terms of NEPA. In fact, the great number of NEPA cases to come before the federal courts can be attributed to the willingness of the courts to grant standing to conservationist groups and individuals interested in NEPA's enforcement.[50]

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[46]Anderson 11 *et seq.*

[47]*ibid.*

[48]Seeley "The National Environmental Policy Act: A guideline for compliance" 1973 *Vand L Rev* 296; Muskie & Cutler "A national environmental policy: Now you see it, now you don't" 1973 *Maine L Rev* 174. Shortly after the act was passed, Executive Order 11514 was issued, making the CEQ responsible for issuing guidelines to federal agencies for the preparation of detailed statements on proposals for legislation and other federal actions affecting the environment, as required by s 102(2)(C) (Executive Order No 11514, par 3(h) 35 Fed Reg 4247, March 5, 1970). The CEQ, however, does not officially approve or disapprove particular agency procedures, statements or failure to prepare statements; rather, it relies on informal consultation. (Anderson 12–13. Cf also Yost "Implementing the National Environmental Policy Act" 1971 *Sw U L Rev* 88 *et seq.*) The CEQ may, of course, persuade the President to act in his executive capacity to restrain agencies involved in controversial projects (Muskie & Cutler 174). It has been suggested that the CEQ should be given a more meaningful function in that it be given regulatory power over both the substance and procedure of the EIS. Cf "America's changing environment – is the NEPA a change for the better?" 1972 *Fordham L Rev* 920 and Sandler "The National Environmental Policy Act: A sheep in wolf's clothing" 1970 *Brooklyn L Rev* 158. See infra NEPA's shortcomings.

[49]Anderson 271–4 points out that it is very discouraging that federal agencies themselves have rarely relied upon NEPA to defend their actions in taking environmentally protective measures.

[50]Yarrington 13–15.

In "liberalizing" the requirement of standing, the courts followed the trail blazed by the famous case of *Scenic Hudson Preservation Conference v EPC.*[51] It has been decided that a plaintiff will have standing if the particular agency's action caused him "injury in fact, economic or otherwise", if the injury alleged was to an interest which is "arguably within the zone of interests to be protected" by the statute which had been violated.[52] It is obvious that the zone of environmental interests protected by NEPA is very wide. It is clear also that aesthetic and other non-economic interests, even of future generations, fall within the scope of NEPA and that injury to such interests will confer standing on individuals and organizations suing for judicial review in terms of NEPA.[53] The trend towards liberalized standing, however, received something of a setback in the decision of *Sierra Club v Morton.*[54] The injury in fact requirement was strictly interpreted and it was held that a mere interest in the environment would not amount to injury in fact. The supreme court decided that a person has standing to seek judicial review under the Administrative Procedure Act only if he can show that he himself has suffered or will suffer injury. Although the court conceded that environmental harm may amount to such injury, it emphasized that the plaintiff must be among the injured.

Whereas concerned individuals and conservation groups encounter no particular difficulties in being granted standing, industry – which has also taken an interest in suing for compliance with NEPA – has no easy task in proving standing in terms of NEPA.[55] Anderson,[56] moreover, points out that the court may examine more closely whether an industry plaintiff has a sufficient adversarial interest in seeing NEPA enforced, since industry's motives would usually be related to delaying agency action affecting it.

REMEDIES FOR NON-COMPLIANCE WITH NEPA

Although NEPA itself makes no provision for remedies in instances where its provisions are disregarded, the courts have been willing to grant injunctions and allow judicial review where NEPA's provisions are not complied with.

Injunction

The courts have had little hesitation in enjoining projects proceeding in violation of NEPA, until the provisions of the act were complied

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[51]354 F 2d 608 (2c Cir 1965).

[52]*Association of Data Processing Service Organisations Inc v Camp* 397 US 150 (1970) and *Barlow v Collins* 397 US 159 (1970). See Bevil "The National Environmental Policy Act of 1969: Analysis and judicial interpretation" 1973 *Baylor L Rev* 78–80; Geer "Judicial review of administrative decisions under the National Environmental Policy Act of 1969" 1974 *Land & Water L Rev* 146–9; Anderson 26 *et seq.*

[53]See generally Anderson 29 *et seq.*

[54]405 US 727 (1972).

[55]Anderson 39 *et seq.* He points out (277) that an industry plaintiff's alleged economic harm would not appear to be within NEPA's zone of interests, nor would it seem that the types of injury which do lie within that zone, e g environmental, aesthetic etc, can consitute injury in fact to an industrial corporation.

[56]278.

with.[57] An injunction is particularly appropriate with regard to the EIS procedure.[58]

The requirements for the granting of a preliminary injunction in terms of NEPA seem to have been relaxed by the courts. The courts have either held that questions of law are determinative, that the circumstances of an injunction in terms of NEPA are so special that the conventional requirements do not apply, or that when applied to a NEPA suit the requirements are heavily weighted by the act itself in favour of preliminary relief.[59] Courts that have decided that the traditional standards governing the granting of preliminary injunctions apply also where NEPA is concerned, have taken the view that the values to be accorded various equities have nevertheless been substantially altered by NEPA.[60]

NEPA apparently does not give plaintiffs a right to have federal projects enjoined on the merits of those projects. Plaintiffs can, however, rely on the act's procedural requirements relating to the filing of an EIS to obtain an injunction until those procedural requirements are satisfactorily met.[61]

Judicial review

Federal decisions are generally reviewed by the federal courts under s 10 of the Administrative Procedure Act.[62] Apart from the APA and other statutes expressly granting review, the courts were willing to review agency decisions under NEPA because NEPA was enacted at a time when the courts have generally tightened their review of agency decision making, and agency decisions in the environmental area

> "more frequently involve vital personal interests such as life, health, and safety which, if offered inadequate protection or allowed to be abused, could conceivably have far more injurious consequences to the public than agency abuse of traditional functions of economic regulation".[63]

By far the most important NEPA provision to give rise to judicial review is s 102(2)(C) prescribing the EIS procedure.[64]

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[57]Anderson 239–45; Lynch "Complying with NEPA: The tortuous path to an adequate environmental impact statement" 1972 *Ariz L Rev* 471–3.

[58]Seeley "The National Environmental Policy Act: A guideline for compliance" 1973 *Vand L Rev* 297–8; Bevil "The National Environmental Policy Act 1969; Analysis and judicial interpretation" 1973 *Baylor L Rev* 80.

[59]Anderson 242.

[60]Anderson 243. Thus it has been held that it was not permissible to require plaintiffs to show that the action in question would cause irreparable environmental harm – *Scherr v Volpe* 446 F 2d 1027 1034 (7th Cir 1972).

[61]*Environmental Defence Fund Inc v Corps of Engineers* 325 F Supp 749 (ED Ark 1971); *National Helium Corporation v Morton* 455 F 2d 650 (10th Cir 1971) (obiter). See Bevil 80; Geer "Judicial review of administrative decisions under the National Environmental Policy Act of 1969" 1974 *Land & Water L Rev* 154. It is, however, not clear how these decisions must be reconciled with *Calvert Cliffs' Co-ordinating Committee v AEC* 449 F 2d 1109 (DC Cir 1971) and *Environmental Defence Fund v Corps of Engineers* 470 F 2d 289 (8th Cir 1972). These cases are discussed infra.

[62]5 USC par 701–6 (1970). See generally "Judicial review: NEPA and the courts" 1973 *Duke LJ* 306–10 and Anderson 16 *et seq.*

[63]Anderson 21.

[64]Hoffman "Evolving judicial standards under the National Environmental Policy Act and the challenge of the Alaska pipeline" 1972 *Yale LJ* 1604 points out, however, that

Review of threshold determinations as to filing of an EIS

In view of the heavy burden imposed on federal agencies by the requirement of an EIS, it is obvious that agencies may attempt to avoid the submission of an EIS by concluding that the action in question is not federal, is not major or does not significantly affect the environment. The courts have therefore carefully reviewed preliminary agency determinations as to whether s 102(2)(C) applies at all to the agency action in issue.[65]

Cases differ on the appropriate judicial standard for review, some favouring *inter alia* the arbitrary and capricious standard, while others apply a stricter standard that amounts to *de novo* review.[66] Reasonableness has also been suggested as a standard.[67] A trend seems to be emerging toward abandonment of the arbitrary and capricious standard and toward a more searching standard of review. Anderson argues that the policy and goals of NEPA suggest that *de novo* review is the more appropriate standard: He points out that there is no agency with power to enforce compliance with NEPA and he indicates the inherent weakness of agency self-policing under NEPA.[68] He concludes:[69]

> "Without a judicial check, the temptation would be to short-circuit the process by setting statement thresholds as high as possible within the vague bounds of the arbitrary or capricious standard. The past history of agency 'crabbed interpretations' making a 'mockery of the Act' leaves little room for confidence."

Review of the adequacy of the EIS

Even if a federal agency decided to file an EIS, further judicial review is available to determine whether the statement complies with the procedural requirements of NEPA as elaborated in s 102(2)(C) with its five requirements. It has been decided that NEPA is, at the very least, an environmental full disclosure law:

> "The 'detailed statement' required by s 102(2)(C) should, at a minimum, contain such information as will alert the President, the Council on Environmental Quality, the public and, indeed, the Congress, to all known *possible* environmental consequances of proposed agency action".[70]

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the fact that judicial review has focused on the EIS, does not mean that the other provisions have been ignored: courts have tended to combine review for compliance with other NEPA provisions with their review of the EIS.

[65]See generally Rubenstein "Judicial review of a NEPA negative statement" 1973 *BU L Rev* 879 *et seq*; Anderson 24 96 *et seq*; Geer 149 *et seq*; "NEPA, environmental impact statements and the Hanly litigation: to file or not to file" 1973 *NYU L Rev* 522 *et seq*; Campbell's discussion of *Rucker v Willis* 484 F 2d 158 (4th Cir 1973) 26 *SC L Rev* 1974 119 *et seq.*

[66]See generally the note "Threshold determinations under section 102(2)(C) of NEPA: The case for 'reasonableness' as a standard for judicial review" 1974 *W & M L Rev* 107 *et seq*; Anderson 96 *et seq*; Rubenstein 888 *et seq.* Cf also Ashton "The role of the courts under the National Environmental Policy Act 23" 1973 *Catholic U L Rev* 306–11.

[67]Note 16 *W & M L Rev* 1974 124 *et seq.*

[68]104.

[69]*ibid.*

[70]*Environmental Defence Fund v Corps of Engineers* 325 F Supp 728 at 759 (ED Ark 1971–71).

It is generally accepted that the standard against which adequacy of the EIS is to be measured is that of "full disclosure".[71]

The extent of review that has so far been discussed, relates only to formal procedural compliance with NEPA. If filing of an adequate EIS were to have been the only requirement, agencies could relatively easily comply with the language of the act, but still fail to comply with its spirit (as set out in s 101): Even though the adverse environmental impact of a proposed action is known, the federal agency in question may still not take it into account in its decision making. It therefore seems obvious that judicial review could not be restricted to merely interpreting the information and disclosure requirements of s 102(2)(C). Jaffe,[72] however, contends that it is unduly cynical to maintain that the EIS will simply be a hurdle in the path of agencies but will not affect their judgment. In his opinion the EIS will pressure the agency to search out and bring to its attention environmental impacts that might otherwise have been ignored; in view of the tremendous public concern over the environment it would have to bring those considerations into the field of judgment. The requirement that the agency in question must consult with other agencies reinforces this pressure. Finally, he points out that the public will also be alerted through information in the EIS.

There is a school of thought, supported by some courts and commentators, which holds that NEPA creates only a disclosure device to provide information relating to the environmental impact of proposed federal action.[73] Seeley[74] states:

> "Thus, a project may be stopped by the courts if no statement or an inadequate statement has been filed, but not if an adequate statement has been prepared, even though it discloses a potential for substantial environmental damage."[75]

In the latter case, he submits, NEPA relies upon public political pressure to compel abandonment or alteration of the project. Thus, according to this view, if the agency decision makers choose to ignore evidence that advises against a particular project, all that the EIS does is to compel them to do so with full knowledge of the environmentally adverse results that are likely to follow. NEPA cannot, however, be utilized to have such a decision set aside or to enjoin such a project even though it is clearly in conflict with the stated policy of the act. In the final analysis, of course, everything depends upon what rôle congress ascribed to NEPA, and this is not abundantly clear from the wording of the act itself. In view particularly of *Calvert Cliffs' Co-ordinating Committee v AEC*[76] and *Environmental Defence Fund v Corps of Engineers*,[77] the view that NEPA is only a disclosure device is no longer tenable.

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[71]See generally Anderson 200 *et seq*.
[72]"Ecological goals – the ways and means of achieving them" 1972 *W Va L Rev* 27.
[73]See generally "Judicial review: NEPA and the courts" 1973 *Duke LJ* 304–5.
[74]298.
[75]See also Bevil 83; Geer 154; case comments 1973 *Minn L Rev* 636.
[76]499 F 2d 1109 (DC Cir 1971).
[77]470 F 2d 289 (8th Cir 1972). Both cases are discussed infra.

Review of the use of EIS information

Merely disclosing the environmental impact of a proposed action does not, as has been pointed out above, ensure that it will be taken into account by the decision-makers. Apart from the fact that the courts through review can ensure that an adequate EIS be filed (known as "procedural review"), they have, accordingly, held that they can also review the use of the EIS: It has been decided in the celebrated case of *Calvert Cliffs' Co-ordinating Committee v Atomic Energy Commission*[78] that federal agencies must actually consider the information in the EIS by taking serious account of environmental factors, which must then be carefully balanced off against other relevant non-environmental factors, such as economic and technical ones. The court stated that "perhaps the greatest importance of NEPA is to require . . . agencies to *consider* environmental issues just as they consider other matters within their mandates".[79] It was indicated that consideration entailed more than a *pro forma* ritual.[80] The court defined the concept of "consideration" in terms of a balancing of environmental factors against economic and technical factors:

> "NEPA mandates a case-by-case balancing judgment[81] on the part of federal agencies. In each individual case the particular economic and technical benefits of planned action must be assessed and then weighed against the environmental costs; alternatives must be considered which would affect the balance of values . . ."[82]

The point of this individualized balancing analysis is, according to the court, to ensure that the optimally beneficial action is finally taken.[83]

It was held that s 102 – in contrast with s 101 which sets out NEPA's substantive policy – with its requirement of consideration "to the fullest extent possible", does not make NEPA's procedural duties (i e the filing of an EIS) discretionary, but

> "mandates a particular sort of careful and informed decision-making process and creates judicially enforceable duties . . . [I]f the decision was reached procedurally without individualized consideration and balancing of environmental factors – conducted fully and in good faith – it is the responsibility of the courts to reverse".[84]

Hoffman[85] points out that the requirement of "full good faith consideration" relates only to "procedural" and not "substantive" review of agency actions since the review is aimed only at the manner in which agencies make environmental decisions and at the informational base or record compiled during the decision-making process; it is not aimed at the substantive wisdom of the agency decision.

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[78] 449 F 2d 1109 (DC Cir 1971).
[79] at 1112.
[80] at 1128.
[81] For criticism of the case-by-case basis for balancing, see Murphy "The National Environmental Policy Act and the licensing process: environmentalist Magna Carta or agency coup de grace?" 1972 *Colum L Rev* 988–90.
[82] at 1123.
[83] See generally Buntain "Judicial review of cost-benefit analysis under NEPA" 1974 *Neb L Rev* 540 *et seq.*
[84] at 1115.
[85] 1606.

Cohen & Warren,[86] on the other hand, point out that the court's contrast between the "flexible" substantive duties of s 101(b) and the strictly enforceable "procedural" duties of s 102(2) leaves ambiguous the legal meaning of s 102(1). The phrase in s 101(b) to "use all practicable means consistent with other essential considerations", according to the court, connotes a greater flexibility than the phrase in s 102 requiring the fulfilment of duties enumerated in that section "to the fullest extent possible".[87] However, in view of the fact that s 102(1) specifically requires that the substantive provisions of s 101 be applied in interpreting and administering the "policies, regulations, and public laws of the United States", Cohen & Warren contend that the substance and policy requirements of s 101(b) should be incorporated into the requirements of s 102 and that the phrase "to the fullest extent possible" should be applicable to both subsections (1) and (2) of s 102. Such an interpretation would allow the court to strictly enforce NEPA's substantive policy checked against the merits of the agency decision. Cohen & Warren[88] surmise that the reason for judicial reluctance to require strict compliance with s 102(1) is that the courts are disinclined to become involved in decision-making to any significant degree.

It would seem that the court's requirement of "consideration" is inadequate for ensuring that environmental values will in fact be accorded their rightful priority as NEPA's policy (set out in s 101) requires. Muskie & Cutler[89] point out that NEPA's dictates are unlikely to change the environmentally insensitive decision-making in some agencies, since all that an agency must do to comply fully with NEPA's requirements is to conduct a good faith but relatively undefined balancing analysis, consider the alternatives, and file an EIS concerning its proposed action. Anderson, in criticising *Calvert Cliffs'* balancing analysis as being too imprecise,[90] also submits that NEPA may have the effect

> "of causing a better record supporting the basic decision to be made and new information about environmental impacts to be assembled, but it may not actually achieve its ultimate purpose of changing the congressionally recognized tendency of federal decision making toward environmental neglect and destruction"[91]

It must thus be borne in mind that the balancing analysis as a device to be employed towards improved decision-making can only be as effective as the administrator who applies it is sensitive towards and skilful in the nuances of its application.[92]

Cramton and Berg[93] on the other hand are of the opinion that it is not the function of a reviewing court to balance the conflicting values that have

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[86]"Judicial recognition of the substantive requirements of the National Environmental Policy Act of 1969" 1972 *BC Ind & Com L Rev* 697.
[87]1114.
[88]702.
[89]"A national environmental policy: now you see it, now you don't" 1973 *Maine L Rev* 173.
[90]256–8. For further criticism see Cohen & Warren 698.
[91]257.
[92]Cubell "The National Environmental Policy Act of 1969 saved from 'crabbed interpretation'" 1972 *BU L Rev* 424. See also Kessler and Porter 1972 *Geo Wash L Rev* 568.
[93]"On leading a horse to water: NEPA and the federal bureaucracy" 1973 *Mich L Rev* 534.

been placed by the legislature in the hands of administrators. While they concede that the public's suspicion of the intentions and capabilities of government is understandable and by no means baseless, they submit that a court of law cannot replace an administrative agency in balancing the conflicting values in issue.[94]

Jaffe[95] also asserts that balancing of values is basically a political activity, a function which should not be undertaken by the courts, whose function is restricted to setting aside administrative decisions if they amount to an abuse of discretion. But does this mean that NEPA pertains only to procedure and not to substance, that "decision-making in a given agency is required to meet certain procedural standards, yet the agency is left in control of the substantive aspects of the decision"?[96] Does it mean that an agency can perpetrate the worst kind of environmental damage, which would clearly mitigate against the purpose of the act, so long as it properly followed the EIS procedure?

It has rightly been pointed out that it is one thing to require a federal agency to assess environmental consequences by asking it to comply with certain procedures but that it is quite another thing to require that the agency decisions themselves reflect that assessment.[97]

Review on the merits of the agency's decision

Some courts have gone further and have decided that an agency decision to proceed with its action after consideration of an adequate EIS can be reviewed on the merits of that decision (known as "substantive review") to see if it complies with NEPA's policies as set out in s 101.[98] It is in this connection also that the question whether s 101 creates judicially enforceable substantive duties and rights, is relevant.[99] The question basically is: does s 101 provide recourse against environmentally unsound federal agency action, even if the procedural requirements of s 102 are fully complied with? Does s 101 create judicially enforceable rights and duties separate and apart from the duties imposed in terms of s 102?

Actually the requirement that the agency must take account of environmental factors specified in the EIS, combined with the provisions of s 101, especially s 101(b), seem to imply that judicial review on the merits of the agency decision should be possible. Yarrington[100] contends that if

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[94]Cf Kumin "Substantive review under the National Environmental Policy Act: *EDF v Corps of Engineers*" 1973 *Ecology LQ* 199 who refers to cases where courts have been reluctant to examine abuses of the cost-benefit analysis on the grounds that determining whether the benefits of a project exceed its costs is a legislative function.
[95]24.
[96]*Upper Pecos v Stans* 452 F 2d 1233 (10th Cir 1971) at 1236.
[97]Ruse 1973 *Creighton L Rev* 119.
[98]See generally Kumin 173 *et seq*; Geer 155 *et seq*; Haynes" Judicial review of factual issues under the National Environmental Policy Act" 1972 *Ore L Rev* 408 *et seq.*
[99]See generally Robie "Recognition of substantive rights under NEPA" 1974 *Natural Resources Law* 387 *et seq* and Yarrington 37–40.
[100]"Judicial review of substantive agency decisions: A second generation of cases under the National Environmental Policy Act" 1974 *SDL Rev* 294.

s 101(b) creates no obligations on the part of federal agencies that are enforceable through the judiciary, then congress created a national policy that cannot be enforced. "Such a result", according to him, "defies logic, and it would in many ways render NEPA a meaningless statute." He points out[101] that it is particularly important that substantive review should be available

> "so as to improve the quality of agency decisions and make it more likely that the broad and important purposes of hte Act will be realized".

The difficulty with litigation in which courts limit themselves to the correction of procedural failings is according to Sax:[102]

> "[T]hat it fails to focus upon the real underlying problem – the attitude, rather than the legality, of administrative action. The significant potential strength of the judiciary in correcting environmental misconduct is sapped because courts hesitate to inquire into the merits, rather than the peripheral legalities, of environmental issues."

The courts have begun to move in this direction. Thus it was obiter stated in *Calvert Cliffs* that a reviewing court can probably reverse a substantive agency dicision on its merits (in terms of s 101) if it is shown "that the actual balance of costs and benefits that was struck was arbitrary or clearly gave insufficient weight to environmental values".[103] This decision[104] was followed and elaborated upon in the leading case of *Environmental Defense Fund v Corps of Engineers*.[105] The basis of this decision really relates to the purpose of NEPA. Behind the reluctance of courts in the past to disturb ultimate agency decisions after environmental factors had been considered "lay an uncertainty about exactly how far congress intended NEPA to go towards changing the balance of power in environmental policy making".[106] Now it was decided that NEPA is more than an environmental full-disclosure law, that it was intended to effect substantive changes in decision-making and that it is to this end that s 101 sets out specific environmental goals which are to serve as a set of policies to guide agency action affecting the environment.[107] The court referred to s 102(2), which sets forth the procedural requirements and pointed out that its purpose is to ensure that the policies enunciated in s 101 are implemented. Given an agency obligation to carry out the substantive requirements of the act, the court decided that it had an obligation to review substantive agency decisions on the merits.[108]

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[101] *ibid.*

[102] *Defending the environment* (1971) 135.

[103] at 1115.

[104] The court also relied on *Natural Resources Defence Council v Morton* 337 F Supp 165 (DDC 1972), *Committee for Nuclear Responsibility v Seaborg* 463 F 2d 796 (DC Cir 1971), *Scenic Hudson Preservation Conference v FPC* 453 F 2d 463 (2d Cir 1971), *Hanly v Mitchell* 460 F 2d 640 (2nd Cir 1972) and *Ely v Felde* 451 F 2d 1130 (4th Cir 1971). It was confirmed in *Conservation Council of North Carolina v Froehlke* 473 F 2d 664 (4th Cir 1973).

[105] 470 F 2d 289 (8th Cir 1972).

[106] Kumin 177.

[107] at 297.

[108] at 298.

As to the standard of review, the court followed *Calvert Cliffs* and decided as follows:

> "Where NEPA is involved, the reviewing court must first determine if the agency reached its decision after a full, good faith consideration and balancing of environmental factors. The court must then determine, according to the standards set forth in ss 101(b) and 102(1) of the Act, whether the actual balance of costs and benefit that was struck was arbitrary or clearly gave insufficient weight to environmental values."[109]

However, there is still some uncertainty as regards the standard of review.[110]

This decision, which has been welcomed by most commentators,[111] has been followed in a number of recent cases,[112] and although there is still some uncertainty as to whether substantive review under NEPA is permissible, there is a definite trend in this direction in the district as well as the circuit courts.[113] The supreme court has not yet resolved this question.[114]

Although the courts may thus reverse a substantive agency decision which has been based on an arbitrary balance of costs and benefits or on an insufficient consideration of environmental factors, this does not mean that in reviewing agency decisions under NEPA the courts can substitute their own judgment for that of the agency. It has been speculated that, taking the *Calvert Cliffs'* standard of arbitrariness, or of clearly giving insufficient weight to environmental values, and applying them to a given situation may tempt the reviewing court to substitute its judgment for the agency's.[115]

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[109]at 300.

[110]Cf Kumin 189 *et seq* for a discussion of three possible criteria which the courts might consider in reviewing the substantive validity of agency dicesions under NEPA. Small "The National Environmental Act: What standard of judicial review?" 1973 *J Air L* 650 *et seq* points out that the courts generally are uncertain what standard of review to apply, and even where some standard has been decided upon, they are uncertain how to apply it. He avers (653), moreover, that none of the criteria that have been applied, deals with nor correlates to the actual substantive provisions of NEPA. As an adequate standard, he suggests that applied in *Natural Resources Council v Grant* 321 F Supp 356 (ECN Car 1972) namely: "The court's function is to determine whether the environmental effects of the proposed action and reasonable alternatives are sufficiently disclosed, discussed and that they are substantiated by supportive opinion and data." Yarrington, 40–1, calls the standard a "substantial inquiry" test, which stops short of *de novo* review, but permits the courts greater flexibility than the "substantial evidence" test. Cf also Yarrington 1974 *SDL Rev* 290 *et seq.*

[111]Cf Buntain 543, footnote 16.

[112]Cf *EDF v Froehlke* 473 F 2d 346 (8th Cir 1972) (4 ERC 1829), *Conservation Council v Froehlke* 473 F 2d 664 (4th Cir 1973) (4 ERC 2039), *Sierra Club v Froehlke* 473 F 2d (7th Cir 1973) (5 ERC 1920), *Sierra Club v Callaway* 6 ERC 2080 (5th Cir 1974) and *Montgomery v Ellis* 364 F Supp 517 (SD Ala 1973).

[113]See generally Deutsch 58 *et seq* and Yarrington 39.

[114]The first supreme court case to deal with NEPA – *US v SCRAP* 412 US 669 (1973) – did not resolve this question. For cirticism see Gingerich "Environmental Law – NEPA and ICC Rate suspensions" 1974 *Wis L Rev* 600 *et seq.* Cf also McDonald "The relationship between substantive and procedural review under NEPA: A case study of *SCRAP v US*" 4 *Env Aff* 165 *et seq.*

[115]Lynch "Complying with NEPA: The tortuous path to an adequate environmental impact statement" 1972 *Ariz L Rev* 744.

However, no court seems to have been willing to go so far; such a view, in fact, would be based on the controversial assumptions that courts of law are destined and capable to become, as it were, performers rather than reviewers of agency action and that the environment will be better protected by the courts than by the federal agencies. After all, as Delogu[116] points out, the power to order a required act to be done or to judge an act invalid does not entail the power to do the act oneself.

SHORTCOMINGS[117]

It has been remarked that NEPA is a "curious conglomeration of desirable objectives coupled with inadequate machinery for the enforcement and ultimate realization of its goals."[118] One of the most serious shortcomings in NEPA is that no provision was made for its enforcement. The CEQ, as has been pointed out, cannot compel compliance with NEPA. The fact that the act has not been a dead letter is due to citizen groups relying on the courts to enjoin or declare void actions contrary to NEPA. Although it is still a subject of controversy whether reliance should be placed on the courts rather than on a governmental body, it would for the purposes of regular control, seem preferable to entrust enforcement of NEPA to the CEQ, or other similar body. Of course, the CEQ would need authority to implement its decisions, e g a veto power, where no adequate EIS was prepared. On a number of important aspects NEPA is too vague leaving it to the courts to supply the body; this applies particularly to the question of substantive review, whether s 101 created judicially enforceable rights and duties. Other important shortcomings include the fact that NEPA does not apply at state and local level and that it does not apply to private development activities. Another unfortunate omission involves the establishment of a post-impact statement evaluation and adjustment procedure. As Delogu[119] states:

> "Performance must be measured against promise – and adverse performance appropriately modified."

Finally, there is a fear that NEPA will become bureaucratized through layer upon layer of paperwork, which may frustrate its whole *raison d'etre*.

NEPA'S IMPACT

In conclusion it must be determined whether NEPA and its application by the courts have achieved its goals. So far it has not succeeded in its fundamental goal of a better environment through improved federal environmental decision-making. Criticism is levelled particularly at agencies' failure to comply with NEPA as far as policy-level decision-making is con-

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[116] *United States experience with the preparation and analysis of environmental impact statements: The National Environmental Policy Act* (1974) 58.

[117] For shortcomings of NEPA as well as suggestions for its improvement, see generally Delogu.

[118] Felton "NEPA: Full of sound and fury" 1971 *U Richmond L Rev* 127.

[119] 15.

cerned.[120] The familiar complaint has been that agencies are more responsive towards the needs of the industries that are regulated than towards the public interest which it is also supposed to protect. Since the relationship between the agency and the regulated has usually been built up over a long time period, changes would not occur too sudden. Few instances are available of NEPA's having materially altered a federal programme or project. NEPA's fame, according to Anderson,[121] so far rests more upon the amount of attention it has received by federal agencies than upon the results it has achieved. He expresses the fear[122]

> "that NEPA litigation has been primarily successful in stimulating after-the-fact rationalizations which are examined less by agency decision makers than by agency lawyers, whose job it is to ensure that the agency's environmental review can survive legal challenges".[123]

He does point out, however, that a perspective gained from decided cases focuses on situations where things have gone wrong and may not be representative of the many instances where the requirements of the act have been met. Delogu[124] feels more positive about the enforcement of NEPA and contends that the substantial number of impact statements filed with the Council on Environmental Quality indicates that agencies are responding to NEPA.[125] The threat of NEPA suits is perhaps the main factor in stimulating agency compliance with the act. Moreover, as we have seen, the courts exercise strict control over agency decisions, reviewing not only the adequacy of the EIS and the question whether consideration was given to environmental factors, but also the question whether this consideration was adequate, assessing in other words the merits of the agency decision.

Two important positive consequences of NEPA are that issues involved in central government decision-making must be aired and that agencies must articulate the grounds of their decisions. As Cramton[126] states:

> "They must not only invite and listen to outside comments, but they must in practice respond to such comments. If it is asserted that a certain environmental damage is threatened by a given project, the environmental impact statement cannot safely ignore the question. It must either explain why the agency discounts the threat or why the benefits of the proposed project are believed to outweigh the dangers."

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[120]Cf Edmonds "The National Environmental Policy Act applied to policy-level decision making" 1973 *Ecology LQ* 799 *et seq*; Strohbehn "NEPA's impact on federal dicision-making: examples of noncompliance and suggestions for change" 1974 *Ecology LQ* 93 *et seq.*

[121]287.

[122]288.

[123]Cramton & Berg 516 also warn that agencies will have to guard against the "natural but unfortunate tendency to permit the writing of impact statements to become a form of bureaucratic gamesmanship, in which newly acquired expertise is devoted not so much to formulating a project that meets the needs of the environment as to shaping an impact statement to meet the contours of the agency's preconceived program and to withstand the test of judicial review".

[124]24, 62 note 9.

[125]For a general review of NEPA's influence, see "The National Environmental Policy Act: How it is working, how it should work" 1974 *ELR* 10003–7.

[126]*Statement before the Committee on Interior and Insular Affairs and the Committee on Public Works of the US Senate on the effect of NEPA on decision-making by federal administrative agencies* (1972) 8.

He concludes that the requirement that agencies consider and evidence their consideration of outside comment is likely to result in more thoughtful and informed decision-making.

In determining NEPA's influence on federal decision-making, one must remember that it is a "reform statute" which deliberately cuts against the grain of traditional agency values and practices.[127] The fact that NEPA has been relatively slow in making progress must be attributed to this fact. Another factor bearing an influence on NEPA's lack of substantial success is that at the time of its enactment, there was little understanding of the art of environmental forecasting. However, in view of the demand created by NEPA and the general awareness of the environmental crisis, substantial effort has been committed towards a better understanding of the potential environmental effects of proposed action.

With continued vigorous enforcement of the act by environmentalists relying on the courts, NEPA should play an increasingly important rôle in making federal agencies aware of the environmental impact which their actions will have on the environment. Against the background of the tremendous public concern over the environment, one can expect federal agencies to become increasingly aware of the importance of environmental conservation, which awareness should be reflected in their decision-making, thus achieving NEPA's ultimate goal. Short of complete administrative reform bent upon environmental conservation there is not very much more that can be done to stimulate federal agencies into taking the environmental impact of their actions into account.[128] As has been said, a bureaucratic horse can be led to the environmental waters but it cannot be forced to drink. The underlying problem is that the structure of the decision-making process at the agency level is biased against the environment, since many agencies have a dual mandate of environmental conservation and economic development. In this context it must be remembered that these agencies are generally geared towards economic development rather than environmental conservation.[129] NEPA's task, in short, is to reform this imbalance.

THE POSITION IN SOUTH AFRICA

It would, of course, be ideal if every administrative government body (or even private body or individual) would voluntarily evaluate and take into account the potential environmental impact which the implementation of its proposed projects may have on the environment and adjust its actions so as to make provision for environmental conservation. This, however, cannot realistically be expected to happen. Some form of compulsion is therefore necessary, as has been proved by the experience in the USA.

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[127]Anderson 288.

[128]See Cameron "Federal Regulating Agencies – The need for a broader constituency" 1974 *ELR* 50134–5 who suggests some other measures that could be employed to render agencies less obedient to the narrow interests of those who are regulated and more responsive towards the public interest in environmental conservation.

[129]"Oakes Developments in environmental law" 1973 *ELR* 50008.

Various forms of supervision of governmental activities exist: apart from internal review by higher ranking administrators, control over official action is also exercised externally, namely through parliament itself and through the remedies of appeal, interdict, mandamus and judicial review. Of these forms of control judicial review is by far the most important.

Judicial review of the proceedings or decisions of administrative officials, tribunals and authorities is a common law remedy afforded by the supreme court whenever such proceedings or decisions have been irregular or illegal, and any person whose interests have been prejudicially affected thereby can have those proceedings or decisions reviewed.[130]

Of the grounds for review[131] the one which has probably the greatest environmental significance is that an administrative body in arriving at its decision must take into account all relevant and material matters.[132]

The impact which the administrative decision may have on the environment may in certain cases conceivably be regarded as a relevant and material matter which the administrative body must take into consideration. Occasionally statutes list the factors which must be taken into consideration by the administrative body in arriving at its decision; in such cases the administrative decision can be set aside on review if any of these factors were not considered.[133] However, such listing of factors relating to the environment generally does not occur..

For obvious reasons it would, from an environmental point of view, be a more satisfactory solution if, in statutes that affect the environment, express and mandatory provision were made for the impact which the administrative decision is likely to have on the environment to be taken into account by the administrative body concerned.

Far more effective would be a uniform measure such as is contained in NEPA, in which are enumerated the environmental factors to be considered by every administrative agency when undertaking actions that significantly affect the environment.

The premise should be that there should be a statutory obligation that at the very least government departments at all levels as well as other official bodies (and, for that matter, also private bodies and individuals) must disclose, well in advance of implementation, the potential environmental impact which their major actions significantly affecting the environment may have.[134] This can be done through the submission of an environmental

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[130]Rose Innes *Judicial Review of Administrative Tribunals in South Africa* (1963) 1 and rule 53(1) of the Rules of the supreme court.

[131]See Rose Innes 89 *et seq.*

[132]Rose Innes 132 *et seq* and Wiechers *Administratiefreg* (1973) 254 *et seq.* This rule is usually put in its negative form, i e that the administrative body may not take into account extraneous and irrelevant considerations, and is actually an example of the rule that administrative bodies must act *intra vires* (*Greene v Pietermaritzburg Corporation* 1928 NPD 86 93 and *Estate Geekie v Union Government & Others* 1948 2 SA 494 (N) 502).

[133]Rose Innes 132.

[134]It must be conceded that it is going to be difficult to draw the line as to exactly what actions of which bodies having what degree of effect on the environment, should be

impact statement, in the same way as in the USA. It could be required that this statement must be submitted to the Council for the Environment[135] and to the Department of Planning and the Environment[135] and that it be made public. Failure to submit such a statement or submission of an inadequate statement would then, as in the USA, expose any decision nevertheless to proceed with a project to being set aside on review.

However, all that would thus have been achieved, would be the disclosure of potential environmental impacts of proposed projects. To be sure, this would already be no small improvement since the present position is that one often learns of environmentally detrimental projects only after they have already commenced. The main advantage of the introduction of such an obligation of advance disclosure would be that the Council for the Environment, the Department of Planning and the Environment and the public would be alerted and could accordingly consider some restraining action. Another advantage is that the body itself, when compelled to study the potential environmental impact of its proposed action, may decide to consider and evaluate this impact and to avoid undesirable adverse environmental consequences. However, mere disclosure of the potential environmental impact of proposed action is no guarantee that it will be considered and acted upon by the decision-maker. This is evident from the American experience. The main difficulty, therefore, remains that the above-mentioned bodies would, unless restrained at cabinet level, still be able to proceed with their projects despite the fact that adverse environmental consequences are likely to ensue and that alternative avenues which would be less harmful to the environment, could have been pursued.

One possible manner in which this shortcoming can be remedied, is to provide that bodies actually consider environmental factors involved in decision-making where a significant environmental impact is involved, and to provide for judicial review on the merits of the decision following such consideration. This is the direction into which the interpretation of NEPA by the US federal courts has been moving. However, when reliance is placed upon the courts for ensuring that such legislation is implemented, the courts necessarily become involved in decision-making and the balancing of values, functions which are not regarded as belonging to the judiciary. In any case, our courts in similar circumstances seem to be loath to enquire into the potential consequences of an administrative decision, as illustrated by in-

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subject to this obligation. Since the phrase "major . . . action significantly affecting the quality of the human environment" has been subjected to extensive interpretation by federal courts in the USA, it may be expedient to use this as starting point.

[135]This Committee, which until the middle of 1975 was called the South African Committee on Environmental Conservation was established to advise the permanent Cabinet Committee on Environmental Conservation (established in 1972). See generally *Environmental Conservation* (1973) par 4 3 (published by the Department of Planning and Environment).

[136]The Department of Planning in 1973 became the Department of Planning and the Environment and is the central government department which is responsible, not for the direct enforcement of environmental laws (excepting the Environment Planning Act, 88 of 1967), but for the co-ordination of the activities of the many central, provincial and local government departments that are engaged in enforcing environmental laws.

stances where, in resettling groups of persons in terms of the Group Areas Act 41 of 1950 (now Act 36 of 1966), the availability of suitable alternative accommodation must first be considered before evacuation and resettlement are ordered. (This is comparable to the NEPA obligation to study and consider alternatives to the proposed action.) In this respect the appellate division has decided[137] that the legislature did not contemplate an assessment of either the availability or suitability of accommodation with any exactitude:

> "It is much more likely that Parliament intended an assessment by approximation along the broader lines of probabilities. That of course does not mean that any assessment, however haphazard, would do. If the information before the Board is manifestly insufficient for any rational examination of the issue entrusted to it, such information cannot form the basis of a real consideration. Short of that, a Court cannot interfere merely on the ground of paucity of information or the degree of investigation."[138]

Much will of course depend upon the precise way in which the obligation is framed, but where no detailed instructions are contained in the legislation as to the quality of investigation and, accordingly, of the result contemplated, the prospects for the affected persons – or for the environment – do not look bright.[139]

Another way in which environmentally insensitive decision-making could be forestalled is through the introduction of a requirement that all major projects which may have a significant impact on the environment be submitted for approval to a body such as the Council for the Environment. Although such a principle would obviously be very satisfactory from an environmental point of view, it would not seem to fit into our constitutional composition. Suggestions for the institution of bodies with power to control government departments, at least at national level, have in the past met with disapproval. Two relevant examples that come to mind are the suggestion by the National Veld Trust in its model bill and explanatory memorandum, submitted during 1945, on a proposed Veld and Soil Conservation Act, for the establishment of a National Soil Conservation Authority[140] and the proposal in 1947 by the Social and Economic Planning Council for the establishment of a Government Department of Physical Planning with overriding powers as far as land use planning is concerned.[141] Both these suggestions were based on the model provided by the Tennessee Valley Authority in the USA and both were rejected because they were regarded as being too drastic and not practicable.

If this suggestion is considered to be unacceptable in terms of our constitutional set-up, the next best solution would be to provide that the abovementioned projects be submitted to the Council for the Environment, if not

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[137] *Harnaker v Minister of the Interior* 1966 4 SA 303 (A).

[138] 314.

[139] Wiechers 258–9 strongly criticizes this attitude of the court; he maintains that "'n geregtelike kontrole wat bloot na die formele nakoming van die vereiste van ondersoek en inwining van informasie kyk en sy oë sluit vir die werklike gevolge en uitwerking van 'n handeling is niks meer as handewassery in die onskuld van legalisme en letterknegtery nie."

[140] See *Assembly Debates* May 23 1946 8269–70.

[141] See *Assembly Debates* May 22 1947 5280.

for approval, then at least for comments and recommendations (or that the Department of Planning and the Environment be consulted) as to the possible environmental consequences of the proposed action. Although such a solution would seem to be more in line with our constitutional composition, its obvious shortcoming is that there would be no assurance that projects with potentially detrimental environmental impacts would not, despite a critical reception by the Council (or the Department), nevertheless be proceeded with unchanged. This is exactly the reason which prompted the Social and Economic Planning Council in 1947 to suggest a department with overriding powers. Mr Payne well articulated this frustration during the second reading debate on the Natural Resources Development Bill:

> "The trouble always is that having found the facts and made its recommendations, the advisory body is presented with all sorts of reasons as to why the reports and recommendations should not be acted upon."[142]

However, bearing in mind the reality of the political *status quo* and our constitutional composition, there unfortunately appears to be little hope for immediate relief of such frustration. Perhaps the most that can be realistically hoped for, is the introduction of a statutory obligation that administrative government bodies prepare reports on and disclose the potential environmental impact which their proposed actions may have, as has been discussed, that these reports be submitted to the Council for the Environment (and/or the Department of Planning and the Environment) for comments and recommendations, that these comments and recommendations then be studied by the body concerned and that if these recommendations are not to be followed, that reasons, which must be made public, be given as to why they are not to be implemented. Judicial review would then be available if any of these requirements have not been complied with. In order to provide for effective implementation of this remedy the proposed statute should allow *locus standi* to at least the major environmental societies in South Africa.[143] Greater public participation in the Council for the Environment, through adequate provision for public representation, is also necessary if the misgivings as regards administrative government bodies' unsympathetic treatment of the environment – which in fact gave rise to NEPA – are to be allayed.

Finally, as some measure of consolation, it can be stated that effective implementation of provisions relating to land use planning, such as those included in the Environment Planning Act 88 of 1967 through its amendment in 1975, can contribute much towards preventing environmentally harmful impacts of proposed projects at an early planning stage.[144] However, valuable though these provisions potentially are for environmental conserva-

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[142] *Assembly Debates* May 22 1947 5293.

[143] That these groups have a very real interest in environmental conservation and can contribute in this respect, is hardly open to contention. However, they would have considerable difficulty in complying with the traditional strict requirement of a direct or personal interest, which still applies in South Africa. See Rose Innes 21 *et seq* and Wiechers 284 *et seq*.

[144] See generally Rabie *South African Environmental Legislation* (chapter on land use planning) to be published during 1976.

tion, they could not be implemented on such a large scale as to offer a guarantee against environmentally insensitive land use planning or other actions – especially that undertaken by government – that detrimentally affect the environment nor were they intended for this purpose. The introduction of NEPA-like provisions, as has been pointed out, therefore is necessary if we want to make sure that governmental (and other) action is planned and undertaken with the necessary respect for the environment or if, at the very least, we should know what price, in terms of the environment, we are paying for "progress". □

BUTTERWORTH-PRYS

Dit doen die redaksie genoë om aan te kondig dat die Butterworth-prys vir die beste eersteling bydrae van 1975 toegeken is aan:

J W LOUW

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Die Butterworth-prys – regsboeke ter waarde van R60 – word deur die uitgewers beskikbaar gestel aan die outeur wat in die bepaalde kalenderjaar die beste artikel vir publikasie in die Tydskrif *aan die redakteur steeu.*

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

Word die Spontane Agtervolgingsleerstuk Misbruik?

Robert P. Pace

Prokureur, Ladysmith (Natal)

Daar word dikwels deesdae in die nuusmedia, veral met betrekking tot gebeure op die noordelike grense van die Republiek van Suid-Afrika en van Suidwes-Afrika, na die leerstelling van spontane agtervolging ("the doctrine of hot pursuit") verwys wanneer die Suid-Afrikaanse weermag straftogte oor die landsgrens teen terroristekampe in Angola onderneem. Alhoewel hierdie terminologie in die onlangse verlede nog gebruik is toe verwys is na straftogte deur Israel teen Jordanië en deur die VSA se magte teen Laos en Kombadja is die skrywer van mening dat die gebruik van hierdie leerstuk as regverdiging vir vergelding deur troepe van een staat teen 'n ander staat oor die gemeenskaplike grens heeltemal foutief en onjuis is.

Histories het die leerstelling van spontane agtervolging sy oorsprong in die volkeregtelike beginsels wat ter see van toepassing is en, al is dit dan ook 'n tipe van eiehulp, is hierdie leerstuk geregverdig deur die beginsel dat 'n vreemde skip wat 'n oortreding van die kusstaat se reg begaan het, nie die jurisdiksie van die kusstaat mag ontduik nie.[1]

Gedurende die 19e eeu is hierdie beginsel alreeds in Anglo-Amerikaanse gebruik met die volgende vereistes geformuleer:

1 Die vreemde skip of iemand aan boord moes die reg van die kusstaat binne die territoriale waters van die kusstaat oortree het.

2 Die agtervolging moes terwyl die vreemde skip nog in die territoriale waters van die kusstaat was of net daarvan ontsnap het, begin het en mag glad nie onderbreek word nie.

3 Alleenlik oorlogskepe het die reg gehad om aan die agtervolging deel te neem.

4 Die agtervolging was beperk tot die oop see en kon nie tot in die territoriale waters van die staat waaraan die skip onderdanig was of van 'n derde staat voortgesit word nie.[2]

Bogemelde staatsgebruik het mettertyd algemene aanvaarding geniet en as gevolg van die konferensie oor die reg van die see gehou te Genéve in 1958 is die beginsel in artikel 23 van die Geneefse Konvensie ingelyf. Die

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[1]G Schwarzenberger *A Manual of International Law* (1967) 135.
[2]G L Williams "The Juridicial Basis of Hot Pursuit" 1939 *BYIL* 83.

vereistes van spontane agtervolging soos in artikel 23 omskryf kan kortliks soos volg saamgevat word:

1 Spontane agtervolging mag onderneem word wanneer die bevoegde owerheid van die kusstaat goeie rede het om te glo dat 'n vreemde skip die reg en regulasies van die kusstaat oortree het en mag alleenlik op die ope see voortgesit word indien die agtervolging ononderbroke plaasvind.[3]

2 Die reg tot spontane agtervolging loop ten einde sodra die vreemde skip die territoriale waters van sy eie of 'n derde staat binnevaar.[4]

3 Spontane agtervolging word nie geag om 'n aanvang te geneem het tensy die skip van die kusstaat tevrede is dat die vreemde skip binne òf die territoriale waters òf die aansluitende sone is nie. Die agtervolging mag dan eers plaasvind nadat 'n sigbare of hoorbare waarskuwing aan die vreemde skip gegee is op 'n afstand waar dit deur die vreemde skip gesien of gehoor kan word.[5]

4 Die agtervolging mag net deur oorlogskepe, militêre vliegtuie, of ander skepe of vliegtuie op regeringsdiens wat spesiaal tot daardie doel gemagtig is, onderneem word.[6]

Uit bogemelde is dit duidelik dat die leerstuk van spontane agtervolging sy oorsprong in seereg het en dat hierdie beginsel vandag as gevolg van die Geneefse Konvensie van 1958 aansien geniet. Verder is dit duidelik dat die unieke vereistes wat in artikel 23 neergelê is alleenlik op gevalle ter see toegepas kan word en dat die toepassing van dieselfde vereistes op gevalle aan land onvanpas is en geen bestaansreg het nie. Dit sou onsinnig wees om by wyse van analogie dieselfde reëls op land te probeer toepas waar daar bv met terroriste-aanslae vanuit 'n buurstaat te make is. Gewoonlik is die aanslae verby en die terroriste alreeds op weg na hulle basis alvorens die aanval ontdek word: onder welke omstandighede kan daar dan nog bv 'n sigbare of hoorbare waarskuwing gegee word? Van nog groter belang is die feit dat in die klassieke gevalle van spontane agtervolging ter see die reg tot agtervolging gestaak moet word sodra die vreemde skip die territoriale waters van sy eie of 'n derde staat binnevaar. Met sogenoemde spontane agtervolging op land neem die agtervolgers reg in eie hande en agtervolg hulle die vlugtelinge selfs tot binne die buurstaat se landsgebied. Myns insiens mag daar nie in sodanige gevalle van spontane agtervolging gepraat word nie. Veel eerder het ons hier met vergelding te doen wat onder die hoof van selfverdediging, wat ook noodsaak insluit, hoort. Maar dan ontstaan die volgende vraag: is sodanige vergeldingstappe onder huidige volkeregtelike beginsels toelaatbaar waar oorlog nie verklaar is nie?

Voor die totstandkoming van die VV was vergeldingstappe met gebruik van wapengeweld in vredestyd deur een staat teen 'n ander staat nie uitgesluit nie. Histories is vergelding 'n tipe van eiehulp wat van nature

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[3]art 23(1).
[4]art 23(2).
[5]art 23(3).
[6]art 23(4).

wederregtelik is maar wat in volkereg as uitsondering toegelaat word as reaksie van een staat teen die skending van daardie staat se regte deur 'n ander staat. Die doel van hierdie reaksie is om die oortredende staat te probeer oorreed om die saak te skik of om die skade wat veroorsaak is te vergoed.[7] Gewapende vergeldingstappe is veroorloof teen regskending selfs al was die regskending nie met wapengeweld gepleeg nie, mits die verhoudingsbeginsel tussen die skending en die reaksie daarop streng toegepas was.[8] Sekere bronne verlang ook dat die vergeldingstappe deur 'n onbevredigde eis voorafgegaan moes word soos met die geval te Naulilaa.[9] Ons is dus geregtig om vergelding as 'n sanksie van volkereg te beskou.[10]

In die tydperk tussen die twee wêreldoorloë is daar twee pogings aangewend om die gebruik van geweld in internasionale verhoudings te verbied, nl in die Verdrag van die Volkebond van 1919 en in die Kellogg-Briand ooreenkoms van 1929.[11] Albei verdrae het oorlog in sekere omstandighede verbied maar geweldpleging wat nie aan die vereistes van formele oorlog voldoen het nie, is nie beperk nie. Die reg tot vergelding, selfs al was dit met geweld uitgevoer, is dus nie deur hierdie twee dokumente aangetas nie.[12]

Met die stigting van die VV en die aanvaarding van die VV se handves egter, is die gebruik van geweld tussen state uitdruklik verbied. Artikel 2(4) van die handves bepaal dat alle lede hul in hul internasionale verhoudings van die bedreiging of gebruik van geweld teen die territoriale integriteit of politieke onafhanklikheid van enige staat sal weerhou. Artikel 2(3) van die handves skryf ook voor dat alle lede hul internasionale geskille op vreedsame wyse sal besleg. Gewapende vergelding is dus duidelik deur die bepalings van die VV se handves uitgesluit.[13]

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[7]M Sorensen *Manual of Public International Law* (1968) 753; J G Starke *An Introduction to International Law* (1967) 411.

[8]A J P Tammes *Internationaal Publiekrecht* (1966) 215; Schwarzenberger a w 184; H Kelsen *Principles of International Law* (1966) 20–22.

[9]Die *Naulilaa*-saak (1927–1928 *Annual Digest of Public International Law Cases* No 360) waar 2 Duitse soldate en 'n Duitse amptenaar in Oktober 1914 te Naulilaa in Angola deur Portugese soldate geskiet is nadat die Duitsers die grens tussen Duits-Suidwes-Afrika en Angola oorgesteek het met die doel om samesprekings te hou. Portugal was in hierdie stadium nog neutraal. Die Duitse goewerneur van Duits-Suidwes-Afrika het onmiddellike vergeldingstappe gelas en 'n aantal Portugese forte en buiteposte in Anglola is deur die Duitsers aangeval. Na die oorlog het 'n spesiale tribunaal bevind dat "[r]eprisals are an act of self help on the part of the injured state responding after an unsatisfied demand to an act contrary to international law on the part of the offending state. This would be illegal if a previous act contrary to international law had not furnished the reason for them . . . The use of force is only justified by its character of necessity . . . The necessity of a proportion between the reprisals and the offense would be recognised . . . The arbiters concluded that the German aggressions . . . cannot be considered lawful reprisals . . . in view of the lack of sufficient occasion of previous demand and of admissible proportion between the alleged offense and the reprisals taken." (Vertaling uit W Bishop Jr *International Law Cases and Materials* (1962) 747–748.)

[10]Kelsen a w 21.

[11]Gesluit tussen VSA en Frankryk op 27 Augustus 1928 te Parys maar wat eers op 24 Julie 1929 deur 15 ondertekenaars bekragtig is.

[12]Kelsen a w 37–39 en 61; Bishop a w 754–758.

[13]I Brownlie *Principles of Public International Law* (1966) 385; Schwarzenberger a w 185; Starke a w 412.

As ons verder na die VV se handves kyk en veral na hoofstukke VI en VII daarvan, sal ons sien dat alle geskille of omstandighede wat internasionale wrywing kan veroorsaak na die veiligheidsraad verwys moet word en dat alleenlik die veiligheidsraad mag besluit op stappe wat geneem moet word. Artikel 51 van die VV se handves, en terloops is dit ook die enigste artikel wat na selfverdediging verwys, bepaal dat niks in die handves die lede se inherente reg tot selfverdediging in die geval van 'n gewapende aanval inkort nie. Die artikel gaan voort en beperk egter sodanige selfverdedigende handelinge totdat die veiligheidsraad die nodige stappe gedoen het om internasionale vrede en veiligheid te herstel. Verder moet die lid wat die selfverdedigende stappe geneem het onmiddellik aan die veiligheidsraad verslag doen. Die handves van die VV poog dus om 'n gesentraliseerde magsmonopolie vir die VV te skep en om die maatreëls van eiehulp, insluitende selfverdigende maatreëls, wat aan lede toegelaat is, in te kort.[14] Artikel 51 definieer dan die omvang van die reg tot selfverdediging vir lede van die VV. Enige vergeldingstappe wat deur 'n staat gedoen word nadat sy regte geskend is, kan gevolglik net binne die raamwerk van artikel 51 gedoen word.

Die omvang van die reg tot selfverdediging, wat vergelding insluit, het sedert die ontstaan van die VV heelwat twispunte veroorsaak as gevolg van die uiteenlopende interpretasies van artikel 51. Daar word algemeen aanvaar dat waar gepoog word om die omvang van die reg tot selfverdediging wat in die VV se handves toegelaat word, te bepaal, artikel 51 nie afsonderlik nie maar wel tesame met al die voorskrifte van die handves gelees moet word. Hiervan is artikel 2(3) en (4) die belangrikste.[15] Met die ekstensiewe interpretasie van artikel 51[16] word die woorde "inherente reg tot selfverdediging" as 'n voorbehoud van gewoontereg eerder as 'n nuutgeskepte vergunning uitgelê.[17] Gevolglik moet ons kyk na die gewoontereg van selfverdiging en onsself afvra of selfverdediging ook selfverdediging in afwagting van 'n gewapende aanval en die reg tot selfbehoud insluit. Die vereistes m b t die gewoontereg van selfverdediging is in die bekende nota van die Amerikaanse staatsekretaris Webster aan lord Ashburton in 1842[18] neergelê nl: "[The] necessity of self-defense is instant, overwhelming and leaving no choice of means, and no moment for deliberation . . . [and the actions must involve] nothing unreasonable or excessive since the act justified by the necessity of self-defense must be limited by that necessity and kept clearly within it".[19] Die feite is kortliks dat 'n groep Amerikaners en Kanadese gedurende die Kanadese opstand van 1837 aan die Kanadese kant van die grens tussen die VSA en Kanada gekamp het met die doel om

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[14]Kelsen a w 61.

[15]In die bespreking van die verskillende interpretasies waartoe artikel 51 hom verleen raak ek nie die interpretasie van "kollektiewe selfverdediging" nie.

[16]Kyk in die algemeen na D W Bowett *Self Defence in International Law and the Use of Force by States* (1964); J Stone *Legal Controls of International Conflict* (1959); J Stone *Aggression and the World Order* (1958).

[17]Starke a w 428; Kelsen a w 64 e v; Sorensen a w 765 e v.

[18]Voortspruitend uit die VSA–Groot Brittanje geskille oor die *Caroline* (1837) en *McLeod*-(1841) voorvalle.

[19]soos bespreek deur Bishop a w 777.

die rebelle by te staan. Die Amerikaanse skip *Caroline* het voorraad aan hierdie groep voorsien. 'n Gewapende groep onder bevel van 'n Britse offisier het die *Caroline* een aand in 'n Amerikaanse hawe aan boord gegaan, die skip aan die brand gesteek en daarna die skip oor die Niagara-valle laat vaar. Die VSA het protes aangeteken en die Britse regering het geantwoord dat dit 'n daad van noodsaaklike selfverdediging was. Die vereistes soos hierbo aangehaal, is later algemeen aanvaar en deur die militêre tribunale van Nürnberg en Tokyo in 1946 en 1948 onderskeidelik bekragtig. Dit is interessant om daarop te let dat Webster in die lig van die feite van die *Caroline*-voorval geen duidelike skeidslyn tussen die reg tot selfverdediging en die reg tot selfbehoud trek nie.[20] Verder het ons hier 'n voorbeeld van selfverdediging in afwagting van 'n aanval. Gevolglik is daar skendings van 'n staat se regte wat selfverdediging regverdig al het sodanige skendings nie uit wapengeweld bestaan nie. Hierdie reg tot selfverdediging laat dus 'n staat toe om wanneer sy regte bedreig word selfverdedigend op te tree selfs met gebruik van wapengeweld al het die aanvallende staat nog nie wapengeweld gebruik nie. In hierdie geval word artikel 2(4) van die handves beperkend uitgelê om 'n bedreigde staat die reg te gee om die inisiatief te neem in die gebruik van geweld wanneer dit ter verdediging van sekere essensiële regte van die staat nodig geag word.[21] In sodanige gevalle veroorsaak die toepassing van die verhoudingsbeginsel onsekerheid. Die verhoudingsbeginsel vereis dat selfverdedigende handelinge in verhouding met die dreigende gevaar moet wees.[22] Kelsen wys daarop dat alhoewel verskeie skrywers die mening huldig dat selfverdedigende handelinge streng tot afwering van die onmiddellike gevaar beperk moet wees, hy die mening toegedaan is dat die voorkomende doel van selfverdediging nie die interpretasie van die verhoudingsbeginsel om maatreëls toe te laat om die dringende gevaar te verwyder, uitsluit nie.[23] Myns insiens is laasgenoemde die korrekte interpretasie in die lig van die gewoontereg gesien. Dit volg dus dat 'n staat wie se soewereiniteit deur terroriste-aanvalle uit 'n buurstaat geskend is maatreëls wat wel agtervolging en vergelding kan insluit binne die raamwerk van artikel 51 van die VV se handves onder die hoof van selfverdediging mag neem.[25] Sodanige maatreëls kan dan ook die uitwis van die terroriste-basisse en kampe insluit. Daar moet egter op gelet word dat die Veiligheidsraad steeds geken moet word en dié liggaam moet dan verdere maatreëls tref.

In die ander interpretasie van artikel 51[26] word dié artikel beperkend

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[20]Kelsen a w 80–81 voetnoot 72 is van mening dat Webster se stelling die reg tot selfbehoud impliseer aangesien dit nie 'n voorvereiste is dat daar eers 'n skending van 'n staat se regte moet wees alvorens selfverdedigende stappe deur daardie staat geneem word nie.

[21]Sorensen a w 765–766; Kelsen a w 67 e v.

[22]Kelsen a w 81–82.

[23]*ibid* 82.

[24]Starke a w 428–429; Tammes a w 218; vgl egter Sorensen a w 767.

[25]Kelsen a w 68–69 voetnoot 63 waar hy beweer "there has always been a strong tendency to make the customary right of self-defense very nearly synonymous for all practical purposes, with the right of self-help."

[26]In hierdie artikel word net die twee interpretasies van art 51 wat die grootste aanhang geniet, bespreek.

uitgelê. In hierdie geval is artikel 51 'n uitsondering op die algehele verbod wat in artikel 2(3) en (4) neergelê word, en het die handves die gewoontereg van selfverdediging ingekort. Voorstaanders van die beperkende uitleg ken geen spesiale betekenis aan die woord "inherent" toe nie en beweer dat die reg tot selfverdediging alleenlik in die lewe geroep word nadat 'n vroeëre gewapende aanval alreeds plaasgevind het. Dit is dan ook nie verrassend dat hierdie houding sterk deur die meerderheid lede van die algemene vergadering van die VV gesteun word nie.[27] Die handves van die VV laat dus nie selfverdediging toe nie, selfs al word die mees fundamentele en lewensbelangrike regte van 'n staat aangetas of in gevaar gestel, tensy 'n gewapende aanval vooraf plaasvind. Derhalwe kan magsmaatreëls deur 'n bedreigde staat wat in afwagting van 'n aanval getref word of voorkomend van aard is nie as selfverdedigend beskou of beskryf word nie.[28] Met hierdie beperkende uitleg word die verhoudingsbeginsel ook sterk beklemtoon. Selfs met die beperkende uitleg van artikel 51 sal 'n staat wie se soewereiniteit deur terroriste-aanvalle vanuit 'n buurstaat geskend is myns insiens nog steeds die terroriste kan agtervolg. Maar enige teenstappe wat geneem word, sal kortstandig van aard moet wees en in verhouding met die oorspronklike aanval. Daar sal dan ook onmiddellik aan die Veiligheidsraad gerapporteer moet word en dié liggaam moet dan verder optree.

Uit die voorafgaande kan die volgende afleidings dus gemaak word:

1 Die leerstelling van spontane agtervolging hoort alleenlik tot die reg van die see en het geen bestaansreg m b t volkeregtelike beginsels wat op land van toepassing is nie.

2 Enige teenstappe wat op land as gevolg van die skending van 'n staat se soewereiniteit deur sodanige staat geneem word, mag alleenlik kragtens artikel 51 van die VV se handves gedoen word, hetsy dié artikel ekstensief of restriktief uitgelê word. In albei gevalle moet die maatreëls wat geneem is onmiddellik aan die veiligheidsraad gerapporteer word wat dan ook die moontlikheid inhou dat enige besluit wat deur daardie liggaam geneem word nie op suiwer regsbeginsels gegrond sal wees nie maar dat politieke doelmatigheid ook 'n rol mag speel. □

"*Whether it is a question of Roman or Germanic Law, the principal applies:* summum ius, summa iniuria."

H van den Brink *The Charm of Legal History* 169

[27] Kelsen a w 67; Sorensen a w 766.
[28] *ibid.*

Aantekeninge

ASPECTS OF THE ABORTION REFORM IN WEST GERMANY

On 25 February 1975, while the South African Abortion and Sterilization Bill was debated in parliament, the controversy surrounding the German abortion reform came to a head. The *Bundesverfassungsgericht* (federal constitutional court) held that the new German Abortion Act of 1974 was irreconcilable[1] with the provisions of the *Grundgesetz*, i e the constitution.

The former statutory provision, viz par 218 of the German criminal code was approximately 100 years old. Despite a continuous storm of criticism, it prevailed until 1974 in the following form:

1 Any woman who kills her foetus, or allows someone else to do so, shall be punishable by a term of imprisonment not exceeding 5 years.
2 Any person who otherwise kills the foetus of a pregnant woman shall be punishable by a term of imprisonment not exceeding 5 years, or, in especially serious cases, by a term of imprisonment not exceeding 10 years.
3 Attempt is punishable.
4 Any person who supplies a pregnant woman with an object for the killing of her foetus shall be punishable by a term of imprisonment not exceeding 5 years, or, in especially serious cases, by a term of imprisonment not exceeding 10 years.[2]

The German courts have allowed exceptions to the uncompromising strictness of this paragraph. The precise scope of the permissible exceptions have been examined in some detail and may be summarized as follows:

1 The medical indicative

The medical interruption of a pregnancy is permissible if such intervention is necessary to save the mother's life or to protect her against serious physical injury. In this event, the abortion must be performed by a medical doctor acting with the woman's consent.

The German supreme court has held that a serious threat to the mother's life can also exist in the case of threatened suicide.[3]

The abortion must be the only possible way in which the danger to the woman's life or health can be averted. If the woman's consent cannot be obtained, or if she is not aware of the significance or consequence of the operation, consent may be granted by her legal representative or by a person in whose care she may otherwise be.

2 The criminal or ethical indicative

The rape or sexual abuse of mentally retarded or unconscious persons, or the sexual abuse of children or dependants, resulting in pregnancy, does not justify an abor-

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[1]Regarding the competence of the court, see § 13 of the *Gesetz über das Bundesverfassungsgericht* (B ver G).
[2]My translation.
[3]*S & GB Kommentar*; *Leipziger Kommentar* (9th ed) 2nd part (1974) sec 16 par 40–51. See also *BGH* str 2 114 3, 9 and 14, 2.

tion.[4] This opinion of the supreme court is one of the reasons why par 218 has been sharply criticized, and quite rightly. The supreme court has, however, referred to the danger of attempted suicide under such circumstances and the possibility of serious harm to the mental health of the victim. In such a case the medical indicative would permit an abortion.

Ethical considerations give rise, *de lege ferenda*, to extremely serious philosophical, moral and legal problems.[5]

3 The infant indicative

The probability of hereditary defects in the child, or of pre-natal harm to it, could originate from the use of drugs (eg Contergan), from exposure to X-rays, or from the mother's having contracted German measles at an early stage of her pregnancy. Such factors do not, however, justify an abortion. The principles of the medical indicative might apply here, if we assume that the psychic burden on the mother arising from the probability of her giving birth to a sick, deformed or mentally retarded child is so irksome that it results in serious danger to her life or health. Under such circumstances, an abortion would be permissible.

4 The social indicative

The lowly social position of the mother, the consequences that invariably arise from this status or the possibility that she might be in financial straits, do not justify an abortion.

THE POSITION IN PRACTICE[6]

The German Federal Bureau of Statistics has repeatedly indicated that the provisions of the abortion laws, tough as they were, were not being implemented by the authorities concerned. Paragraph 218 had simply remained a dead letter. Only 497 cases of criminal abortion were investigated by the prosecuting authorities in 1973 although experts believe that at least 100 000 criminal abortions were performed in Germany that year. This unsatisfactory situation resulted in a massive public initiative which took the form of protests and demonstrations in favour of a new and more humane regulation more in accord with practice.

Female action groups took a prominent part in the demonstrations. Banners and slogans were paraded through the streets. Hundreds of women, many of them prominent figures in entertainment, openly challenged the prosecuting authorities by making public confessions of abortion.

As the position was clearly intolerable, a parliamentary debate was called in 1972. Since abortion reform does not only concern judicial authorities – medical experts, theologians, sociologists and women themselves are decisively involved – the resulting debate was often stormy and emotional. On

[4] *BGH* str 2 381.

[5] For a comprehensive study of these questions see *Juristenzeitung* 1963 722. It is not the legislator's duty to pass moral judgments. The sole legislative issue ought to be whether the state should or can force a woman, with no regard for the conflict inherent in her situation and under pain of criminal sanction, to bear a foetus conceived as the result of a criminal sexual attack on her. The uncompromising Catholic doctrines on this urgent question, like the diversified teachings of Protestantism, are not conducive to the achievement of a generally acceptable solution.

[6] See Concepte *Abtreibungs-Report* January 1975.

the one hand the women have a constitutionally protected right to the free development of their personality; on the other hand the state guarantees the protection of human life.

Some vital questions arising out of this basic debate confronted the German parliament. The first and most obvious was "when does life begin?" To provide an account of the progressive development of the human foetus would extend beyond the scope of this article. If we take the third month of pregnancy as an example we can say that the foetus has a length of some 9 cm at this stage; its muscles are capable of contraction; it has recognizable human features; and it can swim in the amnion fluid. Because the foetus is alive, the mother can feel its movements. It reacts to certain stimulants, can move its head, elbows and wrists independently, and regularly sucks its thumb as from the 12th week. Hence the inevitable, highly controversial question – what is the value of the life of the unborn foetus at this stage?

A further question is whether it is to be protected with the aid of criminal sanctions.[7]

It is debatable whether such questions can be resolved to any significant extent by the concept of "therapeutic abortion" embodied in any proposed law reform. Packer[8] believes that any moderate reform is ultimately a middle-class reform since it only enables the educated elite to take advantage of the liberalized law. Where will the ordinary female worker, he asks, find a psychiatrist to testify that she runs a grave risk of emotion impairment if she is forced to give birth to her ninth child?

The general motives which impel women to seek abortions are, Packer feels, motives of overwhelming compulsion.[9] A substantial number of women who put themselves at the mercy of illegal abortionists do so from a feeling of desperation that would not be placated by less extreme measures.

Before I next discuss the reform of the century-old par 218 which resulted from the German parliamentary debate, I wish to instance an extreme example of the extent to which public agitation is permitted in a country which, for understandable reasons, jealously guards the democratic rights of its citizens. During the course of the parliamentary hearings on abortion reform, a television programme whose editor is known for his left-wing views, in an attempt to show that an abortion, properly performed, is no less dangerous or painful than the extraction of a tooth,[10] filmed an abortion performed on a 34-year-old mother of three. As a sign of solidarity with the pro-abortion movement, 14(!) medical doctors assisted at the operation. The announcement that this questionable contribution to "Aufklärung" on this

[7]The answer depends on many factors: upbringing, education, religious convictions, professions, sex. It will invariable differ from person to person. In spheres such as this, where the law must supply guidelines in resolving personal, ethical and moral issues, a compromise solution is often best; but it will always be unsatisfactory to a large sector of the community.

[8]H Packer *The Limits of the Criminal Sanction* (Stanford University Press, 1968) 344.

[9]The federal German constitutional court seems to have recognised this to some extent as another ground justifying abortion in certain limited cases. See infra.

[10]Thus Concepte supra.

subject was to be screened nationwide on 11 March 1974 gave rise to an unprecedented public outcry even though the majority of the German electorate favoured liberalized abortion laws.

The department of justice, churches, medical boards and many women's organisations issued statements expressing shock and revulsion. However, so jealously is freedom of speech guarded in post-war Germany, that on 15 March 1974 the film of the abortion was shown, in flagrant yet effective disregard of the existing law, on three regional television programmes.

Some four weeks later the minister of justice reacted mildly, saying that until a new act had been passed by parliament the existing law would remain in force and should be obeyed.

THE NEW STATUTE

The following are brief summaries of the four drafts submitted to the federal parliament for the first reading of the reform of par 218 of the German criminal code by various parties and groups.[11]

1 The social-liberal coalition government believed that an abortion performed between the 14th day and the end of the 3rd month of pregnancy should in principle be free of any criminal sanction. After the end of the three-month period, an abortion should be performed only under the following circumstances:

(a) if there was a serious danger to the life or health of the mother; or
(b) if, within the first 22 weeks of pregnancy, there were definite indications that the child would be born with serious physical or mental defects.

These circumstances had to be established by expert medical evidence. For contravention of the act a term of imprisonment not exceeding three years was laid down, with a fine for an accomplice. Possible exemption from the criminal sanction could be granted to a woman who underwent an abortion under the influence of an extraordinary compulsion or attempted to undergo an abortion while under such compulsion.

2 Twenty-seven government members of parliament presented their own draft. In principle abortion should not be permitted, except in the case of certain extended circumstances or indicatives, ie

(a) medical evidence of serious danger to the life or health of the woman;
(b) definite signs of physical or mental damage to the child;
(c) rape, although only within the first 22 weeks of pregnancy;
(d) if the woman was, as it were, in an emergency[12] owing to certain social or economic pressures.

The procedure involved was simpler than that proposed by the government. Only two medical doctors had to be consulted. For contravention of the statute, a term of imprisonment not exceeding five years was laid down, although only for an accomplice. The woman involved was to be granted exemption from the criminal sanction, as it was felt that she had acted only under the impulse of a serious conflict.[13]

3 The Christian Democratic opposition party was also opposed to abortion in principle. The only exceptions they allowed were to be:

(a) the medical circumstances, and
(b) ethical or criminal circumstances,
(only within the first twelve weeks of pregnancy).

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[11]See Concepte *Abtreibungsreport* no 2 February 1975 at 46.
[12]"Notlage".
[13]Compare Packer's view supra.

Three medical experts had to give a decision in writing. A term of imprisonment not exceeding five years could be imposed for contravention of the statute. The woman and the doctor involved would be granted exemption from the criminal sanction if the woman acted as a result of an extraordinary compulsion.

4 A further twenty-seven opposition members were in favour of a more restricted rule: in principle abortion should not be allowed except where there was a serious threat to the life or health of the mother. (The other procedural terms proposed were similar to those under proposal 3 above).

The debates in parliament, which were regularly televised nation-wide, were stormy. The inevitable conclusion was that many of the participants attempted to make political capital out of a situation which *per se* was larded with emotional conflict.

The following is a brief summary of the proposals which were finally adopted by the German parliament:[14]

1 An abortion may be performed upon a consenting woman by a medical doctor within the first twelve weeks of pregnancy.[15]

2 After a twelve-week period an abortion may be performed if it is necessary to avert a serious risk to the life or health of the mother, but only in so far as the risk cannot be averted by any other means.

An abortion may also be performed after the twelve-week period if there are substantial reasons for assuming that the child, as a result of hereditary factors or harmful pre-natal influences, will suffer irreversible damage to its health. The reasons must be such that the pregnant woman cannot be expected to continue with the pregnancy. No more than 22 weeks may have elapsed since conception.[16] An abortion may be performed only after medical advice has been sought.

This statute accords closely with the *de facto* practice and was welcomed by the majority of the German electorate. The opposition, however, was not satisfied. Adopting the controversial and often politically expedient method of comparing new legislation with the terms of the constitution,[17] it applied to the *Bundesverfassungsgericht* to have the statute set aside on the grounds that it conflicted with article 2 section 2 paragraph 1, read together with article 1 section 1 of the *Grundgesetz*.[18]

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[14]See *Bundesgesetzblatt* 1974 part 1 no 63 1297.

[15]Par 218 a of the *Strafgesetzbuch*.

[16]Par 218 b 1 and 2 of the *Strafgesetzbuch*.

[17]Today almost a rule in the United States. The question is: should the highest court adopt the role of parliamentary guardian? In *Roe v Wade* 12 CLR 3099, the United States supreme court held the Texas criminal abortion laws, which prescribe procuring an abortion except on medical advice for the purpose of saving the mother's life, to be unconstitutional. The court held that a criminal abortion statute that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to the pregnancy stage and without recognition of the other interests involved, violates the "Due Process Clause" of the 14th amendment. The court decided that for the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's physician.

[18]Freely translated article 1 section 1, provides that the dignity of man is inviolable. It is the duty of the state to respect and protect this dignity. Article 2 section 2 paragraph 1 states that the right of every human being to life is protected by the law. The violation of the woman's dignity by being forced to bear an unwanted child is balanced against the right of the foetus' (human being?) to live.

The constitutional court held[19] on 21 June 1974 that the new statute would for the time being not come into operation, but that the final judgment would be delivered later.[20]

It also stipulated certain temporary rules which were to apply in the interim. An abortion performed upon a consenting pregnant woman would not be regarded as criminal if an illegal act had been committed against the woman and substantial reasons existed for accepting that the pregnancy was the result of the illegal act. This situation could arise from:

(a) the sexual abuse of children;

(b) rape; and

(c) the sexual abuse of persons incapable of consent or resistance.[21]

Some four weeks before the official judgment, which was handed down on 25 February 1975 the public was informed by television and radio[22] that the court had upheld the opposition's application and had declared the statute to be unconstitutional.

On 25 February 1975, amid tense expectations and large-scale demonstrations outside the court at Karlsruhe, the judgment (of some 100 pages) was delivered. The prior "leak" had been correct. With a majority of five to three, Germany's highest court upheld the application of the opposition parties, declared the reformed statute to be unconstitutional, and gave certain guidelines to parliament which, in its opinion, could result in a reform of the abortion paragraph which would not conflict with the provisions of the constitution. The essence of the court's judgment was that an abortion "upon demand" within the first twelve weeks, even if it was performed by a medical doctor, would remain subject to criminal sanction. The only exceptions allowed were:

(a) cases where abortion was necessary to protect the life or health of the mother; or where substantial reasons existed for the assumption that the child would suffer from irreparable physical or mental damage, and not more than 22 weeks had elapsed since conception;

(b) cases where pregnancy was the result of a criminal act in terms of paragraphs 176–179 of the criminal code (supra).

It was also held that the courts could refuse to apply a criminal sanction if an abortion had been performed within the first 12 weeks of pregnancy to avert an otherwise non-avertible danger of serious calamity which the woman could not be expected to face. With this exception the court indicated

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[19]*Bundesgesetzblatt* No 64 1309.

[20]The invariable question in such cases is: where does the judicial decision end and the political decision begin? The United States supreme court has partially escaped this dilemma by refusing to review certain constitutional issues where it concluded that the controversies were "political questions". See Chester J Antieau *Modern Constitutional Law* vol 11 (1969) § 15: 28.

[21]Compare paragraphs 176–179 of the *Strafgesetzbuch*.

[22]No doubt as a result of a "leak".

the direction in which future legal reforms could develop to the woman's advantage.

Briefly, the ratio of the majority judgment of the court was as follows:

1 The life developing within the womb of the mother is an independent *Rechtsgut* (protected interest) which is safeguarded by the constitution.[23] The state's duty to protect this interest not only forbids an immediate encroachment upon the developing life but also enjoins the state to protect and succour that developing life.
2 The duty of the state to protect the developing life also exists as against the mother.
3 In principle the protection of the foetus takes precedence over the self-determination of the mother for the duration of the pregnancy; it may not be limited by a certain period.
4 The legislator can show its disapproval of abortion in another manner than through the mandatory application of a criminal sanction. The decisive question will be whether the totality of all other measures results in the actual protection to which the foetus, as a legally-protected interest, is entitled.
5 The continuation of a pregnancy cannot be insisted upon if its termination is necessary to protect the life or health of the mother.

Further, the legislator is bound to take cognisance of other factors as constituting the justification of an abortion if such other factors are in nature of an exceptional burden or calamity that the pregnant woman cannot be expected to face.

Two judges, one of whom was a woman, handed down a dissenting judgment; a third judge dissented independently. The minority opinion held that the entire debate before parliament and the court did not concern the question "whether" to procure an abortion, but the question "when" to procure it. This question was the sole responsibility of the legislator. Under no circumstances did the constitution provide that the state was duty-bound to prohibit the termination of pregnancy regardless of the stage of pregnancy attained. The minority judgment also pointed out that it was not the role of the *Bundesverfassungsgericht* to become a political arbitrator or referee between conflicting legislative proposals, especially if such proposals were highly controversial and had strong political undercurrents.

Further, the minority opinion pointed out that in European legal history, even under the radical influence of canon law, a distinction had always been made between pre- and post-natal life. The constitution, in their opinion, also drew this distinction. If this were not so, there could not logically be any valid reasons for differentiating between ethical, engenic and social circumstances in the termination of pregnancy.

The German minister of justice immediately stated, on behalf of the federal government, that the judgment of the highest court would be respected. The government remained convinced however, that its arguments in favour of a sanction-free period for the termination of a pregnancy remained valid, and felt that its views were substantiated by the minority judgment.

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[23]See footnote 18 supra.

Under no circumstances would the provisions of the old paragraph 218 be resorted to. If necessary, however, a compromise solution would have to be reached together with the opposition within the limits set forth in the judgment of the court. The majority judgment did in fact go beyond the strict terms of the old legislation, and these were welcome indications that the termination of pregnancy could be justified in terms of certain strictly defined social indicatives.

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"The question is not how to punish a man for a crime he has committed, but how society should treat him, so that a repetition of the offence will be prevented. The treatment he is to receive should be dictated by the requirements of prevention and deterrence. To such considerations the moral blameworthiness of the accused is irrelevant and indeed, in the case of mental disorders, is often incapable of resolution."

Stein & Shand *Legal Values in Western Society* 135

Vonnisse

NEW YORK TIMES v CITY OF NEW YORK COMMISSION ON HUMAN RIGHTS (1975) 14 INTERNATIONAL LEGAL MATERIALS 83

Human rights and advertisements for employment in South Africa

The City of New York Commission on Human Rights (the commission) is a statutory body which, as its name connotes, concerns itself with the investigation of alleged discriminatory practices in New York. During the course of its existence the commission doubtless has had many interesting cases to deal with. Of particular interest from a South African point of view is its recently settled legal dispute with *The New York Times* (the *Times*).

A complaint filed with the commission on 12 October 1972 charged the *Times* with aiding discriminatory practices in that it had placed advertisements for employment in the Republic of South Africa in contravention of section B1-7-0 of the Administrative Code. The specific provisions of section B1-7-0 which were allegedly contravened state that it is unlawful for any employer to circulate an advertisement ". . . which expresses directly or indirectly any limitation, specification or discrimination as to age, race, creed, colour, national origin or sex, or any intent to make such limitation, specification or discrimination, unless based on a bona fide occupational qualification."

It is perhaps opportune to mention at this stage that none of the advertisements giving rise to the complaint contained any reference to race, colour or creed. However, upon considering the words "expresses directly or indirectly" the commission held that specification of South Africa as the location of the employment constituted an expression of discrimination. The commission believed the words "South Africa" have come to be commonly understood to be synonymous with white supremacy and were intended to communicate a meaning of discrimination directly or indirectly. Adopting the thesis that the system of "apartheid" practised in South Africa automatically precluded the employment of any black American who would respond to any of the advertisements, the commission construed various acts and statutes of the South African government as in effect requiring a compulsory discrimination in employment. On the basis of the aforegoing the commission, in its order of 19 July 1974, accordingly held that the *Times* had aided and abetted discriminatory acts, and enjoined it from printing any advertisement seeking employees or employment located in South Africa.

Understandably the *Times*, as it was entitled to do, petitioned the New York State supreme court for a review of the commission's findings. In the

course of finding in favour of the *Times* and setting aside the commission's order, Helman J considered the issues involved from different perspectives.

In the first place he found that the *Times* could hardly be charged, from the wording of the advertisement, with evincing an intent, directly or indirectly, to participate in a programme of discrimination. Relying on decisions such as *National Organisation for Women v State Division of Human Rights and Gannett* 40 AD 2d 107 116-7, 338 NYS 2d 570 579 and *National Organization for Women v Buffalo Courier-Express Inc* 71 Misc 2d 917, 337 NYS 2d 608, he was moreover of the opinion that the commission's decision that the publishing of the advertisements rendered the *Times* liable as an aider or abettor could not be sustained since an aider or abettor must share the intent or purpose of the principal actor and there can be no partnership in an act where there is no community of purpose.

In the appropriate circumstances American courts have consistently applied the federal "act of state" doctrine, the gist of which is that a domestic tribunal may not review the act of a foreign government even when that act violates public policy (see e g *Banco Nacional de Cuba v Sabbatino* 376 US 398; *French v Banco Nacional de Cuba* 23 NY 2d 295; and *South African Airways v New York State Division of Human Rights* 64 Misc 2d 707, 305 NYS 2d 651). On the facts before him Helman J found that by its determination the commission in effect was questioning the employment methods and practices of a foreign government. "Economic sanctions", said the judge (at 88), "should be adopted, whenever necessary, on a Federal level and not by a local anti-discrimination agency which at best can only become involved in international problems far removed from the scope of its limited jurisdictions."

The fact that the advertisements made no direct or indirect references to race or colour, combined with the express reluctance of American courts to invade the policies of other nations, were the decisive considerations in the supreme court's decision that the *Times* had not violated any anti-discrimination statutes. A further submission, this one of a constitutional nature, was also advanced by the *Times*. It was argued that the commission's decision and order enjoining publication of any employment advertisements from South Africa violated the First and Fourteenth Amendments to the American constitution since they involved governmental control of decisions of the press as to what may be published. Although a determination of the constitutional question raised by the *Times* was not essential to the court's decision, it nevertheless dealt with the matter and found that employment advertisements were classic examples of so-called "commercial speech" which did not fall within the purview of protection afforded by the First and Fourteenth Amendments (see, inter alia, in this regard *Pittsburgh Press Co v Pittsburgh Commission on Human Relations* 413 US 376, 37 L Ed 2d 669).

To the writer of this note the most salient feature of the *Times* case is the divergent ways in which the commission and the supreme court approached the question of the alleged discriminatory advertisements. The former appears to have ignored the fundamental canons usually applied in Anglo-American legal systems in the interpretation of statutes and handed down what was essentially a moral decision.

It is clear that the conceptions of morality and justice play an important role within the structure of the legal system. Naturally, there are certain areas where the interaction between law and morality is more pronounced than in others. In South Africa, for example, our courts were obliged to take moral considerations into account when applying the Publications and Entertainments Act 26 of 1963 [see eg s 5 and 6 of the act and *Lindberg v Publications Control Board* 1974 4 SA 227 (W); *Brandwagpers (Edms) Bpk v Raad van Beheer oor Publikasies* 1974 3 SA 236 (D), and *Publications Control Board v William Heinemann Ltd* 1965 4 SA 137 (A)], while s 1 of the Publications Act 42 of 1974, which repealed the Publications and Entertainments Act, now provides that in the application of the new act the upholding of a "Christian view of life" must be recognized. The fact remains, however, that our courts are basically courts of law and not of morality (Hahlo and Kahn *The South African Legal System and its Background* 23). Their attitude is, I believe, correctly reflected in the statement of Gutsche J in *R v K and F* 1932 EDL 71 at 77 who said: "The courts are not *custodes morum populi* in the sense that they do not administer the moral but the judicial law . . ." The decision of the New York supreme court in the *Times* case suggests that courts in America approach the issue on similar lines.

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LOUW v M J & H TRUST (PTY) LTD 1975 4 SA 268 T

Kontraktuele aanspreeklikheid van minderjarige – Estoppel

Die kontraktuele aanspreeklikheid van 'n minderjarige het weer in hierdie beslissing ter sprake gekom. L was 'n minderjarige wat 'n motorfiets by M gekoop het. By kontraksluiting was hy 20 jaar oud. M se bestuurder was daarvan bewus maar L het hom redelikerwys laat glo dat hy geëmansipeerd was (270H), wat hy nie was nie. L eis restitusie op grond van sy minderjarigheid tydens kontraksluiting (269B). M verweer dat L gebonde moet wees, en stel 'n teeneis in weens skade aan die fiets, wat teruggegee is nadat L repudiasie gepleeg het, asook vir die betaling van twee agterstallige paaiemente.

Die belangrike vraag wat beantwoord moes word, is of L weens sy bedrog aan die kontrak gebonde is. R Eloff bespreek die Suid-Afrikaanse gewysdes wat betrekking het op hierdie onderwerp, nl *Edelstein v Edelstein* 1952 3 SA 1 (A); *J C Vogel & Co v Greentley* (1903) 24 NLR 252; *Cohen v Sytner* (1897) 14 SC 13; *Auret v Hind* 4 EDC 283; *Pleat v Van Staden* 1921 OPD 91; *Fouche v Battenhausen & Co* 1939 CPD 228 (270 ev). *Pleat* se saak word in detail bespreek en die gemeenregtelike gesag wat daarin voorkom, word ook ondersoek. Die meerderheid daarin van sê alleenlik dat 'n minderjarige wat homself as meerderjarig voordoen, nie meer op restitusie aanspraak kan maak nie. Alleen *Voet* (4 4 43 en 27 9 13) trek dit deur dat die minderjarige wat so optree nie alleen sy aanspraak op restitusie verloor nie maar ook aan die kontrak gebonde is. Die regter konkludeer (273F):

"Summarising then, the only Roman-Dutch or Roman law authorities which seem to support the contention reached in *Pleat's* case is the passage of doubtful validity from *Voet*, 27 9 13. Nor is there any authority . . . which says that a minor's contract is valid in the circumstances under discussion."

Die regter beskou die kontrak as ongeldig. "As is pointed out by Wessels in *The Law of Contract in South Africa* 2nd ed par 831, if one were to consider his contract to be valid if induced by his fraud one places it in the power of the minor to bind himself effectively by his contract. To permit this will frustrate the motivation of the rule rendering a minor's contract invalid" (273G). As oplossing stel r Eloff voor dat so 'n minderjarige op grond van onregmatige daad aangespreek moet word.

Met respek kan daar nie met hierdie beslissing saamgestem word nie. Eerstens is 'n kontrak wat 'n minderjarige sonder die bystand van sy ouer of voog gesluit het nie ongeldig nie. Indien dit die geval was, sou dit nie vir die minderjarige moontlik gewees het om later die kontrak te ratifiseer nie. In die normale geval van 'n minderjarige wat sonder bystand van sy ouer of voog 'n kontrak sluit, ontstaan daar 'n natuurlike verbintenis. Hoewel prestasie nie van die minderjarige afgedwing kan word nie, bestaan daar wel 'n band tussen die partye.

Tweedens is die regter inderdaad korrek waar hy sê dat die betrokke gesag nie oor gebondenheid handel nie, maar alleen oor restitusie. Maar dan moet die vraag gestel word of restitusie nie sodanig verbonde is aan die kontrak wat 'n minderjarige sonder bystand van sy ouer of voog sluit nie dat, indien dit afwesig is, die minderjarige inderdaad aan die kontrak gebonde sal wees. Die belangrikste kenmerk van die natuurlike verbintenis wat met 'n minderjarige aangegaan is, hetsy met of sonder toestemming van sy ouer of voog, is dat 'n eis vir restitusie ter beskikking van die minderjarige is. Die doel hiervan is duidelik: die minderjarige moet sover moontlik beskerm word teen sy eie gebrekkige oordeel. Die oordeel van die ouer of voog is nie noodwendig volmaak nie. Vandaar dat 'n minderjarige ook nadat hy mondig geword het, restitusie kan aanvra. Indien restitusie nou wegval, is daar geen ander wyse vir die minderjarige om hom van die gevolge van sy kontrak te ontdaan nie. Indien die beskermingsmiddel wegval, val die beskerming in feite ook weg omdat daar geen ander middel is waardeur dieselfde resultaat bereik kan word nie. Omdat hierdie tiperende kenmerk van 'n kontrak met 'n minderjarige nou wegval, is dit nie onlogies om te aanvaar dat so 'n persoon dan inderdaad aan die kontrak gebonde is nie.

In hierdie beslissing het die minderjarige restitusie gevra en deur te beslis dat hy nie aan die kontrak gebonde is nie, word restitusie feitelik toegestaan hoewel r Eloff uitdruklik sê dat L deur sy bedrog nie daarop aanspraak kan maak nie (274D-E). Die restitusie is daarin geleë dat L van die gevolge van sy kontrak onthef is.

'n Verdere rede waarom L in hierdie geval aanspreeklik moes gewees het, is dat daar ook voldoen word aan die vereistes van estoppel, hoewel dit nêrens in die beslissing na vore kom nie. Daar is 'n wanvoorstelling omtrent die kontraktuele bevoegdheid van L gemaak. Hy het skuld gehad in die vorm van opset. As gevolg van hierdie skuldige wanvoorstelling is daar 'n kontrak gesluit wat anders nie gesluit sou gewees het nie. Die kontrak is

verder nadelig in die sin dat M twee paaiemente verloor, asook rente op finansiering. Hierdeur kan L verhinder word om hom op die ware toestand te beroep – hy moet soos 'n geëmansipeerde aan die kontrak gebonde wees. Die minderjarige se handelingsbevoegdheid word gefingeer.

Regspolities is so 'n standpunt verkieslik. Soos De Wet & Yeats *Kontraktereg & Handelsreg* (3e uitg) 4 tereg aantoon: indien die minderjarige reeds so 'n leeftyd bereik het dat hy hom as meerderjarig kan voordoen en deur sy bedrog sy beskerming verwerp, moet eerder hy as 'n onskuldige party die nadeel dra. Die beskerming bestaan immers om die minderjarige teen sy eie swak oordeel te beskerm, en nie om hom in staat te stel om straffeloos te bedrieg nie.

PIETER PAUW
Oegstgeest, Nederland

EX PARTE NADER 15 MEI 1975 (O)

(Ongerapporteerde beslissing 306/75 van 15 Mei 1975 (0)) – Locus standi in iudicio *tov minderjariges* – Aequitas – *Toestemming tot operasie*

Interessante regsprobleme kom na vore in die saak van *Ex parte Nader*. Hier kry mens 'n duidelike toepassing van die *aequitas* in die positiewe reg. Dit is net jammer dat mosieverrigtinge gewoonlik nie hul weg tot die hofverslae vind nie, want sonder dat daar 'n volledig beredeneerde uitspraak gegee word, word regsreëls om billikheidsredes getemper en aangepas.

Die feite in hierdie saak was soos volg: 'n Veertienjarige dogter ly aan akute blindedermontsteking. 'n Appendektomie moet dringend op haar uitgevoer word om haar lewe te red of om blywende gesondheidsbenadeling te voorkom. Die dogter se ouers is geskei toe sy ongeveer vier jaar oud was. Aan haar vader is die uitsluitlike beheer en voogdy oor haar deur die hof toegeken. Sy is sedert die egskeiding deur haar vader in die sorg en beheer van N gelaat. N het na haar omgesien asof sy sy eie kind was. Hy het haar voorsien van kleding, onderdak, voeding en mediese dienste (soos byvoorbeeld medisyne vir verkoue, ensovoorts). N kon egter nie die nodige toestemming tot die appendektomie verleen nie. Hy is nie die kind se natuurlike voog of haar juridiese voog nie. Trouens tussen hom en die kind het daar geen juridiese verhouding bestaan nie. (Strauss en Strydom *Die Suid-Afrikaanse Geneeskundige Reg* (Pretoria 1967) 193. Sien ook E Spiro *Law of Parent and Child* (3e uitg Kaapstad 1971) 41-43 en 101.) Toe N nie die vader kon opspoor om die nodige toestemming te verleen nie, wend hy hom tot die moeder van die kind (Strauss en Strydom a w 194). Sy weier egter om die nodige toestemming te verleen – selfs nadat sy meegedeel is dat die operasie geen uitstel gedoog nie. Uit die stukke voor die hof blyk dit verder dat die huisdokter nie die kind kon of wou laat opneem in die hospitaal sonder die nodige toestemming nie.

N wend hom nou tot sy prokureur wat deur middel van 'n advokaat die hele aangeleentheid by wyse van 'n dringende mosie aansoek aan 'n regter

in kamers voorlê. 'n Dringende aansoek word dus gerig aan die hooggeregshof as oppervoog van alle minderjarige kinders om die nodige toestemming tot hierdie noodsaaklike en dringende geneeskundige ingreep. Die hof verleen ook dan, by monde van regter Lucas Steyn, die nodige toestemming dat die ingreep op die kind uitgevoer mag word.

Met betrekking tot hierdie feitekompleks doen drie juridiese probleme of vrae sig voor. Die eerste is die aangeleentheid van *locus standi in iudicio*. Die tweede is dié van die jurisdiksie van die hof. Die derde is dié van die bepalings van artikel 20(7) van die Kinderwet, 33 van 1960.

Dit is 'n gevestigde reël van ons reg dat minderjariges (en seer sekerlik persone wat veertien jaar oud is en wat nie in staat is om 'n beëdigde verklaring af te lê nie) geen *locus standi* het om deel te neem aan die verrigtinge van 'n geregshof nie. Hulle moet in hierdie verband bygestaan word deur hul ouers of voogde.(J T R Gibson *Wille's Principles of South African Law* (6e uitg Kaapstad 1970) 78-79; Herbstein en Van Winsen *The Civil Practice of the Superior Courts in South Africa* (2e uitg Kaapstad 1966) deur L de V van Winson en J D Thomas in samewerking met A C Cilliers 142 en 146.) In die feitekompleks hierbo geskets, het die applikant, N, geen *locus standi* gehad om vir en namens die kind hierdie aansoek tot die hof te rig nie Hy is slegs die persoon met die feitlike beheer en toesig oor die kind. Volgens die reëls van die objektiewe reg bestaan daar geen regsband tussen hom en die minderjarige nie (Strauss en Strydom a w 193). Volgens die bestaande reëls van die personereg en ook die burgerlike prosesreg, kon N nie vir en namens die kind hierdie aansoek tot die hof rig nie. Hy het geen *locus standi in iudicio* in hierdie verband nie (Gibson a w 78-79; Herbstein en Van Winsen a w 142-144). Al persoon wat volgens die reëls van die objektiewe reg wel *locus standi* het, is die vader van die kind en moontlik ook die moeder indien die vader nie beskikbaar is nie (Strauss en Strydom a w 194). Nogtans het die hof tog die aansoek aangehoor alhoewel die applikant oënskynlik geen *locus standi* in hierdie aangeleentheid het nie.

Die enigste logiese afleiding wat mens uit hierdie situasie kan maak is dat die hof die *locus standi* gebaseer het op feitlike voogdy. Die applikant het *locus standi* om vir en namens die minderjarige deel te neem aan hofverrigtinge bloot uit hoofde van sy feitlike voogdy. Omdat juridiese voogdy nie gebruik kon word as basis vir die applikant se *locus standi* nie, is gebruik gemaak van feitlike voogdy. So 'n benadering bevredig dan ook die regsgevoel. Dieselfde probleem kan ook kop uitsteek in die volgende situasie: A, 'n minderjarige van drie jaar se ouers word op 'n nalatige wyse in 'n motorbotsing gedood deur die toedoen van 'n derde. A sou nou onderhoud kan eis van die derde, of andersins dan van sy derdepartyversekeraar (in terme van die Motorvoertuigassuransiewet, 56 van 1972). Gestel dat daar geen nabye familie van A leef nie. Vir en namens hom moet nou opgetree word deur 'n *curator ad litem* wat vir hierdie doel deur die hof aangestel word. Weens A se tenger ouderdom kan hy tog nie self die nodige beëdigde verklarings aflê in die hofproses wat die aanstelling van 'n *curator ad litem* noodwendig vooraf gaan nie. Iemand sal dit vir en namens hom moet doen. Wie is in 'n beter posisie as diegene wat die de facto beheer en toesig oor A het? (Vgl Herbstein en Van Winson a w 145.)

Omdat mens in situasies soos *Ex parte Nader* te doen het met mosieverrigtinge, gee die regter, weens die dringendheid van die aansoek, natuurlik geen geskrewe en beredeneerde uitspraak nie. Die aansoek word slegs toegestaan sonder uiteensetting van die redes daarvoor. Die reëls van ons reg maak oënskynlik nie voorsiening vir situasies soos hierbo geskets nie. Tog word die probleem bevredigend opgelos deur eenvoudig gebruik te maak van die *aequitas*. Die regter tree blykbaar soos 'n egte *praetor* op deur op die gestrenge reg (*stricti iuris*) 'n verbetering aan te bring.

Die tweede probleem waarvoor die juris te staan kom in 'n feitesituasie soos dié van *Ex parte Nader* is die probleem van die hof se jurisdiksie. Alle minderjariges volg gewoonlik die domisilie van hul vader (Spiro a w 124). In die geval van egskeidings volg hul die domisilie van die ouer onder wie se uitsluitlike beheer en toesig hul deur die hof geplaas is (*ibid*). In die feitekompleks van *Ex parte Nader,* volg die minderjarige dogter die domisilie van haar vader. Sy domisilie ten tyde van die mosieverrigtinge was Pretoria. (Hierdie feit blyk nie uit die hofstukke nie, maar is aan die skrywer meegedeel deur die advokaat.) Dus sal die dogter se domisilie ook Pretoria wees en moet die Transvaalse hooggeregshof jurisdiksie hê en nie die hooggeregshof van die Oranje-Vrystaat nie. Onthou moet word dat N slegs vir en namens die kind optree in welke geval gekyk moet word na die hof wat jurisdiksie oor die kind het en nie na die hof binne wie se jurisdiksie N self val nie. (N tree as't ware as "verteenwoordiger" van die kind op. Kyk ook a 19 van die Wet op die Hooggeregshof, 59 van 1959.)

Indien die regter voor wie die aansoek dien, sou weier om die aansoek aan te hoor op grond daarvan dat hy nie oor die nodige jurisdiksie beskik nie, sou die kind permanent en ernstig benadeel word. Weens die afstand sou 'n aansoek tot die Transvaalse Hooggeregshof 'n uitstel van die ingreep vir so 'n tyd verg wat eenvoudig weens die dringendheid van die siekte nie gedoog kon word nie. Weereens het die regter hom laat lei deur billikheidoorwegings sonder om hom veel te steur aan algemeen geldende reëls van die objektiewe reg.

In die derde plek blyk dit nie duidelik uit die hofstukke of N se regsverteenwoordigers, asook die betrokke geneeshere (die huisarts en die chirurg), hulself vergewis het van die bepalings van artikel 20(7) van die Kinderwet nie. Hierdie artikel lui as volg:

> "Indien die superinetendent van 'n hospitaal van mening is dat 'n operasie of mediese behandeling noodsaaklik is om 'n persoon onder die leeftyd van een en twintig jaar se lewe te red of om hom van 'n ernstige en blywende liggaamlike letsel of gebrek te vrywaar en dat die noodsaaklikheid van die operasie of mediese behandeling so dringend is dat dit geeen uitstel gedoog om die persoon te raadpleeg wat wettiglik bevoeg is om toestemming tot die operasie of mediese behandeling te verleen nie, dan kan bedoelde superintendent, nadat hy die mening van 'n ander geneesheer verkry het, die nodige toestemming verleen."

Uit die beëdigde verklarings is dit nie duidelik of daar wel gepoog is om gebruik te maak van die magte van die hospitaalsuperintendent in situasies soos hierbo beskryf nie. Trouens dit kom voor asof die teendeel eerder blyk. Artikel 20(7) van die Kinderwet is op die wetboek geplaas om juis voorsiening te maak vir situasies soos dié wat in *Ex parte Nader* die kop

uitgesteek het. Al wesenlike probleem met die bewoording van artikel 20(7) is dat die begrip "superintendent van 'n hospitaal" eng omskryf is. Omvat "superintendent" ook 'n "adjunk-superintendent" of 'n "waarnemende superintendent"?

'n Verdere probleem wat kan voortvloei uit *Ex parte Nader* is dié van koste. Indien die hospitaalsuperintendent wel beskikbaar was om die nodige toestemming in terme van artikel 20(7) te verleen, maar hy nooit genader is deur N of sy regsverteenwoordigers nie, kan daar van die kind se vader verwag word om die koste van die hele regsproses te dra? In plaas daarvan om gebruik te maak van 'n relatief eenvoudige en goedkoop administratiewe prosedure is 'n hele hofproses aan die gang gesit deur N (of in elk geval sy regsverteenwoordigers). Blote billikheid vereis tog dat N en sy regsverteenwoordigers die goedkoper en eenvoudiger prosedure moes probeer volg. Aangesien daar 'n lasgewingsooreenkoms tot stand gekom het tussen N en sy prokureur kon hy sekerlik van hom verwag om gebruik te maak van die eenvoudige en goedkoop administratiewe maatreël. Die regsverteenwoordigers van N sou hul van hul lasgewingsooreenkoms gekwyt het deur by N aan te beveel om gebruik te maak van die prosedure neergelê in artikel 20(7). Indien hierdie prosedure nie slaag nie, moes hy 'n hofaansoek in hierdie verband doen. Sou hierdie regsverteenwoordigers die koste van die hofproses op N kan verhaal terwyl hul nie eers probeer het om van die goedkoper, eenvoudiger en vinniger administratiewe prosedure by wetgewing neergelê gebruik te maak nie? (Vgl A C Cilliers *Law of Costs* (Durban 1972) 42, 54 en 204; G H Randell en K C Bax *The South African Attorneys Handbook* (2e uitg Durban 1968) 85-89.)

Ex parte Nader laat heelwat regsprobleme op die voorgrond tree. In die eerste plek is daar die probleme rondom *locus standi* en die jurisdiksie van die hof. Tweedens doen die oënskynlike oorsig van die bepalings van die Kinderwet en die onnodige koste van 'n hofproses sig voort. Laastens ontstaan die vraag of die begrip "superintendent" in artikel 20(7) van die Kinderwet nie te eng is nie.

Ten slotte moet ook gewys word op die moontlike rol wat die geneesheer kan speel in feitesituasies soos dié van *Ex parte Nader*. Twee regsfigure kan hier ter sprake kom, naamlik dié van saakwaarneming en noodtoestand (Strauss en Strydom a w 237 e v). In die eerste plek kan geargumenteer word dat die geneesheer hierdie dringend noodsaaklike ingreep kan uitvoer op grond van saakwaarneming. Die persoon wat die nodige regsgeldige toestemming kan gee, is afwesig en 'n handeling word verrig om hierdie persoon se belange te beskerm. Dit gaan egter nie net om 'n belangebeskerming van die vader nie, maar ook 'n belangebeskerming van die kind self en moontlik nog ook dié van die persoon met die de facto beheer en toesig oor die kind. Wie se belange neem die geneesheer nou eintlik waar? Is dit die belange van die persoon met die juridiese voogdy oor die kind, die belange van die kind self, die belange van die persoon met die feitlike voogdy oor die kind of is dit 'n mengsel van die drie? Waar kom die moeder van die kind in die prentjie? Dit kan nie van die geneesheer wat 'n leek is op die gebied van die reg verwag word om handelend op te tree in so 'n onsekere situasie nie.

Dieselfde onsekerheid tref mens aan indien die hele aangeleentheid oor die boeg van noodtoestand gegooi wil word. Die bedreiger en die bedreigde is een entiteit en het mens hier te doen met 'n onmiddellik dreigende gevaar? Teen wie se belang word ingedruis? Mens kan ook nie verwag dat die leek op die gebied van die reg die geneeskundige ingreep sal uitvoer sonder dat hy seker is dat daar wel deeglik 'n jurisdiese regverdiging daarvoor bestaan nie.

Hoewel mens nie redelikerwys van die geneesheer kan verwag om sonder die nodige toestemming 'n ingreep op 'n minderjarige uit te voer nie omdat die gemeenregtelike regverdigingsgronde vir so 'n ingreep vir hom as leek op die gebied van die reg "vaag" is, kan mens tog van hom verwag dat hy vertroud moet wees met die bepalings van artikel 20(7) van die Kinderwet. Die bepalings van hierdie artikel staan in noue verband met sy professionele bedrywighede en dit is heeltemaal redelik om te verwag, of selfs te vereis, dat 'n geneesheer op hoogte moet wees van daardie regsreëls, gemeenregtelik sowel as wetteregtelik, wat direk met sy beroepsuitoefening in verband staan.

Ex parte Nader toon 'n aantal belangrike leemtes in ons reg aan. Terselfdertyd is hierdie beslissing ook 'n duidelike illustrasie van die praktiese aanwending van die *aequitas* deur ons howe. Hierdie beslissing, wat as blote mosie verrigtinge, waarskynlik nie die eer sal hê om in die hofverslae te figureer nie, is, in sy geheel gesien, 'n positiewe bydrae tot die uitbouing en verbetering van die hedendaagse Romeins-Hollandse reg. Het dit nie miskien tyd geword dat die opstellers van die hofverslae meer aandag gee aan mosieverrigtinge nie?

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PITLUK v LAW SOCIETY OF RHODESIA 1975 2 SA 21 (R AD)

Prokureur – Wangedrag – Sessie van kostebevel.

Hierdie uitspraak is gelewer in 'n appèl teen 'n bevel van regter Beck in die algemene afdeling dat respondent vir nege maande geskors word om te praktiseer as prokureur, notaris en aktevervaardiger weens onprofessionele gedrag. Die bevel word in die uitspraak bekragtig deur die Rhodesiese appèlhof.

Die aansoek van die prokureursorde berus op drie gronde:

1. Versuim aan die kant van die prokureur om 'n onderneming teenoor 'n prokureursfirma na te kom en nalatigheid in die beantwoording van briewe van daardie firma. Regter Beck bevind dat hierdie aantyging bo redelike twyfel bewys is.

2. Die feit dat respondent sessie geneem het van sy kliënt van enige kostebevel wat moontlik ten gunste van sy kliënt gemaak mag word.

3. Respondent het versuim om die belange van sy kliënt behoorlik te behartig, hy het sy kliënt se saak nie openlik en eerlik gevoer nie, sy optrede

was beuselagtig en ergerlik, en hy het onnodige litigasie veroorsaak wat 'n verspilling van koste meegebring het. Daar word bevind dat hierdie aantyging geregverdig is.

Die hof het besondere aandag bestee aan die aantyging dat die sessie van die kostebevel op onprofessionele gedrag neerkom. Die redes waarom die prokureursorde dit as sodanig beskou, word soos volg aangegee:

"(a) The attorney would acquire in the outcome of the suit a personal financial interest which he would not otherwise have had, with the following consequences:

(i) his objectivity in the conduct of the case is likely to be impaired;

(ii) unprofessional actions to ensure success in the case may be promoted;

(iii) the duration of the case may be undesirably prolonged;

(iv) out-of-court settlements might be discouraged.

(b) The other party to the suit might be deprived of a right of set-off.

(c) Such an arrangement falls little short of champerty.

(d) The attorney is placed in a position where he may, most undesirably become a party to the litigation. (In the instant case the respondent,after filing his affidavit revealing that the right to the costs had been ceded to him, found himself joined with his client as a respondent in the appeal that was noted.)" (Bladsy 24A).

Die regter bevind dat daar wel omstandighede kan wees waar bogenoemde moontlikhede na vore sal kom en dat sodanige optrede om daardie rede ongewens is. Wat (b) betref, verwys die regter na die onlangse uitspraak in *L T A Engineering Co Ltd v Seacat Investments* (*Pty*) *Ltd* 1974 1 SA 747 (A) waar beslis is dat 'n sessionaris geen beskerming geniet waar hy party is tot 'n sessie wat daarop gemik is om die skuldenaar sy teeneis te ontneem nie. Die vraag ontstaan of sodanige sessie enigsins geldig is (1974 *THRHR* 351) maar ongelukkig gee regter Beck nie hierop 'n antwoord nie en bevind hy slegs dat dit oneties is vir 'n prokureur om sodanige sessie te neem.

Die respondent het aangetoon dat hy sy leerlingskap in Johannesburg gedoen het en dat sodanige sessies algemeen voorgekom het. Voorts het hy aangevoer dat dit ook in Rhodesië praktyk is en dat geen kennisgewing deur die prokureursorde uitgestuur is waarin sodanige sessies afgekeur word nie. Daar word ook verwys na die feit dat die prokureursorde in Suid-Afrika nooit opgetree het teen persone wat van hierdie praktyk gebruik maak nie. Regter Beck aanvaar die respondent se *bona fide* geloof dat wat hy gedoen het heeltemal geoorloof was. Die feit dat die prokureursorde in Suid-Afrika skynbaar nie beswaar daarteen het nie en die afwesigheid van duidelike gesag daarteen steun respondent se bewerings. In die lig hiervan meen die regter dat dit onbillik sal wees om respondent te sensureer en daarom sal die sessie vir die bepaling van sy straf heeltemal buite beskouing gelaat word. Die volgende uitlating van die regter verskaf probleme aan beoefenaars van die beroep in Rhodesië en vanweë die terloopse verwysing

na die posisie in Suid-Afrika, behoort dit ook invloed in Suid-Afrika te hê. Op bladsy 26F: "Henceforth however, the taking of such cession will be seriously viewed by this Court and, in saying this, I have the support of my Brethern with whom I have discussed this matter".

Hoofregter Beadle wys daarop dat die respondent vantevore deur die hof aan onprofessionele optrede skuldig bevind is en dat hy voorts sterk beinvloed is deur die feit dat respondent in die verhoorhof gelieg het. Laasgenoemde optrede word in 'n baie ernstige lig beskou en, aangesien die regter die straf wat in die verhoorhof opgelê is as baie lig beskou, beveel hy dat appellant die koste sal dra. Hy bevestig die houding van die verhoorhof ten opsigte van die sessie: "I mention this complaint merely to say that this Court endorses the views there expressed by the trial Judge, namely that in future the taking of cessions of this sort will be seriously viewed by the Courts" (bl 31A).

Kortliks kan gewys word op enkele interessante aspekte van sodanige sessies wat nadere ondersoek verdien:

1. Dit word nie as champerty beskou nie, maar as optrede wat daaraan grens. (Bladsy 24 van die verslag; in *East London Municipality v Halberd* 1884 SC 140 beskou regter Smith dit wel as champerty).

2. Sessie is 'n oordragshandeling en die oordrag geskied suiwer deur ooreenkoms, gewoonlik word met sessie die oordrag van vorderingsregte bedoel. (Nienaber 1964 *Acta Juridica* 101.) Die ooreenkoms waardeur die reg oorgedra word, word as saaklike ooreenkoms getipeer (Nienaber 1964 *Acta Juridica* 104; De Wet en Yeats *Kontraktereg en Handelsreg* 7) en as sodanig moet dit voldoen aan al die vereistes waaraan enige ooreenkoms moet voldoen. Dit beteken, onder andere, dat die ooreenkoms nie in stryd met die openbare belang of *contra bonos mores* moet wees nie. (Wessels *Law of Contract* par 480 e v; De Wet en Yeats a w 76.) Hierbo is terloops verwys na die vraag of daar in sodanige gevalle sprake kan wees van 'n geldige sessie. In die Nederlandse reg word 'n saaklike ooreenkoms wat *contra bonos mores* is, as ongeldig beskou (Asser Beekhuis *Nederlands Burgerlijk Recht* 153). Voet 2 14 18 *De Pactis*: "*Turpibus insuper conventionibus adnumeratum, quoties de quota litis cum cliente paciscitur causarum patronus. Licet enim de lite dubia inter actorem reumque transactio permissa sit; eo quod ita dissidio finis imponitur, & a iurgio receditur; tamen, cum turpes litium alienarum redemtiones odiose censeantur, ac reprehendendae*"; Grotius 3 1 41 en Sande *De Cessione Actionum* 4 13: "*Advocatis quoquo & procuratoribus sub pactione certae partis: puta, quartae, tertiae, dimidae, actiones cedi jura vetant: adeo ut iis, qui insuper habita hac prohibitione sub nomine honorariorum alienam litem contra bonos mores redemerint, tanquam depraedatoribus interdicant advocationibus & foro*" en 4 20: "*Verum omnino, ut ante dictum est, abstinere debent advocati a pactione redimendae litis aut consequendi quotum aliquam ejus, quod ex ea lite dabitur. Ejusmodi enim redemptio litis bonis moribus adversatur, & calumniae sive vexationis emptio plerumque est potius; quam juris, ac ERGOLABIA mera, ut inquit Jacobus Cajucius, lib* 8 *obs cap* 31" keur hierdie optrede af.

Dieselfde passasies is al aangehaal om aan te toon dat champerty nie vreemd aan ons gemene reg is nie (*Holland v Zietsman* 1885 NLR 93; *Hugo*

and Moller v The Transvaal Loan, Finance and Mortgage Company 1894 OR 336). In *Hollard v Zietsman* (supra) word dit ook gebruik om aan te toon dat hierdie afkeurenswaardige optrede nie tot advokate en prokureurs beperk was nie. Dit is duidelik dat in hierdie passasies wel 'n aanknopingspunt is vir die stelling dat champerty nie vreemd aan ons gemene reg is nie, maar veral Voet en Sande het primêr onprofessionele optrede van die prokureur of advokaat in gedagte. Sande sê duidelik dat sodanige ooreenkomste *contra bonos mores* is en dat advokate en prokureurs hulle daarvan moet weerhou. Hieruit kan die afleiding gemaak word dat die ooreenkomste as ongeldig beskou moet word. Hy voeg daaraan toe dat hulle van die rol geskrap moet word en dit wil dus voorkom asof geen gevolg aan die ooreenkoms gegee is nie èn dat die oortreder van die rol geskrap is. Voet verwys na sodanige ooreenkomste as *turpibus conventionibus* en verwys ons na die gewoonte van sy tyd dat advokate en prokureurs 'n eed moes aflê dat hulle hulle nie aan sodanige gedrag skuldig sou maak nie.

In vroeëre beslissings is die houding ingeneem dat ooreenkomste waardeur prokureurs sessie verkry van die regte van hulle kliënte in stryd met die openbare belang is (*East London Municipality v Halberd* supra; *Incorporated Law Society v Reid* 1908 SC 612).

Dit wil voorkom asof dit later vir prokureurs praktyk geword het om sessie van kostebevele van hulle kliënte te neem. (*Haine v Podlashuc and Nicholson* 1933 AD 104; *Lovell v Paxinos and Plotkin; In re Union Shopfitters v Hansen* 1937 WLD 84; *Industrial Finance & Trust Co v Schneider London* 1925 WLD 92; *Schoeman v Thompson* 1927 WLD 298; *Baskin & Barnett v Barnard* 1928 CPD 58; *Barnabas v Govender* 1928 NPD 260; *Allen v Duke* 1954 1 SA 213 (N); *Schreuder v Steenkamp* 1962 4 SA 74 (O); *Van Aswegen v Pienaar* 1967 3 SA 677 (O).) In geen van hierdie beslissings word die geldigheid van die sessies aangeveg op grond van die feit dat dit deur 'n kliënt aan 'n prokureur gemaak is nie. Dit is ook nie altyd duidelik of die prokureur aan wie sedeer word die kliënt se verteenwoordiger in die betrokke geding is nie. In die meeste gevalle, hierbo genoem, word slegs die kostebevel sedeer en die vraag ontstaan of dit uitsluitlik daartoe beperk word.

Onder ooreenkomste in stryd met die openbare beleid behandel *Wille's Principles of of South African Law* (6e uitg deur J T R Gibson (1970) 32) "an agreement between the plaintiff and his attorney that the latter should, in consideration of his professional services, receive half of the proceeds of the action, . . . or all of the proceeds . . ."

'n Sterk argument wat aangevoer kan word waarom sodanige sessies as ongeldig beskou moet word, is te vinde in die redes wat die prokureursorde aanvoer waarom hulle dit as onprofessioneel beskou (bl 24A).

4. 'n Sessie van 'n moontlike kostebevel deur 'n kliënt aan 'n prokureur sal beskou moet word as die sessie van 'n *spes*. Dit is wel moontlik mits die korrekte konstruksie daaraan gegee word. (De Wet en Yeats a w 180). Dit beteken dat die kliënt wel kan ooreenkom om te sedeer maar dat die reg eers oorgedra word nadat die kostebevel reeds gemaak is.

5. In beginsel mag die skuldenaar se posisie nie deur die sessie verswaar word nie. Hierdie beginsel lê die verbod op die sessie van 'n gedeelte van 'n

vorderingsreg ten grondslag (Wille and Millin's *Mercantile Law of South Africa* 16e uitg deur J F Coaker en W P Schutz 62). Die sessie van 'n kostebevel moet beskou word as die oordrag van 'n reg wat *ex lege* ontstaan en hou nie met die vonnisskuld verband nie. In *Allen and Others v Duke* 1954 1 SA 213 (N) beslis regter-president Broome dat sessie van 'n kostebevel wel geldig is en dat dit nie neerkom op die sessie van 'n gedeelte van 'n vorderingsreg nie.

Dit is moeilik om te bepaal in watter mate die uitspraak van die Rhodesiese appèlhof die posisie in Suid-Afrika gaan beïnvloed. Dit wil voorkom asof die Suid-Afrikaanse howe sodanige sessies as geldig beskou en nou is dit moielik verklaarbaar hoe dit moontlik is dat dieselfde sessie deur een hof (hooggeregshof van Suid-Afrika) as geldig beskou word en terselfdertyd deur 'n ander hof, (Rhodesiese hooggeregshof) albei met Romeins-Hollandse reg as gemene reg, as oneties en onprofessioneel afgekeur word. Dit blyk uit die meeste uitsprake nie duidelik of die sessie plaasgevind het tussen kliënt en sy prokureur in die betrokke geding nie en ook nie of dit beperk word tot die sessie van 'n kostebevel nie. Dit word aan die hand gedoen dat regsverteenwoordigers hulle in beginsel moet weerhou van optrede waardeur hulle 'n persoonlike belang in die uitslag van 'n geding verkry en aangesien die sessie van kostebevele dit tot gevolg kan hê, (soos aangeduiin die uitspraak, bladsy 24A) word aan die hand gedoen dat dit voortaan as ongeldig beskou sal word, selfs al vind die sessie plaas nadat uitspraak gegee is.

SUSAN SCOTT
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Boeke

HENOCHSBERG ON THE COMPANIES ACT

onder redaksie van sy ed A MILNE

(Derde uitgawe)

Butterworth, Durban 1975; xxi en 1149 bl; prys R43

Soos sy so bekende twee voorgangers, is hierdie omvangryke, aantreklike en redaksioneel goedversorgde werk van groot nut vir diegene wat met die maatskappyereg minstens redelik vertroud is, en na 'n deskundige standpunt en uitvoerige verwysing na gesag oor 'n spesifieke probleem op soek is. In die lig van die talle veranderings wat deur die reeds ook weer gewysigde nuwe Maatskappywet teweeggebring is, kan hierdie herbore bekende vir 'n derde keer staatmaak op 'n hartlike verwelkoming deur regs- en ander praktisyns wat met hierdie afdeling van die reg te doen kry.

Indien u die prys skokkend vind, sal selfs 'n vlugtige besoek aan 'n boekhandelaar, enige boekhandelaar, 'n stewige bydrae tot gelate berusting lewer.

Afgesien van die gebruiklike voorwoord bestaan die werk uit 'n paar verduidelikende aantekeninge vooraf; tabelle waarin die ooreenstemmende artikels van die huidige, die herroepe en die Engelse wette onderskeidelik aangetoon word; 'n opsomming van die hoofstuk- en sub-hoofstukopskrifte en kantskrifte van die 1973-wet; en 'n weergawe van elke artikel, volgens tradisionele patroon telkens gevolg deur kommentaar op die betrokke voorskrif en verbandhoudende gesag. In bylaagvorm word a 381 van die Strafproseswet 56 van 1955 (met aantekeninge daaroor), al die toepaslike regulasies en voorgeskrewe vorms en gelde, en 'n voorbeeld van groeps-finansiële jaarstate aangebied.

Kommentaar op standpunte in 'n werk van so 'n omvang moet uiteraard uiters selektief wees. En waar die keuse natuurlikerwys val op sekere nuwe ontwikkelings waar van die skrywers se standpunte verskil word, moet in gedagte gehou word dat ek reeds waardering vir hierdie nuttige werk betuig het.

'n Opmerking, op hierdie stadium, oor die tyd van verskyning. Die skrywers wys tereg op die wysigings, sommige ingrypend en baie daarvan terugwerkend, wat die nuwe wet en twee van sy bylaes reeds ondergaan het. 'n Hele aantal probleme wat nog deur die wet opgelewer word, is redelik bekend en dit is dus onwaarskynlik dat die wysigingsproses om bestaande probleme uit te skakel afgehandel is. Gevolglik bestaan die wesenlike gevaar van snelle veroudering op kritieke punte.

'n Belangrike innovasie in die nuwe wet was die skepping in a 1 van die beherende/beheerde maatskappyverhouding naas dié van houer/filiaal. Om redes wat daar gelaat kan word, is beide verhoudings sedert die inwerkingtreding van die Maatskappywysigingswet, 1974 op "beheer" gebasseer, ofskoon die onderskeie definisies verskil. Verder is die inherente onsekerheid van die bestaan al dan nie van die beherende/beheerde verhouding in baie gevalle só groot dat dit 'n gevaarlike hoeksteen is om belangrike verbodsvoorskrifte (soos dié in a 37 of a 226) op te skoei. Gevolglik is die voortbestaan van hierdie nuwe verhouding twyfelagtig. Vir die huidige bestaan die verhouding, en speel dit 'n belangrike rol in o m die twee vermelde artikels. Daarom val die skrywers se behandeling van die beherende/beheerde verhouding (24-25) besonder op. In die eerste plek is die toets volgens hulle of die een maatskappy "has exclusive, actual, effectual *legal* power to control the other company in *all its activities* and in *all situations*" (ek beklemtoon). Na my mening dek die eerste gedeelte van die omskrywing van beherende maatskappy juis ook enige vorm van *de facto* beheer. En voordat een maatskappy 'n ander só volledig beheer soos in die ander beklemtoonde sinsnedes in die vooruitsig gestel, sal hy ook bv na willekeur 'n spesiale besluit moet kan deurloods. Selfs die hou van 74 persent van die ekwiteitsaandelekapitaal sal dan nie noodwendig in alle gevalle "beheer" impliseer nie. So 'n resultaat is nie net verrassend nie; dit bots met geval (a) in dieselfde definisie vermeld. Tweedens verklaar die skrywers herhaaldelik dat geen maatskappy meer as een beherende maatskappy kan hê nie. Waar die beheerketting van maatskappye A, B, C en D telkens op meerderheidsekwiteitsaandeelhouding berus, wil dit uit die bespreking voorkom of C as onmiddellik beherende maatskappy van D tegnies as die beherende maatskappy kwalifiseer. Berus die beheerketting egter op die bevoegdheid om direkteure aan te stel of af te dank, lei ek af uit die bespreking dat die tegnies "beherende maatskappy" hoër op in die ketting gesoek kan word. Of dit net B moet wees, en of sover as A, die uiteindelike beheerder, gegaan moet word, kon ek nie aflei nie. Die definisie verklaar uitdruklik dat die beheer "regstreeks of onregstreeks" kan wees, en na my mening is al die maatskappye in die beheerketting af (A, B en C) beherende maatskappye van die laaste skakel (D). D word regstreeks deur C beheer, maar onregstreeks deur A en B. Terloops, in die praktiese sakewêreld met sy toenemende verskynsel van gesofistikeerde maatskappyegroepe maak 'n standpunt soos dié van die skrywers van sê die verbod op lenings aan 'n beherende maatskappy (a 37) 'n onbenulligheid wat geen doel dien nie. Slegs aan een maatskappy in so 'n groep sal die betrokke beheerde maatskappy geen lenings kan maak nie.

Tereg word daarop gewys (op bl 27) dat 'n sekretaris wat 'n regspersoon is in a 1 van die definisie van "beampte" uitgesluit word. As rede word aangevoer dat "beampte" in die wet met verwysing na 'n menslike wese gebruik word, veral vir doeleindes van straf. In der waarheid het hierdie uitsluiting nie slegs die ongeregverdigde immuniteit teen talle strafbepalings vir 'n regspersoon-maatskappysekretaris tot gevolg nie, maar ook dat, om een voorbeeld te noem, lenings aan so 'n sekretaris – in teenstelling met 'n sekretaris wat 'n individu is – vryelik gemaak kan word (a 226). Dit is so dat waar sekretariële dienste deur een van die maatskappye in 'n groep aan die ander gelewer word, sekere van die wet se voorskrifte probleme oplewer

indien so 'n maatskappy soos enige ander sekretaris behandel word. Vrystelling van daardie besondere voorskrifte mag geregverdig wees – maar uitsluiting vir alle doeleindes in die definisie is beswaarlik te verdedig.

Artikel 32 maak voorsiening vir die oprigting van nie slegs 'n publieke en 'n private maatskappy nie, maar ook van 'n maatskappy wat "'n private maatskappy met 'n enkele lid gaan wees". In die praktyk het die vraag ontstaan of hierdie eenman-maatskappy na oprigting sy ledetal mag uitbrei en sodoende 'n "gewone" private maatskappy mag word. In die bespreking (61–62) sou mens kommentaar hierop verwag.

Met die skrywers se oortuiging (63-64, 103-104) dat 'n maatskappy met meer as een hoofdoelstelling geregistreer kan word, kan waarskynlik saamgestem word. Wat mens mis in 'n werk van hierdie aard is 'n indringender bespreking van die wyse waarop die derduisende bestaande maatskappye met hul tipies ellelange reeks doelstellingsklousules deur die nuwe bedeling geraak word. Die feit dat t a v geen maatskappy in die toekoms met vertroue aanvaar kan word dat sy vermoë korrek in sy akte van oprigting weerspieël word nie, word ook nie verduidelik nie.

Een van die interessantste en mees omstrede[1] nuwighede in die wet is a 36, met sy misleidend eenvoudige kantskrif "[h]andelinge *ultra vires* die maatskappy nie nietig nie". Die skrywers se siening dra mildelik tot dié omstredenheid by. Maar laat my dadelik byvoeg dat arrogansie hier nog gevaarliker as gewoonlik is, en dat my bondige kritiek op die skrywers se beskouings met agting gelewer word.

Die skrywers kom nie, soos al gedoen is, tot die gevolgtrekking dat die blote feit dat die derde by die kontrak buite die maatskappy se vermoë 'n lid of 'n direkteur is, nietigheid tot gevolg het nie. Hiermee wil ek met respek saamstem. Maar volgens hul uitleg verleen a 36 geen beskerming nie waar die derde *weet* dat die handeling *ultra vires* die maatskappy is (71); en ofskoon die skrywers dit nie vermeld nie, kan die blote feit dat die derde 'n direkteur is of sê een aandeel in die maatskappy hou, in hierdie verband 'n (soms ongelukkige) rol speel. Of die voorskrif derdes wat weet behoort te beskerm, is een vraag; of dit inderdaad so 'n beskerming verleen, is 'n totaal ander vraag waarop die antwoord na my mening positief is. My kernbeswaar teen die skrywers se standpunt is dat hulle die leerstuk van toegerekende kennis totaal oor die hoof gesien het, en trouens nie eens daarna verwys nie. In der waarheid was dit juis hierdie leerstuk wat die Van Wyk de Vries-kommissie beweeg het om 'n voorskrif te ontwerp wat kennis van die derde irrelevant sal maak (Hoofverslag RP 45/1970 par 27 26). Die gevolg van die skrywers se oorsig is voorspelbaar. Elders in hul werk (127) leer hulle nog steeds dat 'n derde wat met die maatskappy onderhandel geag word op hoogte te wees van die inhoud van o m die akte van oprigting. Behoudens die komplikasie dat 'n maatskappy se vermoë nie meer noodwendig korrek in die akte weerspieël word nie, is die implikasie dat alle derdes "weet" – òf inderdaad òf deur toeskrywing van kennis ingevolge die leerstuk. Die enigste uitweg vir die skrywers sou wees om aan te voer (wat hulle nie doen nie) dat a 36 'n onderskeid tussen werklike en toegerekende kennis noodsaak, dat eersgenoemde relevant is maar dat die leerstuk verval het wat die doelstellings in die akte van oprigting betref. Vir so 'n

onderskeid lewer a 36 (anders as bv a 9 van die Engelse European Communities Act, 1972) kwalik gronde. Steun vir hul standpunt dat derdes wat weet nie beskerm word nie, meen die skrywers daarin te vind dat derdes wat weet dat 'n interne vereiste vir die bestaan van bevoegdheid van 'n maatskappy se verteenwoordigers nie nagekom is nie, nie deur die *Turquand*-reël (wat nie by name genoem word nie) beskerm word nie. Dit is natuurlik 'n ou bekende waarheid – maar een wat nog nooit met die maatskappy se vermoë iets te doen gehad het nie, en uitsluitlik verband hou met die volmag van maatskappyverteenwoordigers en die gebrek aan publisiteit wat 'n kenmerk is van die nakoming van so 'n interne vereiste. So 'n argument het nut by 'n debat oor wat a 36 *behoort* te bepaal, maar dra niks by tot die skrywers se standpunt nie. Ek wil met respek ook van hulle verskil waar hulle beweer dat kennis ter sake is omdat dit 'n *bykomende* faktor sou wees, terwyl a 36 bepaal dat 'n maatskappy-handeling nie nietig is nie *slegs* vanweë die feit dat die maatskappy sonder die nodige vermoë was. Wat die wetgewer basies te kenne gee, is dat hy slegs die vereiste van vermoë of bevoegdheid aan die kant van die *maatskappy* uit die weg ruim, en nie ook die ander tradisionele vereiste dat diegene wat die maatskappy verteenwoordig oor bevoegdheid (volmag) moet beskik nie. Ruimte vir noemenswaardige bespreking ontbreek, maar dit moet vermeld word dat die skrywers nie oorweging gegee het aan die praktiese implikasies van hul standpunt onder bespreking nie. Hoe raak dit die ratifiseerbaarheid (deur die algemene vergadering) van 'n handeling deur sê die direksie waar die handeling buite sowel die vermoë van die maatskappy as die bevoegdheid van die direksie val? Is hierdie ratifiseerbaarheid afhanklik van wat die derde toevallig weet? 'n Derde, om 'n ander implikasie te noem, wat met die maatskappy kontrakteer, word nog steeds geag te weet wat die bevoegdheidsreëling van die maatskappy se *organe* in die konstitusie is. Indien die kontrak 'n belangrike een is en die derde hom van die geldigheid daarvan wil vergewis, sal hy die statute moet nagaan. Maar ofskoon die bevoegdheidsreëling van die direksie en direkteure tipies in die statute verskyn, kan hy nie met die statute volstaan nie. Hy moet daarmee rekening hou dat die akte van oprigting 'n "spesiale voorwaarde" (a 53(a)) kan bevat wat die bevoegdheid van die direksie of individuele direkteure om die maatskappy te verteenwoordig wesenlik raak. Na die akte van oprigting sal so 'n derde dus ook moet kyk; en sal hy ooit kan ontken dat hy geweet het wat die maatskappy se vermoë blykens die doelstellingsklousule was? Die skrywers se standpunt impliseer dus dat juis die derde wat sy kontrak wil beveilig die beskerming van a 36 gaan ontbeer.

Van die verskeie ander opsigte waarin ek nog van die skrywers se vertolking van a 36 verskil, word nog net een genoem. "It can, in practice", beweer hulle (72), "only be where the transaction (or proposed transaction) causes (or may cause) loss to the company, and, thus to the shareholders, that the Court could award damages against the company or the responsible directors (as the case may be) or interdict the company from entering into the proposed transaction". In hierdie enkele sin is daar ernstige aanvegbaarhede oor basiese beginsels. Hoe kan skadevergoeding toegestaan word as die handeling bloot 'n voorgestelde een is wat skade mag veroorsaak? Hoe op aarde kan die skade wat die maatskappy ly regtens as die skade van

die aandeelhouers beskou word sodat die aandeelhouers (blykbaar enige van hulle individueel vir 'n *pro rata* gedeelte) die *maatskappy*, wat juis die skade gely het, vir skadevergoeding kan aanspreek? Die sin impliseer selfs dat aandeelhouers in daardie hoedanigheid die *direkteure* vir hul "skade" kan aanspreek; wat word dan van die maatskappy se skade? Waarom moet 'n voorgenome handeling buite die maatskappy se vermoë waarskynlik skade veroorsaak voordat 'n interdik verleen kan word? Ek meen dit is gebillik om te sê dat stellings soos hierdie werklik verwarrend is.

By die bespreking van die kontraktuele werking van die maatskappy-konstitusie word die tradisionele stelling dat geen persoon anders as 'n lid in daardie hoedanigheid regte uit die statute kan verwerf nie, soos verwag kan word, aangetref (122). Wat ons reg betref is al meermale daarop gewys dat met die konstruksie van 'n beding ten behoewe van 'n derde in dié verband, anders as in Engeland, rekening gehou moet word. Van hierdie moontlikheid maak die skrywers geen melding nie.

Die reeds gewysigde a 76 is nog steeds nie sonder sy probleme nie. Vir doeleindes van moontlike oordrag op die aandelepremierekening word o m voorgeskryf dat 'n bate gewaardeer moet word indien dit teen die uitreiking van aandele verkry word *en geen teenprestasie aangeteken word nie* (a 76(2)). Die beklemtoonde woorde lewer meer vrae op as wat die skrywers se verwysing na *Henry Head and Co Ltd v Ropner Holdings Ltd* (1952) Ch 124 beantwoord (144-145).

Die nuwe reëling ingevolge waarvan toestemming om as direkteur op te tree (a 211) vereis word, is na my mening in sekere opsigte 'n ongelukkige een. Een van die probleme wat daaruit voortspruit is die vraag na die geldigheid van regshandelinge namens die maatskappy van persone wie se aanstelling nie in werking getree het nie omdat sê die registrateur se kennisgewing dat indiening van die toestemming plaasgevind het in die pos verlore geraak het. Hierdie vraag kan vir derdes kritiek wees, en dit is beswaarlik voldoende om die saak af te maak (soos die skrywers op 369 doen) met 'n kursoriese verwysing na a 214 ("gebrek in aanstelling van direkteur en geldigheid van handelinge"). Of a 214 altyd van hulp gaan wees by 'n direkteursaanstelling wat nie in werking getree het nie, is reeds debateerbaar. Verder is die toestemmingsreëling ook op beamptes van toepassing (a 211(6)) terwyl a 214 slegs op die handelinge van 'n gebrekkig-aangestelde direkteur betrekking het. 'n Mens sou 'n veel duideliker bespreking verwag.

Een van die voorskrifte van die wet waar die skrywers se standpunt dat 'n maatskappy slegs een beherende maatskappy kan hê wesenlike implikasies het, is a 226. Hierdie verbod op lenings aan of sekerheidstelling ten behoewe van direkteure of beamptes van die maatskappy en van sekere beheerde maatskappye bevat soveel probleme dat ingryping deur die wetgewer na my mening noodsaaklik is. In hul bespreking van die verbod (395-397) kom die skrywers nie by naastenby al die probleme uit nie. Een van die vrae wat nie geopper word nie, is of 'n oortreding van die verbod – afgesien van strafregtelike implikasies – nietigheid van die betrokke lening of sekerheidstelling tot gevolg het. Indien die inherente onsekerhede van die voorskrif, die groot spektrum van gevalle wat gedek word (vanaf maklik vasstelbare tot bykans onvasstelbare oortredings), die feit dat aanvanklik volkome gel-

dige transaksies later terugwerkend getref word omdat iemand 'n direkteur of beampte van die een of ander maatskappy word, en die feit dat nietigheid soms billik sal wees maar in ander gevalle uiters onbillik omdat totaal onskuldige derdes ongenadiglik daardeur getref sal word, in gedagte gehou word, is 'n oorhaastige antwoord gevaarlik. Hieroor sou mens kommentaar verwag. Een laaste opmerking. Direkteure wat die maak van 'n lening in stryd met die verbod magtig, wetens toelaat of partye daarby is, word uitdruklik deur die wetgewer gesamentlik en afsonderlik aanspreeklik gestel om die maatskappy skadeloos te stel teen verlies wat daaruit ontstaan (a 226(4)). Dat 'n direkteur wat sy maatskappy skade berokken deur nalatige uitoefening van sy bevoegdhede gemeenregtelik aanspreeklikheid op grond van onregmatige daad opdoen, ontken ek hoegenaamd nie. Maar waar die skrywers (396) die uitdruklike statutêre aanspreeklikheid waarna verwys is as 'n deliktuele aanspreeklikheid bestempel met die oog op die beweerde toepaslikheid van die Wet op Verdeling van Skadevergoeding, moet van hulle verskil word. Dit is argumenteerbaar dat die maatskappy in sommige gevalle ook met 'n aquiliese aksie sal slaag, en dat die genoemde wet in ieder geval van toepassing *behoort* te wees. My punt is eenvoudig dat so 'n spesifiek geskepte wetteregtelike remedie kwalik as een op grond van onregmatige daad bestempel kan word.

Die nuwe reëling tav oorname-aanbiedinge (a 314-320) het verskeie praktiese probleme geskep. Hier word volstaan met 'n verwysing na die skrywers se hantering van twee daarvan. Die eerste is dat die voorskrifte slegs van toepassing is op 'n oorname-aanbod wat kragtens 'n oornameskema gemaak word, en dit is om die geval waar die aanbod die uitwerking sal hê om beheer van die doelwitmaatskappy regstreeks of onregstreeks in die aanbieder te vestig (a 314(1)). "Beheer" is dus kritiek vir die toepaslikheid al dan nie van 'n reeks belangrike voorskrifte. Aan die toepaslikheid van daardie voorskrifte maak dit egter geen verskil of die aanbieder 'n maatskappy of ander persoon is nie. Die skrywers meen dat die toets vir beheer hier is of die aanbieder, waar hy 'n maatskappy is, ingevolge die skema die beherende maatskappy soos in a 1(1) omskryf van die doelwitmaatskappy sal word (546). Indien dit korrek is, is ons weer terug by die probleem van die onsekerheid van die beherende/beheerde maatskappyverhouding en die skrywers se hantering daarvan; hierop is vroeër gewys. Maar waar die aanbieder sê 'n individu is, kan die probleem van beheer in elk geval nie hanteer word met verwysing na definisies wat op die beherende/beheerde verhouding tussen maatskappye betrekking het nie. Oor wanneer hierdie beheer van die doelwitmaatskappy deur 'n individu sal bestaan, laat die skrywers hulle nie uit nie. Die tweede probleem wat vermeld kan word, spruit uit a 314(3). Behoudens sekere uitsonderings is geen oorname-aanbod geldig en vatbaar vir aanname nie na die verstryking van 4 maande vanaf sy uitreikingsdatum, en mag geen oorname-aanbod binne daardie tydperk *teruggetrek* word nie. In die praktyk het die vraag, waaroor terloops botsende menings gegee is, ontstaan of daar ingevolge die voorskrif ook 'n *minimum* termyn vir 'n oorname-aanbod bestaan. Die standpunt wat mens hieroor inneem het aansienlike straf- en privaatregtelike gevolge. In die skrywers se bespreking (548) kon ek nie 'n verwysing hierna vind nie.

Anders as in die ou a 184 is die summiere prosedure vir die afdwinging

van direkteure en sekere andere se aanspreeklikheid teenoor die maatskappy volgens die nuwe a 423 nie slegs beskikbaar waar die maatskappy in likwidasie verkeer nie; dit is beskikbaar "in 'n likwidasie, geregtelike bestuur *of andersins*". Die skrywers gee twee voorbeelde van gevalle "andersins", nl waar 'n gederegistreerde maatskappy se registrasie herstel is (a 73(6)) en waar 'n gelikwideerde maatskappy na ontbinding herleef omdat die ontbinding nietig verklaar is (a 420). Die vraag is of die woorde nie *alle* maatskappye in die greep van a 423 betrek nie, sodat dit vir 'n gegriefde lid wat 'n aanspreeklikheid van sê 'n direkteur teenoor die maatskappy afgedwing wil sien naas a 266-268 'n alternatiewe prosedure bied.

Opsommenderwys wil ek herhaal dat die werk 'n nuttige een is, maar byvoeg dat dit onveilig sou wees om te aanvaar dat nuwe ontwikkelings slegs aan die hand van standpunte daarin ingeneem beoordeel kan word.

S J NAUDE
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THE LAW OF PROPERTY

deur HARRY SILBERBERG

Butterworths, Durban, 1975; xiii en 420 bl; prys R24,00 (hardeband); R18,75 (sagteband)

In sy "Preface" stel die skrywer as gevolg van sy "lectures" sy doel met hierdie werk, nl "to serve as textbook for students and to provide at the same time a convenient starting point to further research in legal practice and in the academic . . . field".

Klaarblyklik het Silberberg 'n meer ambisieuse opset met sy werk gehad as wat *Gaius noster* destyds met sy "leerboek" gehad het. Gaius was in sy tyd 'n "lesser luminary" en het moontlik/miskien/waarskynlik maar sy bes by wyse van "lecture notes" geprobeer doen. Hy het selfs geprobeer om plek-plek (en selfs op baie plekke) regsinstellings in historiese perspektief te stel. Só hoort dit tog by 'n onderriggewer.

Silberberg het in sy werk nie juis besondere belangstelling vir die historiese ontwikkeling van "The Law of Property" getoon nie. Trouens verwysings na gemeenregtelike outoriteite, laat staan nog Romeinsregtelike kenbronne, daag, soos die legendariese bruidegom, nagenoeg nooit op nie.

Na my oordeel het Silberberg nie daarin geslaag om al die doeleindes wat hy met die werk gehad het te verwesenlik nie. Bygevolg het die werk dan ook nie aanspraak op besondere gesag nie, en dit nie omdat dit 'n werk van 'n nog lewende juris is nie – *vide*, om maar een skrywer te noem, J C de Wet.

Silberberg se "Law of Property" is nietemin 'n handige werk vir verwysingsdoeleindes. *Pro tanto* is 'n gestelde oogmerk dan tog verwesenlik. In hierdie verband is die register van gewysde sake, wat 26 bladsye beslaan,

indrukwekkend. 'n Ander verdienstelike aspek van die werk is dat die *casuspositiones* waarop 'n bepaalde reël in die regspraak toegepas is, meermale uitvoerig en ook suiwer gestel word.

Dit is egter nie maklik om allerlei geykte, maar onwetenskaplike stellings sonder kommentaar só te laat staan nie. Enkele voorbeelde van sulke stellings word aangehaal: "OWNERSHIP AS A BUNDLE OF REAL RIGHTS" ('n opskrif bl 37); " . . . an owner may transfer fractions or segments of his *dominium* over a thing to others who then acquire a limited real right in it, which is called a *jus in re aliena*" (ibid); ". . . the law . . . prohibits the vindication of property by its owner . . . Property sold at *judicial sales* or at *public sales by trustees* and liquidators of insolvent estates and companies cannot be vindicated from a *bona fide* purchaser" (bl 221). Die skrywer laat telkens toe dat die begrippe "property" en "thing" mekaar so afwissel en in in die pas aangehaalde stelling word nog steeds vergeet dat die *rei vindicatio* hier nie vir die betrokke persoon beskikbaar is nie en wel omdat hy nie meer eienaar is nie.

By wyse van beoordelende bespreking word ten slotte Silberberg se poging ten opsigte van 'n aangeleentheid wat juis nou aktueel is, vermeld: die probleme om die *rei vindicatio* en *estoppel* is in hoofstuk XIV 5 nie suiwer uitgeken nie en 'n bydrae ter oplossing van die probleme word dan ook nie aangebied nie.

Silberberg verdien lof daarvoor dat hy 'n werk oor ons hedendaagse SAKEREG aangedurf het, 'n gebied wat by ons eintlik braak lê. Die skrywer het egter iets gelewer wat eintlik 'n klagskrif is teen diegene wat besig is *profiteri* maar wie se *responsa* en *disputationes* nie by enige "favourite publisher" opgeteken is nie.

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STUDENTS CASEBOOK ON MERCANTILE LAW

Edited by A J C COPELING

Butterworths Durban 1975; xix en 475 bl; prys R12,75 (sagteband)

Soos deur die titel en die voorwoord aangedui, is hierdie boek basies bestem vir gebruik deur studente en in besonder studente in kommersiële reg (BCom-studente). Aldus word die *Casebook* in twee afdelings verdeel. In afdeling I word die algemene beginsels van die kontraktereg behandel terwyl in afdeling II enkele besondere tipes kontrakte en enkele basiese onderwerpe uit die handelsreg behandel word. Onder afdeling II ressorteer onder meer die koop- en die huurkontrak, verteenwoordiging, borgstelling, vennootskappe, versekering, verhandelbare dokumente en die maatskappyereg.

Dat die redakteur 'n baie ambisieuse taak aangepak het, blyk uit die ontsaglike omvang van die onderwerpe wat gedek word. Nietemin word

daarin geslaag om deur die keuse van sake en die uittreksels daaruit 'n geheelbeeld te gee sonder om die leser te verwar met te veel besonderhede. Terselfdertyd is die inhoud van die uittreksels van so 'n aard dat die boek in die geheel gesien nie alleen onontbeerlik is vir kommersiële regstudente nie, maar ook 'n waardevolle hulpmiddel kan wees vir ander regstudente. As sodanig verdien die *Casebook* 'n veel wyer leserskring as die ietwat beperkte deur die redakteur in die vooruitsig gestel. Gedagtig aan die wye veld wat gedek moet word en die beperkte ruimte daarvoor beskikbaar is dit egter verbasend dat soveel ruimte afgestaan word aan die remedies by kontrakbreuk en aan die verlening van finansiële hulp deur 'n maatskappy by die aankoop van sy aandele. Deur vryer gebruik te maak van aantekeninge kan waardevolle ruimte bespaar word sonder om volledigheid in te boet. Die relatiewe belangrikheid van die pas vermelde onderwerpe kan nie betwyfel word nie. Tog wil dit voorkom asof die oorbeklemtoning van gemelde aspekte geskied ten koste van ander ewe belangrike aangeleenthede. So byvoorbeeld regverdig die verskillende verskyningsvorms van kontrakbreuk vollediger behandeling. Tans word slegs verwys na *mora debitoris* en repudiëring.

Die werkswyse deur die redakteur gevolg, kom daarop neer dat elke beslissing voorafgegaan word deur 'n kort uiteensetting van die ter sake regsbeginsel gevolg deur 'n kernagtige samevatting van die feitekompleks. Daarna word relevante passasies uit die betrokke uitspraak woordeliks weergegee. By geleentheid word die betrokke aspek onder bespreking verder toegelig deur middel van 'n kort aantekening waarin verwys word na ander verbandhoudende regspraak en artikels. Ongelukkig is die aantekeninge oor die algemeen maar aan die dun kant en in latere uitgawes kan dit met vrug uitgebrei word. Vollediger aantekeninge is onontbeerlik in 'n *Casebook* soos hierdie waar vanweë ruimte-oorwegings talle belangrike beslissings nie behandel kan word nie. Die uiteensetting van die toepaslike regsreël en die ter sake feitekompleks is telkens kernagtig dog maklik verstaanbaar. Dit sou egter wenslik wees dat die verwysing na die gedingvoerende partye in die opsomming van sake 93, 120 en 122 in ooreenstemming gebring word met dié wat in die aangehaalde passasies gebruik word. Van besondere waarde is verder die vertalings van Latynse tekste en spreuke wat telkens deur die skrywers ingevoeg word. Veral in die lig van die besondere leserskring waarop hierdie boek gemik is, kan dit alleen tot voordeel wees en bydra tot 'n beter insig.

In verband met die keuse van sake en onderwerpe wat behandel word, is die redakteur uiteraard gekortwiek deur die ruimte tot sy beskikking en die verstaanbare begeerte om die boek binne 'n hanteerbare omvang te hou. Desondanks slaag hy daarin om 'n bevredigende geheelbeeld te gee. Sekere leemtes val egter wel op en 'n aanvulling hiervan sal dien om 'n waardevolle versameling vollediger te maak. Desnoods kan die aanvulling tot 'n groot mate geskied deur ruimer gebruik te maak van aantekeninge. In die besonder word op die volgende gewys:

(a) Die handelingsbevoegdheid van regsubjekte. Slegs na twee sake word verwys. Een handel oor die handelingsbevoegdheid van minderjariges en die ander het betrekking op die bevoegdheid van 'n getroude vrou om die

boedel van haar man te bind ten aansien van die aankoop van huishoudelike benodigdhede.

(b) In verband met huurkontrakte word geen melding gemaak van die huurder se reg op vergoeding vir verbeterings en die Huurgeldewet nie. Terselfdertyd kon huurkoopkontrakte en die probleme daaraan verbonde ietwat vollediger behandel gewees het.

(c) By die behandeling van verteenwoordiging word geen woord gerep oor skynbare volmag (*ostensible authority*) nie. Die omstandighede waaronder 'n persoon met beroep op estoppel verhoed kan word om die volmag van sy gewaande verteenwoordiger te ontken, verdien besondere vermelding. Verwysende na *Coetzee v Mosenthalls Ltd* 1963 4 SA 22(A) word slegs die geval van stilswyende volmag spruitende uit die gedrag van die partye bespreek. Vanweë die gemak waarmee dié twee tipes volmag verwar kan word, sou dit wenslik wees om ter illustrasie na 'n geval van skynbare volmag te verwys en kortliks die belangrikste verskille tussen hierdie twee tipes aan te dui. Selfs 'n kruisverwysing na *Freeman and Lockyer v Buckhurst Park Properties (Mangal) Ltd* 1964 1 All ER (CA) (saak 148) sou voldoende wees.

(d) Opvallend ten aansien van die maatskappyereg is die feit dat geen ruimte afgestaan word vir 'n bespreking van die vertrouensverpligting van direkteure, die bevoegdheidsafbakening tussen die direksie en die algemene vergadering van die maatskappy en dividendreëls nie. Ook sou 'n mens op bl 369 waar die skrywer die negering van die regspersoonlikheid van die maatskappy bespreek ten minste 'n verwysing na *R v Gillett* 1929 AD 365 en *Robinson v Randfontein Estates Gold Mining Co* 1921 AD 168 verwag. By die bespreking van pre-inkorporasie-kontrakte is dit verbasend dat geen melding gemaak word van die belangrike appèlhofuitspraak in *Sentrale Kunsmis Korporasie v NKP Kunsmisverspreiders* 1970 2 SA 367 nie.

(e) In laaste instansie is dit 'n jammerte dat die redakteur nie sy weg oopgesien het om ruimte te maak vir 'n kort behandeling van die insolvensiereg nie. Geen boek oor die handelsreg kan voorgee om volledig te wees as 'n bespreking oor die ter sake beginsels van die insolvensiereg ontbreek nie.

'n Kenmerk van die boek onder bespreking is die min set- en drukfoute. Nietemin word op enkele van die belangrikstes gewys.

Bl 48. Die verwysing na "defendant's" in die tweede reël van die feiteuiteensetting van *Diedericks v Minister of Lands* 1964 1 SA 49 (N) moet lui "plaintiff's".

Bl 314 laaste paragraaf. In die eerste reël behoort "the insurer" te lui "the insured".

Bl 332 *Bawden v London, Edinburgh & Glasgow Assurance Co* 1892 2 QB 534 (CA) en nie 2 QV nie.

Bl 386. Die verwysing in die derde paragraaf na die tweede uitgawe van Gower *The Principles of Modern Company Law* behoort te lui "3rd ed 154".

Bl 395. Die laaste reël van die eerste paragraaf moet lui "if he did *not* in fact so rely".

Bl 427 tweede laaste reël. A 103ter i p v 173ter.

Samehangend hiermee moet daarop gewys word dat die samevatting van die ter sake regsbeginsel in *Eaton and Louw v Arcade Properties (Pty) Ltd* 1961 4 SA 233 (T) nie die posisie geheel en al korrek weergee nie. *In casu* is beslis dat die "undisclosed principal", selfs al is dit 'n vennootskap, na die tyd na vore kan tree en as eiser kan ageer.

Ten spyte van bogenoemde punte van kritiek is die *Students Casebook on Mercantile Law* 'n waardevolle byvoeging tot die boekery van die regstudent en kan dit met groot vrymoedigheid aanbeveel word.

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THE LAW OF COLLISIONS IN SOUTH AFRICA

by I ISSACS QC and G LEVESON

(Fifth Edition)

Butterworth, Durban 1974; pp xxxvi and 294; price R19,75

Since the 4th edition, which appeared in 1958, this book has undergone a change in authorship due to the death of Mr Lionel Leveson. He has been succeeded by Mr G Leveson. Changes in the contents of the book have been necessitated by the appearance of the Assessment of Damages Act, 1971; the uniform Road Traffic Ordinances of 1966 and the Compulsory Motor Vehicle Insurance Act, 1972. Although still rich in quotations, especially from English, Scottish and American cases, verbatim qoutes from post 1947 South African Law Reports have been kept to a minimum. Older, less accessible, cases are, however, still quoted fairly extensively. New cases, up to and including the second volume of the 1974 South African Law Re-Reports are referred to. All too frequently, however, such references are strictly confined to the footnotes, even where some discussion in the text would seem warranted. For instance, a brief discussion of *Arthur v Bezuidenhout & Mieny* 1962 2 SA 566 (A) would have been appropriate in the course of a fairly lengthy discussion of *res ipsa loquitur* in which *Hamilton v Mackinnon* 1935 AD 114 figures prominently and the most recent case discussed in the text is of 1940 vintage.

It is no doubt inevitable in a book which has undergone its 5th edition over a period of 40 years, that there will be anachronisms here and there. Most of these are easily spotted in the present edition and quite harmless. One is, for instance, not likely ot be misled by the statement that "every driver of a vehicle must bear in mind the paramount duty to swing to his left as far as possible and as swiftly as possible in the place [sic] of approaching vehicular traffic." In these days of multi-lane highways and freeways,

however, a paragraph or two on the obligations of a driver wishing to change lanes would perhaps have been more appropriate than a discussion of the permissibility of driving on the right-hand side of an unmacadamised country road where the circumstances warrant it. An unfortunate and dangerous lapse in this regard, however, is the retention (p 182) of the *versari in re illicita* doctrine as propounded in *R v Matsepe* 1931 AD 150.

Considering that the book is concerned mainly with the topic of road traffic, the provisions of the uniform Road Traffic Ordinances, 21 of 1966, of the various provinces, receive singularly little attention. The duties of motorists and pedestrians, as gleaned from a series of mainly pre-1966 decisions, are discussed in detail, but no reference whatsoever is made to the specific sections of the ordinances dealing with these matters. It is true that the discussion is civilly, rather than criminally, orientated and that the principles propounded in the cases generally coincide with the provisions of the ordinances, but this approach of the writers sometimes leads to a bewildering shift of emphasis. Concerning the proper use of a motor vehicle's hooter, for example, the writers (p 61) express the view that "[i]t is the duty of the driver of a motor mehicle to sound his hooter whenever necessary so as to give audible and sufficient warning of the approach or position of his motor car. This is not only a duty imposed by statute, but also the duty of a reasonable person under the circumstances . . ." Section 122 of the ordinances provides that "[n]o person shall on a public road use the sounding device or hooter of a vehicle except when such use is necessary in order to comply with the provisions of this Ordinance or on the grounds of safety."

Despite its title, this book deals not only with the law in as far as it is concerned with collisions on the road, but also with a number of other matters connected with the use of motor vehicles, such as the liability of masters for the acts of their servants, the sale, hire and insurance of motor vehicles, liens and the liability of garage proprietors.

Provided that it is used with caution, this is a useful reference book for anyone concerned with the law in relation to the use of motor vehicles.

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THE ENGLISH SENTENCING SYSTEM

by SIR RUPERT CROSS, DCL FBA

Butterworths, London 1971; pp vi & 184; R6 (hard cover), R4 (soft cover)

This short but stimulating book is based on lectures given by its well known author at the University of Oxford. Consisting of five carefully planned chapters and two appendices containing statistical data and a selected bibliography, the book is far more than merely a prosiac exposition of the English sentencing system. Only the first chapter, in which the powers of the English judge or magistrate in relation to sentencing are set out and briefly

discussed, can be regarded as peculiar to the English system. The remaining chapters, although the discussion is kept within the framework of the English system, deal with problems of a universal nature.

Chapter II is concerned with such questions as the amount of information concerning the accused which should be furnished to a judicial officer; the propriety of judicial officers taking such matters as the probability of executive remission or parole and the probabilities of rehabilitation into account when determining the length of prison sentences. Problems in connection with consecutive and concurrent sentences are also considered. Chapter III contains a thought provoking, and far from conventional, discussion of the theories of punishment. Chapter IV, entitled "Fixing the length of a prison sentence", is far less enervating than the title suggests. The merits and demerits of the so-called tariff system are discussed and objective criteria are sought for determining the relative gravity of offences. Amongst other matters, the problem of reconciling the requirement of consistency in sentencing practice with the modern notion that the penalty should fit the criminal, not the crime, receives attention. The final chapter is concerned with an evaluation of the modern conception of retribution and a shrewd consideration of the feasibility of a drastic reform of sentencing practice, a question which, according to the author, "owes its contemporary significance to the fairly frequent assertion that, because judges (including magistrates) are bad sentencers, it would be a good idea to entrust the whole or most of the country's sentencing to boards of experts." The possible merits of such sentencing boards are considered in the light of the difficulties of empirical research in the field of sentencing and the limitations of the use of such aids in this field as prediction tables and computers. A substantial case is made out for the author's view that "(t)he assertions that judges are bad sentencers, that there are such people as sentencing experts, and that they would do the job better than judges are usually made too hastily."

Throughout the book constant attention is paid to the application of the theories of punishment ot concrete circumstances and many decisions are analysed to illustrate the extent of such application. The views of a wide range of authorities, from Beccaria and Bentham to D A Thomas and Nigel Walker, are subjected to careful scrutiny.

Although it is primarily intended for the use of students interested in criminal law and penology, one can confidently predict that this brief, critical analysis by such an eminent authority will not escape the notice of a far wider field of readers.

A J MIDDLETON
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Since the first edition appeared in 1954 HENOCHSBERG has enjoyed a leading place in our legal literature, having proved to be of great value not only to lawyers but also to accountants, company secretaries and all others concerned with this important branch of law.

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—*S.A. Law Journal*

"Henochsberg het ongetwyfeld 'n waardevolle bydrae gelewer tot die Suid-Afrikaanse Literatuur oor die maatskappyreg. Elke praktisyn sal die behoefte aanvoel om die werk te besit en elke student behoort hiermee as naslaanwerk vertroud te wees."

—*Tydskrif vir THRHR*

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Credit Cards and the Law*

Catherine Smith

University of South Africa

OPSOMMING

Kredietkaarte het hulle oorsprong in die Verenigde State van Amerika gehad maar die Republiek tesame met baie ander lande van die wêreld het die kredietkaartstelsel oorgeneem en die vooruitgang alhier van *Barclaycard*, wat ongetwyfeld die leier op die gebied van die kredietkaartstelsel in dié land is, is fenomenaal.

Terwyl die stelsel ongetwyfeld tot ernstige misbruike mag lei, is daar veel meer voordele as nadele aan verbonde. In die Republiek is ons gemene reg – siviele reg sowel as strafreg – veelsydig en buigsaam genoeg om die verskillende situasies wat uit die driesydige ooreenkoms – die fondament van die kredietkaart self – mag voortvloei, te hanteer.

Die driesydige ooreenkoms bestaan in die eerste plek uit 'n ooreenkoms tussen die bank en die kaarthouer, wat in werklikheid 'n geldleningstransaksie is: die uitreiking van 'n kredietkaart is 'n aanbod om krediet te verleen. Aanvaarding of gebruik van die kaart het 'n kontrak tussen die partye in ooreenstemming met die bepalings daarvan tot gevolg. In die tweede plek is daar 'n ooreenkoms tussen die bank en die handelaar, wat in werklikheid die bank se krediet in plaas van dié van die koper aanvaar. In die derde plek is daar 'n ooreenkoms vir goedere verkoop of dienste gelewer tussen die handelaar en die krediethouer.

Die afsending van ongevraagde kredietkaarte is 'n wesenlik gevaarlike gebruik vanweë die groot risiko dat die kaarte in die hande van ongemagtigde persone kan beland. Aangesien die ontvanger van so 'n kaart onder geen verpligting is om òf die kaart terug te stuur òf dit te aanvaar òf dit te vernietig nie, is slegs die uitreikende bank aanspreeklik vir verlies indien die kaart in die hande van 'n dief sou beland. Die voordele van die kredietkaartstelsel is menigvuldig. Die kaarthouer het nie nodig om kontant of 'n tjekboek rond te dra nie en in hierdie tye van toenemende handsakgrypery en sakkerollery is dit beslis 'n voordeel.

'n Kredietkaart is besonder nuttig in die geval van oorsese reise. Berekening in vreemde valuta is dikwels moeilik en verwarrend. Met 'n kredietkaart werk die houer daarvan in die valuta van die land waarin hy hom bevind.

Wat die banke self betref, is die grootste voordeel van die kredietkaartstelsel dat dit 'n vermindering in die gebruik van tjeks meebring. Die koste verbonde aan lopende bankrekenings vir individue styg gedurig. Die gemiddelde tjek word een-en-twintig keer gehanteer voordat dit na die trekker teruggaan; voortdurende toename in die aantal tjeks is besig om die bankwese te verwurg en het 'n werklike probleem vir kommersiële banke geword. Die invoer van die kredietkaart sal hopelik 'n mate van verligting ten opsigte van hierdie probleem bring.

Watter vordering sal die kredietkaart met sy verbasende ontwikkeling in die verlede, in die toekoms toon? Beweeg ons werklik in die rigting van 'n tjeklose, kontantlose gemeenskap soos Amerikaanse skrywers aan die hand doen? Die uitbreiding van die kredietkaartbesigheid is onvermydelik en dit is waarskynlik dat massabetalings van

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*Inaugural lecture by Professor Catherine Smith of the department of mercantile law of the University of South Africa, delivered on Thursday, 12 February 1976.

elektrisiteitsrekenings, belasting en telefoonrekenings deur middel van rekenaars sal plaasvind. Verder skyn daar geen rede te wees waarom kasregisters in winkels, supermarke, motorhawes, ens nie direk aan rekenaars in banke gekoppel kan word en maandelikse rekenings van rekenaar tot rekenaar betaal word nie.

There is no credit card law in the sense that there is a law of negotiable instruments or a law of insolvency, and there is a dearth of authority both statutory and judicial not only in this country but also in other countries where the credit card system is in use. In an article written in 1968 in the United States it was said that despite the astronomical number of credit cards which had been issued since 1915 there were apparently less than twenty reported civil cases involving credit cards.[1] However, that rugged hybrid, our Roman-Dutch law, is sufficiently versatile and flexible to accommodate the increasing infiltration of this remarkable little plastic card as well as the tripartite agreement governing its operation.

The United States of America was the birthplace of the credit card and has vast experience of the uses and abuses of the system. A number of articles have been written on credit card law by American commentators.[2] Some of these articles are whimsical, some inexcusably circumlocutory but for the most part they are penetrating and exceedingly enlightening. One detects a concept common to most if not all of these articles and that is that it is regarded as imperative to fit this elusive tripartite agreement into some legal category or pigeon-hole. It has been suggested that legislation be introduced to deal with the system. In fact in some states legislation has actually been passed, with what measure of success I cannot say. I hope that our legislature does not contemplate meddling in a situation which can be more than adequately dealt with by our common law. Even in the United States it has been stated with a measure of wisdom, that the courts and the legislature should move with great caution in fashioning new rules to govern the relationships among the various parties. Otherwise, in an attempt to correct a few abuses, they may interfere with the orderly development of a new medium of exchange which has been accepted by businesses, governmental agencies and the public, as a useful device.[3] I often picture our common law as being a type of many headed hydra. The legislature in endeavouring to eradicate some real or imagined evil chops off a head and is immediattely confronted with two others in its place.

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[1]William B Davenport "Credit Cards and the Uniform Commercial Code" *The Banking Law Journal* 1968 Vol 85 No 11.

[2]Ralph C Clontz "Bank Credit Cards under the Uniform Commercial Code" *Banking Law Journal* Vol 87 No 10 888; Jerry G South "Credit Cards: A Primer "*The Business Lawyer* January 1968; Jerry G South "Legal Steps and Pitfalls in Bank Credit Cards" *Banking Law Journal* Vol 87 No 3 222; William B Davenport "Bank Credit Cards and the Uniform Commercial Code" *Banking Law Journal* November 1968 Vol 85 No 11; A G Cleveland "Bank Credit Cards: Issuers, Merchants and Users" *Bankmg Law Journal* September 1973 Vol 90 No 9; Charles E Cooper "The Bank Credit Card Revolution and Articles 4 and 5" *The Business Lawyer* November 1968; William H Webster "Bank Charge Cards – Recent Developments in Regulation and Operation" *The Business Lawyer* September 1970; "Preserving Consumer Defences in Credit Card Transactions" *Yale Law Journal* Vol 81 231 1971; "Bank Credit Cards – a Panel Discussion" *The Business Lawyer* November 1971; D H Maffly and Alex C McDonald "The Tripartite Credit Card Transaction: A Legal Infant" *California Law Review* 48 1960.

[3]"Bank Credit Cards – A Panel Discussion" *The Business Lawyer* November 1971.

There is much to be learnt from the American commentators and we must not be too sceptical or hesitant to benefit from their experience and accept their views provided, of course, that there is no conflict with the principles of our law.

As far back as 1914 the precursor of today's credit card made its embryonic appearance.[4] Large oil companies in the United States began issuing credit cards to their customers. These cards could be used only to purchase petrol, oil and related products from one of the oil company's service stations or branches. At approximately the same time department stores issued credit coins, subsequently replaced by credit cards, for use in their branches.[5] The primary object of the issue of these cards by both oil companies and department stores was to stimulate sales by encouraging and facilitating credit sales. In 1950, so the story goes, a New York credit specialist dined at a restaurant. When the bill was handed to him he discovered, presumably to his acute embarrassment, that he had brought neither cheque book nor cash with him. Fortunately he was able to telephone his wife who came to his rescue. The following day he arranged an interview with his attorney and Diners' Club was founded with fourteen restaurants and two hundred card holders as participants in the scheme.[6]

Not long after the Bank of America and the Chase Manhattan Bank followed suit. The credit card system has in the last two and a half decades developed rapidly in many countries throughout the world including the Republic and there can be no doubt but that the credit card has arrived and will not take its leave of us; on the contrary it is predictable that this form of commercial instrument is capable of incredible and tremendous expansion and with such expansion further legal problems are bound to arise.

Most banks issuing credit cards adhere to very much the same formula in the drafting of agreements regulating the use of credit cards. I am using as the basis of this lecture the agreements drawn and methods used in implementing those agreements by Barclaycard but I shall also refer to another formula adopted by other banks. In fact Barclaycard has more than forty-eight percent of the credit card business and is indisputably the leader in this field in the Republic. I think I can safely say that its expansion and its extension of services to the public is unparalleled, in this country at any rate. Barclaycard is part of an international credit card system, all cards being recognizable by the distinctive blue, white and gold colours forming the basis for international reciprocal acceptability. Some other cards acceptable in the system are Bankamericard and Chargex.

The tripartite agreement between the issuing bank, its cardholder and the merchant, who honours the card by providing the required merchandise or services, must now be examined.

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[4]William B Davenport "Bank Credit Cards and the Univorm Commercial Code" *Banking Law Journal* 1968 Vol 85 No 11 945.

[5]*ibid.*

[6]Donald H Maffly and Alex C McDonald "The Tripartite Credit Card Transaction: A Legal Infant" 1960 *California Law Review* 461.

At the outset it must be emphasized that the agreements both between the bank and the cardholder on the one hand and the bank and the merchant on the other should be brief, concise and, above all, readily understandable. Some of the examples of agreements that I have read in the available literature on credit cards have been couched in terms of such verbosity that in parts they are virtually unintelligible. I imagine that the layman cardholder or merchant after dodging around innumberable subordinate clauses and parentheses would probably stop reading the agreement about a third of the way through. I can find no fault with agreements used by Barclaycard. The agreement between the issuer and the cardholder provides that, amongst other things, the card may be used only by the holder who must sign it in the space provided. The signature serves as a safeguard as the merchant is enjoined to compare the signature on the card with that placed on the voucher evidencing the sale by the cardholder. He should satisfy himself, in so far as this is possible, that the signatures are those of the same person. The holder must sign a voucher on each occasion that he uses the card. Once a month the bank will dispatch a statement of account, to which the vouchers are attached, to the holder. The holder is required to effect payment of the account within twenty five days. A charge of $1\frac{1}{2}\%$ is made on any unpaid balance after the expiry of the twenty five days if payment has not been duly effected. Perhaps one of the most important aspects of the contract between the bank and the cardholder is the stipulation that the bank has the right to cancel the card at any time on notice to the cardholder. The card, it should be noticed, remains the property of the bank at all times. A statement to this effect appears on the credit card itself and its significance will become apparent later. The holder must take reasonable care for the safety of the card and should it be lost or stolen, he must, as soon as he becomes aware of such loss or theft give notice to the bank. Should he fail to give such notice and should the bank suffer any loss it is specifically provided that the bank will be entitled to recover such loss from the holder. It is further provided that no claim by the holder against the merchant or supplier may be the subject of any claim or set-off or counterclaim against the bank.

The agreement between the bank and the merchant provides that the merchant will honour all valid and current credit cards by providing goods and services at prices not greater than normal prices to a value not exceeding a stated floor limit. The bank may authorize an increase of this limit if requested so to do. Sales vouchers and an imprinter are provided by the bank and at the time of the sale the merchant must obtain the signature of the cardholder to the sales voucher and imprint the card on the voucher. Within three days of the sale the sales voucher must be presented for payment at a nominated branch of the bank. The bank agrees to pay to the merchant the amount of the sales voucher less a certain per cent of the price shown on the voucher. Credit cards are valid and current for a year only and the card itself bears an expiry date and accordingly no card is valid or current if the date of expiry stated on it has passed or if the number of the card appears on a void card notice which the merchant has received from the bank.

Not only may a cardholder obtain goods or services from a merchant he may also use his card to draw cash up to an amount of R50 at any branch of the bank. With the authorization of the bank this limit may be increased.

Credit cards may be issued with or without application. Where a card is issued on application the cardholder is obviously bound by the terms of the application. Where the card is issued without application having been made the bank usually sends a copy of the bank-cardholder agreement to the prospective cardholder with the card. A person who receives such a card and agreement and who signs his name on the card and uses it, is deemed to have assented to the terms of the agreement.

A method frequently adopted of acquiring credit cardholders to participate in the scheme is that of sending unsolicited credit cards to members of the public. This is intrinsically dangerous because there is a real risk of these cards falling into the hands of unauthorized persons. Some banks request the addressee, should he not wish to make use of the card, to destroy it; other banks request him to cut it up into small pieces and return them in a self addressed, postage prepaid envelope. This method of acquiring additional business is not confined to bankers operating a credit card scheme. It is not uncommon for enterprising merchants, particularly purveyors of the more popular type of magazine, to dispatch their wares to an address, on neither request nor authority but with the slender hope of effecting a sale.[7] However, such a merchant cannot force a contract on an unwilling recipient by declaring that unless the receives an intimation to the contrary by a specified date, it will be assumed that the recipient has bought the goods.[8] Moreover the recipient cannot be placed under a duty to return the goods. In law a person can accept an offer by conduct but if conduct is to constitute acceptance it must be an unequivocal indication to the other party – the merchant – that the recipient in fact accepts the goods in question.[9] Silence in itself does not amount to consent unless there is a legal duty to speak. In the words of the then chief justice Watermeyer:

> "Quiescence is not necessarily acquiescence, and one party cannot, without the assent of the other, impose upon such other a condition to that effect."[10]

Recently it was reported in the *Pretoria News* that the Standard Bank, in a mass mailing, had posted 100 000 credit cards and that of these 5 000 could have fallen into wrong hands. I find it difficult to believe that as many as 5 000 could have gone astray but it is stated in the report that police throughout the country are searching for Standard Bank credit cards. A spokesman at John Vorster Square is quoted as saying that five cases of fraud involving the cards were being handled from there and other cases by police throughout the country. A bank sending out unsolicited credit cards cannot arbitrarily impose contractual liability on the recipient by stipulating that silence will be deemed to be consent and whatever the bank may request the recipient to do, whether it be to destroy the card or to notify non-acceptance of the card, it cannot burden the recipient with any duty in regard to the card. Should an unsolicited card be used by a thief the bank and the bank only is liable for any loss through fraudulent usage.

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[7] Cheshire and Fifoot *The Law of Contract* 39.
[8] *ibid.*
[9] *Collen v Rietfontein Engineering Works* 1948 1 SA 413 (A) 421.
[10] *ibid.*

Where the merchant has honoured a card by supplying goods and services to a cardholder the bank has no right of recourse against the merchant unless the sales voucher exceeds the specified floor limit or the card has expired or the merchant has received notice that the card has been cancelled or fails to obtain the cardholder's signature.

The tripartite agreement amounts to a loan of credit or reputation by a bank to a customer who is a buyer of goods or services from a merchant who accepts the bank's credit in substitution for that of the buyer. Moreover the cardholder is enabled to make a credit purchase on terms which the merchant might not have been prepared to give to the cardholder personally.

Apart from the basic agreement as described other facilities are offered by an issuing bank to a cardholder. A cardholder may make use of the bank's budget plan for purchases over R50 repayable over a period of between 6 to 24 months. The merchant receives his money from the bank immediately and consequently the cardholder will qualify for any discount the merchant is able to offer. Luxury cruises and flights in the republic or elsewhere in the world are other facilities available to cardholders. Furthermore a credit card can be used anywhere in the South African monetary area and as it has been accorded international status it may be used in many countries in the world subject to any exchange control regulations which may apply from time to time.

It is appropriate at this stage to consider the advantages and disadvantages of the credit card system. As with everything else the system has both. The old argument frequently advanced to derogate from any form of purchasing of goods on credit has been levelled at credit cards. A credit card, it is alleged, enables a person to buy goods he does not need, from a person he does not know, on conditions he does not understand with money he does not have. Credit cards did not exist in the London of Dickens' time. That, however, did not deter Micawber from living in a state of chronic indebtedness and purchasing merchandise in the never diminishing hope that something would turn up. A credit card, in the hands of an irresponsible person, can be a dangerous instrument. It can, I suppose, encourage overspending and no doubt a little bit of Micawber lurks in most of us.

However, it must be remembered that by far the majority of cardholders are responsible even if not affluent people. They use their cards as a matter of convenience with the knowledge that they will be able to pay when called upon to do so. In other words the card is being used as a convenience card or as a medium of exchange. In fact, many of the Barclaycard brochures bear the explicit legends "Think of it as money" or "Shop without cash". According to John Higgs in a panel discussion on bank credit cards held in New York many credit card men are wont to say that credit cards are a new medium of exchange; they trace the growth of human commerce from the use of barter to the introduction of various kinds of mediums of exchange – first cash, then cheques, now credit cards.[11]

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[11]"Bank Credit Cards – A Panel Discussion" *The Business Lawyer* November 1971 117.

American commentators distinguish between wild cards and hot cards. Where a credit card is stolen and used by an unauthorized person it is referred to as a hot card. Where the credit card holder indulges in a spending spree the card is referred to as a wild card. Writers Maffly and McDonald in an article appearing in the *California Law Review*[12] cite the classic case of a nineteen year old youth who indulged in a one-month trip back and forth across the North American Continent. During his frolic he bought nearly ten thousand dollars' worth of goods and services simply by making frequent and extravagant use of his omnipotent credit card. He used it to hire motor-cars, buy airline tickets, live in luxurious hotel suites, buy food and liquor, numerous items of men's wear, a mink stole for a newly acquired girl-friend and a puppy dog for himself. When the law eventually caught up with him and he was asked to explain his conduct he, without any remorse, said: "All of a sudden, the credit card was just like an Aladdin's lamp and you didn't even have to rub it." As far as I am aware, nothing on such a grand scale has been attempted in this country, but a South African variation on an American theme is quite possible. There can be no doubt that the credit card system can be subject to grave abuse. As far as wild cardholders are concerned the bank has hit upon a simple but extremely effective device. As I have pointed out before the bank at all times retains ownership of the card and a clause to this effect is printed on the back of the card. If a wild cardholder shows reluctance to part with his Alladdin's lamp when requested to do so, the bank threatens to, and if necessary will, lay a charge of theft against him. This I have been informed almost invariably has the effect of persuading the cardholder to surrender his card. Theft consists of an unlawful assumption of control, with intent to steal, of a thing capable of being stolen.[13] Our law will not concern itself with trivialities. Consequently should a person steal a sheet of note paper from another person, a charge of theft would most certainly not be entertained. The plastic credit card in itself is of little if any value; its real value lies not in itself but in its potential purchasing power, which is an incorporeal. So if a credit card is stolen, what actually happens according to the modern view is that the holder of that card is deprived of the incorporeal economic value in the corporeal card and in certain cases in our courts theft of an incorporeal has been established as a principle of our law.[14]

On the other hand, the advantages of the system are legion. As far as the cardholder is concerned the card frees him from the necessity of carrying cash or a cheque book and in times of increasing bag snatching and pick-pocketing this is a decided advantage; and he need not be concerned with the reluctance of merchants to accept his cheques; he obtains interest free credit for a period of up to two months; he has the convenience of a single monthly account which covers purchases from many different merchants; cash withdrawals may be made from any branch of the bank in the country;

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[12] "The Tripartite Credit Card Transaction: A Legal Infant" 1960 *California Law Review* 459.

[13] Hunt *South African Criminal Law and Procedure* Vol 2 566.

[14] J A Coetzee "Diefstal van Onliggaamlike Sake?" 1970 *THRHR* 369; *S v Graham* 1975 3 SA 569(A) 576.

for larger purchases he can repay his indebtedness in instalments over periods of up to two years with low interest rates – infinitely more satisfactory than a hire-purchase agreement; a card is enormously useful in overseas travel. Calculating in foreign currencies is often difficult and confusing. With a credit card the holder works in the currency of the country where he is. Last but not least a credit card serves as an assurance or symbol of creditworthiness. As far as the bank itself is concerned the main advantage of the credit card system is that it brings about a reduction in the use of cheques. The costs of operating current banking accounts for individuals are rising. The average cheque is handled twenty one times before being returned to the drawer and the perpetually increasing volume of cheques is strangling the banking system and has become a real problem to commercial banks – the introduction of the credit card will hopefully provide a measure of relief as regards this problem. Banks, moreover, wish to extend their services to the public and to find alternative sources of revenue. As far as the merchant is concerned he has the advantage of having his credit sales converted into cash sales and payment of the purchase price is virtually guaranteed to him. The bank collects the debts and assumes the risk for bad debts. One of the fundamental aspects of the credit card scheme is that the merchant who accepts a credit card can rely on the good faith and creditworthiness of the bank and not on that of an unknown customer. This assurance is obviously worth the discount which he undertakes to grant to the bank.

So far I have dealt with the credit card system as used by Barclays and many other banks. It is necessary to examine another system in use which achieves the same result but assumes a different form. For want of a better name and in conformity with American law terminology I shall refer to this system as the cession scheme (American writers use the term assignment theory). Once again a tripartite agreement is contemplated. The cardholder is entitled to purchase goods or services from a specified merchant on presentation of his card and becomes indebted to the merchant for the purchase price of the goods or services. The merchant cedes his claim in respect of this indebtedness to the bank. The cardholder is obliged to pay a finance charge which varies but does not exceed an annual finance charge rate of 18,25 per cent of the amount owing; the merchant is obliged to *sell and cede* his claim to the bank in respect of each sale made by him to the cardholder; to forward to the bank the voucher evidencing the sale, duly signed by the cardholder. As consideration for the cession the merchant is entitled to payment of the amount of the voucher, less a certain variable discount. The third agreement is the agreement for goods sold or services rendered between the cardholder and the merchant.

It has most pertinently been stated that the law of contract differs from all other branches of the law in one remarkable aspect in that "speaking broadly the parties themselves make their own rules".[15] So there is no reason why a bank, which after all is the pivot of all credit card schemes, should not be free to choose to make use of the direct obligation scheme which is the scheme used by Barclaycard or the cession scheme which is the

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[15] J Chitty *Chitty on Contracts* (23rd ed) 1.

scheme used by Wesbank. I am not certain why some banks in other countries in the world choose the cession scheme, but in this country at any rate it is undoubtedly used with the intention of evading the provisions of the Limitation and Disclosure of Finance Charges Act which has superseded the old Usury Act.

The Limitation and Disclosure of Finance Charges Act deals, inter alia, with money lending transactions and its purpose is to provide for the limitation and disclosure of finance charges levied in respect of money lending transactions and credit transactions and for matters incidental thereto.[16] A money lending transaction is defined in the act as meaning any transaction, which, whatever its form may be, and whether or not it forms part of another transaction, is substantially one of money lending.[17] It includes any agreement in terms of which goods are sold under a condition of repurchase of such goods at a higher price.[18] The latter part of the definition does not concern us in this context but I have mentioned it because I shall refer to it later on.

In the words of Innes then judge of appeal:

> "as a general rule, the parties to a contract express themselves in language calculated without subterfuge or concealment to embody the argreement at which they have arrived. They intend the contract to be exactly what it purports; and the shape it assumes is what they meant is should have. Not frequently, however, (either to secure some advantage which otherwise the law would not give, or to escape some disability which otherwise the law would impose), the parties to a transaction endeavour to conceal its real character. They call it by a name or give it a shape, intended not to express but to disguise its true nature. And when a Court is asked to decide any rights under such an agreement, it can only do so by giving effect to what the transaction really is, not what in form it purports to be . . . The Court must be satisfied that there is a real intention, definitely ascertainable, which differs from the simulated intention. For if the parties in fact mean that a contract shall have effect in accordance with its tenor, the circumstances that the same object might have been attained in another way will not necessarily make the arrangement other than it purports to be".[19]

To illustrate this dictum I refer to the case of *Tucker v Ginsberg*[20] where it was pointed out that the object of discounting a promissory note on the one hand and lending money on the strength of it on the other is the same, namely to provide one party to the agreement with ready cash, but the nature of the two transactions is fundamentally different. In the discounting trans-transaction the object is achieved by the party selling the promissory note before its due date for an amount in cash that is less than the amount of the note – the difference being known as discount charges. In the loan transaction, the object is achieved by the party borrowing the money from the lender and undertaking to pay an equal amount on due date, the note being negotiated to the lender as security for the repayment of the loan. Had the court decided that the transaction was a loan then it would have been a money lending transaction and subject to the provisions of the Usury Act.

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[16]Preamble to Act 73 of 1968.
[17]S 1 of the act.
[17]*ibid.*
[19]*Zandberg v Van Zyl* 1910 AD 302 309.
[20]1961 2 SA 58 (W).

On the other hand had the court decided that the transaction was a discount agreement then it would not have been subject to the provisions of the Usury Act, notwithstanding the fact the discount charges exceeded the amount of interest which would have been permissible had the agreement been a loan. It must be emphasized that both agreements are perfectly legal.

Reverting to the two types of credit card schemes it is abundantly clear that the scheme used by Barclaycard is a money lending transaction. The contract of loan is a contract in terms of which the lender delivers some fungible thing to the borrower who is bound at a later date to return to the lender a thing of the same kind, quality and quantity.[21] A loan of money is accordingly a contract whereby money is delivered to another who undertakes to repay an equal sum at some future time. The money does not have to pass direct from lender to borrower. So, for example, when a banker honours a cheque drawn by his customer on an overdrawn account, he makes payment to the payee of the cheque on behalf of his customer and in so doing lends the amount of the cheque to his customer. A similar phenomenon takes place when Barclaycard makes a payment to a merchant on behalf of a cardholder. Barclaycard is in effect lending the amount of the payment to the cardholder.

But what of the second type of scheme which I have called the cession scheme? Can this be classified as a money lending transaction, that is, a transaction which, whatever its form may be, is substantially one of money lending? It is necessary to determine its nature because if it is a money lending transaction then it is subject to the provisions of the Limitation and Disclosure of Finance Charges Act and consequently limited as to the amount of finance charges. I must emphasize that the tripartite agreement adopted by Wesbank is a perfectly genuine agreement. It has never been suggested, even in the judgments to which I shall presently refer, that it is a simulated or sham agreement, which is in essence a dishonest agreement.

There have been two judgments in the Transvaal provincial division of the supreme court in regard to this type of scheme.[22] Since each presiding judge came to a different conclusion on the same set of facts it can readily be appreciated that the law in regard to credit cards regulated by the cession scheme is by no means as straightforward as some people would appear to believe.

It is necessary to give a short description of the factual background relating to these two judgments. A dispute arose between Wesbank and the Registrar of Financial Institutions as to whether certain provisions of the Limitation and Disclosure of Finance Charges Act apply to certain aspects of Wesbank's credit card scheme. Wesbank applied to court for a declaratory order in regard to the matters in dispute. The application was heard by Mr Justice Viljoen who decided that the transaction in question was in fact a

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[21]Grotius 3 10 1; *Western Bank Limited v Registrar of Financial Institutions and The Minister of Justice* 1975 4 SA 37 (T).

[22]*Western Bank Limited v Registrar of Financial Institutions* unreported. Judgment delivered on 10 May 1973; *Western Bank Limited v Registrar of Financial Institutions and The Minister of Justice* supra.

money lending transaction. Wesbank appealed to the full court against this decision. At the hearing of the appeal the question arose as to whether the Minister of Justice should not have been joined in the application. The court, with the consent of the parties, ordered that the judgment of Mr Justice Viljoen be set aside and that leave be granted to the applicant to approach the court on the same papers amplified as far as necessary and to join any other party in the application.

In due course the application, with the minister of justice joined as second respondent, came before Mr Justice Boshoff who decided that the transaction in question was not a money lending transaction and was not subject to the provisions of the Limitation and Disclosure of Finance Charges Act. In order to arrive at a decision the learned judge, in the first place, applied the recognised principles of statutory interpretation in order to ascertain what a money lending transaction is within the meaning of the act and concluded that there can be no loan of money, not even substantially, unless there is a contract to pay money to another who undertakes to repay an equal sum. In the second place the transaction itself has to be interpreted to ascertain whether it qualifies as such a money lending transaction. The learned judge indicated that when it comes to the interpretation of the transaction itself it must be borne in mind that the parties may as a rule arrange their transactions so as to remain outside the provisions of the act. He states:

> "such a procedure is in the nature of things perfectly legitimate. There is nothing in the authorities to forbid it. Nor can it be rendered illegitimate by the mere fact that the parties intend to avoid the operation of the law and that the selected course is as convenient in its result as another which would have brought them within it."[23]

The learned judge further pointed out that it is the nature of the agreement and not its object or the operative reason in the minds of the contracting parties for entering into it at which the court must look in order to decide whether the agreement is a money lending transaction or not. The agreements entered into under the cession scheme make it clear that both the merchant and the cardholder intend that the merchant will acquire a claim against the cardholder for payment, which the merchant sells and cedes to the bank. It is clear from the judgment that the court regarded the cession of the merchant's claim to the banker as fundamental to the scheme. The court came to the conclusion that, accepting thus the validity of the cession of the merchant's claim against the cardholder and the legal consequence that the cardholder has to make payment of the claim to the bank as cessionary of the claim, the bank does not lend money to the cardholder. The transaction is not therefore a money lending transaction.

With respect, I have serious doubts about the correctness of this decision. The very essence of the credit card scheme is that it is a method of financing sales of merchandise and rendering of services. On no account should the means used obscure the lawful end. The fallacy in the argument that the cession scheme is not a money lending transaction is that it places

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[23] *Western Bank Limited v Registrar of Financial Institutions and The Minister of Justice* supra at 44.

undue emphasis on the sale which is regarded as resulting in a claim by the merchant against the cardholder, which claim is then ceded to the bank. This argument seems to ignore the fact that before the contract of sale was entered into, two previous contracts had been entered into, one between the bank and the cardholder and one between the bank and the merchant. The merchant agrees to send the voucher evidencing the sale to the bank and the bank undertakes to pay the amount reflected on the voucher less a specified discount. Because the cardholder is obliged to effect payment direct to the bank, the conclusion is irresistible that the merchant parts with goods or services, as the case may be, not in reliance on the cardholder's but on the bank's undertaking to pay.[24]

The virtually identical application came before Mr Justice Viljoen some three years prior to the hearing of the application by Mr Justice Boshoff and as I have already pointed out the view of the court on the first occasion was diametrically different from that of the court when the matter came before it on the second occasion. The fact that the judgment of Mr Justice Viljoen was set aside does not render it a nullity; it remains a judgment and has persuasive force. The learned judge was of the opinion that what Wesbank intended to bring about was an obligation coming into existence between it and the cardholder to the effect that if the cardholder were to present his card to any authorized merchant, he would receive whatever he required in the form of goods or services at the normal retail price, and he would, provided he conformed to the conditions of his contract, become indebted to Wesbank in the amount. As far as the cardholder is concerned it seems a fair inference that there would be no intention on his part to enter into any contract with the merchant which would result in his becoming indebted to the merchant. The word "transaction", it was held, means everyting which is done, all steps which are being taken, to bring about the relationship of debtor and creditor visualized by the scheme under consideration. Dealing with the cession attention was, quite rightly in my opinion, drawn to the fact that sight must not be lost of one important factor and that is that the cession by the merchant to the bank is not the usual type of cession of a right of action, where the cedent cedes his claim against the debtor to the cessionary who notifies the debtor that the claim has been so ceded and that henceforth payment of the debt as specified in the contract between the cedent and the debtor, should be made to him. The crux of the matter was expressed by the learned judge in the following words:

> "[T]he cession should not be allowed to cloud the issue. Of course, it should be given its due weight, but no overriding importance should be attached to it. The outstanding feature in this whole transaction consisting of a conglomerate of smaller transactions is that Wesbank agrees with the cardholder beforehand that, in the event of a purchase being made or services rendered on the strength of the card and provided a cession as contemplated is effected, Wesbank would pay the cardholder's debt and provide facilities for paying that debt in monthly instalments. This amounts to an overdraft and an overdraft is nothing else but a loan of money. The overriding part of this transaction is the granting of facilities to the cardholder. Seen in this light, there is no doubt in my mind that each such transaction whereby

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[24] Cf Donald M Maffly and Alex C MacDonald "The Tripartite Credit Card Transaction: A Legal Infant" 1960 *California Law Review* 459 499.

> facilities as contemplated are granted, is a 'money lending transaction' or at least substantially a 'money lending transaction' in terms of the act."[25]

With respect, this to my mind is a correct exposition of our law.

I may add that my view as to the correctness of Mr Justice Viljoen's exposition of the law derives a small measure of support from the dictum of Mr Justice Colman in the matter of *S v Friedman Motors (Pty) Ltd.*[26] A person, who must be in fairly desperate financial straits, can raise money by the expedient of selling, for example, his motor car for a fixed sum of money and repurchasing it for a greater sum repayable in instalments. The unfortunate seller of the car being unwilling to lose the use of it either by disposing of it completely or pledging it as security, has to resort to such a transaction and the transaction under the common law is precisely what it purports to be, namely one of sale and repurchase. In order to bring the transaction within the ambit of the Usury Act and its successor the Limitation and Disclosure of Finance Charges Act, the legislature extended the definition of a money lending transaction to include any agreement in terms of which goods are sold under a condition of repurchase of such goods at a higher price, in which case the lower price at which the goods are sold is deemed to be a sum of money lent. In Friedman's case the court had to consider such an agreement. It was decided that even if the portion of the definition relating specifically to sale and repurchase agreements had not been enacted it might nevertheless have been contended that although the transactions were not money lending transactions in form or intention, they were to be treated as such for the purpose of the act, because they were "substantially" transactions of money lending. Mr Justice Colman stated that such contention might well have been sound because it is difficult to see why the first part of the definition of "money lending transaction" should have been enacted at all, unless it was intended to bring within the scope of the act transactions which were not money lending transactions at common law. The learned judge said "the phrase 'substantially one of money lending' was intended to bring within the scope of the act transactions which at common law, are of a different type".[27] It was not necessary to decide this question and accordingly the judgment as regards this point is merely an obiter dictum.

How will the credit card with its astonishing development in the past progress in future? Are we really moving towards a chequeless, cashless society as suggested by the American commentators? To a large extent credit cards are replacing cheques and cash as a means of payment but I think it unlikely, in the foreseeable future at any rate, that the credit card will make a take over bid. The expansion of the credit card business is however inevitable and new ways of using the basic tripartite agreement are already under consideration. With computerization mass payments of electricity accounts, rates and taxes and telephone accounts are well within the bounds of probability. There seems to be no reason why cash registers in depart-

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[25] *Western Bank Limited v Registrar of Financial Institutions* (unreported) 29.
[26] 1972 1 SA 76 (T).
[27] *ibid* at 82.

ment stores, super markets, garages and so forth should not be directly connected to a computer at the bank and monthly accounts settled from computer to computer. The saving of an enormous amount of paper work would in the long run justify the expense of installing such computers.

To extend the eloquent metaphor coined by J G South, the relatively modest credit card creek is rapidly heading towards a larger, deep-flowing but, I hope, not too murky river, whose bounds are difficult to define. However, I think I may predict with impunity that the development in this branch of the law will be interesting, challenging and varied. □

BUTTERWORTHS OF SOUTH AFRICA OVERSEAS STUDY TRAVEL GRANT

Applications are invited from full-time teachers of law in any South African or Rhodesian university for the 1977 grant. The grant amounts to R1 000 each alternate year and is available for study travel to the Continent of Europe and the United Kingdom only; the duration of the stay must be not less than four months.

Applications for the grant must be made no later than 30th June and should be addressed to the Managing Director, Butterworths, PO Box 792, Durban, indicating the specific reasons for the visit overseas, the places to be visited and the year and period of absence from South Africa. The selection will be made during July, and the successful applicant notified as soon as possible thereafter.

Grondslag vir die Erkenning van 'n Selfstandige Persoonlikheidsreg op Privaatheid in die Suid-Afrikaanse Reg

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SUMMARY

In South African law the common law basis of the *actio iniuriarum* is wide enough for the recognition of an independent personality right to privacy and in fact the courts have already recognised such a right. The concept of *dignitas* provides the starting point in this respect. This concept can be considered a collective noun for all personality interests besides *corpus* and *fama* and must accordingly not be restricted to the personality interest *honour* or *dignity*. The judgments which protect privacy only in so far as intent to insult or a violation of dignity is in issue, must therefore be rejected.

In 'n resente beslissing van die Rhodesiese appèlhof, *S v I and Another*,[1] waar dit oor die afloer van persone in 'n geslote kwartier en die binnedringing van 'n private woning gegaan het, het die kwessie van die erkenning van 'n selfstandige persoonlikheidsreg op privaatheid weer eens[2] ter sprake gekom. Hoofregter Beadle[3] ontken die selfstandige bestaan van sodanige reg en verklaar dat "the invasion of privacy is an injury to *dignitas* . . ."[4] Onder *dignitas* verstaan hy oënskynlik, in die lig van minstens sommige van die gesag waarop hy steun, die persoonlikheidsgoed "dignity"[5] (eer of waardigheid). Hierdie beskouing, wat die betekenis van *dignitas* beperk tot die eer of waardigheid en privaatheid bygevolglik met die eer gelykskakel, is myns insiens, met respek, vatbaar vir kritiek. Die oogmerk van hierdie bespreking is dan ook om aan te toon dat daar wel 'n algemene grondslag vir die erkenning van 'n selfstandige reg op privaatheid in die Suid-Afrikaanse reg bestaan. Ten einde hierdie oogmerk te bereik, is eerstens 'n ondersoek na die aard en omvang van die delik *iniuria* in die Romeinse en Romeins-

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[1] 1976 1 SA 781 (RA).

[2] Vir 'n vroeëre beslissing in hierdie verband, sien *S v A and Another* 1971 2 SA 293 (T).

[3] op 783–4 van die verslag.

[4] *ibid* 783.

[5] *ibid*, waar hoofregter Beadle oa verklaar dat "the privacy of the complainant was invaded and that that invasion injured her *dignity*" (my kursivering).

Hollandse reg onontbeerlik.[6] Daarna sal die Suid-Afrikaanse regspraak mbt die toepassing van gemeenregtelike beginsels aan 'n kritiese beskouing onderwerp word.

ROMEINSE EN ROMEINS-HOLLANDSE REG

Ten einde die gebied van *iniuriae* in die Romeinse reg sinvol in oënskou te neem, is dit wenslik om die kasuïstiek van die bronne volgens die een of ander sisteem in te deel. Die mees aanvaarde indeling wat in die Digesta self aangetref word, is dié van Ulpianus.[7] Volgens hom kom die *actio iniuriarum* te pas by aantastinge van die *corpus,* die *fama* en die *dignitas.*[8] Hierdie indeling was egter nie in die Romeinse reg van besondere betekenis nie. Soos uit die *Digesta*[9] self blyk, word nêrens gepoog om die voorbeelde van *iniuria* dáár aangehaal, op sodanige wyse in te deel nie.[10] Ook gaan die Romeinse reg mank aan duidelike omskrywings van die begrippe *corpus, dignitas* en *fama.*[11] Hoe dit ook al sy, waar 'n mens nietemin die *corpus* en *fama* as selfstandige persoonlikheidsgoedere met 'n min of meer vaste betekenis kan afbaken,[12] is dieselfde afbakening nie mbt die *dignitas* moontlik nie.[13]

Verskeie pogings is dan ook reeds aangewend om die betekenis van laasgenoemde begrip in die Romeinse reg te bepaal. Die mees resente hiervan is dié van De Wet.[14] Volgens hom was die *dignitas* nie 'n selfstandige persoonlikheidsgoed soos die *corpus* of die *fama* nie:

> "'*Dignitas*' of '*existimatio*', soos dit ook genoem word, was eintlik die sosiale status wat iemand regtens beklee het.[15] 'n Persoon se '*dignitas*', as sodanig, kon dus nie soos sy '*corpus*' of '*fama*' gekrenk word nie, maar wel die regte wat met sy '*dignitas*' of status verband gehou het. Elke '*injuria*' was 'n '*injuria*' wat verband hou met die '*dignitas*' van die slagoffer, en dus ook aantastings van sy '*corpus*' of krenking van sy '*fama*'. In D 47 10 word daar van baie '*injuriae*' gewag gemaak wat nouliks as aantastings van die slagoffer se '*corpus*' of krenking van sy '*fama*' beskou kan word, en ook hierdie '*injuriae*' hou verband met die slagoffer se '*dignitas*'. Hulle is egter nie almal teen een en dieselfde 'regsgoed' of 'persoonlikheidsreg' gerig nie, en in ieder geval nie die regsgoed '*dignitas*' nie, want '*dignitas*' was, soos reeds betoog, nie 'n 'regsgoed' nie, maar die status of stand van die persoon in die samelewing, aan

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[6]Dit lê nie op my weg om die delik *injuria* in besonderhede na te vors nie maar slegs vir sover dié delik met privaatheidsbeskerming verband hou: vir 'n volledige uiteensetting, sien Joubert *Grondslae van die Persoonlikheidsreg* (1953) 77 ev; vgl ook Ranchod *Foundations of the South African Law of Defamation* (1972) 1 ev; Bliss *Belediging in die Suid-Afrikaanse reg* (1933) 1 ev.

[7]Sien Joubert *Grondslae* 83 ev; Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse reg* (1970) 11; Amerasinghe *Aspects of the Actio Iniuriarum in Roman Dutch Law* (1966) 171; McKerron *Law of Delict* (1971) 9; vgl ook De Wet en Swanepoel *Strafreg* (1975) 222, 231 ev.

[8]D 47 10 1 2: "omnemque iniuriam aut in corpus inferri aut ad dignitatem aut ad infamiam pertinere".

[9]Vgl D 47 10.

[10]De Wet en Swanepoel aw 232–3; Joubert *Grondslae* 83; sodanige pogings is die produk van latere skrywers oor die Romeinse reg: Joubert *Grondslae* 83 e v

[11]De Wet en Swanepoel aw 232–3.

[12]Sien Joubert *Grondslae* 83–4, 85–6 oor die betekenis van hierdie persoonlikheidsgoedere; sien ook Amerasinghe aw 173.

[13]De Wet en Swanepoel aw 233.

[14]*ibid* 233–4.

[15]Sien *D* 50 13 5 1, 2 en veral die kommentaar van De Wet en Swanepoel aw 233 n 92.

welke status sy regte verbonde was. Hierdie regte is in die Romeinse reg nie duidelik omskryf en bygevolg ook nie duidelik van mekaar afgebaken nie."[16]

In sy klassifikasie van *iniuriae* in die Romeinse reg beskou Joubert,[17] aan die ander kant, die *dignitas* wel as 'n selfstandige persoonlikheidsgoed, te wete daardie rustige-waardige houding wat die Romeine so belangrik geag het.[18] Later ag hy hom egter nie gebonde aan hierdie opvatting nie.[19] Hy verklaar nl:[20]

> "Maar daar bestaan geen rede waarom mens *dignitas* nie in 'n ruimer sin sal opneem nie.[21] Dan is skending van die *dignitas* elke *injuria* wat nie gerig is teen die fisiese persoon van die benadeelde of sy goeie naam nie: elke krenking hom toegevoeg, waardoor [sic] inbreuk gemaak word op die agting wat 'n vrye man toekom".

So gesien, vind De Wet se beskouing aansluiting by dié van Joubert. Die *dignitas* is dan in ieder geval nie 'n enkele, afgebakende persoonlikheidsgoed soos die *fama* of *corpus* nie, maar eerder 'n versamelnaam vir persoonlikheidsgoedere of -regte wat in die Romeinse reg nog nie duidelik van mekaar onderskei en selfstandig afgebaken was nie.[22] Hiermee is die deur vir verdere ontwikkeling van persoonlikheidsbeskerming oopgelaat. Die praetor kon nl die toepassingsgebied van die *actio iniuriarum* uitbrei deur die aanwending van die *boni mores*-onregmatigheidstoets.[23] In die lig hiervan is dit nie verbasend nie dat privaatheid, alhoewel nie by name nie, reeds in die Romeinse reg onder die *dignitas* en bygevolg onder die beskermingsgebied van die *actio iniuriarum* tuisgebring is.[24]

Dit is verder belangrik om daarop te let dat om aanspreeklikheid onder die *actio iniuriarum* in die Romeinse reg te fundeer, die dader die persoonlikheid van die benadeelde met 'n gesindheid van *contumelia* moet aangetas het.[25] Soos Joubert[26] tereg aantoon, moet *contumelia* nie met die *bedoeling*

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[16]Alhoewel hy *dignitas* nie met status in verband bring nie, praat Amerasinghe a w 173–4 ook van "rights relating to *dignitas*". Afgesien van *iniuriae* m b t die *corpus* en *fama*, is die ander gevalle van *iniuria* wat in die *Digesta* genoem word, volgens hom slegs voorbeelde van regte wat met die *dignitas* verband hou.

[17]*Grondslae* 84.

[18]Hierdie eng opvatting van die *dignitas*-begrip noop Joubert *Grondslae* 86 e v om naas Ulpianus se indeling verdere hoofde by te voeg. Hy onderskei nl ook nog *iniuriae* t a v die eergevoel en dié t a v privaatheid of die mens se afsondering van openbaarheid.

[19]Soos Joubert *Grondslae* 110 self verduidelik, het hy slegs ter wille van duidelikheid m b t die Romeinsregtelike kasuïstiek *dignitas* in die engere sin van waardigheid opgeneem.

[20]*Grondslae* 110.

[21]Volgens De Villiers *The Roman and Roman Dutch Law of Injuries* (1899) 24 vn 19 is dit in elk geval duidelik dat volgens *D* 47 10 die begrip *dignitas* in 'n baie ruim sin opgeneem moet word, te wete as ". . . that valued and serene condition in [a person's] social or individual life which is violated when he is, either publicly or privately, subjected by another to offensive and degrading treatment, or when he is exposed to ill-will, ridicule, disesteem or contempt" (*ibid* 24).

[22]Mens moet goed in gedagte hou dat die Romeinse reg die gebied van *iniuria* kasuïsties benader het (sien Joubert *Grondslae* 102; De Wet en Swanepoel a w 234). Van 'n geordende sisteem van persoonlikheidsregte was daar nie sprakte nie (Amerasinghe a w 171; Joubert *Grondslae* 102–3; De Wet en Swanepoel a w 234).

[23]Sien Joubert *Grondslae* 102; De Wet en Swanepoel a w 234.

[24]Sien Joubert *Grondslae* 87–9, 146.

[25]*D* 47 10 1 pr: "specialiter autem iniuria dicitur contumelia"; sien Joubert *Grondslae* 92 e v vir 'n volledige uiteensetting van hierdie vereiste; vgl Amerasinghe a w 171.

[26]*Grondslae* 93–4; sien ook Joubert *Die Persoonlikheidsreg: 'n Belangwekkende Ontwikkeling in die Jongste Regspraak in Duitsland,* 1960 *THRHR* 41–2.

om te beledig (of die *krenking van die eergevoel*) gelykgestel word nie. In sy ruimer oorspronklike betekenis beteken *contumelia* niks anders nie as 'n handeling wat met 'n gesindheid van oormoed of verwaandheid verrig is[27] – dus, regsterminologies uitgedruk, 'n gesindheid van *opset* of *dolus malus*.[28] Ook wat die latere Romeinse reg betref kan daar volgens Joubert[29] "geen twyfel meer bestaan nie dat *contumelia* . . . eenvoudig die element opset, *dolus*, verteenwoordig: ook bekend as *animus iniuriandi*, di die opset om 'n *iniuria* of persoonlikheidskrenking te pleeg".[30]

Die delik *iniuria* van die Romeinse reg het in wese dieselfde in die Romeins-Hollandse reg gebly.[31] Voet[32] volg bv bloot op die voetspoor van Ulpianus waar hy (Voet) verklaar: [*Iniuria est*] *delictum in contemtum hominis liberi admissum, quo eius corpus vel dignitas vel fama laeditur dolo malo.* Net soos in die Romeinse reg, heg die ou skrywers geen besondere betekenis aan die begrip *dignitas* nie.[33] Trouens, die skrywers wat in Nederlands skryf, verwys nie eers na Ulpianus se indeling nie, maar gebruik begrippe soos "hoon", "eer" en "lasteringe".[34] Eenstemmigheid oor die betekenis van hierdie begrippe blyk egter nie uit die bronne nie.[35] Mens kan dus konkludeer dat ook in die Romeins-Hollandse reg die *dignitas* (of aanverwante begrippe soos die "eer") geen selfstandige afgebakende persoonlikheidsgoed was nie.[36] Nietemin stel die behoud van die Romeinsregtelike vereiste van *contra bonos mores*[37] die Romeins-Hollandse reg ook in staat om die *iniuria* aan te pas by veranderende gemeenskapsopvattinge aangaande wat reg en verkeerd is.[38] Eweneens, soos reeds uit Voet se definisie hierbo blyk, is opset of *dolus malus* noodsaaklik om die dader vir *iniuria* aanspreeklik te stel.[39] Alhoewel die ou skrywers die woord "*contumelia*" gebruik, heg hulle oënskynlik geen besondere betekenis daaraan nie.[40]

Uit die voorgaande blyk duidelik dat die *actio iniuriarum* in die Romeinse en Romeins-Hollandse reg beskikbaar was vir iedere *opsetlike* krenking van 'n ander se *corpus*, *fama* en *dignitas*. Die *dignitas* is nie 'n afgebakende selfstandige persoonlikheidsgoed nie, maar eerder die versamelnaam vir persoonlikheidsgoedere wat nog nie geïdentifiseer en duidelik van mekaar onderskei

[27]Joubert *Grondslae* 93, 96–7.
[28]*ibid* 97.
[29]1960 *THRHR* 41.
[30]Vgl ook Ranchod aw 12; Van Heerden aw 206; De Wet en Swanepoel aw 241 aanvaar eenvoudig dat opset die vereiste skuldvorm is sonder om eers na die "opset om te beledig" te verwys.
[31]Sien Joubert *Grondslae* 108 ev; Amerasinghe aw 172–3; De Villiers aw 17; Van Heerden aw 206; McKerron aw 9; Van der Merwe en Olivier aw 16; Ranchod aw 72 ev; vgl ook De Wet en Swanepoel aw 234–5.
[32]47 10 1; sien ook De Villiers aw 17.
[33]De Wet en Swanepoel aw 234, 235; Amerasinghe aw 173.
[34]Vir 'n volledige uiteensetting van die beskouings van die ou skrywers, sien De Wet en Swanepoel aw 234–5; sien ook Joubert *Grondslae* 108–9 n 225.
[35]*ibid.*
[36]Sien De Wet en Swanepoel aw 235; Amerasinghe aw 173–4.
[37]Matthaeus 47 4 1 1 verklaar bv: "contumelia contra bonos mores alicui illata".
[38]Sien Joubert *Grondslae* 109; Van der Merwe en Olivier aw 16.
[39]Sien ook Joubert *Grondslae* 110; De Villiers aw 23 n 13.
[40]Sien Joubert *Grondslae* 108–9.

is nie. Een van hierdie persoonlikheidsgoedere is sonder twyfel *privaatheid*. In hierdie opsig dien die vereiste van die *boni mores* as basis vir die uitbreiding van persoonlikheidsbeskerming.

Die gevolgtrekking is dus dat die gemeenregtelike grondslae van persoonlikheidsbeskerming ruim genoeg is om privaatheid daaronder tuis te bring.[41] Die vraag is egter of die Suid-Afrikaanse regspraak reeds so ver gevorder het as om privaatheid as 'n selfstandige persoonlikheidsgoed uit die *dignitas*-begrip af te baken.

SUID-AFRIKAANSE REGSPRAAK

Die *locus classicus* vir die erkenning van 'n selfstandige reg op privaatheid in die Suid-Afrikaanse reg is *O'Keeffe v Argus Printing and Publishing Co Ltd and Another*.[42] Hier is 'n foto van 'n ongetroude dame sonder haar toestemming as deel van 'n advertensie van gewere, pistole en ammunisie gepubliseer. Sy stel 'n aksie in op grond daarvan dat die publikasie haar reg op privaatheid skend.[43] By eksepsie aanvaar waarnemende regter Watermeyer dat die *actio iniuriarum* beskikbaar is vir "an intentional wrongful act which constitutes an aggression upon [a plaintiff's] person, dignity or reputation"; of, anders gestel, vir "a wrongful act, committed intentionally and which violates 'the real rights related to personality' of another".[44] Aangesien daar in die onderhawige geval nie sprake is van aantasting van die eiseres se "person" of "reputation" nie, is die enigste vraag of daar 'n aantasting van haar "dignity" of "*those rights relating to her dignity*"[45] was.[46] Ten einde die betekenis van "dignity" of *dignitas* te bepaal,[47] sluit die regter[48] hom aan by De Villiers[49] wat beweer dat dié begrip wyd opgeneem moet word en verklaar hy:

> "'Whether an act is to be placed amongst those that involve an insult, indignity, humiliation or vexation depends to a great extent upon the modes of thought prevalent amongst any particular community or at any period of time, or upon those of different classes or grades of society, and the question must to a great extent therefore be left to the discretion of the Court where an action on account of the alleged

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[41] Sien ook McQuoid-Mason *Invasion of Potency?* 1973 *SALJ* 23 25.

[42] 1954 3 SA 244 (K); McKerron aw 54 verklaar: "The case goes further than any previous case in recognising the existence of a right to privacy in South African law"; hierdie beslissing is met goedkeuring aangehaal in *Prinsloo and Another v SA Associated Newspapers Ltd* 1959 2 SA 693 (W) 695–6; *Gosschalk v Rossouw* 1966 2 SA 476 (K) 490; *Mr and Mrs "X" v Rhodesia Printing and Publishing Co Ltd* 1974 4 SA 508 (R) 511–2 (bekragtig in *Rhodesian Printing and Publishing v Duggan* 1975 1 SA 590 (RA) 592). Vir besprekings van die *O'Keeffe*-saak, sien Joubert 1960 *THRHR* 26–7, 39 ev; Van der Merwe en Olivier aw 393–4; McQuoid-Mason 1973 *SALJ* 25–6; Amerasinghe aw 175–6, 188–9.

[43] Sien 246 van die verslag.

[44] op 247.

[45] my kursivering; die regter beskou dus tereg nie die "dignity" of *dignitas* as 'n enkele afgebakende persoonlikheidsgoed nie; sien ook *Gosschalk v Rossouw* 1966 2 SA 476 (K) 490.

[46] op 247.

[47] Dit is van belang om daarop te let dat die begrippe "dignity" en *dignitas* vir die regter identies is.

[48] op 247–8.

[49] aw 24, 25 (aangehaal *supra* n 21).

injury is brought'[50] . . . In the same way it seems to me that the present case must be judged in the light of modern conditions and thought, and the fact that the identical situation is not covered by Roman or Roman-Dutch authority is not conclusive of the matter".[51]

In ooreenstemming hiermee beslis regter Watermeyer dat die publikasie die eiseres se *dignitas* kan krenk en wys hy die eksepsie van die hand.[52]

Hierdie beslissing kan in beginsel onderskryf word. In eerste instansie gee die regter tereg aan *dignitas* so 'n wye omskrywing dat dit die hele regtensbeskermde persoonlikheid behalwe die *corpus* en *fama* omvat.[53] As sodanig is die *dignitas* nie 'n enkele persoonlikheidsgoed nie, maar omvat dit al "those rights relating to . . . dignity".[54] Alhoewel die regter dit nie uitdruklik so stel nie, blyk dit myns insiens bo alle twyfel uit sy uitspraak[55] dat hy die reg op privaatheid as een van daardie "rights" identifiseer.[56] Die bepaling van die beskermingswaardigheid van hierdie reg geskied met verwysing na die *boni mores*. Verder moet die privaatheidskending, soos in alle gevalle waar die *actio iniuriarum* ter sprake is, *opsetlik* geskied om die dader aanspreeklik te stel. Tereg verwerp die regter dan ook, in navolging van *Foulds v Smith*,[57] die beskouing dat *contumelia* in die sin van "insult" die "essence of an *injuria*" is.[58]

Die beslissing in *S v A and Another*,[59] waar dit oor die ongemagtigde meeluistering van private gesprekke gegaan het, skyn met die eerste oogopslag ook selfstandige erkenning aan die reg op privaatheid te verleen.[60,61] Soos die regter in die *O'Keeffe*-saak, aanvaar waarnemende regter Botha[62] dat 'n *iniuria* geleë is in die onregmatige, opsetlike aantasting van 'n ander se "person", "dignity" of "reputation".[63] Insgelyks neem hy "dignity" so wyd op dat dit die hele regtensbeskermde persoonlikheid, behalwe die "person" en "reputation", omsluit.[64] Gevolglik besluit hy[65] dat "the right to privacy

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[50]aanhaling uit De Villiers a w 83.

[51]op 248; sien ook Amerasinghe a w 175–6.

[52]op 249.

[53]Sien ook Joubert 1960 *THRHR* 39.

[54]Sien weer 247 van die verslag.

[55]Vgl sy opmerkings op 249 oor die beskerming van privaatheid in soortgelyke gevalle in die VSA.

[56]Hierdie afleiding word ook gemaak in *Gosschalk v Rossouw* 1966 2 SA 476 (K) 490–1. Regter Corbett verklaar met verwysing na die *O'Keeffe*-saak: "The rights relating to dignity include, it would seem, . . . a qualified right to privacy"; vgl ook *Mr and Mrs "X" v Rhodesia Printing and Pub Co Ltd* 1974 4 SA 508 (R) 512; vgl egter Joubert 1960 *THRHR* 40.

[57]1950 1 SA 1 (A) 11.

[58]op 248.

[59]1971 2 SA 293 (T).

[60]In *Mr and Mrs "X" v Rhodesia Printing and Pub Co Ltd* 1974 4 SA 508 (R) 512 word met goedkeuring na hierdie beslissing verwys; sien ook *S v I and Another* 1976 1 SA 871 (RA) 783–4.

[61]Dit is van belang om daarop te let dat die vereistes vir *crimen injuria* soortgelyk aan dié vir siviele aanspreeklikheid is (sien in die algemeen Bliss a w 36 e v; vgl egter Amerasinghe a w 180 n 49–50).

[62]op 297.

[63]in navolging van *R v Umfaan* 1908 TS 62, 66.

[64]op 297.

[65]*ibid.*

is included in the concept of *dignitas*" en dat "there can be no doubt that a person's right to privacy is one of . . . "those real rights, those rights *in rem*, related to personality, which every free man is entitled to enjoy".[66] Op die oog af dus 'n onomwonde erkenning van die reg op privaatheid as selfstandige persoonlikheidsreg.[67] Ongelukkig vertroebel regter Botha sy benadering by die behandeling van die opset-vereiste. Hy vereis nl nie bloot die opset om privaatheid te skend nie, maar die "intention to impair the complainant's dignity".[68] Sodanige opset vind hy in die vorm van *dolus eventualis:* "They must have forseen the possibility that the complainant could or would be hurt and *insulted*"[69] by their conduct, but they acted in reckless disregard of his feelings.[70] In stryd met sy standpunt hierbo beperk regter Botha sodoende nou die "dignity" of *dignitas* tot die *eer* as persoonlikheidsgoed en negeer hy die selfstandige betekenis van die reg op privaatheid.[71] Indien privaatheid as sodanig beskerm is, bestaan daar myns insiens geen twyfel nie dat opset in die vorm van *dolus directus* by die beskuldigdes aanwesig was.

Die beskouing dat *dignitas*, en bygevolg privaatheid, beperk moet word tot die *eer* en dat die *opset om te beledig* dienooreenkomstig 'n element van *iniuria* is, blyk reeds vroeg uit die Suid-Afrikaanse regspraak m b t privaatheidsbeskerming.[72] In bv *R v Holliday,*[73] waar die klaagster afgeloer is terwyl sy besig was om te ontklee, erken regter Gardiner die reg op privaatheid as inbegrepe in die *dignitas*-begrip.[74] Hy verklaar:[75] "It is the violation of a man's rights of personality . . . which gives rise to an action of injury. Now among the rights of personality to which under our civilization a woman is entitled, is the right to privacy in regard to her body". Die regter stel *dignitas* egter gelyk met "selfrespect"[76] en vereis gevolglik 'n "intention to do the *insulting* act"[77] om 'n skuldigbevinding te fundeer.[78] Die reg op privaatheid word dus slegs beskerm vir sover die opset om te beledig aanwesig is.

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[66]Ook vir waarnemende regter Botha is die *dignitas*-begrip dus skynbaar 'n versamelnaam vir 'n verskeidenheid persoonlikheidsregte, waaronder die reg op privaatheid.

[67]Hierdie erkenning blyk nog duideliker waar regter Botha op 298 verklaar: "The offence consists simply in the fact that there was a wrongful and intentional breach of the complainant's right to privacy".

[68]op 299.

[69]my kursivering.

[70]op 299.

[71]Oor die onderskeid tussen privaatheid en die eer, sien my bespreking in *Die Reg op Privaatheid* (proefskrif 1976) 278 e v, 299–301.

[72]Hierdie beslissings volg waarskynlik op die voetspoor van *R v Umfaan* 1908 TS 62. Die hof stel dit duidelik dat *dignitas* slegs geskend kan word indien daar 'n element van "degradation, insult or *contumelia*" aanwesig is. (Vir 'n kritiese bespreking van hierdie vonnis, sien De Wet en Swanepoel a w 235–6). Dié beskouing vind ook weerklank in die appèlhof: sien *Matthews and others v Young* 1922 AD 492, 503; Van Heerden a w 205.

[73]1927 CPD 395; sien ook Van der Merwe en Olivier a w 393.

[74]op 400.

[75]op 401.

[76]op 400.

[77]my kursivering.

[78]n Soortgelyke standpunt blyk uit *R v S* 1955 3 SA 313 (SWA) 315; *R v R* 1954 2 SA 134 (N) 135; vgl verder De Wet en Swanepoel a w 326 n 10.

Selfs siviele beslissings wat na die *O'Keeffe*-saak gevolg het, handhaaf 'n soortgelyke standpunt mbt die erkenning van die reg op privaatheid. In bv *Kidson and Others v SA Associated Newspapers Ltd*,[79] waar die ongemagtigde publikasie van 'n foto van verpleegsters ter sprake was, stel regter Kuper[80] dit mbt die *iniuria pertinens ad dignitatem* duidelik dat "a remedy should be given only when the words or conduct complained of involve an element of degradation, insult or *contumelia*".[81]

Die gelykskakeling van privaatheid met die eer moet verwerp word.[82] Sodanige gelykskakeling is nie alleen regsteoreties onaanvaarbaar nie,[83] maar ook beslis in stryd met die Romeinse en Romeins-Hollandse reg.[84] Soos duidelik geblyk het, het die gemene reg nie die *dignitas* tot die persoonlikheidsgoed "eer" beperk nie. Ook is *contumelia* in die sin van opset om te beledig, nie as vereiste vir die delik *iniuria* gestel nie. Daarom kan die verwerping van hierdie onjuiste beskouings deur die appèlhof[85] nie genoeg onderskryf word nie.

SLOTSOM

Die reg op privaatheid word ongetwyfeld as 'n selfstandige persoonlikheidsreg in ons reg erken en is as sodanig reeds uit die *dignitas*-begrip afgebaken. Die vertroue kan uitgespreek word dat die Suid-Afrikaanse appèlhof, anders as die Rhodesiese appèlhof in *S v I and Another*[86], die suiwer beskouing wat in die *O'Keeffe*-saak[87] en andere gehandhaaf is, sal bevestig. □

Die mens is 'n wispelturige wese wie se belange aan tyd en plek gebonde is en daarom bied die humanisme nie 'n onveranderlike en sekere beginpunt waaraan menseregte vasgeanker kan word nie. En watter mens se belange moet per slot van sake die deurslag gee?

– J D van der Vyver *Die Beskerming van Menseregte in Suid-Afrika* 7

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[79]1957 3 SA 461 (W); sien ook *Mhlongo v Bailey and Another* 1958 1 SA 370 (W) 372.
[80]in navolging van *Walker v Van Wezel* 1940 WLD 66.
[81]op 467.
[82]Sien in die algemeen Joubert *Grondslae* 140–1, 1960 *THRHR* 40–2; vgl ook McQuoid-Mason 1973 *SALJ* 27–8; Van der Merwe en Olivier a w 394–5.
[83]Sien *supra* n 71; Joubert 1960 *THRHR* 41.
[84]Sien Joubert 1960 *THRHR* 41–2.
[85]*Foulds v Smith* 1950 1 SA 1 (A) 11; sien ook *Moaki v Reckitt and Colman (Africa) Ltd and Another* 1968 3 SA 98 (A) 104; die *O'Keeffe*-saak *supra* op 248; Joubert 1960 *THRHR* 41.
[86]*supra.*
[87]*supra.*

Rechtshulp in Zuid-Afrika

Een voorstel tot verbetering

MJ Krenning

Nederland

SUMMARY

A comparison is drawn between the Juridisch Advies Buro (JAB) at Leiden University and the legal advice clinic operated by the law faculty of the University of Cape Town in the hope that the latter would achieve maximum efficiency by drawing from the experience of the former, a much older and more effectively organised institution.

The aims, organisation, operation and spheres of involvement of the JAB are described whereupon attention is directed to the various legal aid systems operative in South Africa with special reference to the legal advice clinic at UCT. It is contended that the "means test" and the arbitrary discretion given to the legal aid official to determine what constitutes a "deserving case" are some of the main defects of the Legal Aid Act of 1969.

The operation of the legal aid clinic at UCT having been briefly described, the essential differences between the above organisation and the JAB are enumerated as follows: South African students are obliged to refer all matrimonial disputes and maintenance claims to the legal aid board and, secondly, students in South Africa are not permitted to act on behalf of their clients. It is suggested that the legal aid clinic would operate more effectively if (i) a syllabus was drawn to describe and analyse the various methods of consulting with clients, (ii) training weekends were organised, (iii) students participated once a week for a minimum period of six months, (iv) an attorney along with those who have been active at the clinic during a specific week discuss and analyse the cases attended to during the week, and lastly (v) statistics were kept of how clients learnt about the services of the legal aid clinic.

INLEIDING

In elk rechtssysteem komen leemten voor. In vele landen zijn daarom rechtshulpinstellingen gecreëerd. Het navolgende zal het wetswinkelsysteem van het juridisch advies buro (JAB) in Leiden, Nederland, behandelen samen met dat in Kaapstad, Zuid-Afrika.[1]

De gekozen opzet is niet willekeurig. Aangezien het wetswinkelsysteem in Nederland een langere geschiedenis heeft en daardoor verder ontwikkeld is, kan een bespreking ervan een gunstige bijdrage leveren tot eventuele verbetering van het Zuid-Afrikaanse systeem. Deze stelling suggereert, dat het ZA systeem niet optimaal functioneert. Evenwel moet worden beseft,

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[1]De rechtenfaculteit van de Universiteit van Kaapstad heeft mij de faciliteiten geboden om dit onderzoek te verrichten. Allen, die mij hebben geholpen, betuig ik daarvoor mijn oprechte dank.

dat deze constatering wordt gedaan door een Europese juriste, vertrouwd als zij is met haar eigen rechtssysteem.

DOELSTELLINGEN VAN HET JURIDISCH ADVIES BURO

Er zijn verscheidene gronden aan te wijzen, waardoor er een leemte in de rechtshulp bestaat. Enerzijds tracht het JAB deze leemte op te vullen door individuele hulpverlening en anderzijds ageert het tegen maatschappelijke wantoestanden veroorzaakt door ons rechtsstelsel. Voor de Zuid Afrikaanse jurist zal ik op het eerstgenoemde punt nader ingaan.

Een financiële, psychische (drempelvrees) dan wel culturele (taalgebruik) barrière maakt het voor velen moeilijk zich te richten tot de officiële instantie, zoals:

- advocaat (te duur).
- rechtshulp ogv *pro deo* regeling tevens door een advocaat. (Langdurige procedure èn gekoppeld aan inkomensnorm van f25 000 bruto.)
- juristen bij vakbonden (alleen hulp aan leden in beginsel gespecializeerd op arbeids- en sociaalrecht).
- Ombudsman (Kan meestal niet individueel helpen door centrale positie. Kan het zeer grote aantal gevallen niet aan. Bovendien is de ombudsman niet voldoende gespecialiseerd.)

De wetswinkel heeft het voordeel door zijn informele positie elke barrière op te heffen. Ze specialiseert zich juist op problemen van minvermogenden zonder expliciet een bepaalde inkomensnorm te hanteren. Verder draagt de wetswinkel bij aan zodanige bewustwording van het publiek, dat het een probleem als een juridisch probleem onderkent.

ORGANISATIE EN WERKWIJZE VAN HET JAB

Aan het JAB zijn oa de volgende mensen met ieder een eigen functie verbonden:

	Aantal	
Receptionist	1	
Administrateur	1	
Medewerker-adviseur	±50	(student), onderverdeeld in 5 nader uit te leggen secties.
Sectie coördinator	5	
Wetenschappelijke medewerkers	10	
Algemeen en dagelijks bestuur	13 en 3	

Het JAB is open gedurende 4 ochtenden en één avond per week. De adviseurs vragen nooit rechtstreeks naar het inkomen van de client, omdat het mensen zou kunnen afschrikken. De voorwaarden om deze kosteloze rechtshulp van het JAB te krijgen zijn ook niet exact omschreven. De adviseurs gaan veeleer op eigen indrukken of omtrent de welvarendheid van

de persoon. In de praktyk blijkt zelden dat een evidente "profiteur" op deze gemakkelijke manier aan rechtshulp probeerde te komen.

Receptionist

De klienten worden door de receptionist opgevangen, een functie die door een niet-spreekuur houdende medewerker wordt uitgeoefend. De receptionist verwijst de klienten naar de betreffende sectie, waarvan per ochtend/avond minimaal 1 adviseur zitting houdt.

Medewerker, adviseur

De medewerker is in de doctoraal fase van de rechtenstudie. Hij moet bereid zijn om gedurende minimaal 6 maanden 1 maal per week zitting te houden op het JAB en de sectievergadering bij te wonen. De termijn van 6 maanden schijnt op het eerste gezicht nogal lang, maar deze garandeert op den duur een zekere deskundigheid. De rechtenfaculteit heeft de eis van minimaal 6 maanden aantrekkelijk gemaakt door in geval van werkzaamheid op de (nog nader uit te leggen) sectie contractenrecht een vrijstelling te geven voor een onderdeel in de doctoraal studie civielrecht, nl het houden van een pleidooi voor een studentenrechtbank en professoren. Doorgaans blijft het merendeel van de medewerkers zelfs tot ongeveer 9 maanden voor het JAB werken.

In samenwerking met de wetenschappelijke staf van de universiteit hebben (oud) medewerkers van het JAB reeds diverse stencils/syllabi gemaakt over verscheidene onderwerpen mbt de meest voorkomende problemen van clienten. Deze stencils dienen als leidraad voor de adviseurs. Van hen wordt dan ook verwacht, dat zij bekend zijn met de inhoud van die stencils, die betrekking hebben op hun sectie. Dit bevordert de kwaliteit van de rechtshulp. Bovendien worden de problemen sneller overzien en aangepakt. De volgende stencils zijn oa uitgebracht:

- procederen voor de kantonrechter
- echtscheiding
- paspoorten
- geldleningen
- overzicht huurrecht
- verzekeringen
- burenrecht - hinderwet
- alimentatie
- verkeersdelicten
- rechtsbijstand strafzaken
- toevoeging raadsman
- uitvoering algemene bijstandswet
- huurharmonisatie

Bovendien wordt door de (nog nader te noemen) administrateur periodiek een gestencild bulletin samengesteld, waarin alle voor de medewerkers van belang zijnde zaken worden opgenomen. Het bulletin wordt aan alle medewerkers en stafleden uitgereikt en vormt de belangrijkste bron van direkte informatie.

Tenslotte zijn de medewerkers onderverdeeld in 5 secties, ter bevordering van deskundigheid en efficiente verdeling der werkzaamheden, al naar gelang eigen interesse van de adviseurs en mogelijke specialisatie in hun studie.

De volgende secties zijn er gevormd:

fiscaalrecht
contracten
publiekrecht dwz staatsrecht en strafrecht en ter wille van een evenredige verdeling van zaken over de secties is ook het echtscheidings- en huwelijksgoederenrecht bij deze sectie ondergebracht.
sociaalrecht
wonen.

Per sectie werken er ongeveer 8 tot 12 studenten. Elk van de secties wordt constant begeleid door één of meer *wetenschappelijk* medewerkers van de universiteit (studeren meestal voor hun LLD graad), wier specialisme samen valt met het terrein van de betreffende sectie.

Elke week worden àlle zaken, die die week zijn binnen gekomen in een sectievergadering besproken samen met deze wetenschappelijke medewerkers. De vergadering gaat na hoe de zaak het beste aangepakt kan worden. Bovendien worden nieuwe ontwikkelingen in lopende zaken besproken. Het is dus de bedoeling, dat een adviseur geen advies geeft aan zijn client zonder eerst zijn sectie geraadpleegd te hebben. Wanneer hij door omstandigheden gedwongen wordt te adviseren voordat de vergadering bijeen is geweest, wordt het advies naderhand in de vergadering geverifieerd.

In de praktijk blijkt dat eenvoudige routine gevallen meteen worden afgehandeld en dat deze nauwelijks nadere bespreking behoeven in de volgende vergadering. Evenwel wordt het begrip routinezaak eng geïnterpreteerd, omdat het gevaar zou ontstaan dat teveel op eigen houtje geadviseerd wordt.

Administrateur

De administratie wordt gevoerd door een juridisch student, die als enige van de JAB medewerkers en stafleden etc ervoor betaald wordt (1200 Rand per jaar, ongeveer even hoog als een studietoelage in Nederland om 1 jaar te kunnen leven). Deze betaling dient als stimulans, omdat het werk tijdrovend en tamelijk saai is. Hij is gedurende de openingsuren aanwezig. Zijn taken zijn:

- verwerken van de dossiers over de zaken
- verwerken van de post
- zorgen voor voorlichtingsmateriaal, studieboeken
- bijwonen van vergaderingen
- ontvangen van nieuwe medewerkers
- uittypen van stencils
- uitvoeren van opdrachten van het bestuur
- bijhouden van kaartenbak van instanties waarmee het JAB redelijk contact heeft.

Het JAB gebruikt het volgende dossier formulier:

STATISTIEK JURIDIES ADVIESBURO

DATUM AANVANG:........ kode onderwerp:........ juli 1973
afronding:........ juli 1974
dossier: ja/nee adviseur:........

kliënt

1 man/vrouw........ naam: ....

2 beroep (ev van echtgenoot) . . . .

3 leeftijd: . . . . (a) – 26
(b) 26 – 60
(c) 60 –

4 adres: . . . .

5 woonplaats: . . . . (a) leiden
(b) oegstgeest
(c) leiderdorp
(d) alphen aan de rijn
(e)

6 is de kliënt al eerder bij het juridies adviesburo geweest? . . . . . . ja/nee

7 is de kliënt voor deze zaak al bij een andere instantie geweest? . . . . ja/nee
indien 'ja': welke: . . . .
hoe verliep het kontakt? . . . .

8 hoe hoorde kliënt van het jab? . . (a) media, nl:........
(b) instelling, nl: ....
(c) familie, vrienden, kennissen........
(d) ....

9 verloop/afloop van de zaak: . . . (a) niet voor ons bestemd
(b) onmiddellijk verwezen
(c) eenvoudige informatie, één kontakt
(d) begeleiding, onbekende afloop
(e) begeleiding met uiteindelijk verwijzing
(f) begeleiding tot (bittere) eind

10 indien verwezen is:
naar wie? . . . .
hoe is het verder gelopen? . . . .

Tav dit formulier zou ik het volgende willen opmerken: Het formulier is aangepast aan de in andere Nederlandse wetswinkels gebruikte formulieren. Deze uniformiteit vergemakkelijkt de statistische werking voor het hele land. Door de datum van aanvang en afronding te noteren kan de looptijd berekend worden. De antwoorden op vraag 7 en 10 zijn belangrijk ten aanzien van het verloop van kontakten. Onder media wordt verstaan: kranten en televisie.

Algemeen bestuur en dagelijks bestuur

Het JAB is opgericht in de vorm van een stichting, die bestuurd wordt door een algemeen bestuur van 13 leden, waaronder o a hoogleraren, lid van de HR (Appellate Division), de studentenadvocaat, een vertegenwoordiger van die Leidse bevolking. Uit het algemeen bestuur is een dagelijks bestuur van 3 personen samengesteld, die zorgdragen voor de continuïteit op het JAB en voor een zo efficient mogelijke organisatie.

WERKZAAMHEDEN VAN HET JAB

Om een beeld te krijgen van de verrichtingen van het JAB zal ik deze eerst per sectie beschrijven.

De sectie *fiscaalrecht* draait jaarlijks omstreeks februari, maart op volle toeren door de stormloop van clienten, die hun aangiftebiljet door de medewerkers laten invullen. Er is een geheim kaartsysteem, waardoor men bij latere meningsverschillen met inspecteur of ontvanger gemakkelijk het afschrift van het aangiftebiljet in het archief kan opsporen. Tevens worden er veel bezwaarschriften tegen aanslagen ingediend en problemen mbt bijvoorbeeld motorrijtuigen belasting of buitenlandse belastingplicht behandeld.

De sectie *contracten* behandelt voornamelijk zaken over koop en verkoop, aanneming van werk, huurkoop en koop op afbetaling, colportage en verzekering.

De sectie *publiek- en familierecht* heeft hoofdzakelijk te maken met vraagstukken over echtscheidingen, erfrecht, gemeenterecht en verkeersrecht.

De sectie *sociaalrecht* is de drukst bezochte sectie. 30% van die JAB clienten wordt hiernaar verwezen. De meeste gevallen hebben betrekking op uitkeringen krachtens de Algemene Bijstandswet, Sociale (verzekerings) wetten, ziektewetten of houden verband met ontslagzaken.

De sectie *wonen* houdt zich bezig met het geven van adviezen in zake onderhuur, ontruimingen, burenrecht, erfafscheidingen, erfdienstbaarheden, achterstallig onderhoud, huurverhogingen, woonvergunningen en kraken.

Alle secties verschaffen dmv zelfontworpen brochures (waarin de weinig begrijpelijk juridische taal vermelden wordt) voorlichting aan het publiek. Aparte werkgroepen zijn er gevormd om de materie (bijv inzake belastingen, koop, garantie) uit te denken. Tevens worden in de plaatzelijke pers stukjes geschreven door de medewerkers over de meest voorkomende problemen. Het publiek leert ervan en het verlaagt de drempelvrees om zich tot het JAB te wenden.

Sommige secties (contracten en wonen) hebben ook nog verscheidene zaken voor de kantonrechter lopen. De adviseurs zelf treden mbt deze zaken ten behoeve van de client in rechte op.[2] Het gebeurt nogal eens, dat clienten op het spreekuur komen, die een dagvaarding of een verzoekschrift tot het uitvaardigen van een rechterlijk bevel tot betaling gekregen hebben. Meestal zal het JAB ten behoeve van de clienten procederen. De medewerker doet hierdoor aanzienlijke praktijkervaring op.

De kantonrechter is immers bevoegd ter zake van–

(1) persoonlijke vordering t/m f1 500 (a 38 RO);

(2) alle vorderingen mbt huur en verhuur etc (a 27 Huurwet);

(3) arbeidszaken, ook wanneer deze de vordering van f1 500 to boven gaan; en

(4) huurkoopzaken, *idem*.

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[2]In Nederland kunnen *kantongerecht* procedures door iedere meerderjarige bijgestaan worden (a 99 rechtsvordering).

Wanneer daarentegen een client met een zaak komt die bij de rechtbank aangebracht moet worden is daarvoor een advocaat/procureur nodig. Het JAB legt dan uit hoe de gratisadmissie procedure voor *pro deo* hulp in zijn werk gaat of geeft de client een lijst met namen van advocaten. In het algemeen is het kontakt tussen het JAB en advocaten vrij goed. Doordat de bevoegdheid van de studenten om in rechte op te treden is beperkt tot het optreden voor de kantonrechter, bestaat er vrijwel geen vrees dat het JAB het terrein van de advocaat betreedt.

In de afgelopen jaren na de oprichting van het JAB werd 1 maal per jaar een "trainings weekend" voor de JAB medewerkers en stafleden gehouden. Deze naweken vermeerderden het kontakt tussen de medewerkers en leverden o a discussies op over de doelstellingen, de organisatie van het JAB en over de prettigste benadering van de client.

Statistische gegevens

In het eerste jaar van het bestaan van het JAB (1 febr '72 t/m febr '73) werden 200 clienten geholpen. Van 1 febr '73 t/m 1 febr '74: 5 500 clienten!

Verdeling over de secties:

	febr '72 – febr '73	mrt '73 – juni '73[3]
fiscaal	18%	27%
contracten	14%	14%
publiek/familie-recht	20%	14%
sociaal	27%	15%
wonen	21%	30%
	100%	100%

Aard van de adviezen:

zuiver advies (in 1 of 2 maal af te handelen)	57%	
verwijzing (naar bijv advocaat, deurwaarder, Huuradviescommissie, Burohuisvesting)	12%	slechts!
bijstand (langer durende correspondentie, in rechte optreden voor kantonrechter)	31%	

Gegevens over clienten:

man:	60%
vrouw:	35%
echtpaar:	5%

Verder blijkt dat het JAB vergeleken met de officiële instanties een lage drempel heeft: heel veel mensen komen zonder meer uit eigen beweging.

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[3]Er zijn geen gegevens tot recentere datum beschikbaar.

DE RECHTSHULP IN ZUID-AFRIKA

In de Zuid-Afrikaanse wetgeving vindt men een aantal wetten en regelingen tav de rechtshulp aan on- en minvermogenden. Het stelsel is daardoor tamelijk gecompliceerd geworden, maar kort samengevat zijn er de volgende mogelijkheden:

(1) Op grond van regel 53 gebaseerd op de Wet op Landdroshowe 32 van 1944 kan men bij het landdrosthof een verzoek indienen tot *pro deo* rechtsbijstand. Het hof kan de client vervolgens naar een procureur verwijzen, die onderzoekt of de persoon in kwestie een in *prima facie* zaak heeft en daarnaast over onvoldoende geldmiddelen beschikt. De uiteindelijke beslissing is bij de hof op grond waarvan een procureur wordt aangewezen.

(2) Op grond van regel 40 gebaseerd op de Wet op die Hooggeregshof 59 van 1959 kan iemand op analoge wijze als onder (1) *in forma pauperis*-bijstand verkrijgen. De voorwaarden hiervoor zijn dat het wederom een in *prima facie* zaak betreft en dat de betreffende persoon geen bezittingen heeft die bij elkaar de waarde van 100 Rand (f400) overtreffen, na aftrek van huisraad, kleren en ambachtsgereedschap en dat hij niet binnen redelijke tijd zo een bedrag uit verdiensten kan opbrengen.

(3) In geval de mogelijkheid bestaat, dat de beklaagde ter dood veroordeeld wordt, is in de praktijk algemeen aanvaard dat de beklaagde *pro deo*-bijstand krijgt.

(4) Ten slotte is de Wet op Regshulp 22 van 1969 (gewijzigd in 1971 en 1972) ingesteld om "voorsiening te maak vir regshulp vir behoeftige persone en om vir daardie doel 'n Regshulpraad in te stel en sy werksaamhede te bepaal".

Voor iemand die om welke reden dan ook niet in staat is om naar een procureur te gaan, is het nogal verwarrend, welke van de 4 geschetste wegen hem ten dienste staan, mede omdat ze niet ieder een eigen terrein afbakenen. De Wet op Regshulp is in wezen een raamwet, die relatief het hulp voor een opvang van het publiek sorgt, omdat ogv deze wet rechtsbeamptes zijn aangesteld aan wie men zijn probleem kan voorleggen.

Deze rechtshulpbeampte verwijst de personen naar de betreffende instanties als de wegen (1) of (2) slechts betreden kunnen worden of naar een procureur in geval het probleem ogv (4) kan worden aangepakt.

De studenten in Zuid-Afrika hebben in tegenstelling tot hun Nederlandse collega's geen bevoegdheid om in rechte voor hun clienten op te treden. Door deze beperking èn het feit, dat in de praktijk de meeste problemen onder (4) worden gerangschikt, word het merendeel van de mensen in de klinieken doorgestuurd naar de rechthulp beampte. Zodoende zal ik de werking van deze Wet op regshulp in het kort weergeven.

A 2 ev van de wet handelt over de regshulpraad, die op zijn beurt nadere voorwaarden mag stellen wanneer en in welke gevallen rechtshulp (dws verwijzing naar een procureur) aan behoeftige personen wordt gegeven. De leden van de raad (en vervangers) worden door de minister van

justitie aangewezen die ten allen tijde de ambtstermijn van hen kan beeindigen. De raad moet verder desgewenst inlichtingen over haar werkzaamheden en financiën aan de minister verstrekken naart het overleggen van jaarstukken.

De regshulpraad heeft bij elk landdroshof een regshulpbeampte benoemd, die nagaat of de clienten voor rechtshulp voldoen aan de normen, welke door de raad zijn vastgesteld in de sogenaamde regshulpgids.

Allereerst moet de client voldoen aan de eisen van de middeletoets (zie nr 6 1 1 ev van de gids), dws dat zijn/haar netto inkomen onder die volgende grenzen moet liggen wil hij/zij in aanmerking komen voor rechtshulp:

Alleenstaande Blanke	R102 plus per afhankelijk kind	R18 per maand
Gehuwde	R204 *idem*	
Alleenstaande Kleurling	R55 plus per afhankelijk kind	R9 per maand
Gehuwde	R110 *idem*	
Alleenstaande Bantoe	R35 plus per afhankelijk kind	R6 per maand
Gehuwde	R70 *idem*	

Als een Bantoe meerdere vrouwen heeft, wordt elke vrouw behalve de eerste als een afhankelijk kind beschouwd, tenzij zij van zichzelf voldoende inkomsten heeft (c 10 Gids).

Evenwel moet er naar rato worden bijgedragen in de kosten, hoewel onder bijzondere omstandigheden de directeur van de regshulpbeamptes een uitzondering kan toestaan.

Deze bijdragen varieren voor een blanke van 2 – 21 Rand
Deze bijdragen varieren voor een kleurling van 1 – 10 Rand
Deze bijdragen varieren voor een bantoe van 1 – 8 Rand.

In geval van echtscheiding zijn de kosten respectivelijk, Blanke R30, Kleurling R20 en Bantoe R15.

Naar mijn mening zijn deze inkomensgrenzen armzalig laag. Nog meer bevreemding wekt het feit, dat de regshulpbeampte iedere rechtshulp mag weigeren als hij van mening is, dat de verzoeker zonder goede reden werkeloos is of een buitensporige of "dishonest" leven leidt (10 2 Gids). Behalve dat deze beoordeling volkomen arbitrair is, is deze bovendien sterk afhankelijk van de opstelling en het begrip van de regshulpbeampte ten aanzien van al hetgeen leeft onder de minder geprivilegeerde groepen in Zuid Afrika.

Vervolgens wordt het door de client voorgelegde probleem door de regshulpbeampte op zijn merites beoordeeld (10 1 Gids). Over de vraag welke normen hierbij in acht moeten worden genomen zwijgt 10 1 helaas.

Rechtshulp wordt zowel in strafrechtelijke zaken als in burgerrechtelijke zaken gegeven.

T a v strafrechtelijke zaken zijn de volgende daarentegen uitgesloten:

(1) die zaken waarvoor *pro deo* hulp beschikbaar is;

(2) misdrijf ten aanzien waarvan de schulderkenning reeds is geconstateerd of is afgekocht.

Waarom nu moet deze beklaagde van rechtshulp worden uitgesloten?

(3) ingeval de verdediging van de beklaagde zo eenvoudig is, dat deze kan worden gevo d door de beklaagde zelf.
De beoordeling, dat de beklaagde de in de ogen van de regshulpbeampte eenvoudig bevonden verdediging zelf kan voeren, lijkt mij arbitrair en houdt een risico in, dat hierbij wordt voorbijgegaan aan mogelijke psychische drempelvrees van de beklaagde;

(4) verkeerszaken;

(5) ingeval van voorbereidend onderzoek;

(6) ingeval van het indienen van een klacht voor een klachtdelict.

Evenwel kan in een "verdienstelike geval", waarin die beklaagde schuld heeft bekend, rechtshulp worden gegeven teneinde verzachtende omstandigheden aan te voeren, tenzij deze sodanig zijn dat zij door de beklaagde zelf kunnen worden aangevoerd (11 3). Hetzelfde bezwaar als onder (3) geldt ook hier. Trouwens wanneer spreekt men van een "verdienstelike geval"?

Ten aanzien van burgerrechtelijke zaken zijn de volgende uitgesloten:

(1) vorderingen mbt a 65–74 van de wet op Landdroshowe 32 van 1944).

(2) mbt de administratie van een status;

(3) ten behoeve van schadevergoedingsactie ogv laster, verleiding, overspel;

(4) het instellen van de vaderschapsactie. Naar mijn mening is rechtshulp juist in minder bevoorrechte kringen tav deze actie hard nodig, te meer omdat het aantal onwettige kinderen aanzienlijk is en in de meeste gevallen de vermeende vader geen bereidwilligheid toont tot onderhoud. Het verschaffen van onderhoud is juist in het belang van het kind;

(5) ten slotte in een rechtsgeding waarin de raad party is.

Lezen wij nu 17 1 1 en 17 1 2 van de gids, waarin een beroepsmogelijkheid bij de directeur wordt gegeven tegen de weigering van de regshulpbeampte om de verzoeker naar een procureur te verwijzen, rijst onmiddellijk de vraag door wie dan de minder draagkrachtige verzoeker zich in een dergelijke beroepsprocedure laten bijstaan? Door een procureur?

Afgezien hiervan dat een beroepsgang voor een verzoeker zonder de bijstand van een procureur zwaar is, zal deze ook nog bemoeilijkt worden aangezien de regshulpbeampte zonder opgaaf van redenen rechtshulp weigert! Bovendien zijn de weigeringsgronden zo ruim geredigeerd: (11 3 "deserving case"; 11 1 "it shall be just and reasonable that the accused be assisted by the Board" wanneer?); en is in 10 1 het simpele zinnetje: "Provided that each case is judged on merit" gebezigd, dat ik me niet aan de indruk kan onttrekken dat daarnaast een (te) ruime beslissingsbevoegdheid aan de beampte toekomt. Ter illustratie wil ik nog het volgende opmerken: in een persoonlijk onderhoud word mij door een regshulpbeampte toevertrouwd, dat hij het redelijk vindt, dat hij ongemotiveerd rechtshulp weigert, aangezien

rechtshulp uiteindelijk bekostigd wordt uit (ook door hemzelf betaalde) belastingelden.

Tot slot wil ik ingaan op de mogelijkheid om rechtshulp te krijgen ogv de gids voor het instellen van een eis tot echtscheiding of om zich daartegen te verweren. De overgrote meerderheid van clienten bij de regshulpkliniek kampt nl met een dergelijk probleem.

De regshulpbeampte moet bij elk geval op basis van een "proefbeampte se verslag" zich afvragen of:

(1) er geen mogelijkheid is tot verzoening;

(2) het verschaffen van rechtshulp terzake van echtscheiding tot wezenlijk voordeel voor de verzoeker strekt.

Hierbij vraag ik me af of een beampte het juridisch inzicht heeft om hierover te oordelen.

(3) of het probleem niet opgelost kan worden door een andere instantie;

(4) rekening houdend met alle omstandigheden, of het een "deserving case" is.

Ook hier heb ik twijfel of een rechtshulpbeampte dit kan beoordelen, mede omdat bij toekenning van rechtshulp door de beampte waardoor de client dus naar een procureur verwezen wordt, de procureur de zaak nog weer op zijn beurt op deze merites moet beoordelen (of het een in *prima facie* saak is). De gids eist dus een dubbele contrôle bij een positieve beslissing van de beampte (tot het verlenen van rechtshulp). Daarentegen vindt slechts één contrôle plaats (door iemand, die bovendien een veeleer administratieve dan juridische functie bekleedt) wanneer deze uitloopt op een negatieve (en voor de client een fatale) beslissing.

De UK studenten houden 4 avonden per week zitting in de regshulpklinieke in de kleurlingwijken. Deze klinieken worden gesteund door de Wetsgenootskap van de Kaap de Goede Hoop en in het bijzonder door de Kaapstadse prokureursvereniging. Op elke zittingsavond is één procureur aanwezig om de studenten nader te adviseren. Ongeveer 30 procureurs hebben zich hiervoor beschikbaar gesteld. De medewerkende studenten (50) zijn meestal in de laatste 2 jaar van hun studie. Op grond van een rotatiesysteem worden ze 6 à 7 keer per jaar ingeschakeld (dus aanzienlijk minder dan bij het JAB-Leiden).

Statistische gegevens

Van Maart '72 – 24 April '73 werden door de klinieken 303 zaken behandeld, waarvan slechts 5% strafzaken.

Rangschikking overigens:	echtscheiding	24%
	algemeen huislik	12%
	contracten	10%
	huurzaken	10%
	onderhoudskwesties	12%

31% werd doorgestuurd naar die rechtshulpbeampte.

24% kon meteen door de studenten afgehandeld worden. Onder dit percentage zijn waarschijnlijk de 12% onderhoudskwesties geschaard, die doorverwezen worden naar de onderhoudsbeampte.

Op grond van de Regshulpwet werden van eind maart 1971 – 20 febr 1973 4 312 problemen afgehandeld, waaronder 4 121 civiele en 191 strafrechtelijke zaken. De verdeling op basis van huidskleur was:

Strafrechtelijk:	Blank	128
	Kleurling	24
	Bantoe	39
Burgerrechtelijk:	Blank	2 232
	Kleurling	1 253
	Bantoe	631

Gedurende mijn verblijf in Kaapstad ben ik zeer dikwijls naar de regshulpklinieke geweest. Het was voor mji bijzonder boeiend om langs deze weg geconfronteerd te worden met de juridische aspecten van de sociale omstandigheden waaronder de minder bevoorrechte groepen verkeren. De ervaring was interessant en deprimerend tegelijkertijd: hoeveel noodlijdenden immers worden voor regshulp niet dagelijks afgewezen? De middeletoets stelt nl haast onredelijke eisen (alleen al *qua* inkomen). Ik hoop dan ook dat die aangekondigde herziening[4] getuigt van begrip en realiteitszin. Verdrietige taferelen zullen zich wellicht minder dikwijls afspelen.

Ik heb getracht me een indruk te vormen van de werkwijze in de klinieken. Hierbij heb ik voornamelijk de nadruk gelegd op de vraag hoe de mensen worden opgevangen en de problemen worden aangepakt. Er is een merkbaar verschil hierin tussen het JAB en de klinieken. In de 1e plaats wordt het veroorzaakt, doordat in Zuid-Afrika het merendeel van de gevallen betrekking heeft op echtscheidingen of alimentatievorderingen, waardoor de studenten worden gedwongen de clienten direkt door te sturen naar respectivelijk de regshulpbeampte of de onderhoudsbeampte. In de 2e plaats zijn de Zuid-Afrikaanse studenten helaas niet bevoegd om voor hun clienten in rechte op te treden.

Desondanks is er voor de kliniek nog een ruime taak weggelegd. Het feit, dat in de laatste maanden ongeveer gemiddeld 7 à 8 mensen op het spreekuur kwamen, duidt erop dat de kliniek aardige bekendheid heeft gekregen en dat er zeker behoefte aan advies bestaat. De voordelen van een kliniek zijn evident:

- ze zijn gemakkelijk bereikbaar voor het publiek door de plaats in de Kleurling wijken;
- ze geven kosteloze bijstand;
- doordat advies door studenten gegeven wordt, zal het de psychische drempelvrees verlagen;
- door vermijding van juridisch taalgebruik kan de taalbarrière worden opgeheven;

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[4]Volgens berichten treedt de herziening sept/okt 1974 in werking.

– de kliniek kan meewerke aan een soort bewustwording bij de minder bevoorrechte groeperingen van hun toekomende rechten, door byvoorbeeld voorlichting en publicaties.

Op grond van de werkwijze en organisatie van het JAB zou ik de volgende suggesties willen doen, die mogelijk de kliniek tot nut zijn:

(A) Naar wat ik hier gezien heb, bestaat het merendeel van de zaken, zoals ik reeds gezegd heb, uit echtscheidingen, onderhoudsvorderingen, huurkwesties en huiselijke problemen. Op zich zijn het overwegend doorsnee problemen, waarvan bijvoorbeeld onder leiding van een procureur of lid van de wetenschappelijke staf een syllabus kan worden samengesteld, waarin de aanpak- en adviesmogelijkheden worden geanalyseerd en omschreven. Deze syllabi naast de middeletoets vormen voor de nieuwkomende medewerker een goede praktijk informatie voor wat hem in de kliniek te wachten staat.

(B) Verder zou ik willen voorstellen dat een medewerker gedurende minimaal een half jaar 1 maal per week (of per 2 weken) zitting houdt op de kliniek. In Leiden blijven de meesten zelfs 8 tot 9 maanden. Afgezien van het feit, dat hij hierdoor een dosis praktijkervaring opdoet, komt dit de kwaliteit van de adviezen ten goede. De juridische faculteit zou deze 6 maanden lange inzet aantrekkelijk kunnen maken door er een vrijstelling van een examen (onderdeel) voor te verlenen.

(C) Voorts bleken in Leiden de "trainings weekenden" met alle medewerkers en regelmatige vergaderingen erg produktief. Tijdens soortgelijke in te voeren bijeenkomsten van de medewerkers van de klinieken kan er misschien dmv een rollenspel geoefend worden in gesprekstechnieken en opvang van clienten. Bovendien kunnen de nieuwste ontwikkelingen en plannen worden besproken.

(D) Bovendien zou ik gaarne aanbevelen, dat als ideëen (A), (B) en (C) enigszins gehoor gekregen hebben, de procureur slechts 1 maal per week op een vergadering komt met alle dienstdoende medewerkers (minimaal 8) van de afgelopen week, in plaats van nu iedere avond. Dit voorstel lijkt op het eerste gezicht waarshijnlijk onaanvaardbaar, maar de hierdoor gecreëerde situatie zie ik als volgt:

(a) voor dringende zaken is een procureur wel telefonisch bereikbaar;

(b) op de eens per week te houden vergadering met de procureur worden alle zaken van deze week (inclusief routine zaken) en het vervolg van de nog lopende zaken met die procureur besproken. Deze besprekingen vormen een supplement op de in de syllabi reeds behandelde problemen. Bovendien leert de medewerker veel meer van deze collectieve behandeling van alle zaken. Hij hoort de problemen, die voorgelegd werden aan zijn collega's.
De procureur bespreekt op deze vergadering:

(aa) alle copiën van brieven die in routinezaken of dringende zaken reeds aan clienten werden meegegeven of adviezen die in andere vorm werden gegeven.

(bb) alle nog te geven adviezen oplossingen in minder dringende en routine zaken. Deze zaken krijgen hierdoor weliswaar een looptijd van 2 weken. In beginsel wordt het begrip routinezaak eng uitgelegd, omdat de medewerkers in de nieuwe werkwijze nog niet veel ervaring hebben en de kwaliteit van adviezen gegarandeerd moet blijven. Wanneer kennis van de syllabi en middeletoets, trainingsbijeenkomsten, de eis dat eidere medewerker elke week zitting houdt ingevoerd zijn en daarnaast op wekelijkse vergaderingen met een procureur alle gevallen besproken en geverifieerd worden, zullen de medewerkers na verloop van tijd aanzienlijke ervaring hebben opgedaan. Dàn mag het begrip routinezaak minder eng uitgelegd worden en dus een groter aantal zaken meteen worden behandeld (met de contrôle ervan achteraf op de vergadering).

De volgende voordelen zijn hieraan verbonden:

(i) Kwaliteit van adviezen wordt aanzienlijk beter.

(ii) Zaken worden efficienter, sneller behandeld door grotere ervaring en deskundigheid van de medewerker.

(iii) De client krijgt meer vertrouwen en goede reklame is hiervan het gevolg en dus vermeerdering van het aantal clienten.

(iv) De regshulpbeampte krijgt door deze serieuze aanpak meer vertrouwen in de kliniek. De relatie kliniek-beampte wordt hierdoor gunstig beïnvloed en wellicht ook zijn begrip tav het publiek dat door de kliniek naar hem wordt doorgestuurd.

(v) Tenslotte moet het positief (psychologisch) effect op de procureur niet worden onderschat. Hun bereidwilligheid om te helpen blijkt wel uit het feit, dat ze meestal op een zittingsavond even langs komen. Doordat de studenten maar 6–7 keer per jaar zitting houden op de kliniek zijn ze vrij onervaren in het adviseren en nog te onbekend met de inhoud van de middeletoets. (Enkele medewerkers uitgesloten!). Hierdoor worden de procureur niet bijster waardevolle vragen gesteld. De oorzaak hiervan ligt in de niet op praktijk gerechte studieopzet. Wanneer de werkzaamheden efficienter aangepakt worden door (A), (B) en (C) is het ruimschoots voldoende als de procureur 1 maal per week de vergadering bijwoont. Zijn spaarzame tijd wordt rendabeler besteed, hetgeen een deste stimulerender invloed op hem heeft.

(E) Tenslotte zou het ten behoeve van de statistische verwerking nuttig zijn om op het invulformulier de vraag te stellen, hoe de client van het bestaan van de regshulpkliniek heeft vernomen. Het bereik onder het publiek kan hierdoor wellicht worden vergroot. □

Hersiening van Landdroshofverrigtinge voor Vonnis?

C F Klopper

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SUMMARY

Proceedings in the magistrate's court before passing of sentence were reviewed by the Cape supreme court in *S v Ndcela* 1974 2 PH H 41. Divergent and conflicting decisions by the various supreme court divisions on this point however exist. In the Cape it has consistently been decided that such proceedings may be reviewed in appropriate circumstances and although no authority for the exercise of such powers is cited in the decided cases it is stated that ss 97 and 98(4) of the Magistrates' Courts Act do not confer such powers. The same approach has been adopted by the Natal supreme court and the Griqualand-West/Northern Cape division. Only the OFS supreme court has until recently held that proceedings before passing of sentence cannot be reviewed, but in *S v Malakwana* 1975 3 SA 94 (O) it was decided that where the magistrate had committed a gross irregularity the supreme court does in fact have the power to review proceedings. It is submitted that the court erred in relying on s 26(4) of Ordinance 4 of 1902 (ORC) (which has been repealed) instead of s 24(1)(c) of Act 29 of 1959. Conflicting decisions in the Transvaal are causing difficulties in the lower courts in the absence of a decisive decision by the appellate division in this respect.

In conclusion it is submitted that the correct legal position is the following:

(1) S 98(4) of the Magistrates' Courts Act 32 of 1944 is only applicable in proceedings after sentence.

(2) In terms of the provisions of s 19(1)(b) read with s 22(1) of the Supreme Court Act 59 of 1959 a higher court may review magistrate's court proceedings before conviction or sentence but only in the instances mentioned in s 24(1).

(3) In terms of its inherent jurisdiction a higher court may review magistrates' courts proceedings in cases not covered by the above if the court is of the opinion that fair adjudication has not taken place.

Die Kaapse hooggeregshof het onlangs in *S v Ndcela* 1974 2 PH H41 onder die volgende omstandighede die verrigtinge van 'n landdroshof na skuldigbevinding maar voor vonnis in hersiening geneem. Twee beskuldigdes het voor 'n landdros sonder regsverteenwoordiging tereggestaan. Na skuldigbevinding verkry een van hulle die dienste van 'n regsverteenwoordiger. Laasgenoemde verkry beëdigde verklarings wat *prima facie* daarop dui dat die staatsgetuies meinedige getuienis gedurende die verhoor afgelê het. Onder hierdie omstandighede is die saak vir hersiening aan die hoërhof voorgelê – dis nie duidelik deur wie nie – en is die skuldigbevinding ter syde gestel. Daarna word die saak vir verdere verhoor na die landdros teruggverwys.

Aangesien die verskillende afdelings van ons hooggeregshof oor hierdie aangeleentheid uiteenlopende en botsende beslissings gegee het en weens die feit dat daar in een afdeling botsing in eie geledere bestaan, sal dit dienstig wees om die verskillende benaderings te ondersoek en 'n moontlike oplossing aan die hand te doen.

I KAAPSE HOOGGEREGSHOF

Hierdie hof het sover konstant beslis dat landdroshofverrigtinge na skuldigbevinding maar voor vonnis in gepaste gevalle in hersiening geneem kan word. In *Ginsberg v Additional Magistrate of Cape Town* 1933 CPD 357 beslis rp Gardiner dat wanneer daar onreëlmatighede in die verrigtinge voorkom sodanige verrigtinge beslis voor vonnis hersien kan word. As voorbeeld noem hy:

(1) die geval van 'n beskuldigde wat sonder 'n duidelike regsvoorskrif in sy afwesigheid verhoor word; en

(2) die geval waar 'n landdros die beskuldigde regsverteenwoordiging weier.

Die regter vervolg egter:

> "But where a magistrate in a proper and regular way, performs his functions, but comes to a wrong conclusion of law, then I do not think that the Court would interfere until a conviction has resulted."

In *R v Smit* 1948 4 SA 266 (K) is die beskuldigde aan nalatige bestuur skuldig bevind. Daarna twyfel die landdros aan die korrektheid van sy beslissing en stuur hy die saak vir hersiening met die versoek dat die skuldigbevinding ter syde gestel word. Regter Herbstein meen dat artikels 97 en 98(4) van die Wet op Landdroshowe 32 van 1944 nie aan 'n hof voor vonnis hersieningsbevoegdheid verleen nie. Dan vervolg hy:

> "Every consideration of convenience and justice supports the view that this Court should act now instead of sending the matter back for a sentence to be passed and then exercising the powers given by sec 93(4) of the Magistrate's Courts Act. To insist upon a sentence being imposed with the knowledge that the verdict, and sentence are to be set aside would be to enact a farce."

Die skuldigbevinding word gevolglik ter syde gestel. Die regter wys egter ten slotte daarop dat elke saak op eie meriete behandel moet word.

In *S v Dawids* 1961 3 SA 913 (K) 914A laat wr Banks hom soos volg uit:

> "But in exceptional cases review proceedings have been entertained even though sentence has not been passed."

Die hof wys verder daarop dat artikels 97 en 98(4) van Wet 32 van 1944 nie toepaslik is in gevalle soos hierdie nie.

Ook in *R v Stoffels* 1942 CPD 40 het die hof verrigtinge voor 'n landdros na skuldigbevinding maar voor vonnis hersien.

'n Ontleding van hierdie gewysdes toon duidelik aan dat die optrede van die hoërhof in elkeen van die gevalle weens die besondere omstandighede van daardie sake geregverdigd was. Dis egter opmerklik dat geen gesag gesiteer word op grond waarvan die hof hersieningsbevoegdheid het

nie. Wat die hof wel doen is om te konstateer dat artikels 97 en 98(4) van die Wet op Landdroshowe geen sodanige gesag aan die hof verleen nie.

II NATALSE HOOGGEREGSHOF

Sover vasgestel kan word het hierdie hof, net soos die Kaapse hof, ook konstant beslis dat hy hersieningsbevoegdheid het na skuldigbevinding maar voor vonnis.

In *R v Ngwenya* 1959 2 SA 397 (N) wys r Holmes (later appèlregter), met verwysing na Gardiner & Lansdown *S A Criminal Law & Procedure* vol 1 (6e uitg) 731 daarop dat ons hoërhowe se beslissings in hierdie verband nie gelykluidend is nie. Hy beslis dat die Natalse hooggeregshof, na aanleiding van artikel 8 van Wet 39 van 1896 (N) – tans herroep en vervang deur a 19(3) van die Wet op die Hooggeregshof 59 van 1959 – jurisdiksie het–

> "to review the proceedings of all inferior Courts."

Die hof vervolg (398A):

> "[I]t would be almost farcical to require a sentence to be passed before inevitably setting the conviction aside."

In hierdie saak het 'n landdros A 'n beskuldigde op drie klagtes van diefstal skuldig bevind. Toe 'n ander landdros B hom later ingevolge artikel 186(4) van die Strafkode wou vonnis, het hy bedenkings gekoester oor die korrektheid van die eerste landdros A se skuldigbevinding en die saak vir hersiening gestuur. By hersiening word die skuldigbevinding op een aanklag ter syde gestel, 'n tweede gewysig en die derde bekragtig en word die saak vir vonnis na die landdros teruggestuur.

Ook in *S v Mtembu* 1961 4 SA 152 (N) het 'n landdros wat 'n beskuldigde ingevolge artikel 186(4) van die Strafkode moes vonnis die saak vir hersiening gestuur omdat hy van oordeel was dat die skuldigbevinding verkeerd was. Die advokaat vir die staat het geargumenteer dat die hof geen sodanige bevoegdheid het nie en hom soos volg uitgelaat (153C):

> "It will lead to an 'Iliad of woes' if magistrates' judgments can be called into question before sentence is passed – more particularly if reviews at the instance of persons who are not parties in the case are permitted."

Die staatsadvokaat het verder betoog dat 'n hof slegs hersieningsbevoegdheid het–

> "if there was something in the nature of an illegality or irregularity" (154D).

Regter Milne het nie hiermee saamgestem nie en het die skuldigbevinding ter syde gestel. Hy was van oordeel dat die saak voor hom "a proper case" was om die skuldigbevinding op daardie stadium ter syde te stel.

In *S v Vezi* 1963 1 SA 9 (N) het landdros A die beskuldigde veroordeel terwyl landdros B – ingevolge artikel 186(4) van die Strafkode – later die vonnis opgelê het. By hersiening blyk dit dat die onverdedigde beskuldigde se regte na afsluiting van die staatsaak nooit aan hom verduidelik is nie en dat die verrigtinge dus onreëlmatig was. Regter Caney meen nogtans dat die

hoërhof voor vonnis jurisdiksie het om verrigtinge uit 'n landdroshof in hersiening te neem, nie op grond van artikel 98(4) van Wet 32 van 1944 nie, maar wel op grond van die bepalings van die Wet op die Hooggeregshof. Op 12H van die verslag sê hy:

> "The Supreme Court Act by sec 19(1)(b) gives this Court jurisdiction to review the proceedings of inferior courts and sec 24(1) prescribes a variety of grounds including gross irregularity; whatever may be the effect of sub-sec (3) of sec 19, it is clear that this Court would have had jurisdiction in the present instance notwithstanding that sentence had not been passed, because a gross irregularity had been committed in the proceedings."

In *R v Ngobo* 1961 1 PH H34 (N) was die feite byna identies met dié in *S v Ndcela* hierbo aangehaal. Die landdros het gevolglik voor vonnis die saak vir hersiening gestuur. Regter-president Broome hersien die verrigtinge op grond van die bevoegdheid aan hom verleen deur artikel 19(3) van die Wet op die Hooggeregshof. (Kyk ook verder *S v Mia* 1962 2 SA 718 (N) en *S v Moolman* 1964 1 PH H 45 (N) waarin soortgelyke beslissings gegee is.)

Word die benaderings van die Natalse hof van nader beskou, blyk dit dat die hof sy hersieningsbevoegdheid op grond van die bepalings van artikels 19(1)(b) gm 19(3) en 24(1) van die Wet op die Hooggeregshof baseer.

J C Ferreira *Strafprosesreg in die Landdroshof* 577 meen dat die standpunt van die Natalse hooggeregshof bo die van sommige uitsprake in Transvaal te verkies is "want dit lyk verkeerd om 'n beskuldigde te vonnis waar hy dit nie verdien nie."

III **GRIEKWALAND-WES/NOORD-KAAP**

Ook hierdie hof stel hom op die standpunt dat hy voor vonnis 'n landdros se skuldigbevinding in hersiening kan neem.

In *S v Sekakala* 1962 2 SA 105 (G) is die beskuldigde skuldig bevind op twee klagtes dat sy motorvoertuig nie gelisensieer was nie en boonop ook nie derdepartydekking gehad het nie. Die aanklaer ontdek daarna dat die onverdedigde beskuldigde, 'n ongeleerde bantoe, inderdaad die wet in alle opsigte nagekom het en nooit aangekla moes gewees het nie – die arme man het maar met stoïsynse gelatenheid aanvaar dat hy skuldig moet wees indien die aanklaer so beweer*!* Die landdros het dadelik die saak vir hersiening gestuur en versoek dat die twee skuldigbevindings ter syde gestel word. In 'n weloorwoë uitspraak kom r De Vos Hugo (106G) tot die slotsom dat die hof op die volgende drie gronde jurisdiksie het:

1 Die hof het inherente jurisdiksie om in 'n geval soos hierdie op te tree. Die regter verwys in hierdie verband o a na *Corderoy v Union Government* 1918 AD 513 517 en *Ecker v Dean* 1937 AD 254 259 waar die appèlhof inderdaad beslis het dat 'n hoërhof by ontstentenis van duidelike regsvoorskrifte o a jurisdiksie het om kwelsugtige litigasie stop te sit. Regter Viera het in *Ex parte Millsite Investment Co (Pty) Ltd* 1965 2 SA 582 (T) die volgende gesê oor die inherente jurisdiksie van die hooggeregshof (585G–H):

> "The jurisdiction of the Supreme Court is laid down in sec 19(1) of Act 59 of 1959 in terms similar to those to be found in the Statutes setting up the various pre-Union

> Courts. It is clear from the decided cases that those Statutes confer on the Supreme Court the same kind of jurisdiction and powers as were enjoyed by the Courts of the Netherlands; see e g *Steytler v Fitzgerald,* 1911 AD 295 at p 315. So that, apart from powers specifically conferred by statutory enactments and subject to any specific deprivations of power by the same source, a Supreme Court can entertain any claim or give any order which at common law it would be entitled so to entertain or give. It is to *that reservoir of power* that reference is made where in various judgments Courts have spoken of *the inherent power* of the Supreme Court: see e g *Union Government and Fisher v West* 1918 AD 556 at p 572–3. The inherent power claimed is not merely one derived from the need to make the Court's order effective, and to control its own procedure, but also to hold the scales of justice where no specific law provides directly for a given situation."

2 Die hof het ook ingevolge artikel 19(1) van die Wet op die Hooggeregshof jurisdiksie. Artikel 19(1)(b) gm art 24 van hierdie Wet bepaal pertinent dat 'n hoërhof regsbevoegdheid besit om die verrigtinge van alle laerhowe binne sy regsgebied te hersien oa tov 'n onreëlmatigheid. Die hof beslis dat 'n onreëlmatigheid in die onderhawige geval wel plaasgevind het.

3 Die hof meen verder dat artikels 97 en 98(4) van die Wet op Landdroshowe nie so uitgelê moet word "dat geen saak afkomstig uit 'n Landdroshof hersienbaar is voor vonnis opgelê is nie. Dit is nie die bedoeling van die artikel nie" (106G). Op 107G gaan die regter soos volg voort:

> "Dit is 'n saak van eminente openbare belang dat 'n landdros wat van mening is dat daar iets met die verhoor voor hom verkeerd geloop het die vrymoedigheid sal hê om sonder die nakoming van 'n formele en soms swaarwigtige prosedure, hom onmiddellik op die hersieningsbevoegdheid van die Hooggeregshof sal kan beroep sodat wat verkeerd gegaan het herstel kan word en die verhoor sy normale voortgang kan hê. In sulke gevalle sal hierdie Hof steeds doen wat immer moontlik is om die goeie gang van die regspleging te bevorder."

Bygevolg word die skuldigbevindings ter syde gestel.

In *S v J H Roos en A J Oelofse* 1966 1 PH 03 (GW) het 'n landdros na skuldigbevinding vasgestel dat die beskuldigde verkeerdelik skuldig bevind is en stuur hy die saak vir hersiening. Die hof volg die beslissing in *Sekakala.*

IV ORANJE-VRYSTAAT

Sover ek kon vastel is die Vrystaatse hooggeregshof die enigste hoërhof wat tot heel onlangs konsekwent beslis het dat verrigtings uit 'n landdroshof nie voor vonnis in hersiening geneem mag word nie.

In *R v Mpatsi* 1957 2 SA 517 (O) het 'n onverdedigde beskuldigde weens diefstal van 'n os voor die landdros tereggestaan. Na skuldigbevinding word sekere inligting aan die landdros verstrek wat *prima facie* die onskuld van die beskuldigde bewys. Hierdie inligting is op versoek in beëdigde vorm aan die hersieningsregter voorgelê. Na oorweging van sekere beslissings van die Kaapse en Oos-Kaapse hoërhowe konkludeer die regter desnietemin dat hy geen hersieningsbevoegdheid het nie en word die saak na die hof *a quo* teruggestuur vir vonnis. Die hof beveel dat die saak daarna vir hersiening gestuur moet word. Dit is nie bekend of die verrigtinge daarna bekragtig of ter syde gestel is nie.

Die hof wys daarop dat artikel 98(4) van die Wet op Landdroshowe nie hier toepaslik is nie omdat die beskuldigde nog nie gevonnis was nie. Die hof wys verder daarop dat artikels 25 en 26 van Ord 4 van 1902 (ORK) ook nie 'n geval soos hierdie dek nie. Artikel 25 verleen wel hersieningsbevoegdheid aan die hoërhof maar dan slegs t o v gevalle wat in artikel 26 genoem word. En dit is duidelik uit die spesiale omstandighede van hierdie saak dat artikels 25 en 26 nie hier van toepassing was nie. Hoewel artikels 25 en 26 van die betrokke ordonnansie later deur die Wet op die Hooggeregshof van 1959 vervang en uitgebrei is, was laasgenoemde wet dus nog nie in werking ten tye van hierdie beslissing nie.

Hieruit blyk duidelik dat die hof in die onderhawige geval nòg op artikel 98(4) nòg op voor-Unie-wetgewing vir sy hersieningsbevoegdheid kon steun. Die hof het ongelukkig nie oorweeg of hy inherente jurisdiksie in hierdie verband gehad het nie.

Die *Mpatsi*-beslissing is in *S v Thabanchu* 1967 2 SA 323(O) gevolg. Beskuldigde is deur 'n afloslanddros verkeerdelik aan veediefstal i p v gewone diefstal skuldig bevind. Toe 'n ander landdros op die strafstadium die fout agterkom, stuur hy die saak vir hersiening. Regter de Villiers meen dat die hof nie hersieningsbevoegdheid het nie. Op bl 324A sê hy die volgende:

> "Aangesien vonnis nog nie opgelê is nie, is die hof nie geregtig om die verrigtinge te hersien uit hoofde van die bepalings van artikels 97 en 98(4) van Wet 32 van 1944 nie . . . In terme van Artikel 19(3) van Wet 59 van 1959 behou die hof wel sy mag om die verrigtings in 'n strafsaak in hersiening te neem op een of ander van die gronde genoem in Artikels 25 en 26 van Ord 4 van 1902 (Vgl *S v Hlongwa* 1963 1 SA 14 (N)), maar genoemde artikels is nie van toepassing in die onderhawige geval nie, aangesien daarin geen reg van hersiening toegestaan word op grond daarvan dat 'n landdros fouteer het op die feite van die saak nie."

Die hof het hier fouteer. Artikels 25 en 26 van Ord 4 van 1902(O) is deur Wet 59 van 1959 herroep – vergelyk die 2de bylae van daardie wet. Die betrokke artikels is egter grootliks herverorden in artikel 24 van Wet 59 van 1959. Die hof sou dus o a op grond van 'n growwe onreëlmatigheid in die verrigtinge die saak kon hersien. Klaarblyklik was die hof van oordeel dat die landdros se fout m b t die feite nie 'n growwe onreëlmatigheid was nie en gevolglik wou die hof nie onder hierdie regsvoorskrifte optree nie. Die keerpunt het egter nou ook in hierdie afdeling gekom, want in *S v Malakwana* 1975 3 SA 94 (O) beslis r MT Steyn dat indien die landdros wat skuldig bevind, 'n growwe onreëlmatigheid begaan, die hooggeregshof na luid van die bepalings van a 26(4) van Ord 4 van 1902 (ORK) die skuldigbevinding op grond daarvan voor vonnis kan hersien.

Die feite in die onderhawige saak was kortliks soos volg: Beskuldigde staan voor die landdros tereg op 'n aanklag van diefstal. Getuienis word gelei dat beskuldigde inderdaad ook ingebreek en daarna gesteel het. Die landdros vind hom skuldig aan huisbraak met die opset om te steel en diefstal omdat hy onder die waan verkeer het dat huisbraak 'n bevoegde uitspraak is op 'n aanklag van diefstal. Voor vonnis kom hy sy fout agter en stuur die saak vir hersiening. Regter MT Steyn onderskei die sake van *R v Mpatsi* 1957 2 SA 517 (O) en *S v Thabanchu* 1967 2 SA 323 (O) en stel die skuldig-

bevinding ter syde op grond van die bevoegdheid wat a 26(4) van Ord 4 van 1902 (ORK) aan hom verleen (96D).

Soos reeds hierbo aangetoon, het die hof fouteer deur hom op Ord 4 van 1902 te verlaat. Artikel 24(1)(c) van Wet 59/1959 gee aan 'n hersieningshof die bevoegdheid om verrigtinge van 'n landdroshof op grond van 'n growwe onreëlmatigheid te hersien. Die hof moes dus onder hierdie artikel opgetree het.

V **OOS-KAAP**

In *R v Xegwana* 1940 EDL 315 is die beskuldigde daarvan aangekla en skuldig bevind dat hy 'n sekere regsvoorskrif in die distrik van Indwe nie nagekom het nie. Later blyk dit dat die verordening nie op die distrik van Indwe van toepassing was nie. Die landdros stuur gevolglik voor vonnis die saak vir hersiening met die versoek dat die veroordeling ter syde gestel word. Die hof voldoen hieraan sonder om na enige gesag te verwys.

In *R v Atleni* 1934 EDC 331 word die beskuldigde in die afwesigheid van sy regsverteenwoordiger verhoor en skuldig bevind. Die landdros was onbewus daarvan en toe hy dit agterkom stuur hy die saak voor vonnis vir hersiening. Weer eens word die veroordeling ter syde gestel sonder dat na enige gesag verwys word.

In *S v Bailey* 1962 4 SA 514 (OK) het 'n sekere senior landdros voorgesit by die verhoor van die beskuldigde. Nadat getuienis vir twee dae gelei was, het die verdediging versoek dat die landdros hom aan die saak moet onttrek omdat hy met die saak in sy hoedanigheid as Bantoesakekommissaris gemoeid was. Toe hy weier, is die saak by wyse van hersieningsdagvaarding voor die hoërhof gelê. Die hof verwys na die bepalings van artikels 19(1) en 19(3) van Wet 59 van 1959 en neem die verrigtinge in hersiening. Op 515H–516A laat r p Jennett hom hieroor soos volg uit:

> "While a Superior Court will be slow to exercise its power upon the unterminated course of proceedings in a lower Court, it clearly has, I think, the power to do so . . . The decision whether or not to exercise the power referred to will depend upon the facts of the case, and particularly the question of prejudice if it is not exercised. The type of irregularity relied on will also be relevant."

VI **SUIDWES-AFRIKA**

In *S v Besser* 1968 1 SA 377 (SWA) is die getuienis voor die landdros per abuis nie op band vasgelê nie. Onbewus hiervan vind die landdros die beskuldigde skuldig op die aanklag maar omskep hy later die verrigtings in 'n voorlopige ondersoek op grond van die beskuldigde se vorige veroordelings. Die saak is in hierdie stadium vir hersiening gestuur met die versoek dat die verrigtinge ter syde gestel word sodat 'n voorlopige ondersoek *de novo* begin kon word. Regter Muller oordeel dat die hof *a quo* 'n onreëlmatigheid t o v die afneem van die getuienis begaan het en dat die hof ingevolge artikel 19(1) g m artikel 24 van Wet 59 van 1959 wel die verrigtinge op hierdie stadium kan hersien. Die hof wys verder daarop dat hoewel artikel 97 en 99 van Ord 29 van 1963, wat dieselfde lees as artikels 97 en 98 van Wet 32 van 1944, nie aan 'n hoërhof hersieningsbevoegdheid voor vonnis verleen

nie, dit verder geen inbreuk maak op 'n hoërhof se hersieningsbevoegdheid ingevolge Wet 59 van 1959 nie.

VII TRANSVAAL

Sover ek kon vasstel is hierdie afdeling die enigste waar daar in eie geledere verdeeldheid bestaan. Daar is enersyds beslissings wat volstrek weier om voor vonnis verrigtinge van 'n landdroshof in hersiening te neem, terwyl daar andersyds weer ewe sterk beslissings is wat die teenoorgestelde houding inneem. Met inagneming van die leerstuk van *stare decisis* word die laerhowe in hierdie afdeling in 'n moeilike posisie geplaas. By ontstentenis van 'n deurslaggewende beslissing deur die appèlhof is dit wenslik dat hierdie afdeling hom hieroor finaal sal uitspreek ten einde regsekerheid hieromtrent te skep.

In die volgende sake het die hof hom teen hersiening voor vonnis uitgespreek:

S v Stokel 1966 1 SA 143 (T). Landdros A veroordeel die beskuldigde terwyl landdros B, na luid van artikel 186(4) van die Strafkode, die beskuldigde moet vonnis. Landdros B oordeel dat die beskuldigde verkeerdelik skuldig bevind is deur sy voorganger en stuur die saak op daardie stadium vir hersiening. Regter Theron laat hom (op 144D) soos volg uit:

> "Magistrate le Grange assumed powers he did not have. He purported to pass judgment on the verdict returned by his colleague when his sole function was to pass sentence and if so advised he could have thereafter referred the case for review to the Court."

Die regter vervolg (op 144E):

> "I pause there to say I am unable to appreciate where the magistrate obtained this right to determine upon the correctness of the decision of a colleague. In doing what he did he not only exceeded his powers but, in my view, erred in his conclusion namely a conclusion that the State had failed to prove the commission of the offence by aliunde evidence."

Die verrigtinge word aan die landdros vir vonnis teruggestuur.

Hierdie beslissing is gekritiseer in die THRHR 1966 270 en in die SALJ 1966 147.

Die opmerking van die regter dat 'n landdros nie voor vonnis die reg het om onder hierdie omstandighede 'n saak vir hersiening te stuur nie moet bevraagteken word. Alhoewel die feite in hierdie saak sodanig was dat die landdros wat vonnis moes oplê, gefouteer het, beteken dit nog nie dat daar nie gevalle sal opduik waar die verhoorlanddros met die skuldigbevinding kon fouteer het nie. In daardie gevalle verkry die vonnislanddros sy reg om die saak voor vonnis vir hersiening te stuur vanweë die feit dat ons reg nie absurde gevolge gedoog nie, en dit hoef seker geen betoog dat dit absurd is om 'n onskuldige wat verkeerdelik skuldig bevind is eers te straf en daarna die saak vir hersiening te stuur sodat beide die verkeerde skuldigbevinding en die verkeerde vonnis dan ter syde gestel kan word nie.

In *S v Matubako* (nie gerapporteer) het die provinsiale afdeling op 14 Augustus 1970 'n soortgelyke beslissing gegee. Die beskuldigde het

weens veediefstal voor die landdros tereggestaan en is skuldig bevind. 'n Ander landdros moes hom vonnis maar hy was van oordeel dat die beskuldigde verkeerdelik skuldig bevind is. Hy stuur die saak vir hersiening maar die hoërhof weier om die verrigtinge te hersien en verwys die saak vir vonnis na hom terug. Daarna word die saak weer vir hersiening gestuur en by hierdie geleentheid word beide die skuldigbevinding en vonnis vernietig.

In die ongerapporteerde saak van *S v Nyalunga* het die hof op 1 Desember 1966 met die volgende stel feite op hersiening voor vonnis te doene gekry. Die landdros vind per abuis twee beskuldigdes skuldig in afwesigheid van nr 1 se prokureur. Hy stuur die saak vir hersiening en vestig die hersieningshof se aandag op die beslissing in *R v Atleni* 1934 EDC 331 waar 'n soortgelyke situasie ontstaan het en in welke saak die verrigtinge ter syde gestel en vir verdere verhoor na die landdros teruggestuur is.

Die hersieningsregter antwoord hierop soos volg:

> "Hierdie hof is nie by magte om by wyse van hersiening aan die versoek van die landdros te voldoen nie, daar geen vonnis in die saak gevel is nie. Die omstandighede waarna die landdros verwys is nie sulks dat dit beskou kan word dat daar 'n growwe onreëlmatigheid plaasgevind het nie – sien *S v Mtembu* 1961 4 SA 152; *S v Stokel* 1966 1 SA 143."

In *Die Landdros* vol 2 (1967) 68, waaraan bovermelde feite ontleen is wys die redakteur daarop dat daar wel 'n onreëlmatigheid in hierdie saak voorgekom het. Die hof sou dus op grond van die bepalings van artikel 19(1)(b) gm artikel 24(1)(c) die verrigtinge kon hersien op grond van 'n growwe onreëlmatigheid.

In die volgende sake het die hof wel voor vonnis sake afkomstig uit die landdroshof in hersiening geneem:

In *R v Marais* 1959 1 SA 98 (T) is die beskuldigde voor 'n landdros oa van strafbare manslag aangekla. Die verdediging het nadere besonderhede tot die klagstaat versoek en was nie tevrede met die besonderhede wat die vervolger verstrek het nie. Bygevolg is die saak op hersiening geneem op grond daarvan dat die klagstaat nie 'n misdaad openbaar nie en dat die klagstaat dus òf eksipieerbaar was, ingevolge artikel 166 van die strafkode òf nietig verklaar kon word na luid van artikel 167. Na oorweging van verskeie gewysdes (101) kom wr Galgut (soos hy destyds was) tot die volgende slotsom (101H):

> "It is not necessary for me to say more in this case than that the cases suggest that a Supreme Court may well come to the assistance of an accused person on review before the end of the trial before the magistrate, where there is a gross irregularity or where there is such serious prejudice as could result in a miscarriage of justice."

In *R v Masemula* 1959 4 SA 285 (T) is die beskuldigde deur 'n landdros aan roof skuldig bevind. Weens sy vorige veroordelings is die verrigtinge in 'n voorlopige ondersoek omskep. Die prokureur-generaal het die saak met verhoogde jurisdiksie na dieselfde landdroshof vir verhoor terugverwys. Per abuis word die saak voor dieselfde landdros geplaas wat die eerste verhoor in 'n voorlopige ondersoek omskep het en gevolglik vertroud was met die besku'digde se lys van vorige veroordelings. Eers na skuldigbevinding

van die beskuldigde ontdek die landdros sy fout. Hy stuur dadelik die saak op hersiening met die versoek dat die tweede skuldigbevinding ter syde gestel word.

Die hersieningshof verwys oa na *R v Hendricks* 1945 EDL 258 waar 'n soortgelyke situasie ontstaan het en wys daarop dat hersienings van landdroshoweverrigtinge normaalweg eers na vonnis plaasvind. Die hof wys verder daarop dat optrede ingevolge a 18 en 19(4) van Proklamasie 14 van 1902 nie moontlik is nie omdat Wet 59 van 1959 hierdie artikels herroep het. Optrede ingevolge laasgenoemde wet was ook nie moontlik nie omdat die wet hoewel gepromulgeer, destyds nog nie in werking gestel was nie.

Regter Cillié meen egter dat:

> "[I]t would be more fitting to make use of the Court's power to deal with such matters and follow the procedure which has been adopted by the Cape Provincial Division in the case of *Rex v Smit* 1948 4 SA 266 (C)" (286G).

Die regter se verwysing na "the Court's power" is waarskynlik 'n verwysing na die inherente jurisdiksie wat 'n hooggeregshof in sodanige gevalle het. Dat daar in hierdie saak 'n growwe onreëlmatigheid plaasgevind het, behoef seker geen betoog nie en by ontstentenis van 'n statutêre voorskrif wat aan die hof hersieningsbevoegdheid gee, skyn dit niks meer as reg te wees dat die hof op sy inherente jurisdiksie sal terugval nie.

S v Nyathi TPA (ongerapporteer) 4 Junie 1962. In hierdie saak vind landdros A die beskuldigde skuldig en moet landdros B hom later straf. Laasgenoemde is van oordeel dat sy kollega se skuldigbevinding verkeerd was en stuur gevolglik die saak voor vonnis vir hiersiening. Regter Dowling laat hom soos volg uit:

> "The point arises whether it is competent for this Court to pass a judgment on review in a case where the accused has not been sentenced. It seems that there is authority for this view".

Die hof verwys oa na *R v Smit* 1948 4 SA 266 (K) en stel die veroordeling ter syde.

Na aanleiding hiervan maak die redakteur van *Die Landdros* vol I (1965) 67 die volgende opmerking:

> "In conclusion we wish to suggest, however, that a magistrate should be very sure that he is correct before he announces in open Court that he does not agree with a colleague and that the record of proceedings will be sent for review."

VIII APPÈLHOF

Sover ek kon vasstel het die appèlhof hom slegs in *Wahlhaus v Additional Magistrate Johannesburg* 1959 3 SA 113 hieroor uitgespreek. Appellante het voor 'n landdros op verskeie klagtes van bedrog tereggestaan. Die verdediging versoek nadere besonderhede tot die klagstaat maar is nie tevrede met die besonderhede wat wel verstrek is nie. Gevolglik word die landdros versoek om die klagstaat na luid van a 167(2) van die strafkode nietig te verklaar. Toe hy weier, rig die appellante by wyse van 'n petisie 'n aansoek aan die provinsiale afdeling van die Transvaalse hooggeregshof waarin hulle oa 'n bevel vra dat die klagstaat voor die landdros nietig verklaar word. Die

hoërhof wys die petisie van die hand, maar verleen aan die appellant verlof om na die appèlafdeling te appelleer. Te 119–120 laat ar Ogilvie Thompson (soos hy toe was) hom hieroor soos volg uit:

> "It is true that, by virtue of its inherent power to restrain illegalities in inferior courts, the Supreme Court may, in a proper case, grant relief – by way of review, interdict, or mandamus – against the decision of a magistrate's court given before conviction. (See *Ellis v Visser*, 1956 2 SA 117 (W) and *R v Marais*, 1959 1 SA 98 (T) where most of the decisions are collated). This, however, is a power which is to be sparingly exercised. It is impracticable to attempt any precise definition of the ambit of this power; for each case must depend upon its own circumstances. The learned authors of Gardiner and Lansdown (6th ed vol I p 750) state:
>
> 'While a superior court having jurisdiction in review or appeal will be slow to exercise any power, whether by mandamus or otherwise, upon the unterminated course of proceedings in a court below, it certainly has the power to do so, and will do so in rare cases where grave injustice might otherwise result or where justice might not by other means be attained . . . In general, however, it will hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the court below, and to the fact that redress by means of review or appeal will ordinarily be available.'
>
> In my judgment, that statement correctly reflects the position in relation to unconcluded criminal proceedings in the magistrates' courts."

IX GEVOLGTREKKING

Na oorweging van die voormelde gewysdes, blyk die regsposisie soos volg te wees:

(1) 'n Hoërhof kan *nie* ingevolge die bepalings van artikel 98(4) van die Wet op Landdroshowe 32 van 1944 verrigtinge uit 'n landdroshof voor vonnis (of skuldigbevinding) hersien nie. Hierdie artikel is slegs toepaslik op verrigtinge na vonnis.

(2) 'n Hoërhof kan wel na luid van die bepalings van a 19(1)(b) gelees met a 24(1) van die Wet op die Hooggeregshof 59 van 1959 voor skuldigbevinding of vonnis die verrigtinge in 'n landdroshof hersien maar dan slegs in die gevalle gemeld in a 24(1) naamlik:

(a) Gebrek aan regsbevoegdheid van die hof.

(b) Belang by die geding, vooroordeel, kwaadwilligheid of korrupsie by die voorsittende regterlike beampte.

(c) Growwe onreëlmatigheid in verband met die verrigtinge.

(d) Die toelating van ontoelaatbare of onbevoegde getuienis of die verwerping van toelaatbare of bevoegde getuienis.

(3) 'n Hoërhof kon, ingevolge sy inherente jurisdiksie, verrigtinge uit die landdroshof voor skuldigbevinding of vonnis hersien in gevalle wat nie deur paragraaf 2 hierbo gedek word nie, indien die hof van oordeel is dat regverdige beregting van die saak nie geskied het nie.

In hierdie kader kan om die volgende gevalle betrek word:

(a) Waar dit onmiskenbaar blyk dat die staatgetuienis gedurende die verhoor meinedige getuienis gelewer het (*S v Ndcela* 1974 2 PH H41 (K)).

(b) Waar die verhoor- en straflanddros nie dieselfde persoon is nie en laasgenoemde van oordeel is dat eersgenoemde se veroordeling verkeerd is. In hierdie verband moet die waarskuwing van die redakteur van *Die Landdros* vol I (1965) 67 egter sterk onderskryf word nl dat die straflanddros absoluut seker moet maak dat die skuldigbevinding juridies verkeerd was voordat hy die saak vir hersiening stuur.

(c) 'n Geval soos *S v Sekakala* 1962 2 SA 105 (G), waar die beskuldigde nooit aangekla moes gewees het nie. □

Aantekeninge

DIE SERTIFIKAAT INGEVOLGE ARTIKEL 2(1)(a)(v) VAN DIE WET OP TESTAMENTE 7 VAN 1953

Artikel 2(1)(a)(v) van die Wet op Testamente 7 van 1953 lui soos volg:

"2(1) Behoudens die bepalings van artikels *drie* en *drie bis*–
(a) is geen testament wat op of na die eerste dag van Januarie 1954 verly word, geldig nie tensy–
. . .
(v) indien die testament deur die erflater deur die maak van 'n merk of deur iemand anders in teenwoordigheid en in opdrag van die erflater onderteken word, 'n magistraat, vrederegter, kommissaris van ede of notaris aan die end daarvan sertifiseer dat hy homself oortuig het van die identiteit van die erflater en dat die aldus ondertekende testament die testament van die erflater is, en indien die testament meer dan een bladsy beslaan, elke ander bladsy as die bladsy waarop dit eindig, ook deur die magistraat, vrederegter, kommissaris van ede of notaris wat aldus sertifiseer, onderteken word op enige plek op die bladsy;"

Artikels drie en drie *bis* het onderskeidelik te doen met die soldatetestament en testamente verly ooreenkomstig die reg van sekere ander state en raak hierdie bespreking geensins nie.

Deur die jare het hierdie artikel al verskeie probleme opgelewer waarvan twee onlangs deur die howe opgelos is. Die eerste het te doen met welke woorde in die sertifikaat gebruik moet word. In *Soobramoney v Moothoo* 1957 3 SA 707 (D & K) het die hof beslis dat die sertifiserende beampte die *ipsissima verba* van die wet moet gebruik. (Sien ook *Ex parte Naidu* 1958 1 SA 719 (D & K); *Ex parte Sookoo: In re estate Dularie* 1960 4 SA 249 (D & K); *Oldfield v The Master* 1971 3 SA 445 (N) en *Soonaram v The Master* 1971 3 SA 598 (N).) *In re Jennett* 1976 1 SA 580 beslis die appèlhof egter dat die doel van die artikel is om te verseker dat die dokument wat deur die maak van 'n merk onderteken is, die testament van die testateur is. Hierdie oogmerk kan bereik word sonder dat die *ipsissima verba* van die artikel gebruik word. Die hof meen dat enige sertifikaat geldig sal wees, watter woorde ook al gebruik is, op voorwaarde dat dit in effek neerkom op 'n verklaring dat die sertifiserende beampte hom oortuig het van die identiteit van die testateur en dat die testament wat deur die maak van 'n merk onderteken is, die testateur se testament is (sien veral die uitspraak van regter Galgut op bladsy 583–584 van die verslag).

Hierdie beslissing moet verwelkom word. Om op die *ipsissima verba* aan te dring, sou oordrewe formalisties wees. Ook in die meesterskantoor kan die beslissing nie veel probleme oplewer nie. Dit behoort immers nie moeilik te wees om te bepaal of 'n sertifikaat wel aan die vereistes voldoen wat die wet stel nie.

'n Tweede saak waaroor vroeër geen duidelikheid bestaan het nie was die vraag of die sertifikaat aangebring moes word op dieselfde tydstip as wat die testament deur die testateur en die getuies onderteken is en of dit later gedoen kon word solank dit net voor die dood van die testateur geskied. Die saak is etlike kere in die howe aangeraak maar nooit definitief beslis nie. (Sien byvoorbeeld *Ex parte Nel* 1955 2 SA 133 (K) 135F en *Soonaram v The Master* 1971 3 SA 598 (N) 604.) In *Arendse v The Master* 1973 3 SA 333 het die aangeleentheid egter pertinent voor die Kaapse hof ter sprake gekom. Hier het die kommissaris van ede sy sertifikaat 'n dag na die ondertekening van die testament aangebring. Die meester weier om die testament te aanvaar en daar word by die hof aansoek gedoen om die testament geldig te verklaar.

Dit gaan hier met ander woorde oor die vraag of 'n testament *uno contextu* verly moet word al dan nie. Bloot op 'n uitleg van die wet wil dit voorkom of dit nie nodig is om die sertifikaat aan te bring op dieselfde tydstip as wat die testateur en die getuies die testament onderteken nie. Die hof kom dan ook tot hierdie gevolgtrekking (336H–337E). Die resultaat van die beslissing is dus dat die sertifiserende beampte sy sertifikaat nie tydens verlyding van die testament hoef aan te bring nie maar dit later kan doen solank dit net voor die dood van die testateur geskied. Ook met hierdie bevinding is met respek geen fout te vind nie. Op *uno contextu*-verlyding sal hieronder teruggekom word.

'n Aangeleentheid wat egter nog nie opgelos is nie is die vraag of die sertifikaat na die dood van die testateur aangebring of verander kan word. Hierdie probleem het vir die eerste keer ter sprake gekom in *Ex parte Nel* 1955 2 SA 133 (K). Die testatrise het haar testament deur die maak van 'n merk onderteken maar die sertifikaat soos deur artikel 2(1)(a)(v) vereis, is nie aangebring nie. Volgens die hof se uitleg van die betrokke artikel kon die sertifikaat nie *post mortem* aangebring word nie. Ten tye van die beslissing moet die sertifiserende beampte gesertifiseer het dat die testateur aan hom "bekend is". Aan hierdie bewoording het die hof in sy uitspraak groot waarde geheg. Per slot van sake hoe kan die beampte sertifiseer dat die testateur aan hom "bekend is" as die testateur reeds dood is? Deur artikel 1 van Wet 48 van 1958 is hierdie bewoording egter gewysig sodat die artikel nou lui dat die beampte hom moet "oortuig van die identiteit van die testateur".

Die kwessie van nadoodse veranderings in die sertifikaat het ook in verskeie Natalse beslissings ter sprake gekom. (*Soobramoney v Moothoo* 1957 3 SA 707 (D & K); *Ex parte Naidu* 1958 1 SA 719 (D & K) en *Ex parte Sookoo: In re estate Dularie* 1960 4 SA 249 (D & K)). In al hierdie gevalle het die meester geweier om 'n testament as geldig te aanvaar omdat die sertifikaat na sy mening nie voldoen het aan die vereistes wat die wet gestel het nie. Telkens is by die hof aansoek gedoen dat die testamente geldig verklaar word en nie dat die sertifikaat *post mortem* verander word nie. Verder is die bewoording van die wet in al hierdie sake oorweeg voor die verandering deur Wet 48 van 1958 aangebring is. Nogtans is dit uit opmerkings van die regters duidelik dat die inhoud van die sertifikaat by die dood van die testateur moet vasstaan – nadoodse wysigings sal nie toegelaat kan word nie. In die *Soobramoney*-saak stel regterpresident Broome dit soos volg:

> "If that certificate does not comply with the Act, it necessarily follows that the will is invalid, even if there is abundant proof *aliunde* that it was (the testator's) mark and that she intended to execute the document as a will" (709G).

Sien ook die *Naidu-* en *Sookoo*-saak op bladsy 723E–H en 251A respektiewelik.

Nadoodse sertifisering het nog eens ter sprake gekom in *Ex parte Goldman and Kalmer* 1965 1 SA 464 (W). Die testateur het onderaan elke bladsy van die testament 'n simbool of tekening gemaak. Daar word aansoek gedoen dat die testament geldig verklaar word en in die alternatief dat die notaris gemagtig word om die defektiewe sertifikaat te wysig. Die hof beslis dat die simbool wel 'n handtekening is sodat die alternatiewe aansoek nie oorweeg word nie. Regter Galgut maak dit egter nogtans baie duidelik dat die sertifikaat nie nadoods gewysig of vervang kan word nie (467E).

In *Soonaram v The Master* 1971 3 SA 598 (N) het die kommissaris van ede nie gesertifiseer dat die testament die testament van die testateur is nie. Die meester weier gevolglik om die testament te aanvaar. In hierdie geval word wel aansoek gedoen dat die testament ten spyte van die gebrek in die sertifikaat aanvaar word en in die alternatief dat die kommissaris van ede gemagtig word om die sertifikaat te verander. In 'n volbankbeslissing (regters Henning en Shearer) verwerp die hof die aansoek. Regter Henning stel dit onomwonde dat die sertifikaat by die dood van die testateur volledig moet wees. Dit kan nie daarna aangebring of verander word nie (603–604). Sowel die *Goldman-* as *Soonaram*-saak is beslis na die wysiging wat Wet 48 van 1958 aangebring het.

In *Arendse v The Master* 1973 3 SA 333 (K) het die hof, soos reeds aangedui, beslis dat die sertifikaat nie ten tye van die verlyding aangebring hoef te word nie (sien *ante*). Waarnemende regter Baker het egter verder gegaan en sonder dat dit vir sy uitspraak nodig was beslis dat die sertifikaat ook ná die dood van die testateur aangebring kan word.

Waar 'n testateur sy testament by wyse van 'n merk onderteken of iemand anders namens hom onderteken en die testament uit meer as een bladsy bestaan, vereis artikel 2(1)(a)(v) dat die sertifiserende beampte ook die voorafgaande bladsye op enige plek onderteken. In *Van Huyssteen v Die Meester* 1975 4 SA 449 (W) het 'n testament uit een bladsy bestaan. Die testateur onderteken deur die maak van 'n merk maar daar is te min plek onderaan die bladsy om die sertifikaat aan te bring. Heeltemal korrek bring die sertifiserende beampte die sertifikaat op die agterkant van die bladsy aan maar versuim om die eerste bladsy van die testament te onderteken. Regter Hiemstra beslis dat hy dit nadoods kan doen. Hy steun op die obiter dictum van waarnemende regter Baker in die *Arendse*-saak en redeneer soos volg: die ondertekening deur die sertifiserende beampte is onafskeidelik van die sertifisering en as die sertifikaat *post mortem* aangebring kan word, kan die handtekening op die ander bladsye *a fortiori* ook nadoods aangebring word:

> "Sy handtekening sertifiseer dat die betrokke bladsy deel van die erflater se testament is, en as hy dit kon weet *ante mortem testatoris*, kan hy dit nou nog ewe goed weet. Daar is in die wetsbepaling niks wat hiermee strydig is nie" (452B).

In *Roberts v The Master* 1975 4 SA 377 (W) is die sertifiserende beampte ook sonder meer gemagtig om die voorafgaande bladsye van die testament *post mortem* te onderteken.

In *Radley v Stopforth* 1976 1 SA 378 (T) het nie uit die sertifikaat geblyk dat die sertifiserende beampte 'n "magistraat, vrederegter, kommissaris van ede of notaris" is nie. Waarnemende regter Van Reenen beslis dat die testament derhalwe ongeldig is. Hy sê uitdruklik dat die sertifikaat minstens voor die dood van die erflater aangebring en in orde moet wees. Dit kan nie *post mortem* aangebring, verander of aangevul word nie (386–387).

Daar heers dus tweespalt in ons howe oor die vraag of die sertifikaat nadoods aangebring of gewysig mag word en die vraag is nou welke standpunt die korrekte is. As 'n mens na die menings van die voorstanders van nadoodse aanbring of wysiging van die sertifikaat kyk, blyk dat hulle hoofsaaklik op twee argumente steun: die wysiging wat Wet 48 van 1958 in die bewoording van die sertifikaat aangebring het en die feit dat 'n testament nie *uno contextu* verly hoef te word nie.

Wat die verandering in die wet betref, mag dit wel so wees dat die wet nou vatbaar is vir die interpretasie waarvolgens die sertifikaat nadoods aangebring mag word. Nogtans skyn dit baie onwaarskynlik te wees dat die wetgewer met die wysiging so 'n ingrypende verandering wou teweegbring (sien *Soonaram v The Master* 1971 3 SA 598 (N) 604 en *Radley v Stopforth* 1976 1 SA 378 (T) 386A). Daar blyk immers 'n baie belangrike rede te wees waarom die wetgewer die vroeëre bewoording gewysig het. Voor 1958 moes die sertifiserende beampte sertifiseer dat die testateur aan hom bekend is. Die probleem by sodanige bewoording lê voor die hand. Wat doen die testateur wat nie sodanige persone ken nie? As hy ongeletterd of byvoorbeeld verlam is, sou dit beteken dat hy noodgedwonge intestaat moes sterf. Die bepaling dat die sertifiserende beampte moes sertifiseer dat die testateur aan hom bekend is, is van die notariële testament afkomstig en die onderhawige probleem is ook reeds deur ons ou skrywers ingesien. Sommige van hulle (Voet 28 1 24; De Groot 2 17 22 en Van Leeuwen *Censura Forensis* 3 2 11–12) sê dan ook dat dit voldoende is as die notaris die getuies ken en dat hulle hom verseker dat die testateur die persoon is wat hy voorgee om te wees. (Kamfer *Testamentsformaliteite in Verskeie Regstelsels* 253–254; Beinart 1953 *SALJ* 173; *Arendse v The Master* 1973 3 SA 333 (K) 336E–G en Van der Merwe en Rowland *Die Suid-Afrikaanse Erfreg* (2e uitg) 149). Deur die wysiging van die Wet in 1958 is hierdie probleem uitgeskakel. Die sertifiserende beampte moet hom nou slegs van die identiteit van die testateur oortuig en dit kan hy doen sonder dat hy die testateur hoef te ken. Die wenslikheid van 'n verandering in die bewoording van die sertifikaat lê dus voor die hand.

Wat die *unus contextus*-reël betref, is dit myns insiens uit die wet as sodanig duidelik dat *uno contextu*-verlyding nie noodsaaklik is nie. Die wetgewer vereis byvoorbeeld dat die testateur die testament in die teenwoordigheid van die getuies onderteken (artikel 2(1)(a)(ii)). So ook moet die getuies in teenwoordigheid van mekaar en van die testateur onderteken (artikel 2(1)(a)(iii)). Daar is egter geen aanduiding dat die handtekeninge terselfdertyd aangebring moet word nie. As die testateur byvoorbeeld sy

handtekening aanbring en bewusteloos sou word voor die getuies kon onderteken, kan hulle later onderteken. Dit sou nie tot ongeldigheid van die testament lei nie mits die handtekeninge telkens in die teenwoordigheid van die testateur en albei getuies gemaak is. Waar die wetgewer dus vereis dat een of ander handeling in verband met die verlyding van 'n testament in teenwoordigheid van sekere persone geskied, het hy dit so bepaal. Wat die sertifikaat betref, bestaan daar geen sodanige vereiste nie. Bloot op 'n uitleg van die wet kan 'n mens dus tot die gevolgtrekking kom dat *uno contextu*-verlyding nie vereis word nie. Blykbaar is ook in die gemene reg nie vereis dat 'n testament *uno contextu* verly word nie. Hieroor later meer. Die mening dat 'n testament nie *uno contextu* verly hoef te word nie word ook gehuldig deur Joubert (1955 *THRHR* 275); Rowland (1966 *THRHR* 142) en Murray (1955 *Annual Survey of South African Law* 122) terwyl Beinart (1955 *Butterworths South African Law Review* 146) en Hahlo (1955 *SALJ* 227) vereis dat die verlyding van 'n testament *uno contextu* moet geskied.

Die wet bevat egter geen aanknopingspunt vir die nadoodse aanbring of wysiging van die sertifikaat nie. Die voorstanders daarvan dat die sertifikaat wel *post mortem* aangebring of gewysig kan word, wend hulle nou tot die gemene reg en lei daaruit af dat 'n testament in die gemene reg nie *uno contextu* verly hoef te gewees het nie en dat sommige formaliteite selfs nadoods aangebring kon word. Na analogie hiervan redeneer hulle dan dat die sertifikaat ook nadoods aangebring of gewysig kan word (sien *Arendse v The Master* 1973 3 SA 333 (K) en Rowland 1966 *THRHR* 135 e v). Dit is hoofsaaklik die notariële testament wat hier ter sprake kom omdat die bepaling omtrent die sertifikaat aan die notariële testament ontleen is (Beinart 1953 *SALJ* 173).

Dit lyk of daar in hierdie opsig te veel waarde geheg word aan die gebruike en vereistes wat veral vir die notariële testament voor inwerkingtreding van die huidige wet gegeld het. Dit is wel so dat 'n wet in die lig van die gemene reg uitgelê moet word maar dan moet die gemeenregtelike posisie darem ook duidelik wees (Steyn *Die Uitleg van Wette* (4e uitg) 105). Wat *uno contextu*-verlyding betref, is dit egter nie heeltemal seker in watter mate die reël gegeld het nie. Almal is dit eens dat testamente ingevolge die Romeinse reg *uno contextu* verly moes word (Beinart 1955 *Butterworths South African Law Review* 146; Van der Merwe en Rowland a w 152 en Kamfer a w 7 e v). Maar in die Romeins-Hollandse reg is die posisie onseker. (Sien in die algemeen Beinart *ibid*; Hahlo 1955 *SALJ* 227; Kamfer a w 257; Rowland a w *passim* en *Arendse v The Master* 1973 3 SA 333 (K)). Weliswaar wil dit voorkom of die reël, indien dit inderdaad in die Romeins-Hollandse reg op nie-Romeinse testamente betrekking gehad het, nie van veel betekenis was nie, maar aangesien die posisie nie bo alle twyfel duidelik is nie moet 'n mens versigtig wees met afleidings wat daaruit gemaak word.

Verder moet in gedagte gehou word dat die notariële testament 'n heeltemal ander soort testament was waarvoor ander vereistes gegeld het as vir die een ingevolge Wet 7 van 1953. So was dit nie 'n vereiste vir die geldigheid van die notariële testament dat dit deur die testateur en getuies onderteken moes word nie. (Voet 28 1 23; Van Leeuwen *Het Rooms-Hollands-Regt* 3 2 4; Kamfer a w 253; Juta *The Law of Wills* 15.) Trouens sodanige

testament kon selfs geldig wees as die testateur sy uiterste wil mondelings aan die notaris in die teenwoordigheid van twee getuies oorgedra het en gesterf het voordat die instruksies op skrif gestel is (Kamfer a w 254; sien ook Van der Merwe 1969 *THRHR* 399). Hieruit volg vanselfsprekend dat die notaris die testament eers na die dood van die testateur kon onderteken en sy ander verpligtinge kon nakom. Na aanleiding hiervan kan egter nie geargumenteer word dat die sertifikaat ingevolge Wet 7 van 1953 *post mortem* aangebring of gewysig kan word nie (sien die *Arendse*-saak en Rowland a w). Met ander woorde die ondertekening deur die notaris kan nie met die sertifisering ingevolge artikel 2(1)(a)(v) gelykgestel word nie. Terwyl die wet in artikel 2(1)(a) uitdruklik die vormvereistes stel waaraan 'n testament moet voldoen ten einde geldig te wees, is die feit dat die notaris sy verpligtinge ook na die dood van die testateur kon vervul 'n uitvloeisel van die vereistes wat eie was aan die notariële testament. 'n Mens kan dit ook anders stel: in die gemene reg is wel vereis dat die notaris die testament onderteken maar nie dat hy dit in alle omstandighede voor die testateur se dood doen nie. Hierteenoor beklemtoon die wetgewer dat as 'n testament namens 'n testateur onderteken word of die testateur deur die maak van 'n merk onderteken, 'n sertifikaat aangebring moet word anders is die testament ongeldig.

Uit bostaande wil dus voorkom of die gemene reg nie van veel hulp is nie. Eerstens weens die onsekere posisie aldaar maar veral omdat daar nie in die gemene reg 'n testament met 'n soortgelyke vereiste bestaan het wat met ons statutêre testament vergelykbaar is en dus as gesag kan dien nie. Alhoewel die bepaling omtrent die sertifikaat wel aan die notariële testament ontleen is, beteken dit glad nie dat ook al die ander vereistes van die notariële testament oorgeneem is nie. Die bedoeling van die wetgewer moet dus uit die wet self vasgestel word met inagneming van die euwels wat hy daarmee wou bekamp (*Radley v Stopforth* 1976 1 SA 378 (T) 386C). En soos reeds gesê, is daar in die wet geen aanduiding dat die wetgewer nadoodse aanbring of wysiging van die sertifikaat magtig nie. Trouens die wetgewer skryf die prosedure voor wat gevolg moet word ten einde 'n geldige testament daar te stel en dit moet tog by die dood van 'n testateur vasstaan of hy 'n testament het al dan nie. 'n Dokument wat voorgee om 'n testament te wees en dit by die dood van die testateur nie is nie kan ingevolge die wet nie later in 'n testament verander word nie (*Soonaram v The Master* 1971 3 SA 598 (N) 604H–605A en Joubert 1955 *THRHR* 274). Die wetgewer wou met hierdie bepaling onder andere bedrog voorkom (*Ex parte Naidu* 1958 1 SA 719 (D & K) 723B; *Ex parte Sookoo: In re estate Dularie* 1960 4 SA 249 (D & K) 252A en *Arendse v The Master* 1973 3 SA 333 (K) 337G–H). En hoewel sekerlik nie gesê kan word dat die artikel alle bedrog sal uitskakel nie, moet erken word dat as toegelaat word dat die sertifikaat *post mortem* aangebring of gewysig word ongetwyfeld meer geleentheid vir bedrog sal ontstaan.

Twee ander aspekte wat hier in gedagte gehou moet word, is dat die bepalings van artikel 2(1)(a) gebiedend is en geen diskresie aan die hof laat nie (*Naidu* se saak 723F–G; *Oldfield v The Master* 1971 3 SA 445 (N) 447F en *Soonaram* se saak 604H) en verder dat testamentêre wetgewing streng uitgelê moet word (Steyn a w 198).

'n Beginsel wat in hierdie verband telkens benadruk word, is dat daar 'n neiging in ons howe bestaan om 'n testament eerder geldig as ongeldig te verklaar as dit gebrekkig verly is (*Ex parte Nel* 1955 2 SA 133 (K) 136C–F; *Radley v Stopforth* 1976 1 SA 378 (T) 386C–D; Rowland a w 141). Dit is 'n gesonde beginsel, 'n goeie illustrasie waarvan te vinde is *In re Jennett* 1976 1 SA 580 (A). Dit is moontlik om artikel 2(1)(a)(v) so uit te lê dat van die sertifiserende beampte vereis word om die presiese woorde van die wet te gebruik (sien *ante*). Dit sou egter oordrewe formalisties wees en sou verder tot gevolg gehad het dat die testament *in casu* ongeldig verklaar sou word. Hierdie benadering word dan ook nie deur die appèlhof gevolg nie maar wel dié waarvolgens die testament geldig sou wees (sien *ante*). Die onderhawige beginsel moet egter wyk voor die vereistes wat die wet vir 'n geldige testament stel (sien die *Nel*-saak 136F en die *Radley*-saak 386F).

Uit bostaande is dit duidelik dat volgens ons huidige wetgewing die uitspraak van waarnemende regter Van Reenen korrek is. Daar kan nie gesê word dat dit onbillik is nie want die wetgewer sê uitdruklik en in die fynste besonderhede hoe 'n eenvoudige prosedure gevolg moet word ten einde 'n geldige testament te verly (sien *Comley v Comley* 1957 3 SA 401 (OK) 403A). Of hierdie 'n allesins bevredigende resultaat is, is egter 'n ander vraag. Dit wil voorkom of dit nie die geval is nie. Dit spruit egter nie uit onduidelikheid van die wet as sodanig nie maar is 'n gevolg van die toepassing van die bepalings deur die kategorieë van persone wat die wet aandui. Dat hulle verantwoordelike persone is, word nie ontken nie maar nie al hierdie kategorieë persone het noodwendig 'n kennis van die verlyding van testamente nie. Al die sake wat hierbo bespreek is, het op die ou end in die hof beland weens die onkunde van die sertifiserende beampte. (Dit geld nie net die inhoud van die sertifikaat nie maar ook *waar* dit aangebring moet word – sien byvoorbeeld *Stemmet v Die Meester* 1957 3 SA 404 (K).) Dit is vanselfsprekend nie 'n baie gelukkige toedrag van sake as die amptenaar wat moet toesien dat die bepalings van die wet uitgevoer word, veroorsaak dat aan die bedoeling van die testateur nie gevolg gegee kan word nie. Dit is dan ook in hierdie opsig waar verligting gebring moet word. Verskillende moontlikhede doen hulle voor. Eerstens kan aan die howe 'n groter mate van diskresie gegee word. Tweedens kan vereis word dat die sertifikaat alleenlik aangebring word deur persone wat noodwendig oor kennis van die verlyding van testamente beskik. Derdens kan die sertifikaat heeltemal afgeskaf word en van 'n ander wyse van verlyding gebruik gemaak word, byvoorbeeld die maak van 'n merk in die teenwoordigheid van 'n verantwoordelike en deskundige persoon (sien Van der Westhuizen 1975 *De Rebus Procuratoriis* 171). Dit is te hope dat die wetgewer spoedig aan hierdie aangeleentheid aandag sal gee in welke geval nuttig gebruik gemaak kan word van die bogenoemde artikel van professor Van der Westhuizen.

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DISPOSAL OF THE UNDERTAKING OR THE WHOLE OR GREATER PART OF THE ASSETS OF A COMPANY

1 INTRODUCTION

Disposals by companies of assets are not uncommon occurences. Trading companies are wont to resort to clearance sales, some once, others more than once a year. Share dealing companies are viable only to the extent that they are able to switch into the right holdings from time to time which may even mean momentarily being completely liquid. Township development companies exist in order to liquidate portfolios acquired and developed by them and then start the process all over again. Retailers in other fields must turn over their stocks at a much faster tempo in order to make ends meet.

Yet, despite the basic and commonplace nature of such disposals, a proper appreciation of the underlying legal principles and requirements at stake is not always present.

Three basic issues are involved.

The first concerns the ability of the company to effect the disposal. Under the Companies Act 1973, as amended (the act), this issue will only on rare occasion be of any consequence.[1]

The second is which of the company's organs is empowered to represent it or act on its behalf in that regard. The third, tying in with the second, relates to the formalities necessary to properly constitute the power or authority of such organ.

The treatment in the act of particularly this third issue leaves much to be desired and will be exposed to a critical analysis. For purposes thereof it will be necessary briefly to consider the second as well.

2 POWERS TO EFFECT DISPOSAL ON BEHALF OF COMPANY

1 Division of powers between company organs

Not being natural persons, companies can act only through a general meeting of members or its board of directors (or agents appointed by either of them). The division of power between these two major organs of a company is regulated mainly in its articles of association. The standard provision in this regard provides in essence that the business of a company shall be managed by the directors who may exercise all such powers of the

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[1]In terms of par (b) of Schedule 2 to the act, read together with s 34 thereof, every company has the power to "sell, lease, mortgage, *dispose of*, give in exchange" its undertaking or all or any part of its property and assets unless that power has expressly been excluded or qualified in its memorandum of association. Only where this power has so been excluded or qualified can it be in issue. Disposals in conflict with such exclusion or qualification would not however, in view of s 36 of the act, be void but the delinquent directors might be faced with claims for damages suffered in consequence thereof.

company as are not by the act or by the articles of association of the company required to be exercised by the company in general meeting.[2]

A power vested in one organ cannot be exercised by another, or in the words of Lord Greer:[3] "[The general body of shareholders] cannot themselves usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in the general body of shareholders."

2 Directors' powers to manage business and dispose of property

Powers of management include the power to dispose of property. Where therefore the powers of management are vested in the directors, the general meeting can neither dispose of the assets of the company nor force the directors to do so.[4] And in the absence of any contrary provision either in the articles itself or in the act the directors, conversely, can dispose of all or any assets of the company without reference to the general meeting.

The English act contains no such contrary provision laying down formalities whereby directors would be fettered in the exercise of their powers with regard to disposal of assets.[5] The act, on the other hand, does, to wit in s 228.

3 SECTION 228 FORMALITIES WITH REGARD TO DIRECTORS' POWERS OF DISPOSAL

Requirements

Section 228 provides that notwithstanding anything contained in its memorandum or articles the directors of a company shall not have the *power,* save with the approval of a general meeting of the company, to dispose of–

(a) the *whole* or *substantially the whole* of the undertaking of the company, or

(b) the *whole* or the *greater part* of the *assets* of the company.[6]

To be effective a resolution of the company (in general meeting) approving such disposal must expressly authorise or ratify the specific transaction.[7] Such approval may, clearly, be given retrospectively and apparently informally as well. The power of disposal, it would seem, is not divested from the directors and invested in the general meeting but remains in the board (as in art 59 or 60) to be exercised in concurrence with the general meeting. Nothing in s 228 contained, however, appears to preclude the

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[2]Table A (Schedule 1) to the act. This table contains two optional sets of articles, one in respect of public, one in respect of private companies. The relevant articles in this regard are respectively article 59 and article 60 and are largely identical to article 80 of Table A to the English Companies Act 1948, (the English act).

[3]In *Shaw & Sons (Salford) Ltd v Shaw* (1935) 2 KB 113 134 and cited in Cilliers and Benade *Company Law* (2nd ed) 171 footnote 7.

[4]*Automatic Self-Cleansing Filter Co Ltd v Cunningham* (1906) 2 Ch 34.

[5]Despite recommendation in this regard by the Jenkins Committee in par 113 of its report (Cmd 1749, 1962).

[6]sub-section 1.

[7]sub-section 2.

articles of association being so framed that such power solely vests in the company in general meeting.

Consequences of non-compliance

Failure to obtain the requisite approval could have far-reaching consequences for directors. By effecting a disposal without the requisite shareholders' approval, directors act beyond the scope of their *authority*, thereby exposing themselves to possible claims for damages either from the company itself or, depending on the circumstances, from the other contracting party. An unauthorised disposal has no legal efficacy unless it is subsequently ratified or the *Turquand* rule applies.

Shareholder approval as required by s 228 constitutes an internal formality necessary to complement the directors' power of disposal. It is not usually attended by publicity. In terms of the rule in *The Royal British Bank v Turquand*[9] the third party (to whom the disposal is made) need not enquire to establish whether the internal formality (of obtaining shareholders' consent) has been complied with, and the company will only be able to rely on the lack of shareholders' consent and consequent directors' authority if it can be shown that the third party in fact had knowledge thereof. Where knowledge cannot be established the company would be bound despite the lack of authority on the part of the directors who would, however, be liable to it for such damages as it might have suffered by reason of an unauthorised and detrimental disposal. And if the unauthorised disposal would be advantageous to the third party, but not to the company, it is unlikely that shareholders' ratification would be forthcoming. Where the third party cannot invoke the *Turquand* rule to hold the company to the contract, he will look to the directors for any damages he might have suffered in that regard. Whether such a claim will be successful will depend on whether the directors warranted either expressedly or impliedly that they had authority to effect the disposal or are estopped from denying that they represented that they did.

It is therefore crucial that the provisions of s 228 are observed. Yet it is not always as easy as it would appear at first blush to establish when the approval of shareholders must be obtained and when it may be dispensed with.

Interpretation problems

Meaning of "dispose"

It is far from clear when, for purposes of the operation of s 228, a disposal, a concept which is not defined in the act, takes place.

Two difficulties arise. The first is whether "disposal" relates not only to the actual *implementation* of the agreement of disposal but also to the very

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[9](1856) 6 E & B 327. Followed in *Mine Workers' Union v Prinsloo* 1948 3 SA 831 (A). For support for the proposition that the *Turquand* rule is applicable to situations where shareholders' approval in terms of s 228 has not been obtained, see Basil Wunsh "Disposing of the Undertaking or Assets of a Company" 1974 *SALJ* 351 and Henochsberg *on the Companies Act* (3rd ed) 401.

conclusion of that agreement. The second relates to the range of transactions falling within its ambit. For instance, would leasing or exchanging property (or, for that matter converting cash holdings into other investments) fall within the ambit of s 228? And what is the position with regard to the granting of options, pre-emption rights, mortgages, pledges and the like over property of the company?

In a different context, the word "disposal" has been taken to mean "not the actual transfer or ownership but the granting of the right to acquire ownership".[10] However, it has been suggested that "dispose" in s 228 refers to an actual parting with the property and not to the mortgaging of property or the granting of pre-emption rights in respect thereof.[11] While it is true that s 228 does not apply in respect of the granting of pre-emption rights,[12] it does not necessarily follow that the same holds regarding options. For a right of pre-emption merely enables the grantee thereof to enforce a sale to him on the same terms offered to the grantor by a prospective purchaser *if and when the grantor decides to sell* to such purchaser. An option on the other hand, entitles the grantee to enforce a sale, *if he decides to purchase,* against the grantor who has in terms of the option irrevocably bound himself to sell.

And it would appear as if the word "dispose" is not necessarily confined to sales, alienations or outright transfers for it has judicially been held that a prohibition against the disposal of assets includes the mortgaging of such assets.[13] And in the United States where the disposal of assets is in all states, with the sole exception of Arizona, governed by corporation statutes,[14] "disposal" appears to include both a mortgage and pledge. Thus, for instance, the Model Business Corporation Act[15] refers to "a sale, lease exchange, mortgage, pledge or other disposition of all, or substantially all,

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[10]*Peri-Urban Areas Health Board v Tomaselli* 1962 (3) SA 346 (A) with regard to the meaning of disposal in s 27(1) of Ordinance 11 of 1931 (Transvaal). See too *Langeberg Kooperasie Bpk v Inverdoon Farming and Trading Co Ltd* 1965 2 SA 597 (A) with regard to the definition of "dispostion" in s 2 of the Insolvency Act, 1936 which clearly includes agreements as well. And in *Rex v Stein* 1947 4 SA 442 (T) it was stated that "the word 'disposal' is one of very wide meaning, and the use to which a thing is put is one of the ways in which it may be disposed of."

[11]Cilliers and Benade 250 relying on Henochsberg (2nd ed) 183 who refers to *Grey v IR Commissioners* (1958) 2 All ER 428 and *Rhyl UDC v Rhyl Amusements Ltd* (1959) 1 All ER 257 and *R v De Aranjo* 1961 3 SA 243 (T) 235. See too Henochsberg (3rd ed) 401.

[12]*Linder v National Bakkery* 1961 1 SA 372 (O) at 382. "It [a right of pre-emption] merely prohibits the company from disposing of its assets pending the fulfilment of a condition namely that the company makes a valid offer of sale" to the grantee which is not accepted by him within the pre-emption period.

[13]*Ex parte De Jager* 1926 NPD 423 and *Ex parte Radloff* 1932 OPD 118 both involving the interpretation of wills; *Langeberg Kooperasie Bpk v Inverdoon Farming and Trading Co Ltd* supra with regard to "disposition" in the Insolvency Act where that definition refers to "mortgage" and "pledge" by name.

[14]Stanley Siegel: "When Corporations Divide: A Statutory and Financial Analysis" 1966 *Harvard Law Review* 534 537; Stephen D Lobrano "The Voluntary Transfer of Corporate Assets in Louisiana" 1975 *Tulane Law Review* 624 625. A sale of all the property and assets of a not insolvent corporation was traditionally regarded *ultra vires* unless all shareholders unanimously approved. This rule of American common law found its way into the various state enactments.

[15]ABA – ALI Model Business Corporation Act 1959 as amended.

the property and assets of a corporation",[16] implying that a mortgage or pledge is a disposition.[17]

To clarify the meaning of "dispose" where it appears in s 228 should not be beyond the realms of human ingenuity. By suitably adapting the definition of "disposition" in s 2 of the Insolvency Act, 1936, thereby making it clear on the one hand that both mortgages and pledges are included and on the other hand that not only acts in execution of agreements of disposal but the acts whereby such agreements are concluded are covered, the matter would be put beyond conjecture.

Meaning of "whole/substantially whole of the undertaking" and "whole/greater part of the assets"

For s 228 to apply the disposition must either be of the "whole or substantially the whole of the undertaking of" or of the "whole or the greater part of the assets of" the company, but yet again it is left open to speculate what is entailed. Evidence to the effect that the words "the greater part of the assets" were vague and required clarification, was considered by the van Wyk de Vries Commission (the "commission") but apparently not heeded.[18]

This is most unfortunate for an endless number of questions arises. Where the company is completely liquid, ie all its assets are cash, "greater part" presumably means cash in excess of fifty per cent. But how is this determination made if the company's assets consist of a wide range of investments all made at different stages and which norm is the relevant one? Assuming asset value to be the yardstick, how is such value in turn determined? Is it historical cost, current market price or a figure arrived at by capitalising yields? Assuming that a suitable index has been obtained what reading on the scale would be equated with "the greater part" of the assets? Would 50,1 per cent tip the scales or say only 60 per cent or 70 per cent or is an even higher reading required?

"Substantially the whole undertaking", on the other hand, apparently connotes a percentage closer to the hundred per cent mark. "It seems likely that the words 'substantially all' were inserted . . . to prevent avoidance of the statute retention of some minimal residue [of the original assets]".[19]

The reason for such distinction or for referring to "the undertaking of the company" at all is not apparent.

Instead of using size of the assets or undertaking disposed of as the sole test, the enquiry should also be whether the transaction is or is not within the company's ordinary course of business.

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[16]Sections 71 and 72: where the transaction is in the *usual and regular course of business* no authorization or consent of the stockholders is required; where it is not, such consent is required after proper notice. See too hereunder.

[17]Compare in this regard the wording of par (b) of Schedule 2 to the Act referred to in footnote 1 supra.

[18]Main Report (RP 45/1070) par 44 44.

[19]Stanley Siegel "When Corporations Divide" supra at 541, referring to the test employed by the Model Business Corporations Act and the statutes of a majority of states in America regarding disposal of assets.

Relevance, if any, of the disposal being within the ordinary course of business

Unlike some American statutes, s 228 draws no distinction between disposals which are and those which are not within the usual and regular course of business of the company.

Prima facie, therefore, even the directors of companies, the assets of which are continually being turned over, such as those engaged, for instance, in township development, jobbing (whether in commodities, securities or currencies), supermarketing or trading of whatsoever description for that matter, cannot carry on the normal business of the company vested in them without having continually to refer back to their shareholders for *authority*. Obviously this is absurd and could never have been intended by the legislature.

American courts have not hesitated to acknowledge this. The necessary distinction which the legislature has failed to draw in this regard, has been drawn by them judicially: "Notwithstanding the broad language [of the corporation statute of New York at the time] . . . it is obvious that it was not addressed to *ordinary sales* by a corporation, nor even to those *extraordinary in size* but still in the *regular line* of its *business* . . ."[20] The object of this line of approach has been formulated in the following terms: "One of the purposes of the *regular course of business* qualification is to facilitate transfers by companies whose *stock in trade* consists of tangible or capital assets. *Thus where an enterprise is organized for and engages on a regular basis in* the sale of real estate or the liquidation of assets, *shareholders' approval need not be obtained for each transaction.* It is only in those cases where a sale works a virtual dissolution of the business of a corporation that shareholder consent must be obtained."[21]

There is no reason why this approach should not be adopted by South African courts as well. For it is a venerated canon of construction that a court may depart from the clear language of a statute when to give the plain words of such statute their ordinary meaning would lead to an absurdity so glaring that it could never have been contemplated by the legislature or where it would lead to a result contrary to the intention of the legislature.

Nevertheless, it is desirable, it is believed, that the legislature should intervene to remove any absurdity inherent in s 228, rather than leave it to the courts to speculate as to what was or was not intended by parliament.

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[20]*In re Timmins* 93 NE 522 1910 at 523. Here a printing company sold a calender department representing one thirteenth of the assets of the corporation, together with goodwill. In addition the corporation was indefinitely barred from re-entering the calender business. The court held that stockholder approval was required: "The sale before us was not made in the *ordinary course* of the business of the corporation, for it was not organized to sell calender departments, or any department that would involve going out of business pro tanto". See further *Wattley v National Drug Stores Corp* 122 Misc 533, NY Supp 254; *Baldwin v American Trading Co* 243 p 710 (Cal App 1925); *Epstein v Gosseen* 256 NYS 49 52–53 (App Div 1932); *In re Miglietta* 39 NE 2nd 224 (NY 1942); *Hodes v 1299 Realty Corporation* 104 NYS 2nd 206 207 (App Div 1951); *Strauss v Midtown Enterprises Inc* 60 NYS 2nd 601 (Sup Ct 1945).

[21]Stephen D Lobrano "The Voluntary Transfer of Corporate Assets in Louisiana" supra at 634. Observe that s 21 of the Louisiana Business Corporation Law does not expressly distinguish dispositions within the *regular course* of business from those not within.

Determination of regular course of business

In America two approaches have been developed for determining a company's regular course of business.[22] One relies solely upon the corporate charter[23] while the other focuses on the actual operations and history of a corporation.[24] In *Eisen v Post*[25] the issue was whether the sale of a sub-lease which was the corporation's sole asset was beyond the regular course of its business and thus required shareholder approval. While the corporation's charter authorized it to engage in buying, it had in fact in the past only managed and operated a theatre under the sub-lease in question. Relying entirely on the previously unexercised, but charter authorized power to deal in real estate, the court affirmed the transaction and held that dealing in real estate was the ordinary corporate business, thus disregarding a number of prior New York decisions applying the actual business approach.[26] The *Eisen* decision was subsequently overruled by an amendment to the New York consent statute, providing that the "*actual business* of the corporation" is the determining factor.[27]

Disposals by conglomerates

An important case in regard to conglomerates is the recent Delaware case of *Gimbel v Singnal Cos*[28] concerning the disposal by the directors of a corporation of its subsidiary in the oil and gas industry, the original business of the corporation. A shareholder objected that he had originally invested in the corporation because of its operation in the oil and gas field, that the sale resulted in a *change* in the *nature* of this investment and was *outside* the *regular business* of the business of the corporation. The court did not agree. In holding that shareholder agreement was not required it pointed out that the very nature of conglomerates contemplates the acquisition and disposal of independent branches. This seems to run counter to the philosophy adopted by the Johannesburg Stock Exchange.

Disposal by subsidiaries of listed companies

Unlike s 228, calling for the approval only of the shareholders of the company disposing of the assets, the Johannesburg Stock Exchange calls for the approval of shareholders of the listed holding company as well in respect of disposals by unlisted subsidiaries. However, this additional Stock Exchange requirement operates only where the disposal would materially alter the consolidated assets or earnings or the trading objects of the listed company or the subsidiary or where the subsidiary proposes to utilize the

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[22]43 NCL Rev 957 (1965); 67 *Yale LJ* 1288 (1958); 49 *Tulane Law Review* supra at 634.
[23]*In re United Gas Corp* 58 F Supp 501 (D Del 1944); *Wattley v National Drug Stores Corp* supra; *Eisen v Post* 169 NYS 2d 15, 146 NE 2d 77 (1957).
[24]*Schreiber v Butte Copper & Zinc Co* 98 F Supp 106 (SD NY 1951); *In re Kuning* 121 NYS 2d 220 (App Div) 120 NE 2d 228 (1953).
[25]See footnote 23 for reference.
[26]"The Voluntary transfer of Corporate Assets in Louisina" 49 *Tulane Review* supra at 635.
[27]ibid. One solution suggested to the commission was in somewhat similar vein. It proposed that shareholders' consent be required whenever a disposal would *affect* the *nature of the business actually* carried on. (Main Report par 44 44).
[28]316 A 2d 599 (Del Ch) Aff'd 316 A 2d 619 (1947).

proceeds to acquire other assets. This rule, like s 228, does not operate as a *pro tanto* exclusion or qualification in terms of s 34 of the subsidiary company's powers of disposal. It is given as an undertaking firstly by the directors of the listed holding company and secondly by the directors of the unlisted subsidiary, that initially any agreement in that regard will be provisional and will be put to the shareholders of the listed holding company for approval. It is open to objection on various counts.

In so far as it relates to the directors of the listed holding company it seems to be premised on the retention of the *status quo* in terms of size of past assets and earnings and possible perpetuation of the serfdom of that unlisted subsidiary. It is objectionable in so far as it might restrict normal rejuvenation or natural expansion taking place within the confines of the regular course of business of the unlisted subsidiary.

In so far as it relates to the directors of the unlisted subsidiary it would appear to be inefficacious in that a fettering of their discretion by directors or a subjection thereof to the wishes of the shareholders of the controlling listed company would be in breach of that fiduciary duty. Not only should the undesireable state of affairs with regard to the directors of unlisted subsidiary companies be rectified, but the whole philosophy should be brought in line with that to be followed in s 228.

4 CONCLUSION

In view of the pitfalls and traps abounding the field of s 228 in its present form, radical change, it is believed, is called for, in the interest of those who have to live with the section under the sword of s 226,[30] namely company directors. Two courses of action are open: the one is to amend s 228 on the lines mooted above; the other, as has been suggested by Mr Arthur Suzman QC, in his dissenting report,[31] is to scrap it altogether.

Directors are, it is submitted, surely entitled to a clear mandate.

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[29]Article 12 of Schedule IV of s 3, Rules, Requirements and Procedures for Listing, Febr 1970.

[30]Entitling shareholders to institute proceedings against a director for the recovery of any damages or loss suffered by the company for any benefit of which it has been deprived as a result of any wrong, breach of trust, or breach of faith committed by such director.

[31]Reservations by Mr Arthur Suzman QC, appendix C to the Main Report par 9.

Vonnisse

S v MQABUZANA 1976 1 SA 212 (OK)

Diefstal en poging tot diefstal

Die beslissing van *S v Mqabuzana* 1976 1 SA 212 (OK) kan slegs as 'n onaangename verrassing beskryf word. Veral in die afgelope twee dekades is die misdaad diefstal in 'n groot mate duidelik deur ons howe toegelig en is nie veel probleme daarmee in die praktyk ondervind nie. Daarom klink die snaar waarop daar in *S v Mqabuzana* getokkel word besonder vals. En vals note mag in die strafreg nie onopgemerk gelaat word nie, omdat dit normaalweg in 'n koor van valse note eindig.

Klaarblyklik het die beskuldigde in 'n selfbedieningswinkel te Cradock 'n bottel reukverdrywer en 'n buisie gesigroom voor by haar bors onder haar klere verberg. Die artikels was die eiendom van die winkel. Die beskuldigde is 'n tydlank deur 'n assistent dopgehou en later het beskuldigde die assistent probeer ontwyk. Sy neem die artikels vanwaar sy dit versteek het en plaas dit in die mandjie toe sy opmerk dat sy dopgehou word.

Tydens die daaropvolgende verhoor is die beskuldigde deur die landdroshof skuldig bevind aan diefstal van die artikels en dienooreenkomstig gevonnis tot ses maande gevangenisstraf (nadat vorige veroordelings van onbekende aard en aantal teen haar bewys is).

By hersiening beslis wnr Smalberger, ondersteun deur sy ampsbroeder, wnr Stewart, dat die skuldigbevinding aan diefstal nie te regverdig is nie en vervang moet word deur 'n skuldigbevinding aan poging tot diefstal. Om tot hierdie gevolgtrekking te geraak, maak die waarnemende regter van die volgende argumente gebruik:

1 Diefstal is onttrekking van 'n saak uit die beheer van 'n ander met die opset om dit toe te eien (212G);

2 in 'n selfbedieningswinkel word 'n voorgenome koper toegelaat om in die selfbedieningsarea artikels wat hy van die vertoonrakke verwyder het alvorens hy of sy na die betaalpunt beweeg fisies in sy besit te hê (213B);

3 by die betaalpunt oefen die winkeleienaar nog beheer uit oor die betrokke artikels en mag alleenlik sodanige artikels as waarvoor betaal is by die betaalpunt verbygeneem word (213B–C);

4 genoegsame onttrekking om diefstal uit te maak, geskied eers wanneer artikels *animo furandi* (213C) sonder betaling verby die betaalpunt geneem word; en

5 indien die persoon derhalwe artikels aan haar persoon versteek het met die opset om nie daarvoor by die betaalpunt te betaal nie, dit wil sê met

die opset om dit te steel, kom haar optrede op 'n poging tot diefstal neer (213E).

Ad 1: Die mees gebruiklike definisie van diefstal is dié van Hunt *South African Criminal Law and Procedure* 566: "Theft consists in an unlawful *contrectatio* with intent to steal of a thing capable of being stolen." Daar word nooit in die praktyk beweer dat 'n beskuldigde 'n saak uit die beheer van 'n ander onttrek het met die opset om dit toe te eien nie. Gewoonlik word beweer dat 'n beskuldigde wederregtelik 'n saak, die eiendom of in die regmatige besit van iemand anders, geneem het met die opset om te steel.

Ad 2: Uiteraard neem 'n voorgenome *koper* in die selfbedieningsarea van 'n selfbedieningswinkel artikels van die rak op uitnodiging van die eienaar in besit, dit wil sê *regmatige besit.* Daar kan geen twyfel wees dat sodanige inbesitname op regmatige wyse moet geskied nie. "Besit" van artikels onder 'n klant se klere kan tog sekerlik nie regmatige inbesitname daarstel nie – en nog minder op uitnodiging geskied. Die posisie is doodeenvoudig dat 'n persoon wat artikels aan haar persoon onder haar klere versteek, geen *koper* is nie en ook nie die artikels weens die uitnodiging van die eienaar aan egte kopers regmatig kan besit nie. Indien sy, soos die hof in die onderhawige geval ook bevind het, die artikels aan haar persoon versteek het met die opset om dit te steel (213E–F), kan sy tog sekerlik nie "deur die eienaar uitgenooi wees om die artikels fisies in haar besit te hê" nie. Die feit dat die hof in sy omskrywing van diefstal nie na die wederregtelikheid van die onttrekking verwys nie, laat mens wonder of die hof nie dié aspek geheel en al buite rekening gelaat het nie – en vandaar die beskouing eerstens dat die beskuldigde 'n koper is en tweedens weens die uitnodiging van die winkeleienaar die artikels fisies mag beheer.

Ad 3: Dit is te betwyfel of die eienaar nog by die betaalpunt beheer uitoefen oor die artikels wat beskuldigde aan haar persoon versteek het. Die oomblik toe sy die artikels versteek het met die opset om dit te steel en derhalwe nie daarvoor te betaal nie, het die beskuldigde die artikels wederregtelik uit die regmatige besit van die eienaar geneem en dit gesteel. In elk geval beteken die feit dat die beskuldigde die artikels weer in die mandjie geplaas het toe sy gemerk het dat sy dopgehou word, nie veel nie. Sy het op daardie stadium reeds die artikels aan die regmatige besit van die eienaar onttrek en dus diefstal gepleeg – die feit dat sy steeds met die artikels in die winkel is, die feit dat sy die artikels nie weggeneem het nie, beteken nie dat sy die artikels nie gesteel het nie. (Sien *Hunt* a w 571; sien ook die beslissings wat hy op dieselfde bladsy in voetnoot 118 aanhaal.) Die onttrekkingshandeling wat sonder twyfel onregmatig was, is reeds uitvoeringshandeling.

Ad 4 en 5: Genoegsame onttrekking het reeds plaasgevind toe beskuldigde die artikels *animo furandi* onder haar klere aan haar persoon versteek het. Reeds toe al het sy die artikels met die opset om dit te steel, *dit wil sê met die opset om nie daarvoor te betaal nie*, op wederregtelike wyse uit die regmatige besit van die eienaar geneem.

Dit verbaas beslis dat die hof volstaan met 'n aanhaling uit De Wet en Swanepoel *Strafreg* 296. Die geweldige analogie in *R v Mtaung* 1948 4 SA

120 (0), sòos gekwalifiseer in *R v Sibiya* 1955 4 SA 247 (AA) en die vrugbare bespreking in Hunt aw 570 ev, moes nooit die aandag van die hof misgeloop het nie. Dan sou die hof waarskynlik beslis het dat die verhoorhof te Cradock wel die somtotaal van twee plus twee korrek aangedui het.

E DU TOIT
Kantoor van die Prokureur-generaal, Bloemfontein

S v HEAVYSIDE 1976 1 SA 584 (A)

Staatsreg – uitleg van artikel 37 en deel B van die eerste bylae van die Transkeise Grondwet 48 van 1963.

Sedert die inwerkingtrede van die Transkeise Grondwet 48 van 1963 op 30 Mei 1963 (asook die jonger verwant daarvan – die Grondwet van die Bantoetuislande 21 van 1971 op 31 Maart 1971) het vrae oor die presiese omvang van die wetgewende bevoegdhede wat selfregerende tuislande aan dié twee wette ontleen, betreklik gereeld voor die howe ter sprake gekom (*S v Ndewanana* 1966 3 SA 312 (OK) (die "sleutelvonnis"), *S v Xesi* 1969 1 SA 1 (OK), *S v Dlanga* 1968 1 SA 5 (OK), *S v Zitudeza* 1970 2 SA 773 (OK); *S v Quma* 1974 3 SA 722 (OK), *S v Moagaesi* 1974 1 SA 141 (NK) en enkele ander).

Die vraag ter beslissing het hom gewoonlik – uitgesonderd die feitelike verskille – in dieselfde gedaante aan die hof voorgedoen as in die onlangse geval van *S v Heavyside* 1975 2 SA 106 (TH) en 1976 1 SA 584 (A): die appellant is deur 'n Transkeise hof skuldig bevind en gevonnis ingevolge die Wet op die Misbruik van Afhanklikheidsvormende Stowwe 41 van 1971 (hy het in dagga handelgedryf). Wet 41 van 1971 is egter vanaf 6 Julie 1973 deur Wet 83 van 1973 gewysig om voorsiening te maak vir 'n minimumvonnis van vyf jaar in die geval van sekere oortredings ingevolge die wet (waarvan die ter sake dienende oortreding een was). Drie maande tevore, op 1 April 1973, is daar by proklamasie aan die Transkeise wetgewende vergadering die bevoegdheid oorgedra om wette te maak oor alle gesondheidsdienste in die Transkei. Ingevolge artikel 37 van die Transkeise Grondwet impliseer dit (i) dat die Transkeise wetgewende vergadering die bevoegdheid verkry om self wette van die parlement oor die betrokke aangeleentheid te herroep of te wysig (a 37(1)) en (ii) dat geen wet van die parlement oor die betrokke aangeleentheid gemaak na die verlening van die bevoegdheid (1 April 1973 in hierdie geval) in die Transkei geld nie. (Artikel 65 van die Transkeise Grondwet bepaal dat alle wette wat by die inwerkingtreding van die Grondwet in die Transkei gegeld het, bly voortbestaan totdat herroep of gewysig deur die bevoegde gesag wat, afhangende van die aangeleentheid waaroor dit gaan, òf die parelement òf die wetgewende vergadering is).

Op die oog af behoort die feite in *S v Heavyside* nie probleme op te gelewer het nie. Sedert 1 April 1973 kon die Transkeise wetgewende vergadering wette maak oor gesondheid; dit sou volg dat wet 83 van 1973 nie in die Transkei geld nie.

Ongelukkig het die wetgewer in deel B van die eerste bylae van die Transkeise Grondwet waar die onderwerpe waaroor die wetgewende vergadering bevoeg is om wette te maak beskryf word, 'n item 23 ingevoeg – *ex abundante cautela* noem regter Van der Heever dit in *S v Moagaesi* 1974 1 SA 137 (NK) 141D – te dien effekte dat die Transkeise wetgewende vergadering wette kan aanneem vir "die oplê van sttrawwe vir die *afdwing van 'n wet deur die Wetgewende Vergadering gemaak* met betrekking tot 'n aangeleentheid wat binne in hierdie Bylae vermelde klas onderwerpe val" (eie kursivering).

Dit was hierdie item wat die hof aanvanklik in die "sleutelvonnis" (*S v Ndewanana*) en gevolglik ander sake in navolging daarvan op 'n dwaalspoor laat beland het. Die hof het dáár naamlik beslis dat die Transkeise wetgewende vergadering strawwe kan oplê *slegs* in verband met aangeleenthede *waaroor hy self 'n wet gemaak het.*

> "It would follow then that any enactment of the Parliament of the Republic which continued in force in the Transkei by reason of the provisions of sec. 65 of the Constitution Act 'die Transkeise Grondwet' and which related to a matter appearing in the First Schedule could be amended by the Assembly *provided that such amending legislation did not relate to any provisions in the enactment in question imposing punishment for the purpose of enforcing that law*" (appèlregter Wessels in *S v Heavyside* 1976 1 SA 584 (A) 588H; eie kursivering).

Om wel die strafbepalings te kon wysig sou die Transkeise wetgewer eers die hele bestaande wet moes heraanneem om dit 'n "wet deur die Wetgewende Vergadering gemaak" (waarna item 23 verwys) te maak. Regter Van den Heever het in *S v Moagaesi* 1974 1 SA 141 (NC) die gekunsteldheid van dié redenasie ingesien en beaam dat "daar geen regverdiging is nie vir die woordwysigende uitleg aangehang in *S v Ndewanana* . . ." (141A–B). In enkele artikels en 'n vonnisbespreking is ook op die onhoudbaarheid van die uitspraak in *S v Ndewanana* gewys (F Venter 1972 THRHR 348, 1975 THRHR 179; DH van Wyk 1974 THRHR 7, 1975 THRHR 7 n 27).

In *S v Heavyside* 1976 1 SA 578 het die appèlhof uiteindelik die geleentheid gekry en te baat geneem om van 'n positiefregtelike kant die saak in die reine te bring. Appèlregter Wessels lewer die eenparige uitspraak kategories:

1. Die Wet op die Misbruik van Afhanklikheidsvormende Stowwe 41 van 1971 is hoofsaaklik gerig op die bevordering van volksgesondheid. Vóór die inwerkingtrede van item 26 van deel B van die eerste bylae van die Transkeise Grondwet was dit 'n aangeleentheid wat by die parlement van die Republiek berus het, maar na die inwerkingtrede van item 26 het die Transkeise wetgewende vergadering volle wetgewende bevoegdheid daaroor verkry.

2. Die wetgewende bevoegdheid van die Transkeise wetgewende vergadering ontleen aan artikel 37(1) van die Transkeise Grondwet is baie wyd, en daar is geen steun vir 'n argument dat die bevoegdheid om 'n wet van die parlement te wysig, nie die bevoegdheid insluit om 'n bepaling van so 'n wet waardeur strawwe voorgeskryf word te wysig nie.

> "When any Act of the Parliament of the Republic applying in the Transkei relates to a matter appearing in Part B of the First Schedule, the competent authority to amend that Act is the Transkei Legislative Assembly, and it alone has the power to

amend, e g, provisions relating to the imposition of punishment for the purposes of enforcing that law" (589D–E).

3. Die bevoedheid om wetgewing oor enige aangeleentheid aan te neem moet noodwendig die bevoegdheid insluit om strawwe op te lê ter afdwinging van 'n wet oor so 'n aangeleentheid. In dié verband word met goedkeuring verwys na die opmerking van regter Van den Heever in *S v Moagaesi* dat item 23 waardeur die Transkeise wetgewer gemagtig word om strawwe op te lê *ex abundante cautela* ingevoeg is (589F).

4. Dit kon nooit die bedoeling van die wetgewer gewees het dat die Transkeise wetgewende vergadering nie die bevoegdheid mag hê om die strafbepalings van 'n wet van die parlement wat in die Transkei geld oor 'n aangeleentheid waaroor die Transkeise wetgewende vergadering die alleenbevoegdheid het, te wysig nie.

5. Die bevoegdheid om strawwe voor te skryf sluit ook die bevoegdheid in om voorskrifte aan die verhooramptenaar te rig aangaande die oplegging daarvan (byvoorbeeld minimumstrawwe). Voorskrifte van dié aard kom nie *ipso facto* op wysigings van die Strafproseswet 56 van 1955 neer nie. Hierdie aspek van die saak is die enigste waaroor die hof hom nie volkome duidelik uitlaat nie. Wanneer sal 'n wet wat strawwe voorskryf of voorskrifte aan 'n verhooramptenaar rig, neerkom op 'n wysiging van die Strafproseswet? Die hof beweer dat enige twyfel in die onderhawige saak uit die weg geruim word deur die afwesigheid van enige verwysing na die Strafproseswet in die langtitel van die Republikeinse wysigingswet van 1973! Die wetgewer sou volgens dié redenasie nie *bedoel* het om die Strafproseswet te wysig nie. Afgesien daarvan dat die langtitel van 'n wet met omsigtigheid as gesag vir die bedoeling van die wetgewer aangewend moet word (vgl Steyn *Die Uitleg van Wette* 4de uitgawe 154) bly die vraag steeds of daar in 'n geval soos hierdie na 'n teoretiese bedoeling van die wetgewer gekyk moet word of na die objektiewe uitwerking van die wet. 'n Paar riglyne deur die hof oor hoe om enige een van die twee te beoordeel sou die seël op 'n andersinds baie bevredigende uitspraak geplaas het.

6. In gevalle waar wette van die parlement in die Transkei geld en deels oor 'n onderwerp handel wat binne die wetgewende bevoegdheid van die wetgewende vergadering val en deels daar buite, het die wetgewende vergadering volle bevoegdheid oor dié gedeelte wat 'n onderwerp binne sy sfeer raak. Die implikasie hiervan is duidelik: dit kan selfs wees dat gedeeltes van die Strafproseswet binne die bevoegdheid van die wetgewende vergadering val omdat die Strafproseswet meer as bloot strafprosesregtelike reëlings bevat (volgens die hof is voorskrifte in verband met minimum- (of maksimum-) strawwe so 'n aangeleentheid).

Ongeag die kritiek onder 5 hierbo geopper moet hierdie uitspraak van die appèlhof verwelkom word. Sover dit die Transkei betref het *S v Heavyside* sy verskyning laat in die dag gemaak, en is dit van nie veel meer as akademiese belang nie in die lig van die onmiddellike onafhanklikheid van die Transkei. Aangesien die bepalings van die Grondwet van die Bantoetuislande 21 van 1971 wesentlik ooreenstem met dié van die Transkeise Grondwet, en die meerderheid selfregerende gebiede ingevolge eersgenoemde wet

nog geruime tyd hul wetgewende bevoegdhede kragtens artikel 30 (die byna woordelikse eweknie van artikel 37(1) van die Transkeise Grondwet) sal uitoefen, kon *S v Heavyside* nie op 'n meer geleë tydstip gekom het nie. Die verwarring rondom die bevoegdheid van 'n selfregerende Bantoetuisland om by wet strawwe voor te skryf, is vermoedelik iets van die verlede.

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MINISTER VAN POLISIE v EWELS 1975 3 SA 590(A)

Aanspreeklikheid weens 'n late

Die beslissing van die appèlhof in hierdie saak sal in die toekoms as die finale stap in 'n jarelange ontwikkelingsproses gesien word. Na talle beslissings (sommige van die appèlhof self) waarin daar geleidelik gevorder is weg van die onsekerhede en dwalinge wat aanvanklik ons reg op die gebied van deliktuele aanspreeklikheid weens 'n late vertroebel het, het die appèlhof nou by wyse van 'n kort, duidelike uitspraak van hoofregter Rumpff al die spoke van die verlede besweer.

Om te verseker dat die volle implikasies van hierdie beslissing nie misgekyk word nie, gee ek in alle beskeidenheid 'n opsomming van die hoofpunte daarvan:

1 Daar rus volgens ons reg nie 'n algemene regsplig op 'n persoon om te verhinder dat iemand anders se belange aangetas word en hy gevolglik skade ly nie (596 H).

2 Of daar in gegewe omstandighede 'n regsplig op 'n persoon gerus het om deur positiewe optrede die aantasting van die regsgoed van 'n ander te voorkom, moet volgens die norme van die objektiewe reg bepaal word (596 H en 597 A–C).

3 Waar daar geen duidelik uitgekristalliseerde norme bestaan wat die besondere geval dek nie, moet daar volgens die algemene maatstaf van objektiewe redelikheid besluit word of daar wel sodanige regsplig bestaan het, al dan nie (597 B).

4 Die maatstaf is objektief in die sin dat die "totaal van die omstandighede van . . . [die] bepaalde geval" (597 A) by die aanwending daarvan in aanmerking geneem moet word (daar moet dus 'n *diagnose* gemaak word) en dat dit nie gaan om hoe die dader of 'n persoon in die plek van die dader op die tydstip van die handeling die moontlike toekomstige verloop van gebeure gesien het of behoort te gesien het nie (daar word dus nie *prognosties* te werk gegaan nie) (597 B–C).

5 Deurslaggewend vir die maatstaf van objektiewe redelikheid is die opvattings van die gemeenskap omtrent wat op die gebied van die onregmatige daad as regmatig en onregmatig beskou word (597 B).

Dit gaan met ander woorde hier nie in eerste instansie om wat die gemeenskap vanuit 'n morele of byvoorbeeld 'n strafregtelike oogpunt as reg of verkeerd beskou nie (596 H en 597 B). So kan dit gebeur dat die versuim om 'n bepaalde gevolg te voorkom privaatregtelik as onregmatig beskou word sonder dat dit strafregtelik op dieselfde wyse beoordeel sou word en omgekeerd. (Die hoofregter kontrasteer nie uitdruklik deliktuele en strafregtelike onregmatigheid (wederregtelikheid) nie maar laat tog duidelik blyk dat 'n mens steeds in gedagte moet hou dat dit in 'n geval soos die onderhawige om "deliktuele onregmatigheid" gaan (596 C).)

6 Beoordeling in die lig van die "totaal van omstandighede van . . . [die] bepaalde geval" beteken dat *alle faktore* wat volgens gemeenskapsopvatting mag dui op 'n regsplig om handelend op te tree, in aanmerking geneem moet word. Faktore wat hier *byvoorbeeld* 'n rol kan speel is die volgende:

6 1 die feit dat die verweerder deur 'n voorafgaande handeling 'n gevaarlike situasie geskep het (597 A);

6 2 die feit dat die verweerder beheer uitgeoefen het oor goed wat *per se* gevaarlik is of waarop 'n gevaarlike toestand later ontstaan het (597 A – die hoofregter verwys na "beheer oor eiendom" sonder om spesifiek gevaarlikheid te noem);

6 3 die feit dat daar deur *byvoorbeeld* 'n administratiefregtelike bepaling aan sekere persone die verpligting opgelê word om op 'n sekere wyse op te tree (596 C–D); en

6 4 die feit dat daar 'n besondere beskermingsverhouding tussen die eiser en verweerder bestaan het (597 E–H).

Hierbo het ek "byvoorbeeld" gekursiveer om te beklemtoon dat dit nie moontlik is om *a priori* 'n volledige katalogus op te stel van die faktore wat in hierdie verband 'n rol kan en moet speel nie.

7 Die onregmatigheidselement van die onregmatige daad is aanwesig indien dit blyk dat daar 'n regsplig op die verweerder gerus het om deur sy positiewe optrede te voorkom dat die eiser se regsgoed aangetas word, en dat hy (die verweerder), sonder dat daar 'n regverdigingsgrond aanwesig was (byvoorbeeld die regverdigingsgrond onmoontlikheid soos in *Regal v African Superslate (Pty) Ltd* 1963 1 SA 102 (A)), inderdaad versuim het om die bepaalde gevolg te voorkom. (Indien dit vir die verweerder fisiek onmoontlik was om die regsgoedaantasting te voorkom, is hy nie aanspreeklik nie omdat die handelingselement – in die wye sin wat ook 'n late insluit – ontbreek.) Nadat onregmatigheid bevind is, ontstaan die vraag of daar ook skuld by die dader aanwesig was (598 A).

8 In die onderhawige saak was dit nie vir die hoofregter nodig om op die moontlikheid van die skuldvorm opset in te gaan nie. Dit spreek egter vanself dat die verweerder se skuld daarin kan bestaan dat hy inderdaad voorsien het dat sy late tot die besondere gevolg mag lei (bewussyn met 'n hoër of laer graad van waarskynlikheid/moontlik-

heid dat die gewraakte gevolg uit sy handeling mag voortvloei) terwyl hy daarvan bewus was dat sy versuim om die voorsiene gevolg te voorkom onregmatig sou wees (onregmatigheidsbewussyn) en dat hy die intrede van die gevolg gewil het of hom minstens daarmee versoen het.

9 Ontbreek dit die verweerder aan opset, kan hy nog altyd aanspreeklik wees op grond van sy nalatigheid. Die hoofregter dui kortliks aan dat die feite wat nalatigheid daarstel, geleë is in die bewering dat die verweerders "behoort te voorsien het dat hul late die eiser skade sou laat ly en dat hulle versuim het om deur redelike optrede die skade te verhoed" (598 A) en elders dui hy aan dat verwysing na die *bonus paterfamilias*-figuur gebruiklik is by die nalatigheidstoets (597 B). Dit is duidelik dat die hoofregter die algemeen aanvaarde nalatigheidstoets in gedagte het wat gewoonlik op ietwat simplistiese wyse soos volg geformuleer word: Sou die redelike man in die plek van die verweerder benadeling van 'n ander voorsien en voorkom het (sien byvoorbeeld *Kruger v Coetzee* 1966 2 SA 428(A)).

10 Die tweede been van die toets, naamlik of die redelike man die skade sou *voorkom* het, kan veral by die late verwarring stig. Dit mag die indruk skep dat 'n mens hier tog maar weer met die vraag na die regsplig om positief op te tree te doen het, en dat die onregmatigheidsvraag dus goedskiks oorgeslaan kon gewees het. Daar moet egter altyd in gedagte gehou word dat die toets vir nalatigheid 'n prognostiese, dit wil sê 'n *voorsienbaarheids*toets is. 'n Persoon wat op onregmatige wyse die regsgoed van 'n ander aangetas het, word van regsweë daarvoor verwyt dat hy behoort te voorsien het dat sy handeling nadelige gevolge vir ander mag meebring.

11 Die vraag is egter *hoe* voorsienbaar die nadelige gevolge moes gewees het voordat gesê kan word dat die verweerder nalatig was. Dit is duidelik dat bevredigende resultate slegs bereik kan word indien die voorsienbaarheidsgraad wat as vereiste gestel word, kan wissel van geval tot geval – daar moet met ander woorde met 'n *variabele* voorsienbaarheidsgraad gewerk word (sien Meijers, *De Beteekenis der Elementen "Waarschijnlijkheid" en "Schuld" voor de Aansprakelijkheid uit Onrechtmatige Daad*, *Verzamelde Privaatrechtelike Opstellen* deel III 237). Indien die benadeling wat voorsienbaar is byvoorbeeld besonder ernstig sal wees, is 'n lae graad van voorsienbaarheid genoegsaam om nalatigheid daar te stel en omgekeerd (sien Van Rensburg *Normatiewe Voorsienbaarheid as Aanspreeklikheidsbegrensingsmaatstaf in die Privaatreg* 1972 Butterworth 19–27 en die sake daar aangehaal). Terwyl dit onmoontlik is om 'n volledige katalogus op te stel van die faktore wat 'n rol moet speel by die vasstelling van die graad van voorsienbaarheid wat in 'n bepaalde geval genoegsaam is om nalatigheid daar te stel, en terwyl dit bowendien onmoontlik is om vooraf *in abstracto* te besluit watter gewig aan elk van die moontlike faktore toegeken moet word, maak ons reg eenvoudig van die redelike man-figuur gebruik om die knoop deur te hak. Volgens die maatstaf van die redelike man was die dader nalatig indien benadeling van ander as gevolg van sy optrede só

voorsienbaar was dat die redelike man, indien hy in dieselfde posisie as die dader verkeer het, anders sou opgetree het as die dader. (Die benadeling wat voorsienbaar was, hoef nie dieselfde te wees as dié wat inderdaad later ingetree het nie – sien Van der Walt 1964 SALJ 504.)

12 By nalatigheid is die vraag of die redelike man skade sou *verhoed* het (in aansluiting by die woorde van die hoofregter op 598 A) dus nie dieselfde as die onregmatigheidsvraag by 'n late nie. Wanneer die nalatigheidsvraag by 'n late ter sprake kom, staan dit reeds vas dat die redelike man, indien hy die saak moes beoordeel met die wysheid wat kom wanneer die gebeure hulle klaar afgespeel het en al die relevante feite reeds bekend geword het, beslis *nie* die dader se versuim sou goedkeur nie – hy sou dit sien as die nie-nakoming van 'n regsplig. Om die verweerder se moontlike nalatigheid te bepaal, word die horlosie egter teruggedraai sodat die redelike man geplaas kan word in presies dieselfde posisie waarin die dader verkeer het toe hy nog deur positiewe optrede die regsgoedaantasting kon voorkom het. (Die tydstip van die handeling – in die wye sin wat ook 'n late insluit – is deurslaggewend vir die bepaling van moontlike nalatigheid). Dit mag dan wees dat die dader se versuim om die gevolge te voorkom, hom nie verwyt kan word nie omdat die redelike man in die lig van die kennis wat *toe* beskikbaar was (en dit sluit byvoorbeeld kennis aangaande voorsorgmaatreëls wat die dader reeds mag getref het in) nadelige gevolge vir andere nie met so 'n graad van waarskynlikheid sou voorsien het dat hy noodwendig anders as die dader sou opgetree het nie. Dit mag met ander woorde blyk dat die dader nie nalatig was nie omdat hy in die lig van dit wat hy behoort te geweet en voorsien het toe hy gehandel het (in die wye sin), alle redelike stappe gedoen het om die intrede van die nadelige gevolge te voorkom; of anders gestel, omdat sy optrede *redelik* was in die lig van dit wat toe aan hom bekend behoort te gewees het. Die feite van die saak *Minister of Forestry v Quathambla* (*Pty*) *Ltd* (1973 3 SA 69 (A)) verskaf 'n goeie voorbeeld van so 'n geval (sien ook 1973 THRHR 427).

13 Wanneer die hoofregter dus sê:

> "Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike "nalatigheid" van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree,"

moet die woord "redelik" gesien word as 'n verwysing na die nalatigheidskwessie wat goedskiks op hierdie plek weggelaat kon gewees het. Indien daar 'n regsplig op die verweerders gerus het om die skending van die regsgoed van die eiser te voorkom en hulle sonder regverdigingsgrond versuim het om dit te doen, dan het hulle onregmatig opgetree. Indien dit verder sou blyk dat hulle optrede nie redelik was in die lig van dit wat voorsienbaar was toe hulle nog in die gang van sake kon ingryp nie, moet die verwyt van nalatigheid hulle boonop tref.

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ALPHA TRUST (EDMS) BPK v VAN DER WATT 1975 3 SA 734 (A)

Uitwinning – Verhaalsreg van koper waar saak minder werd is as die prys ten tye van uitwinning

Weer eens het die appèlhof uitspraak gegee oor 'n omstrede punt en sodoende die reg daaromtrent vasgelê (vir minstens 'n geslag lank?). Daar is naamlik beslis dat 'n koper wat uitgewin is die volle prys wat betaal is, kan terugvorder selfs waar die uitgewonne saak minder werd was as die prys ten tye van die uitwinning. Na aanleiding hiervan sal iedereen homself afvra of die hof se vertolking van die bronne korrek is, of die betrokke vertolking dogmaties aanvaarbaar is en of dit met die billikheid strook.

Die bronne openbaar 'n verskil van mening oor die verhaalsreg van die koper in die onderhawige soort geval omdat sommige meen dat die koper slegs skadevergoeding kan eis (dit wil sê die waarde van die saak ten tye van die uitwinning plus enige ander skade) terwyl ander meen dat hy die volle prys wat betaal is, kan terugvorder ongeag die feit dat sy skade minder mag wees.

Eerstens die Romeinse reg. Die bronne verklaar uitdruklik dat die koper slegs die waarde van die saak kan verhaal (*D* 19 1 45 *pr;* 21 2 66 3 en 21 2 70). 'n Mens moet nie 'n ongeskoolde waarde hieraan heg nie omdat die Romeinse reg nog nie die volle ontwikkeling van die moderne reg ten aansien van die gevolge van waarborgbreuk bereik het nie en hierdie reëling moontlik net 'n uiting was van die primitiewe Romeinse reg (J A Ankum *De Voorouders van Een Boze Fee* (1964) 6). Romeinsregtelik was 'n skuldeiser nie geregtig op die terugvordering van sy eie prestasie op grond van die ander party se kontrakbreuk nie: hy kon slegs skadevergoeding vorder. By die berekening van hierdie skadevergoeding is daar ag geslaan op die waarde van die saak wat hy nie kry nie of vanweë die ander party se kontrakbreuk verloor. Die prys was in hierdie verband die voor die handliggende maatstaaf sodat die koper in die gewone geval die prys sou kon verhaal. Waar die waarde egter minder was as die prys, handhaaf die Romeine die onderliggende maatstaf, naamlik dat die koper geregtig is op die waarde ten tye van die uitwinning van die saak. Dit blyk ook uit Voet 21 2 26.

Was dit ook die Romeins-Hollandse reg? Vanweë die resepsie van die Romeinse reg sou ons verwag dat dit wel sou wees tensy die Romeinse reg anders deur die Glossatore en Kommentattore uitgelê is en hulle mening geresipieer is of daar 'n besondere teenstrydige Germaansregtelike idee behoue gebly het. Dat die Glossatore en Kommentatore anders gevoel het, word nie aanvaar nie (Mostert 1967 *Acta Juridica* 68). Die inheemse reg van voor die respesie het weliswaar die verkoper verplig om eiendomsreg te verskaf maar hierdie verpligting het met die resepsie van die Romeinse regsreëling dat 'n *res aliena* geldiglik verkoop kon word, verdwyn en die verkoper was na die respesie slegs op grond van uitwinning aanspreeklik.

Teen hierdie agtergrond kan ons die Romeins-Hollandse bronne benader. Daar is 'n oorweldigende getal bronne wat sê dat die koper geregtig is op die prys plus enige ander skade wat hy ly (kyk bl 745-6 van die verslag en Mostert a w 110 noot 393). By gebrek aan verdere kwalifikasie is hierdie bronne nie insiggewend nie omdat hulle gebaseer is op die grondslag

dat die eiser geregtig is op sy *id quod interest* en dat dit, in geval van 'n waardevermeerdering van die saak sedert die koop, gelyk is aan die prys plus daardie waardevermeerdering (d w s die waarde van die saak ten tye van die uitwinning). Die juistheid van die formule dat die koper sy prys plus enige ander skade kan verhaal, kom eers na vore wanneer die saak wat uitgewin is minder werd is as die prys wat hy betaal het en die vraag is of hy beperk is tot die waarde van die saak ten tye van die uitwinning. Ten aansien hiervan is die gegewens betreklik gering.

De Groot 3 15 4 verklaar:

> "De zaecke rechtelick zijnde uitghewonnen, heeft den kooper zijn keur of hy wil weder-eisschen de waerde van de zaeck, zulcks die was ten tijde van de koopdag, ofte alle 't gunt hem daer aen was gelegen dat de zaecke niet uitgewonnen en ware geweest."

Alvorens daar gesê kan word dat dit teenstrydig is met enigiets wat De Groot self elders (soos in 3 14 6) verklaar het, moet die betekenis hiervan bepaal word. Van der Keessel (*Praelectiones ad Gr* 3 15 4) is in hierdie verband nie besonder behulpsaam nie omdat hy die tekste wil versoen en nie die klem laat val op die ware betekenis van hierdie mededeling nie. Sy verklaring is dat De Groot hier sê dat waar 'n koper iets koop vir minder as die werklike waarde, dan kan hy die werklike waarde eis en, as dit betaal word, dit kan meebring dat hy geen verdere belang het wat as skadevergoeding gevorder kan word nie (sien ook bl 746H-747A van die verslag en Mostert a w 111). Hierdie uitleg bevredig vir Van der Keessel t a p en ar Botha (te bl 747 van die verslag) omdat die koper daarvolgens die prys plus skadevergoeding kry. Waarom De Groot dan egter die woorde "heeft den kooper zijn keur of . . . of" gebruik, is onduidelik. Volgens die hof kry die koper skadevergoeding bereken as (i) die prys plus die meerdere waarde van die saak of (ii) sy skade. Hierdie is egter alternatiewe maniere om die tradisionele resep (naamlik prys plus skade) te formuleer en De Groot sou nie na 'n keuse van die koper verwys as hy bloot die algemene formulering herhaal het nie. Mostert (1868 *Acta Juridica* 37) gee te kenne dat De Groot 'n keuse tussen die prys of die waarde toelaat. Dit oortuig ook nie heeltemal nie want die keuse wat De Groot vermeld is tussen die waarde *ten tye van die koop* of skadevergoeding. Dit wil voorkom asof De Groot dit in gedagte gehad het dat die koper normaalweg die prys plus sy skade (waaronder gereken word enige waardevermeerdering sedert die koop) kan eis. As hy die saak vir minder as die waarde ten tye van die koop gekry het, sou hy dan volgens De Groot nogtans die volle waarde ten tye van die koop kon eis. Ons moet veronderstel dat die saak nie sedert die koop in waarde verminder het nie. Die basiese uitgangspunt is dus nie dat die koper geregtig is op die prys plus waardevermeerdering nie, maar dat hy geregtig is op die waarde ten tye van die uitwinning wat kan bestaan uit die prys plus die mate waarin die waarde die prys oorskry of die waarde ten tye van die koop plus die daaropvolgende waardevermeerdering. Ten einde die daaropvolgende keuse te verstaan, moet ons aanneem dat De Groot dink aan 'n geval waar die koper meer skade ly as die verlies van die waarde en dat hy dan verklaar dat die koper in so 'n geval sy volle skade kan verhaal. So vertolk, sê De Groot niks meer as dat die koper geregtig is op die verlore waarde plus enige ander skade wat hy ly nie.

Voet 21 2 26 gee die Romeinse reg weer asof dit ooreenstem met die reg van sy tyd. As die koper slegs geregtig is op die waarde ten tye van die uitwinning en nie die volle prys nie, dan is daar egter ander tekste in Voet wat skynbaar hiermee in stryd is. In 21 2 31 verklaar Voet byvoorbeeld dat die koper in die geval daar behandel, die prys kan terugvorder. Om egter op grond hiervan aan te neem dat Voet verkeerd is wanneer hy verklaar dat die koper slegs die waarde en nie die prys kan terugvorder nie, sou beteken dat 'n mens tevrede is dat die ander gevalle analoog is en dat hulle korrek beslis is.

Buite die bronne van die Romeins-Hollandse reg is daar wel materiaal wat verklaar dat die koper die volle prys kan verhaal as die saak minder as die prys ten tye van die uitwinning werd is. Huber *HR* 3 5 62 verwys na twee gevalle waar hierdie beginsel in die praktyk gehandhaaf is. Pothier (*Vente* par 269) volg die mening van Molinaeus (*Tractatus de eo quod interest* paras 68-9) en verwerp die opvatting dat die koper slegs die waarde ten tye van die uitwinning kan vorder. Hierdie skrywers het egter nie pertinent oor die Romeins-Hollandse reg geskryf nie en voer geen bevredigende en oorredende *ratio* vir hulle opvatting aan nie.

Na aanleiding van die voorgaande kan daar dan gevra word hoe oortuigend die gevolgtrekking van die hof (bl 747D-E van die verslag) is dat die koper altyd geregtig is op die prys plus wat ook al hy daarbo as skade gely het.

Die gevolgtrekking van die hof moet ook aan die teoretiese grondslae van ons reg getoets word. Die verkoper waarborg die koper teen die gevaar van uitwinning. As uitwinning desnieteenstaande volg, dan vind daar waarborgbreuk plaas. Volgens die moderne opvatting kan daar in geval van baie ernstige waarborgbreuk uit die koop teruggetree word. Niemand sal ontken dat algehele uitwinning 'n besonder ernstige geval is nie sodat die koper wat algeheel uitgewin is hiervolgens die reg behoort te geniet om uit die ooreenkoms terug te tree. Die gevolg van die terugtrede is dat daar wedersyds 'n teruggawe van prestasie moet wees, tensy om die een of ander rede regtens verskoon. Die koper sou hiervolgens aanspraak kon maak op terugbetaling van die prys of kwytskelding. Omdat dit vir hom onmoontlik is om die saak terug te gee sonder enige skuld aan sy kant, kan daar geredeneer word dat hy van die verpligting om die saak terug te gee ontslaan is (kyk De Wet in 1967 *Annual Survey of SA Law* 101). Dit is volkome in ooreenstemming met die feit dat die koper in 'n geval van gedeeltelike uitwinning sou kon terugtree uit die koop as die uitwinning wesenlik is (Mostert 1968 *Acta Juridica* 50). Dit kan ook versoen word met die feit dat 'n koper wat afgespreek het dat die verkoper nie vir uitwinning aanspreeklik sal wees nie nogtans die prys kan terugeis en slegs ingevolge die beding sy verhaalsreg ten opsigte van enige verdere *id quod interest* verloor (Voet 21 2 31) en dat die koper wat wetend 'n *res aliena* koop nogtans na uitwinning sy prys kan vorder (*Van der Westhuizen v Yskor Werknemers se Onderlinge Bystandsvereniging* 1960 4 SA 803 (T)) op grond daarvan dat dit slegs die eis vir skadevergoeding raak. (Ten aansien van die laaste twee gevalle negeer ons dan die aangegewe *ratio* dat die verkoper die prys moet terug betaal omdat hy andersins *sine causa* ten koste van die koper verryk sou wees omdat die *causa* vir die behoud van die prys weggeval het.)

Die hof hang egter nie hierdie heeltemal aanneemlike grondslag vir die oplossing van die onderhawige geval aan nie. Die hof meen dat die koper geregtig is op die prys plus skadevergoeding (indien enige) sonder terugtrede (bl 748F-G van die verslag). As dit juis is, moet daar 'n ander grondslag vir die koper se verhaalsreg gevind word. Moontlik kan daar aangevoer word dat die verkoper se aanspreeklikheid vir die prys berus op 'n belofte (werklik beding of van regsweë in die kontrak ingelees) om dit as skadevergoeding te betaal in geval van waarborgbreuk (kyk Mostert a w 69-70). Nieteenstaande die aantreklikheid hiervan, moet daar rekening gehou word met die feit dat die algemene opvatting tans is dat skadevergoeding nie ingevolge 'n belofte betaalbaar is nie maar bloot ingevolge die feit wat tot die eis vir skadevergoeding aanleiding gee. 'n Verdere beswaar is dat die algemene oogmerke van alle eise vir skadevergoeding is om die eiser te plaas in die vermoënstoestand waarin hy sou gewees het as die skadeveroorsakende feit nie plaasgevind het nie, sodat die hof se formule 'n verontagsaming van hierdie reël is. As die saak minder as die prys werd is, is die koper se skade normaalweg die verleis van die waarde van die saak plus skade wat voortspruit uit die verlies van die besit van die saak (indien enige en totdat dit vervang kan word). Omdat laasgenoemde soort skade selde in die praktyk ter sprake kom, is die verkoper in die reël slegs vir die waarde van die saak aanspreeklik. Dikwels word die prys vereenselwig met die waarde. As die koper wil bewys dat die waarde meer is as die prys, moet hy bewys dat die waarde sedert die koop toegeneem het. Hy eis dan die prys plus die toename in waarde. Waar die saak minder werd is as die prys behoort die omgekeerde te geld sodat die koper slegs geregtig is op die prys minus die afname in waarde.

Ten slotte moet daar verwys word na die verskillende billikheidsoorwegings. Aan die een kant is daar die argument dat die koper die risiko moet dra ten opsigte van enige waardevermindering. Normaalweg dra die koper, as 'n uitsonderingsreëling wat by die koopkontrak geld, die risiko vir waardevermindering vanaf die oomblik dat die koop *perfecta* is. Die effek hiervan is dat die koper ingevolge sy ooreenkoms met die verkoper die risiko dra dat die saak in waarde sal verminder en geen verhaalsreg kan hê ten opsigte van enige waardevermindering nie. 'n Verdere argument is dat hy gedurende die tydperk van waardevermindering die gebruik van die saak gehad het en dat hy nie deur die verkoper aangespreek kan word vir die waarde van die besit nie (omdat nòg die kontrak nòg die reg insake verryking so 'n aksie erken). Die koper wat sy volle prys kon terugvorder, plus enige skade, sal dan in die posisie wees dat hy sonder enige risiko vir waardevermindering die gratis gebruik van die saak vanaf lewering tot uitwinning geniet het. 'n Verdere oorweging is dat die koper wat van uitwinning gered is deur die feit dat die saak deur toeval voor enige moontlike uitwinning tot niet is, geen eis teen die verkoper kan instel nie. Hy kan hoogstens sy skade verhaal van enige persoon wat vir die verlies van die saak verantwoordelik is. 'n Verdere faktor is dat die verkoper nie waarborg dat hy die eienaar is nie of dat die koper eienaar sal word nie, maar dat die koper nie uitgewin sal word nie. Gevolglik moet die skade van die koper bereken word met verwysing na die intrede van die uitwinning waarteen daar gewaarborg is (kyk McKeurtan *Law of Sale of Goods in South Africa* (3rd ed) 360; ook

Mostert 1968 *Acta Juridica* 38-9). Die inherente meriete van hierdie oorwegings het nie vir ar Botha ontgaan nie en hy het verskeie teenargumente opgenoem. Daar is aangevoer dat die koper nie ten koste van die verkoper verryk is nie (op bl 748H van die verslag); en aangesien hy ten koste van die eienaar verryk is, is dit nie onbillik dat hy die volle prys kan verhaal sonder enige verrekening ten gunste van die verkoper ten opsigte van die verryking ten koste van die eienaar. Die hof maak in hierdie verband geen melding van die kontrak nie, maar mens sou kon byvoeg dat enige verryking van die koper met die instemming van die verkoper geskied het. Ten aansien van die geval van waardevermindering suggereer die hof (*obiter*) dat waar die saak na verloop van 'n lang tyd uitgewin word dit in sommige gevalle dalk as die uitwinning van iets anders as die *res vendita* beskou kan word sodat die koper nie die prys op grond van die uitwinning kan terugvorder nie. Ongelukkig lig die hof nie hierdie punt met voorbeelde toe nie. In die afwesigheid van verdere uitpluising wil dit voorkom asof dit 'n vae en onbewese stelling is. Wie sal glo dat blote ouderdom 'n saak verander sodat dit sy identiteit verloor. Vernietiging van onderdele of parte miskien wel, maar dan is daar op die minste nog gedeeltelike uitwinning wat in sekere gevalle soos algehele uitwinning behandel kan word.

'n Ander teenargument wat genoem sou kon word, sou wees dat die verkoper wat 'n saak verkoop terwyl dit nie aan hom behoort nie, nie die volle prys behoort te kan behou nie (kyk 748H-749A van die verslag en Mostert 1967 *Acta Juridica* 120). Die gedagtegang is dat die verkoper wat nie die koper eienaar gemaak het nie, nie voldoende gepresteer het om die prys te kan ontvang en behou nie. Hierdie argument hou egter nie voldoende rekening met die feit dat die verkoper alleen aangespreek kan word as uitwinning plaasgevind het en nie omdat hy nie die koper eienaar gemaak het nie, dat hy ingevolge 'n bestaande *causa* (dit wil sê die koop) die prys ontvang het, dat hy deur lewering homself van sy voorlopige verpligtings ingevolge die koop gekwyt het en dat hy eers na uitwinning ingevolge 'n *ex lege* waarborg aanspreeklik is.

Uit die bogaande bespreking blyk dat daar op grond van die bronne, die teorie en die billikhede verskillende standpunte ingeneem kan word, selfs verskillende standpunte na gelang mens die een of die ander van die gemelde faktore die swaarste laat weeg. Myns insiens sou dit teoreties te verkies wees om die koper toe te laat om die koopprys terug te eis op grond van terugtrede uit die kontrak. Omdat terugtrede egter bloot 'n konsepsie en 'n regsformaliteit in hierdie geval is, kom dit nooit daadwerklik ter sprake soos in ander gevalle van kontrakbreuk of waarborgbreuk nie. Neem mens die billikhede in ag, wil dit weer voorkom asof hierdie oplossing nie sonder besware is nie.

Wie sou die bronne verkwalik vir 'n verskil van mening? Of die een of die ander vandag moet geld, is 'n kwessie van regspolitiek. Myns insiens het die hof in hierdie opsig reg gekies. Of dit inderdaad die geldende reg van die sewentiende eeu was, laat ek oor aan die oordeel van die leser.

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S v VAN ZYL 1975 2 PH H128 (N)

Dagga – Handeldryf in

Die ou gesegde "hard cases make bad law" het skynbaar weer kop uitgesteek in bogenoemde saak waar die feite soos volg was: Beskuldigde word in besit gevind van 'n rooi blompot waarin drie klein daggaplantjies lustig aan die groei was. Die grootste plant was 5 cm en die kleinste 3 cm lank. Die blompot staan nie op sy tafel of lessenaar nie, maar wel op die gordynrak bokant sy gordyne. Getuienis is gelewer dat hy by een geleentheid die daggaplantjies natgegooi het en dat van sy vriende gedurende sy afwesigheid met verlof die plantjies aan die lewe gehou het.

In die hof *a quo* word die beskuldigde daaraan skuldig bevind dat hy handel in dagga gedryf het deur verbouing daarvan. Die minimumvonnis van vyf jaar gevangenisstraf word opgelê.

By appèl kom die hof tot die slotsom dat, ten opsigte van die verbouing van die dagga, die *de minimis non curat lex*-beginsel toegepas kan word. Die veroordeling ten opsigte van handeldryf word gevolglik vervang deur 'n skuldigbevinding aan besit van dagga en 'n vonnis van drie maande gevangenisstraf word in die plek van die vorige vonnis opgelê. Die hele vonnis word voorwaardelik opgeskort.

Die wetgewer het ongetwyfeld die net ten opsigte van handeldryf in dagga baie wyd gespan, so wyd dat 'n daggaroker wat aan sy ou maat, op dié se aanhoudende geneul, 'n stompie van 'n daggasigaret verskaf om te rook, inderdaad daarin handeldrywe omdat hy die dagga lewer. Die omskrywing van *handeldryf* in a 1(xi) van Wet 41 van 1971 laat daaroor geen twyfel nie. Insgelyks dryf 'n man handel in dagga indien hy 'n enkele daggapit in 'n konfytblikkie plant en die pit groei, want dit ly geen twyfel dat hy dan dagga verbou het nie. Die woorde van die wetgewer in die voormelde omskrywing van "handeldryf" is hieroor baie duidelik.

Dit is wel so dat die hof in *S v Van der Merwe* 1974 4 SA 310 (OK) beslis het dat 'n beskuldigde wat een enkele daggaplant van 1½-duim-lengte natgegooi en vertroetel het nie die plant verbou het nie. Op 312C–E gee r Addleson die volgende redes vir sy beslissing:

> "I think we must deal with this case on the basis that, as Mr Smalberger suggested, legislation of this nature with its far-reaching criminal consequences, should be given a restrictive interpretation and that the definition should not be given a wider interpretation than is necessary to achieve the obvious intention of the Legislature. It is not necessary to quote authorities for those trite propositions of criminal law. Equally it is not necessary to cite authority for the proposition that one should not give to a statute, particularly a penal statute, an interpretation which would produce a manifestly absurd result. It seems to me to be patently absurd to suggest that the Legislature intended that a person who has in his possession one small dagga plant in a tin can in his house, however lovingly he has nurtured that plant, should go to goal for five years. I do not think that it brooks any debate as to whether the Legislature could not have intended such a result."

In die saak onder bespreking huldig r p James egter die mening dat die beslissing van die Oos-Kaapse hof in hierdie verband verkeerd is en dat

die verbouing van 'n enkele daggaplant inderdaad op handeldryf in dagga neerkom. Die regter laat hom hieroor soos volg uit:

> "The words of the definition seem to me to be clear and unambiguous and the legislature appears to have deliberately defined the words 'deal in' in the widest possible terms, no doubt to ensure that not a single person actually dealing in drugs should escape the legal net. In the process it appears to have accepted as inevitable that some very small fry, who are not dealers by any ordinary understanding of the word, must be enmeshed in the net along with the genuine sharks of the drug trade."

Die regter is na hierdie opmerking desnietemin van oordeel dat

> "the appellant's single act of watering the seed in the flower pot is of such minor importance in the whole process of producing and raising the dagga plants that it should be disregarded by applying the maxim 'de minimis non curat lex'."

Respekvol word ter oorweging gegee dat hierdie beslissing nie korrek is nie. Reeds in *S v Shangase* 1972 2 SA 410 (N) sê r Harcourt (op 435F) die volgende:

> "In such cases one is tempted to apply the maxim of *de minimis non curat lex* . . . In my judgment, however, the social evil involved and the manifestly severe intention of the Legislature discernable in the Act make it improper to say that the harm – actual and potential – done to the individual and to the community is of so trifling a nature that the maxim can be properly applied by a court once a prosecution has been brought before it."

Die opmerkings van r Harcourt is van groter toepassing sedert die wysiging van die wet deur Wet 83 van 1973. Ingevolge a 2A van laasgenoemde wet mag geen vonnisse ten opsigte van handeldryf tans opgeskort word nie. Die wetgewer het berekend en doelbewus die net om alle vorms van handeldryf soos omskryf in a 1(xi) nouer getrek. Sommige juriste is van mening dat die straf vir geringe oortredings ten opsigte van handeldryf te swaar is. Dit is miskien jammer dat die wetgewer nie hier ook 'n uitlaatklep, soos by besit, verorden het om verdienstelike gevalle te akkommodeer nie. Die feit is egter dat die wetgewer dit met voorbedagte rade nie gedoen het nie. Daarby het die wetgewer sy bedoeling glashelder gestel in die woorde wat hy gebruik het.

Dit is die plig van 'n voorsittende beampte, hetsy regter of landdros, om 'n wet toe te pas soos hy dit vind. Die primêre funksie van 'n regterlike beampte is om reg te spreek en nie om reg te skep nie. Reeds in *Seluka v Suskin and Salkow* 1912 TPD 258 270 sê r Wessels die volgende oor die hof se funksie by die uitleg van 'n wet:

> "It may be true that this may lead to great fraud and to an undesireable state of affairs, but this has nothing to do with me as a judge . . . My function is *jus dicere*, not *jus facere*."

Dit is veral die geval waar die wetgewer sy bedoeling helder en ondubbelsinnig in die wetgewing uitdruk. So verklaar r Kotze in *Harris v Law Society of the Cape of Good Hope* 1917 CPD 449 451 die volgende:

> "Where the law speaks in clear and unequivocal language the maxim *judicis est jus dicere sed non dare applies . . .*"

(Contra John Dugard in 1971 *SALJ* 181). In die 1967 *THRHR* 101 106 sê h r Steyn in hierdie verband:

"The task of our Courts – I would emphasize, their only task – was to ascertain the intention of Parliament as expressed in this enactment."

Om terug te keer na die saak onder bespreking: indien die hof van oordeel was dat die *de minimis*-beginsel van toepassing was op die groter misdaad van handeldryf dan is dit nie duidelik hoekom die beginsel nie ook op die mindere misdaad van besit toegepas is nie! Die meerdere sluit tog seker die mindere ook in!

Ek meen dat die probleme waarmee die howe in hierdie en die *Van der Merwe*-saak geworstel het op 'n ander manier opgelos kan word. Regter Harcourt het reeds in *Shangase* se saak (op 425H) daarop gewys dat verdienstelike gevalle deur die staatsaanklaer oorweeg kan word en dat sulke sake waar moontlik teruggetrek kan word of dat beskuldigdes slegs weens die besit van dagga aangekla kan word. Dit sal verhoed dat howe by die beregting van sulke sake ietwat gekunstelde uitsprake moet gee om die felheid van die wet te temper.

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S v KHUMALO 1975 4 SA 345 (N)

Diefstal en poging tot diefstal

In bogenoemde saak was die feitekompleks soos volg: Beskuldigde gaan 'n selfbedieningswinkel binne en haal 'n pakkie vleis ter waarde van R1,64 uit die yskas. Sy plaas vervolgens die pakkie onder haar trui, besef daarna dat sy dopgehou word en na sy rondgekyk het, haal sy die pakkie weer onder haar trui uit, sit dit op die toonbank neer en verlaat die winkel. Op hierdie feite staan sy voor 'n afloslanddros weens diefstal tereg. Hy vind haar skuldig maar word verplaas voordat hy 'n vonnis kon oplê. Sy kollega word toe versoek om straf op te lê ingevolge a 186(4) van die Strafkode. Laasgenoemde oordeel dat die staat slegs poging tot diefstal bewys het en stuur gevolglik voor vonnis die saak vir hiersiening met die versoek dat die veroordeling ter syde gestel word en die saak na hom terugverwys moet word vir afhandeling. Die hersieningsregter oordeel dat die staatsgetuienis slegs poging tot diefstal bewys het en die prokureur-generaal, na wie die saak ook verwys is, huldig 'n soortgelyke standpunt.

Daar word respekvol ter oorweging gegee dat die afloslanddros se siening korrek was en dat die beskuldigde in hierdie geval die pakkie vleis gesteel het en nie net gepoog het om dit te steel nie.

In *Uirab v S* 1970 2 PH H172 (SWA) en *S v Xinwa* 1970 2 PH H171 (NK) – die verwysing in die PH verslag dat hierdie uitspraak in SWA gelewer is, is foutief – het die howe onder identiese omstandighede die beskuldigde weens diefstal veroordeel.

Ten opsigte van die skuldelement konkludeer die regter tereg dat die beskuldigde, toe sy die pakkie onder haar trui versteek het, wel die bedoeling gemanifesteer het om dit te steel. Ten opsigte van die handelingselement oftewel die sogenoemde *contrectatio* beslis die hof egter dat die

handeling nie voltooi was nie en dat sy gevolglik slegs gepoog het om diefstal te pleeg.

Die kernvraag wat hier beantwoord moet word is: wanneer is die handeling by diefstal voltooi? Dit blyk duidelik uit die feite van die saak onder bespreking dat die beskuldigde reeds volkome en effektiewe beheer oor die pakkie gehad het toe sy dit eers onder haar trui versteek en daarna op die toonbank teruggeplaas het nadat sy agtergekom het dat mense haar dophou. Dit blyk ook verder dat sy op geen tydstip die pakkie effektief uit die beheer van die eienaars onttrek het nie. Dit sou eers gebeur het indien sy ongesiens die winkel daarmee verlaat het. Myns insiens lê die antwoord op bogemelde vraag tussen hierdie twee pole.

I Effektiewe beheer deur die dief

Hunt *S A Criminal Law and Procedure* vol II 572 huldig die mening dat "it is not necessary that the complainant be deprived of control". Al wat Hunt vereis alvorens die handeling voltooi is, is "an assumption of control" (571). Dit is ook duidelik dat 'n blote aanraking van die saak nog nie die handeling voltooi nie (Hunt 570). Die beurs- of handsakdief wat slegs daarin slaag om 'n handsak oop te maak en die begeerde beursie met klinkende munt aan te raak maar daarna in sy doel verydel word, poog slegs om diefstal te pleeg: hy steel nog nie (vgl *S v Agmat* 1965 2 SA 874 (K), *Vos v R* 1919 NPD 398). Indien hy egter daarin sou slaag om die beursie te verwyder en volle beheer daaroor te verkry, dan is sy handeling voltooi al ruk die eienaar dit ook enkele sekondes daarna weer uit sy hand op dieselfde plek.

As gesag vir sy stelling verwys Hunt o a na *R v Carelse en Kay* 1920 CPD 471 *R v Mapiza* 1945(1) PH H 61(K). In eersgenoemde saak is Carelse deur sy werkgewer gestuur om twee blikke brandstof uit 'n stoorkamer te verwyder. Hy verwyder drie blikke. Die ekstra blik plaas hy in 'n leë houer en sit dit by ander leë houers. Daarna kom Kay en verwyder 'n blik wat hy meen Carelse versteek het en gooi die inhoud daarvan in sy voertuig. (Die werkgewer, bewus van Carelse se manewales, het intussen die oorspronklike blik petrol met 'n ander blik vervang waarin daar petrol en water was!) Beide Carelse en Kay word op hierdie feite weens die diefstal van een blik petrol skuldig bevind. Op 474 laat r p Kotze hom soos volg uit:

> "The tin of petrol was removed from the store where it was kept with a view to being taken away, that is converted, and therefore there was a *contrectatio fraudulosa,* to use the technical language of the law. Consequently the mere fact that this tin was placed back, in the store cannot remove the fraudulent intention, in other words, the intent to steal, which was manifested by the circumstances."

Hieruit bly duidelik dat Carelse deur die blik petrol te versteek effektiewe beheer daaroor verkry het. De Wet en Swanepoel *Die SA Strafreg* (2de Uitg) 329 sê:

> "In die betrokke geval was daar voltooide diefstal, want die blik petrol is op effektiewe wyse aan die beheer van die reghebbende onttrek toe dit weggeneem is van die plek waar hy, die eienaar, sy petrol in bewaring gehou het. Deur die vol blik tussen die leë blikke te plaas, het die dader net so seer die petrol aan die beheer van die garage-eienaar onttrek as wat hy sou gedoen het indien hy die blik petrol êrens in die agterplaas begrawe het."

In hulle 3de uitgawe op 297 benader die skrywers hierdie aangeleentheid nou anders. Hulle sê:

> "Die kernvraag was tog of C die blik petrol aan die beheer van sy werkgewer onttrek het, en die antwoord moes ondersoek gewees het in die lig van die omstandighede. As leë blikke gewoonlik eenvoudig sonder verdere ondersoek weggegooi word, is dit 'n geval van voltooide diefstal, want dan is die blik petrol onttrek aan die beheer van die werkgewer."

Ek meen dat De Wet en Swanepoel in hulle 3de uitgawe nader aan die waarheid is maar dat hulle die feite in die saak verkeerd vertolk. Dit blyk tog duidelik uit die gegewens in die hofverslag dat die beskuldigdes nie weggekom het met die blik petrol wat Carelse aanvanklik uit die stoor verwyder het nie. Sy werkgewers het die blik petrol omgeruil. Die blik petrol is dus nooit uit die beheer van die eienaar onttrek nie.

Die slotsom waartoe mens geraak is dat die beskuldigde, Carelse, vir 'n kortstondige tydperk effektiewe beheer oor die eerste petrol gehad het en dit volgens Hunt, voltooi sy handeling.

In *R v Mapize* 1945 1 PH H68 (K) (Hunt gee die verwysing foutiewelik as H61 aan) het beskuldigde se werkgewers 'n kas met 10 000 sigarette vermis. Beskuldigde het op navraag eers gesê, dat hy die kas na die stoorkamer geneem het. Later is die kas in 'n "cubby hole" onder 'n trap gevind. Die hof *a quo* bevind die beskuldigde skuldig aan diefstal. Sy appèl word van die hand gewys. Die hof beslis dat diefstal nietemin gepleeg is al het die beskuldigde die kas slegs op die perseel versteek. Dit skyn duidelik te wees dat die *corpus delicti* in hierdie geval nog nie effektief uit die beheer van die eienaar onttrek was nie, maar dat die beskuldigde wel beheer daaroor verkry het.

II Effektiewe onttrekking uit die beheer van die eienaar

Beide De Wet en Swanepoel *Strafreg* (3de uitg) 293 en Snyman 1975 *THRHR* 29 veral op (32) vereis 'n toe-eieningshandeling by diefstal dws 'n effektiewe onttrekking van die saak uit die beheer van die eienaar.

De Wet en Swanepoel stel dit so:

> "[O]nttrekking van die saak aan die beheer van 'n ander [is] 'n essensiële vereiste vir diefstal deur toe-eiening."

Die skrywers vervolg (bl 296):

> "Die vraag presies wanneer 'n saak nou juis aan die beheer van 'n ander onttrek is, is een wat volgens verkeersopvattings beantwoord moet word met inagneming van die soort saak waaroor dit gaan, die mate van beheer wat mense gewoonlik oor die soort goed uitoefen, edm. Die aanstaande bruidegom wat trouringe staan en besigtig en dan skelmpies een in sy sak steek, het die ring al klaar gesteel, ook al word hy daarmee betrap voordat hy die winkel verlaat; die man wat met my motorkar wegry, het al klaar die ding gesteel, ook al word hy voorgekeer voordat hy by die hek uit is, maar die diefstel is nog nie voltooi indien hy betrap word terwyl hy nog besig is om met die drade te peuter om die masijen aan die gang te sit nie. Presiese formules is hier net nie moontlik nie, en ook nie nodig nie – die regspleging is, in teorie altans, in die hande van verstandige mense, wat oordeelkundig te werk gaan en nie soos robotte funksioneer nie.

Snyman (a w 32) sê oor 'n toe-eieningshandeling die volgende:

"[E]nige handeling ten opsigte van 'n saak waardeur die dader hom gedra asof hy die eienaar of reghebbende is – waardeur die eienaar of reghebbende daadwerklik uitgesluit word van sy bevoegdhede ten opsigte van die saak."

Snyman gaan voort deur daarop te wys dat sy benadering ten opsigte van die handeling immers 'n duidelike skeidslyn trek tussen diefstal en poging tot diefstal.

Benader mens die saak onder bespreking uit die oogpunt van Hunt en die gewysdes waarna hierbo verwys is, dan was die handeling van die beskuldigde in die saak onder bespreking ongetwyfeld voltooi; hierdie handeling het gepaard gegaan met die nodige dieftige opset – hetsy 'n toe-eieningsgesindheid hetsy 'n onteieningsgesindheid – en gevolglik het sy diefstal gepleeg en nie slegs 'n poging daartoe nie.

Indien 'n toe-eieningshandeling egter vereis word soos De Wet en Swanepoel en Snyman voorgee, het sy slegs gepoog om die vleis te steel omdat haar handeling nog nie voltooi was nie aangesien sy nog nie die *corpus delicti* effektief uit die beheer van die eienaar onttrek het waardeur die eienaar van sy bevoegdhede uitgesluit is nie.

III **Die standpunte met mekaar vergelyk**

Vergelyk mens die standpunt van Hunt met dié van De Wet en Swanepoel en die voorbeelde wat aan beide kante ter motivering daarvan gegee word, dan blyk dit dadelik dat daar oorvleueling is. In die voorbeeld wat De Wet en Swanepoel, hierbo gebruik, van die bruidegom wat trouringe staan en besigtig, dan skelmpies een in sy sak steek en op heterdaad betrap word, bestaan daar hoegenaamd geen twyfel dat die bruidegom nog glad nie die trouring effektief uit die winkelier se beheer onttrek het nie. Dat die bruidegom reeds op daardie stadium effektiewe beheer oor die trouring uitgeoefen het, val ook nie te betwyfel nie. Hunt kon met grasie De Wet en Swanepoel se voorbeeld ter stawing van sy standpunt gebruik het. Maar De Wet en Swanepoel meen (296) dat presiese formules hier nie moontlik en ook nie nodig is nie omdat die regspleging in die hande van verstandige mense is wat nie soos robotte funksioneer nie. Skrywer hiervan het nog altyd baie hoë agting gekoester vir die mening van De Wet en Swanepoel, maar is van oordeel dat hulle gedeeltelik hulle stelling deur hierdie voorbeeld verongeluk. Al bekyk mens die saak uit alle moontlike oogpunte moet jy konkludeer dat die aanstaande bruidegom in ons voorbeeld nog nie daardie ring uit die beheer van die winkelier onttrek het nie.

Op De Wet en Swanepoel se stelling moet hierdie bruidegom slegs aan poging skuldig bevind word.

Ook Snyman sou in die bogemelde voorbeeld tot die onvermydelike slotsom moes kom dat die bruidegom slegs gepoog het om te steel omdat hy as vereiste stel dat "die eienaar of reghebbende daadwerklik uitgesluit word van sy bevoegdhede ten opsigte van sy saak" (32). Dat so-iets hier nie gebeur het nie, behoef seker geen betoog nie.

Ter motivering van sy standpunt dat "an assumption of control" deur die dief genoeg is (571) en dat dit onnodig is om te bewys "that the com-

plainant be deprived of control" (572) gee Hunt die volgende voorbeeld (572):

> "If Y has a tight security system round a building in which diamonds are sorted, surely in a sense, he retains control of all the diamonds in the building even if X hides them here and there and on and in his person. Yet X has assumed control of the diamonds he had hidden and is guilty of theft."

(De Wet en Swanepoel sou weer op hulle beurt met grasie hierdie voorbeeld ter stawing van hulle stelling kon gebruik het!)

Volgens my oordeel is die benadering van Hunt korrek en navolgenswaardig. Hiervolgens word daar nog steeds 'n skerp skeidslyn getrek tussen poging tot diefstal en diefstal. Die dief poog om te steel wanneer hy, ter uitvoering van sy dieftige opset, met 'n uitvoeringshandeling besig is ingevolge waarvan hy beheer oor die *corpus delicti* probeer verkry maar inderdaad nog nie verkry het nie. Sodra hy effektief beheer verkry het is sy handeling voltooi ook al het die eienaar hom voortdurend in die oog gehad en al word hy sekondes later aangekeer. Mens moet tog seker die aangeleentheid uit die oogpunt van die dief benader: hy wou steel en het, sover dit hom betref, reeds klaar gesteel toe hy beheer daaroor verkry het. Diefstal is, volgens J P Verloren van Themaat *Diefstal en, in verband daarmee, Bedrog in die Romeins Hollandse Reg* 69, immers 'n formeel omskrewe misdaad en nie 'n materieel omskrewe misdaad nie.

Ten slotte kan daarop gewys word dat altwee die benaderings hierbo vermeld in ander regstelsels van toepassing is. Snyman (33) beweer dat die Duitse strafreg as vereiste vir die handeling stel dat die reghebbende van sy saak uitgesluit word. In 'n Duitse hof sou Khumalo slegs aan poging tot diefstal skuldig bevind gewees het.

Die opvatting van Hunt is weer in ooreenstemming met die posisie in die Engelse reg. Russell *on Crime* (12de uitg vol II 911) sê die volgende hieroor:

> "The least removing of the whole of the thing taken from the place where it was before with intent to steal it, is a sufficient asportation, though it is not quite carried away. Thus, a guest who had taken the sheets from his bed, with intent to steal them, and carried them into the hall, but was apprehended before he could get out of the house, was held guilty of larceny. So was a person who had taken a horse in a close with intent to steal him, but was apprehended before he could get him out of the close. So was a person, who intending to steal plate, took it out of a trunk wherein it had been deposited, and laid it on the floor, but was surprised before he could carry it away."

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Humility is a quality not always inborn in those who dedicate themselves to advocacy.

Melford Stevenson in David Napley
The Technique of Persuasion

Boeke

DIE BESKERMING VAN MENSEREGTE IN SUID-AFRIKA

deur J D VAN DER VYVER

Juta en Kie Bpk Kaapstad/Wynberg/Johannesburg/Durban 1975; xxxvi en 211 bl; prys R17,50 (hardeband) en R12,50 (sagteband)

Soos in die Verenigde Koninkryk en anders as in state met menseregtebepalings in geskrewe grondwette, vorm die begrip menseregte in Suid-Afrika nie in soveel woorde deel van die positiewe reg nie. Suid-Afrikaanse juriste was tot dusver dan ook meer geneë om die positiewe reg aan die hand van die Engelsregtelike *rule of law*-leerstuk te evalueer, eerder as om van die menseregtebegrip gebruik te maak. Hierbenewens het die lukrake aanwending van die begrip in die internasionale politieke gesprek, by talle juriste twyfel laat ontstaan oor die regswetenskaplike bruikbaarheid daarvan. Ten spyte van die feit dat die menseregtebegrip sedert die Tweede Wêreldoorlog deel geword het van die internasionale publiekregtelike vaktaal, het dit tot dusver nog geen noemenswaardige rol in die Suid-Afrikaanse regsliteratuur gespeel nie. Met sy proefskrif (*Die Juridiese Sin van die Leerstuk van Menseregte* Universiteit van Pretoria 1973) en die publikasie van dele daaruit in die werk onder bespreking, het J D van der Vyver 'n belangrike bydrae gelewer om hierdie leemte te vul. Hy ontsluit daarmee 'n moeilike begrip vir die Suid-Afrikaanse juris en takseer groot gedeeltes van die positiewe reg aan die hand van die gangbare opvattings daaroor.

In die eerste hoofstuk word teen die agtergrond van die tradisionele verband tussen die gepostuleerde menseregte en die natuurreg, 'n oorsig van die humanistiese, Rooms-Katolieke en Calvinistiese menseregteorieë gegee. Die leemtes in die humanistiese en Rooms-Katolieke teorieë word blootgelê (7-8 10 12) en in aansluiting by die Calvinistiese teorieë, gee die skrywer 'n bondige uiteensetting van sy eie konstruksie van menseregte (16-19).

Die tweede hoofstuk bevat 'n oorsig van 'n negetal staats- en volkeregtelike aktes waarin die menseregtebegrip neerslag gevind het. Die skrywer bespreek slegs die verskillende regte soos dit in hierdie aktes voorkom en behandel nie die praktiese implementering van die aktes nie. In die lig van sy latere voorstel dat 'n akte met prosessuele menseregte in Suid-Afrika gewaarborg behoort te word, is dit enigsins jammer dat die skrywer nie ook kortliks kommentaar gelewer het op die implementering van die aktes nie. Daar bestaan vandag waarskynlik meer oneffektiewe as effektiewe *Bills of Rights* in die wêreld en die redes vir die "mislukkings" spruit meesal uit probleme in verband met die praktiese implementering.

Die derde hoofstuk word gewy aan 'n bespreking van die grondwetlike raamwerk vir die beskerming van menseregte in Suid-Afrika. Die skrywer bespreek die toetsingskompetensie van die Suid-Afrikaanse howe, die verskanste bepalings en die wetgewende bevoegdheid van die Suid-Afrikaanse parlement ten opsigte van die erkenning, beperking en afskaffing van die regte. Die afwesigheid van 'n verskanste *Bill of Rights* en die wetgewende oppergesag van die parlement maak ongetwyfeld die belangrikste momente uit van die wyse waarop menseregte in Suid-Afrika beskerm en beperk word. Die prentjie is egter nie volledig nie indien nie ook kennis geneem word van die gemeenregtelike beskerming van die regte en kompetensies van die onderdaan teenoor die uitvoerende gesag en ondergeskikte wetgewers nie. Aspekte daarvan word wel volledig deur die skrywer behandel by sy bespreking van die vergunning van prosessuele menseregte in Suid-Afrika (sien byvoorbeeld hoofstuk 6 par 2 1, 2 3, 2 5, 5 3 en 6 9). Ook Verloren van Themaat se "gerusstellende" stelling dat in Suid-Afrika word alle regte "ten volle gehandhaaf maar is die beskerming in hoofsaak deur middel van die privaatregtelike en strafregtelike sanksies" (*Staatsreg* 2e uitg 1967 128 – wat Van der Vyver op 48 aanhaal), behoort in perspektief geplaas te word.

In hoofstukke 4, 5 en 6 word die Suid-Afrikaanse positiewe reg indringend ontleed ten einde te bepaal in welke mate daar voldoen word aan die gelykheidsbeginsel van die menseregteleerstuk en in welke mate sekere substantiewe en prosessuele menseregte erkenning geniet. Die evaluasie is deurgaans objektief en Van der Vyver het myns insiens hiermee duidelik bewys dat 'n menseregtesisteem bruikbare werkbegrippe bied vir 'n sistematiese beoordeling van die publiekreg. Hierbenewens het die omvattende en deeglike verwerking van die positiewe reg, uiters bruikbare samevattings van uiteenlopende gebiede van die reg opgelewer. Die uiteensettings van differensiasie op grond van geslag, godsdiens, ras en politieke oortuiging, die vryheid van spraak en die pers, die kompetensie om te vergader en te betoog en die verskillende prosessuele regte, vorm elkeen 'n afgeronde studie met volledige positiefregtelike verwysings.

Die skrywer het in hierdie werk 'n omvattende beeld geskets van die beskerming en beperking van menseregte in Suid-Afrika. Dit is gedoen teen die agtergrond van die gangbare opvattings oor en positiefregtelike manifestasies van menseregte (41 53 72 83 84 114 139). Hy meen dat "Suid-Afrika met sekere regsvoorskrifte in vele opsigte uit pas is met tendense wat in die vrye wêreld gangbaar is en dat Suid-Afrika ook met die aanwysinge wat vanuit die regsfilosofie aangaande die aangewese behore ten opsigte van natuurlike menseregte en fundamentele vryhede tot ons spreek, voeling verloor het" (vi). In die slothoofstuk doen hy 'n aantal voorstelle aan die hand, naamlik 'n ondersoek na die magte van die uitvoerende gesag, die hersiening en kodifikasie van misdade teen die staatsgesag, die oorweging van die instelling van die amp van ombudsman, die verskansing van prosessuele menseregte en in laasgenoemde verband ook die verlening van 'n toetsingskompetensie aan die howe. Alhoewel Van der Vyver se kritiek gebaseer is op materiële afwykings van sekere menseregte soos dit in staats- en volkeregtelike aktes geformuleer is, is sy voorstelle vir die verbetering van die situasie formeel van aard. Hy verklaar dat Suid-Afrika nie noodwen-

dig aan die wêreldtendense gehoor moet gee of met die eise van die regsfilosofie moet konformeer nie (vi), maar spreek hom nie uit oor welke beperkinge van die regte in die konkrete Suid-Afrikaanse situasie geoorloof sal wees nie. Die stimulerende aspek van die werk is juis moontlik geleë in die vrae wat dit in dié verband uitlok – vrae soos: terwyl daar nie noodwendig met wêreldtendense gekonformeer moet word nie, watter faktore bepaal die mate waarin afgewyk mag word?; is die "ongewone noodreg versus gewone landsreg"-tema (183-184) nie 'n lofwaardige ideaal wat voor oë gehou kan word, maar wat egter vir die huidige en selfs die onmiddellike toekoms (sy dit onder 'n wit, swart, rooi of bont regering), te simplisties en derhalwe onrealisties is nie?; is dit hoegenaamd moontlik om die perke van prosessuele regte so eksak en absoluut te formuleer dat interpretasieruimte vir die regbank uitgeskakel word? Van die skrywer kon nie verwag word om binne die bestek van hierdie werk al sulke vrae te antisipeer en te beantwoord nie. Bloot deur hierdie soort vrae uit te lok, het die skrywer 'n diens aan die Suid-Afrikaanse juris bewys – dit lei hom om te besin en standpunt in te neem oor kritiese fasette van die Suid-Afrikaanse reg.

Die werk bevat 'n uitgebreide bibliografie en nuttige statute-, vonnis-, persone- en sakeregisters. Die taalkundige en tegniese versorging is uitstekend.

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THE SOUTH AFRICAN LAW OF HUSBAND AND WIFE

by H R HAHLO with an appendix on *Jurisdiction and Conflict of Laws* by Ellison Kahn

(Fourth edition)

Juta & Co Ltd Cape Town/Johannesburg 1975; pp xcii and 754; price R35,00

"It is undoubtedly one of the best legal text-books ever to have been published in this country and sets a standard it would be difficult to surpass." Met hierdie woorde het prof Wouter de Vos 'n bespreking van die tweede uitgawe van die boek afgesluit (1962 *Acta Juridica* 144–157). Die verskyning van die vierde uitgawe, een-en-twintig jaar na die eerste en ses jaar na die derde uitgawe, bevestig weer eens die unieke en invloedryke plek wat die boek in Suid-Afrika verwerf het.

Die vorige uitgawes is in besonderhede bespreek: die eerste deur adv I A Maisels QC in 1954 *SALJ* 183–185 en prof D Pont in 1955 *THRHR* 14–20; die tweede deur prof Wouter de Vos in 1962 *Acta Juridica* 144–157, en die derde deur prof D Pont in 1970 *THRHR* 82–92. Daar kan dus in herdie bespreking met enkele opmerkings volstaan word.

Die vierde uitgawe is nie 'n aangelapte derde uitgawe nie: nuwe materiaal en nuwe ontwikkelinge is volledig bygewerk en geïntegreer om van die vierde uitgawe 'n waardige opvolger van sy voorgangers te maak. Die formaat van die boek en die indeling van die stof het nie verandering ondergaan

nie. Hoofstuk 2 oor „Marriage and the Non-European" val weg as aparte hoofstuk en vorm nou deel van hoofstuk 1 wat sy vorige opskrif behou: „Survey, Historical and Comparative". Die regsvergelykende oorsig in hierdie hoofstuk is aansienlik uitgebrei. Origens bly die hoofstuk-indeling onveranderd sodat die vierde uitgawe uit een hoofstuk minder bestaan as die derde. Die bylaes het van vier tot tien toegeneem deur die insluiting van uittreksels uit 'n aantal verdere tersake statutêre bepalings.

Die taak van die skrywer van 'n regsboek is onbenydenswaardig want 'n enkele beslissing kan ingrypende wysiging van sy werk noodsaak. Volgens die voorwoord van die boek is die regspraak en wetgewing bygewerk tot die einde van 1974, maar daar is klaarblyklik moeite gedoen om so ver moontlik kennis te neem van die heel jongste regspraak. Beslissings wat tydens die eerste helfte van 1975 gerapporteer is, word deurgaans vermeld. Die "jongste" beslissing waarna verwys word is *Chikosi v Chikosi* 1975 2 SA 644 (R) wat in die Junie-aflewering van die Suid-Afrikaanse hofverslae verskyn het. Hoe kon die skrywers geweet het dat die Augustus-aflewering van die hofverslae, wat ongeveer gelyktydig met die boek verskyn het, minstens drie belangrike beslissings oor die huweliksreg sou bevat? Twee hiervan is vonnisse van die appèlhof: in die een word 'n bestaande onsekerheid finaal uit die weg geruim en in die ander laat 'n Suid-Afrikaanse hof hom vir die eerste keer gesaghebbend uit oor 'n belangrike vraagstuk in die internasionale privaatreg. Die derde is 'n beslissing van die Rhodesiese hooggeregshof oor 'n vraagstuk waaroor daar tot dusver nie gesag in die Suid-Afrikaanse regspraak bestaan het nie.

In *Holland v Holland* 1975 3 SA 553 (A) beslis die appèlhof dat "when a restitution order has been made the *onus* is on the defendant to show that his or her offer to restore conjugal rights is *bona fide*" (op 560). Die onsekerheid wat daar in hierdie verband bestaan het as gevolg van teenstrydige beslissings, is hiermee uit die weg geruim. Die standpunt wat die appèlhof inneem, is een wat Hahlo steeds as "in accordance with principle" beskryf het (3e uitg 414; 4e uitg 418). In die *Holland*-saak beslis die appèlhof verder dat "there seems no reason in law why the incidence of the *onus* should be different in the case of the actual return as contrasted with an offer to return" (op 559). Die appèlhof heg derhalwe nie sy goedkeuring aan die onderskeid tav die bewyslas wat r Horwitz in *Wessels v Wessels* 1950 3 SA 852 (O) gemaak het nie. Hahlo se bespreking (op 418) van die ligging van die bewyslas op die keerdag van 'n herstelbevel moet dus nou gelees word onderhewig aan die beslissing in die *Holland*-saak.

Sperling v Sperling 1975 3 707 (A) is 'n ewe belangrike beslissing wat net te laat gerapporteer is vir opname in die boek (met kenmerkende deeglikheid verwys Kahn wel na die kort opsomming van die beslissing van die hof *a quo* wat verskyn in 1974 4 SA 992 (W)). Die partye is in 1954 in Oos-Duitsland getroud en op daardie stadium was hul huwelik buite gemeenskap van goedere. Op 20 Desember 1965 is die Oos-Duitse huweliksreg deur wetgewing met terugwerkende krag verander: die afsonderlike goed van die partye tydens huweliksluiting bly hul afsonderlike eiendom, maar alles wat tydens die bestaan van die huwelik verkry word, val in die gemeenskaplike boedel. *In casu* het die partye in 1957 na Suid-Afrika geëmigreer en die vraag ontstaan of die maritale regime van die partye geraak word deur die

wysiging van die Oos-Duitse huweliksreg in 1965. Ar Corbett kom op bl 721 van die verslag tot die gevolgtrekking dat

> "when the South African rule of Private International Law prescribes that the property consequences of a foreign marriage must be determined in accordance with the law of the matrimonial domicile, that reference should, in general, be to the whole of the *lex causae,* including its transitional law."

Hierdie beginselstandpunt is in ooreenstemming met dié wat Kahn inneem (op 629). Ar Corbett kwalifiseer egter die algemene beginsel deur te sê dat by die besluit of die beginsel in 'n bepaalde geval toegepas moet word,

> "it is . . . proper to have regard to the consequences of deciding the issue the one way or the other and to take into account which course appears to have in its favour 'the balance of justice and convenience'' (op bl 722).

Die derde belangrike beslissing is *S v S* 1975 3 SA 441 (R), 'n aksie om nietigverklaring van 'n huwelik. Die vraag het hier ontstaan of die hof van die eiseres se *domicilium* ten tyde van die instel van die aksie jurisdiksie het? Die Rhodesiese hof kom tot die gevolgtrekking, soos Kahn ook aan die hand doen (bl 563), dat die hof wel jurisdiksie het.

Die boek bly steeds een van die beste in die Suid-Afrikaanse regsliteratuur, en uit voormelde drie beslissings blyk dan ook met welke mate van vanselfsprekenheid ons howe dit aanvaar as 'n gesaghebbende uiteensetting van 'n gebied van die reg wat meer dinamies is as wat selfs die skrywer daarvan aanvanklik vermoed het (sien sy voorwoord by die tweede uitgawe).

Soos in die geval van sy voorgangers is die redaksionele en tegniese versorging van die boek puik. Die drukkersduiwel het egter hierdie keer wraak geneem en gesorg dat daar 'n drukfout verskyn in 'n voetnoot op die heel eerste bladsy van die teks ("givino" ipv "giving").

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MATTHEWS AND OULTON ON LEGAL AID AND ADVICE

by E J T MATTHEWS and A D M OULTON

Butterworths Modern Text Books, London 1971; pp lii and 555; R19 (cloth)

In England and Wales today, "[p]eople are either legally aided persons or they are not" (*Ward v Mills* [1953] 2 All ER 398 400). In this book E J T Matthews, a Master of the Supreme Court of Judicature (Taxing Office) and A D M Oulton MA, barrister of Gray's Inn, in consultation with Seton Pollock, solicitor and secretary of the legal aid committee of the Law Society, tell us, in minute detail, who are legally aided persons and who are not. They also tell us if and how a person can become a legally aided person; and what the consequences are of either one or more or all the parties to an action being legally aided persons. This book is, in fact, a detailed commentary on the English legal aid legislation.

Considering that the first English statute making some provision for legal aid was passed in 1495, it is perhaps not surprising that the table of

cases on this topic takes up twelve pages of fine print. However, only one short chapter is devoted to the history and development of legal aid. The cases and the book itself are mainly concerned with the implementation of the Legal Aid and Advice Act 1949 (c 51); the Legal Aid Act 1960 (c 28) and the Legal Aid Act 1964 (c 30). The composite scheme created by these acts brings into being a system for the provision of three kinds of legal assistance. Firstly, it provides for the giving of oral advice on questions of English law by solicitors in their own offices; secondly, provision is made for the rendering of assistance by solicitors in matters not involving litigation and, thirdly, it provides for the respresentation of the assisted persons in court by solicitors or counsel when necessary. It was originally hoped that provision of the first two kinds of legal aid would go a long way towards obviating the third, but this has proved not to be the case and the most common type of legal aid is still representation in court. Each of these types of assistance is carefully considered and commented upon, with due regard to all relevant regulations and court decisions.

The thorny problem of costs in civil actions where one or more of the parties is an assisted person is, perhaps, the key to appreciating the necessity for the exhaustive discussion of apparently trivial matters in the earlier parts of the book. Section 2(2)(e) of the 1949 Act provides that, in certain circumstances, assisted persons cannot be ordered to pay costs which would otherwise have been awarded against them and that, in every instance where one or more of the parties is an assisted person, the court must have regard to the respective means of the parties in making an order as to costs. Furthermore, it is only in very limited circumstances that an unassisted person will be entitled to recover his costs from the legal aid fund administered by the Law Society. In the light of these provisions, the necessity for exact answers to such questions as who, precisely an assisted person is, when does he cease to be an assisted person, what property is protected in terms of the acts becomes apparent. Without precise answers to such questions it would be impossible for a court to decide, for instance, whether a trustee, unsuccessfully, sued by the assisted beneficiaries of the trust, can recover his costs from the trust funds, where the court cannot make an order against the trust beneficiaries themselves.

To the lay reader the book is of especial value in that each of the 29 chapters is preceeded by a succint summary and the necessity of wading through incomprehensible technicalities is avoided. Furthermore, the authors discuss not only the principles involved and the interpretation of the provisions, but also spell out the mechanics of the system. A chapter, for instance, is devoted to how to apply for legal aid. The reader is told which committee he should apply to, what the application form should contain, what documentation is necessary etc.

The book should be of especial interest to those concerned with the establishment of an efficient legal aid system in South Africa. Of particular interest is the fact that the authors stress the importance of such a scheme being run, not by the state, but by the legal profession.

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TECHNIQUE IN LITIGATION

by advocate ERIC MORRIS SC BA LLB

Juta and Co; 2nd Edition; pp 341; price R18,00

Advocate Morris' book is not an easy one to read. This has, however, nothing to do with the style in which it is written. It flows easily and is often extremely chatty. Then again it unexpectedly breaks into flower and becomes very precious, sometimes distressingly nice. He deals for example with the case where a judgment goes against you and you think it is wrong: "Perhaps", he says, "the passing of the years will remove the lingering after-taste of the cup of bitterness from which you will oft-times sip." But he offers the wise consolation of insight and understanding by saying: "Judges are human. Human beings err. Even judges err."

The reading is difficult not because there is any tough intellectual content in the book that requires close attention. On the contrary his 341 pages (including the six curious appendices) do not set forth any difficult, reflective or analytic matter. No, the trouble is that you never know what he is really doing. At one moment he appears to be dealing with the "Art of Advocacy"; at another he appears to be writing a sort of guide to the rules of forensic procedure. One senses that in neither respect is his effort remarkably successful. In fact these two activities are quite incompatible, and so his book "Technique in Litigation" appears to me to fall between two stools.

Technique after all is definable as *skill,* a clever or systematic way of doing things. And there is no doubt that forensic skill is an art. Usually in writing about an art it is the critic, and not the artist himself, who does it. When the writer *is* an artist he usually approaches the matter with delicacy. Like Mr Harris he puts forward his illuminating little book as mere "Hints on Advocacy". But if you combine it with a guide to practice, a systematic instruction as to how to behave from rule to rule, on pleading, on pretrial procedure, on leading and cross-examining and re-examining witnesses, in each case offering "assistance, guidance, illustration, and example" the "art" aspect of the matter flies out of the window.

After all in his technique the forensic artist simply must know the rules of the law, just as much as he must know the language in which he speaks and the facts of his brief. So too when he wonders what he can get out of a witness; how it will affect the psychology of the judge; and how it will embarrass his opponent – that is the field in which his skill is exercised. It is not a text-book of psychology. When you try to mix the *modus operandi* with instruction as to the field of operation the treatment gets out hand. So if you are going to deal with Rule 21(4), with Rule 35 and its twelve subsections, not to mention 36, 37 and 38, on pre-trial procedures it is not enough to say why they are there without quoting them, and then it has nothing to do with the skill or want of skill with which you can use those procedures. But to be fair, Advocate Morris does say something about the want of skill. He very gravely warns the practitioner – presumably the young practitioner – that he must carry out the rules according to their true

spirit; he must be good, frank, truthful. Like the Rev Samuel Smiles on plain living and high thinking in his books on "Character", "Thrift" and "Duty", he indicates that its not enough to be good for its own sake, for if you are not you will be caught out by the judge in public and discomforted by his reproval. Sometimes the "Technique" passes over into a little handbook on morals.

When Advocate Morris refreshingly goes over to *examples* of forensic skill valuable and entertaining matter is presented. If the imagination is to be stirred it should be stirred by the real thing – not by a lamely conceived textbook setting. However it appears that there is a strong demand for his book. It is now in his second edition with a new chapter on appeals and some new commentary on how judges should behave, and available at R18.

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SEVENTEENTH-CENTURY LEYDEN LAW PROFESSORS AND THEIR INFLUENCE ON THE DEVELOPMENT OF THE CIVIL LAW. A STUDY OF BRONCHORST, VINNIUS AND VOET

by R FEENSTRA and C J D WAAL

(Koninklijke Akademie van Wetenschappen, Afd Letterkunde, Nieuw Reeks, Deel 90) *North-Holland Publishing Company, Amsterdam/Oxford 1975 124 bl XII afbeeldinge; prys nie vermeld*

Die Leidse Universiteit is vanjaar vierhonderd jaar oud. Hierdie boek was oorspronklik bedoel as 'n bydrae tot 'n versameling essays wat ter herdenking aan die stigting van die universiteit uitgegee sou word. Die werk het egter té omvangryk geword vir opname in 'n bundel essays en die Koninklijke Akademie van Wetenschappen het dit as monografie gepubliseer.

Tydens die sestiende eeu was die Universiteit van Bourges die sentrum van die humanistiese skool, die *mos gallicus* in teenstelling met die *mos italicus*. Die grootste juriste van die tyd het luister verleen aan Bourges: Franciscus Duarenus, Jacobus Cujacius, Franciscus Hotomanus en Hugo Donellus. Die St Bartholomeus-nag bring in 1572 'n skielike einde aan die roem van Bourges: Hotomanus en Donellus, albei Protestante, vlug uit Frankryk. Met die koms in 1579 van Donellus as professor na Leiden word die grondslag gelê van die regskool wat tydens die sewentiende eeu die toon in Europa sou aangee.

Die lys van Leidse regsprofessore tydens die sewentiende eeu is indrukwekkend: Bronchorst, Tuningius, Vinnius, Cunaeus, Schotanus, Böchelman, Antonius Matthaeus III, Vitrarius, Voet en Noodt. Van hulle het Noodt, Vinnius en Voet waarskynlik die grootste invloed buite die Nederlande verwerf. Noodt was 'n Romanis en sy invloed was beperk tot die studie van die Romeinse reg. Vinnius en Voet, daarenteen, het groot invloed op die praktyk gehad, in Nederland en in die buiteland.

Prof Feenstra en sy mede-skrywer het hul ondersoek toegespits op Vinnius en Voet vanweë die invloed wat hulle op die praktyk gehad het. Besondere aandag word ook aan Bronchorst gegee, want as Donellus se onmiddellike opvolger het hy 'n belangrike rol gespeel by die vestiging en die opbou van die Leidse regsfakulteit. Bronchorst het goed gepas in hierdie rol want hy het veral belang gestel in die regsonderrig, soos die titel van sy intreerede dan ook getuig (*Oratio de studio juris recte instituendo*). Toevallig weet ons ook heelwat meer van Bronchorst as van die meeste van sy Leidse kollegas en opvolgers want sy dagboek het vir ons bewaar gebly.

Die boek bestaan uit drie hoofstukke. In die eerste hoofstuk skets die skrywers, by wyse van inleiding, kortliks die stand van die Europese regswetenskap ten tye van die stigting van die Leidse Universiteit. Hulle wys daarop dat die aanstelling van Donellus pas vier jaar ná die stigting van die universiteit "had focussed the attention of the European scientific world on the young Leyden University" (bl 17). Daarna volg kort lewensketse van Bronchorst (professor vanaf 1587 tot 1621), van Vinnius (professor vanaf 1633 tot 1657) en van Johannes Voet (professor te Leiden vanaf 1680 tot 1713). Onderskeidelik verteenwoordig hierdie drie die begin, die middel en die einde van die sewentiende eeu.

Die tweede hoofstuk bestaan uit 'n verslag van 'n uitvoerige bibliografiese studie van die werke van die drie professore. Die doel was om te probeer vasstel wat hul invloed buite die Nederlande was. Hier het Feenstra en Waal werklik baanbrekerswerk gedoen. Die gegewens wat hulle uit alle hoeke van die wêreld versamel het, sal vir 'n lang tyd alle verdere studie in hierdie verband ten grondslag lê. Naas persoonlike besoeke aan talle Europese biblioteke en inligting verskaf deur kollegas uit verskillende wêrelddele, was die skrywers vir 'n groot deel van hul gegewens aangewese op bibliografieë. Interessant is die feit dat hulle die bekende (in 'n mate verouderde) *South African Legal Bibliography* van A A Roberts as een van weinig werklik betroubare bibliografieë beskou (bl 45 n 198).

In die derde hoofstuk word 'n oorsigtelike beskouing gegee van die invloed van die drie professore buite die grense van die Nederlande. In hierdie kort bespreking kan ek slegs die aandag vestig op wat miskien die twee treffendste kenmerke is wat blyk uit die skrywers se versameling van bibliografiese gegewens. Die eerste is dat die werke van die sewentiende-eeuse Nederlandse juriste buitengewoon hoë aansien geniet het in Spanje en die Spaanssprekende wêreld. Die Spaanse regsonderrig was steeds daarop ingestel om parallelle en verskille tussen die Romeinse en die Spaanse reg aan te toon. Hierdie vergelykende metode het uitgegaan van die Institute van Justinianus, en Vinnius se kommentaar op die Institute is algemeen as handboek gebruik (bl 99 e v). In 1867 nog verskyn 'n Spaanse vertaling van hierdie werk in Barcelona. In die daaropvolgende jaar, in 1868, verskyn 'n Spaanse vertaling van Bronchorst se kommentaar op die Digesta-titel *De regulis iuris* in Meksiko!

Die tweede treffende kenmerk is dat in alle lande behalwe Holland en Suid-Afrika, Vinnius 'n veel invloedryker skrywer was as Voet. Slegs in Italië trek hulle ongeveer gelyk (bl 102 e v); in Duitsland het die werke van Vinnius meer herdrukke beleef as dié van Voet (bl 88 e v), en in

Spanje "we find a complete neglect of Voet in contrast to a great interest in Vinnius" (bl 99). Ook in Engeland en die Verenigde State van Amerika was Vinnius beter bekend as Voet (bl 104 e v). Pothier, die "vader" van die Franse *Code Civil,* verwys dikwels na Vinnius in sy *Pandectae* en sy *Traité des Obligations* – na Voet is daar nie 'n enkele verwysing nie. 'n Mens neem selfs met 'n mate van verbasing kennis dat daar in Pothier se persoonlike biblioteek nie 'n enkele uitgawe van enige werk van Voet aanwesig was nie [volgens die *Catalogue des livres de feu Monsieur Maitre Robert-Joseph Pothier* (Orléans 1772)].

Op bl 111 e v verskyn 'n tabel van uitgawes van werke van die drie professore wat buite Nederland gedruk is. Daarna volg twee registers: 'n register van uitgewers en drukkers van die werke van die drie professore en 'n algemene register. Aan die einde van die boek verskyn twaalf fotografiese afbeeldinge van skilderye van die drie here en van die titelblaaie van verskeie van hul werke. Afbeelding VIII is 'n reproduksie van die skildery van Jan Weenix wat in die Paleis van Justisie in Pretoria hang. Feenstra en Waal betwyfel dit of hierdie skildery inderdaad Johannes Voet uitbeeld (bl 37 n 153).

Die boek bevat 'n rykdom van biografiese en bibliografiese gegewens, veral in die voetnote wat dikwels oorloop van die een bladsy na die ander en heelwat meer ruimte in beslag neem as die teks. Geen regshistoriese studie van sewentiende-eeuse Nederland sal in die toekoms hierdie werk kan negeer nie. Die boek is keurig gedruk op papier van goeie gehalte wat ook reg laat geskied aan die fotografiese afbeeldinge in die teks en aan die einde van die boek.

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THE PRINCIPLES OF THE LAW OF CONTRACT

deur H J KERR

Sewende uitgawe 1975 Butterworth & Kie Durban; xxxviii en 408 bl; prys: hardeband R19,75, slapband R16,25

Dat 'n hele agt jaar verstryk het sedert die eerste uitgawe van hierdie werk verskyn het, blyk by ter hand neem daarvan reeds uit die mate waarin dit gegroei het – van 228 na 408 bladsye.

Hierdie toename in omvang is toe te skryf deels aan 'n uitvoeriger behandeling van bestaande afdelings (soos kontraksluiting, *error in persona*, wanvoorstelling, uitleg van kontrakte en kousaliteit) en deels aan die behandeling van onderwerpe wat nie by die eerste uitgawe inbegrepe was nie. As voorbeelde van laasgenoemde kan by uitstek vermeld word bedinge ten behoewe van derdes, die opsie, kontrakte ter beperking van handelsvryheid en die veronderstelling.

Die uitbreiding van die boek dien ongetwyfeld om die gebruikswaarde daarvan te verhoog en laat sommige punte van kritiek wat in die bespreking van die eerste uitgawe in hierdie tydskrif (1969 313) uitgespreek is, wegval.

'n Mens kan dan ook tereg beweer dat die skrywer se bespreking van onderwerpe soos kontrakte ter beperking van handelsvryheid, die *exceptio doli generalis*, wanvoorstelling, onmoontlikwording van prestasie, uitleg van kontrakte en skadevergoeding 'n werklike bydrae tot die gesprek rondom hierdie aspekte van die kontraktereg lewer. Verblydend is ook die feit dat telkens van talle voorbeelde gebruik gemaak word.

Op die oog af lyk dit dus asof hierdie tweede uitgawe van Kerr se werk 'n welkome uitbreiding van die skrale literatuur oor die Suid-Afrikaanse kontraktereg behoort te wees wat met vrug deur student sowel as praktisyn geraadpleeg kan word.

Ongelukkig getuig die werk egter dikwels van 'n benadering wat bogenoemde eerste indruk weerspreek en wat 'n mens veral laat huiwer om die boek te plaas in die hande van studente wat vir die eerste keer met die beginsels van ons kontraktereg kennis maak. In die lig van die kritiek wat by bespreking van die eerste uitgawe uitgespreek is, kan hier met enkele opmerkings ter motivering van bostaande stelling volstaan word.

Die werk is sistematies swak geïntegreer. Die skrywer bespreek byvoorbeeld die teorieë oor die grondslag van kontraktuele aanspreeklikheid as 'n kort *excursus* (12 ev) nádat hy reeds "actual agreement" as grondslag van 'n kontrak aanvaar en bespreek het. Die skrywer gaan self klaarblyklik van die wilsteorie uit en behoort die waarde van 'n deeglike uiteensetting van die relevante teorieë te besef. Dit is dan ook opmerklik dat die vertrouensteorie weinig aandag geniet, terwyl die beginsel wat in *Smith v Hughes* 1871 LR 6 QB 597 ter sprake was darem te ligtelik afgekam word (12).

Soos in die eerste uitgawe word ook hier die dwalingsprobleem rond en bont bespreek (byvoorbeeld 16, 26, 177) terwyl *mora* as vorm van kontrakbreuk nie by die behandeling van wat die skrywer (295) "major and minor breach" noem aandag geniet nie, maar eers waar dit oor terugtrede handel – en dan nog grotendeels in voetnote (295 n5 en n6)!

Verskeie van die skrywer se opvattinge is ook teoreties en sistematies onoortuigend. So word wat die totstandkoming van 'n kontrak betref die eienaardige onderskeiding tussen aanbod en aanname, enersyds, en vraag en antwoord, andersyds, nog steeds gehandhaaf (35). Ook huldig die skrywer blykbaar die mening dat bedrog nie by wyse van verswyging kan geskied nie (135, 144 n3). Dit val verder te betwyfel of die voorgestelde onderskeiding tussen "invariable", "consensual" en "residual" bedinge juis groter helderheid bring (soos die skrywer wel beweer – 206) as die erkende onderskeiding tussen *accidentalia* en *naturalia*. Indien die begrippe "tacit" en "implied" duidelik uiteengehou word (en ons appèlhof het reeds genoegsame aanknopingspunte daarvoor gegee – sien byvoorbeeld *Barnabas Plein & Co v Sol Jacobson & Son* 1928 AD 25; *Alfred McAlpine & Son Pty Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A)), is daar geen rede om die bestaande terminologie te verwerp nie. Die skrywer se opmerking oor die taalkundige verwarring van *accidentale* met "accident" (187) is om die minste te sê onoortuigend en in sy kritiek op die woord *naturale* (187) verloor hy uit die oog dat die "natuurlike" gevolge van 'n kontrak juis van regsweë bepaal word en nie deur leke nie. Ewe onoortuigend is die opmerkings oor die betekenis van die begrip "terms" op bladsy 228:

bedinge bly bedinge, of hulle nou die vorm van voorwaardes aanneem al dan nie.

Voorts wil dit voorkom asof die skrywer die *stipulatio alteri* in beginsel altyd beskou as 'n beding gerig op die instandhouding van 'n aanbod (48 en veral 50 paragraaf b). So 'n konstruksie dek sekerlik nie die geval van 'n blote onderneming om nog in die toekoms 'n aanbod te maak nie.

Op bladsy 236 word verklaar dat die voorwaarde wat in *Bark and another NNO v Boesch* 1959 2 SA 377 (T) ter sprake was ontbindend van aard was. Die kritiek wat uitgespreek word teen diegene wat dit as 'n opskortende voorwaarde uitlê, gaan egter nie op nie. Die skrywer laat hom mislei deur die feit dat rente in die besondere geval onmiddellik betaalbaar was (236 n2). Die hoofsom was egter nie voor die ontbreking van die toekomstige onsekere gebeurtenis opeisbaar nie – en derhalwe het dit oor 'n opskortende voorwaarde gehandel. Dit is les bes interessant dat Kahn (op wie die skrywer vir sy standpunt steun) self in sy *Contract and Mercantile Law through the Cases* (1971 219) verklaar dat die onderhawige voorwaarde opskortend was!

Ten slotte is dit opvallend dat die boek benewens bruikbare verwysings na die posisie in die Engelse reg soms onnodig breedvoerige uiteensettings van Engelse beslissings bevat oor aangeleenthede waaroor in die Romeins-Hollandse reg geen noemenswaardige beginselprobleme bestaan nie, byvoorbeeld oor aanbod en aanname (36 ev, 65–66). Die skrywer kon ook met vrug meer dikwels na bydraes in die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* verwys het, soos dié van Olivier oor vreesaanjaging (1965 THRHR 187); Nienaber oor die opsie (1965 THRHR 44), oor *Bhagwantha v Tarr & Co* 1964 2 SA 586 (N) (1964 THRHR 225) en oor *Swart v Vosloo* 1965 1 SA 100 (A) (1965 THRHR 243) of Van der Walt oor produkteaanspreeklikheid (1972 THRHR 224).

Bostaande punte van kritiek word gemaak nie om uit kwelsug te verskil met 'n regsgeleerde wat ander menings huldig nie, maar om die stelling te motiveer dat die onderhawige werk alleen deur diegene met ryper oordeel gebruik behoort te word – en dan met omsigtigheid. Dit word by die lees van hierdie boek in elk geval weer eens duidelik dat die beginsels van die Suid-Afrikaanse kontraktereg in 'n groot mate nog onuitgewerk is.

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CONSTITUTIONAL LAW IN THE REPUBLIC OF SOUTH AFRICA

deur GAIL-MARYSE COCKRAM

Juta 1975; 86 bl; prys R3,50

Hierdie boekie is die eerste in Juta se *Legal Guide Series* en bevat in 'n neutedop 'n oorsig van die Suid-Afrikaanse staatsreg. Onderwerpe wat aangeraak word, is die bronne van die Suid-Afrikaanse staatsreg, federale

en eenheidstate, basiese staatsregtelike beginsels (waaronder die leerstuk van skeiding van magte, "Rule of Law" en soewereiniteit van die parlement), die parlement, die uitvoerende gesag, die provinsies, die Bantoetuislande, Suidwes-Afrika en openbare veiligheid.

Die eerstejaarstudent en die student in die staatswetenskappe sal hierdie eenvoudige en direkte opsomming van die vernaamste staatsregtelike reëls ongetwyfeld nuttig vind. Die skryfster probeer geensins om die reëls problematies aan te bied of om op bestaande kontroverse in te gaan nie, maar eerder om die vernaamste beginsels en reëls so bondig en ongekompliseerd as moontlik te stel. In hierdie metode lê sowel die waarde as swakte van die werkie as geheel; deur die reëls kernagtig en duidelik te stel, word verhoed dat die beginner in die regte, die staatsleerstudent, die politikus of ingeligte leek onmiddellik verstrik raak in ingewikkelde staatsregtelike probleme, maar terselfdertyd wek die aanbieding die indruk van 'n soms té eenvoudige en té gemeenplasige optekening van dikwels moeilike en uiters omstrede opvattings en vertolkings. Miskien sou die laasgenoemde beswaar verhoed kon gewees het as daar telkens na uitgesoekte literatuur en bronne verwys word om die student op die spoor van verdere en meer gevorderde navorsing te bring.

Hierdie pretensielose, vlot werkie oor die hoofbeginsels van ons staatsreg kan met die grootste vrymoedigheid as 'n *aide memoire* vir regstudente en inleidinkie vir nie-regstudente aanbeveel word.

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INTERPRETATION OF STATUTES

deur G M COCKRAM

Juta & Co 1975; 88 pp; price R3,50

The *Interpretation of Statutes* by Gail-Maryse Cockram is to be welcomed in that it is one of the few books written in English, dealing with the interpretation of South African statutes. The book comprises 88 pages in all and the writer has divided the subject matter into eight chapters, viz the function of the courts; the interpretation of statutes by parliament itself; the general rules of interpretation; the different parts of a statute; the two versions of a statute; presumptions; maxims and nullity of transactions in contravention of a statute.

A book of such limited scope must obviously have certain advantages and disadvantages. On the credit side the book is concise and inexpensive and could serve as a guide to students who are making their first acquaintance with the problems of interpretation of statutes. In this regard the exposition of the general rules in chapter III could prove very useful, provided the student bears in mind the self-imposed limitation of the work, as the author states rater than discusses the rules. In chapters IV and V the writer clearly and concisely discusses the way in which the different parts of a statute may

be used in interpretation. She also shows to what extent the courts will consider the unsigned text of a statute as well as the meaning of "conflict" in section 65 of the Constitution Act.

On the debit side most of my criticism stems from the fact that the work is too brief to provide anything but a superficial guide. Chapter II for example is devoted to the interpretation of statutes by parliament itself and the various forms such "authentic interpretation" may take. However, the writer merely mentions the Interpretation Act, 33 of 1957 as amended, but does not embark upon a discussion of the scope and meaning of the individual sections. She merely quotes a few examples from the act e g that "month" means a calendar month. The writer does refer to section 12(2)(c) of the Interpretation Act relating to repeals, when discussing the presumption against retrospectivity, but no discussion of the other sections is given.

The writer has made no reference to our common law writers and has not examined the concept of "the intention of the legislature". No reference is made to interpretation by analogy and whether modification of language by the courts is permissible or not. There are no footnotes and all references are quoted in the main body of the work.

In chapter VI the writer says that presumptions are used by the court to interpret ambiguous texts. However, as Wiechers *Administratiefreg* 44 points out, correctly in my view, although the courts usually adopt the approach that presumptions are only used in cases of ambiguity, these presumptions are common law rules which exist independently alongside the provisions of the act.

In chapter VII various maxims such as *expressio unius exclusio alterius* and *eiusdem generis* are discussed, but the writer makes no mention of the rule *cessante ratione legis, cessat et ipsa lex* or the rule that the intention of the legislature may be inferred *ex consequentibus* if not expressed in words.

In spite of the criticisms mentioned above I believe that the book could certainly prove of use, particularly to students, provided they do not lose sight of the fact that it was never intended to be a comprehensive handbook.

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REPERTORIUM BIBLIOGRAPHICUM INSTITUTORUM ET SODALITATUM IURIS HISTORIAE, SUPPLEMENTUM 1969-1974

deur R FEENSTRA

E J Brill, Leiden 1975; prys 38 gilders

Hierdie band is 'n voortsetting en aanvulling op die werk met dieselfde titel wat deur dieselfde persoon in 1969 opgestel is. Daardie werk is in die 1970 *Tydskrif* op bl 314 aangekondig.

Dit is nie nodig om te herhaal wat destyds gesê is nie. Baie kort kan dit gestel word dat 'n internasionale vereniging van vereniginge en institute vir regsgeskiedenis bestaan en die naam dra van *Association internationale d'histoire du droit et des institutions*. Die lede van hierdie vereniging bestaan dan uit liggame soos die Vereniging Hugo de Groot (ten wille van wie hierdie *Tydskrif* gepubliseer word) en wat ook inderdaad 'n lid van hierdie internasionale vereniging is. Die aktiwiteite van die internasionale liggaam is hoofsaaklik om inligting te verskaf oor kongresse, publikasies van algemene belang en oor navorsing op die gebied van regsgeskiedenis wat in verskeie lande aan die gang is.

Die *Repertorium* van 1969 word met hierdie volume aangevul. In die voorwoord word die doel van die werk gestel en 'n oorsig van die aktiwiteite van die AIHDI gegee. Dit word gevolg deur 'n lys van volle en geassosiëerde lede asook 'n lys van die lede van die bestuur. Hierop volg dan 'n aanvullende lys van nuwe reekse van monografieë, uitgawes van bronne en tydskrifte wat verskyn het na die publikasie van die 1969 volume. Dit is verbasend, maar vir die regshistorikus vertroostend, om te sien hoe groot die aanwas is. Dan is daar 'n aanvulling op die gegewens van die institute en verenigings van regshistoriese aard en 'n verdere aanvulling (en dit is die belangrikste deel van die werk) op die reekse van monografië, bronnepublikasies en tydskrifte wat in die eerste deel genoem word. Daar is ook verdere *addenda* tot en *corrigenda* op die 1969 volume en ten slotte 'n register op die name van persone wat by die titels van publikasies in die twee dele genoem is.

Die inligting wat met hierdie twee publikasies beskikbaar gestel is, is van baie groot waarde en nut vir die regshistorikus en die werke sal deur so 'n persoon as naslaanwerk gebruik word.

Dit mag verder genoem word dat altwee die dele baie noukeurig versorg is en die redakteur verdien alle dank en lof.

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ENCHIRIDIUM: Overzicht van de Geschiedenis van het Romeins Privaatrecht

deur J E SPRUIT

Kluwer, Deventer, 1975; XV en 282 bl; prys onvermeld

Die skrywer van hierdie boek is nie alleen 'n kenner van die Romeinse reg nie, maar is ook bekend vir sy werk op die gebied van die Romeinse geskiedenis. Daarom is dit nie verrassend dat hierdie werk 'n hoë peil bereik nie. Dit dek 'n gebied waaroor daar reeds 'n aantal soortgelyke boeke geskryf is (die werke van Krüger, Kübler en Kunkel kom onmiddellik by 'n mens op) en hiervan is daar die goeies, verouderdes en die minder geslaagdes. Hoe dit ook al sy, die Nederlandse Romeinsregtelike wetenskap is gelukkig met hierdie aanwins. Dit is merkwaardig dat dit oor 'n gebied handel waaroor daar reeds 'n ander Nederlandse werk bestaan, nl dié van

Hermesdorf, waarvan die bekendheid en waarde nie hier genoem hoef te word nie. Daar is egter aansienlike verskille in die opset van die twee werke.

Die geskiedkundige ontwikkeling van die agtergrond waarteen die Romeinse reg ontwikkel het asook die bronne van daardie regstelsel is 'n gebied wat nie uitgeput raak nie. Die stelling mag vreemd klink want 'n mens kan jou immers voorstel dat dit 'n gebied moet wees wat streng afgebaken is en wat so dikwels behandel en deurvors is dat daar nie juis iets nuuts daaroor gesê kan word nie. Die onjuistheid hiervan blyk onmiddellik as 'n mens dieselfde soort boek lees wat reeds twintig tot veertig jaar gelede verskyn het. Dat 'n nuwe werk soos hierdie dus geensins oorbodig is nie, spreek dus vanself.

In hierdie werk word die agtergrond en bronne vanaf die vroegste tye tot en met Justinianus behandel. Dit gaan nie verder nie en skets dus nie die verdere lotgevalle van die Romeinse reg nie. Dit begin natuurlik by die vroegste tye en die ontstaan van die sg koningstydperk: die ontstaan van die gemeenskap, die vroeë staatsstruktuur (as dit nie 'n te grootse woord daarvoor is nie) en die regsbronne van dié tyd. Daarna volg die republikeinse tydperk en dit word op soortgelyke wyse behandel. Dit is die periode van groei. Daarna volg die tydperk van die *princeps* (vanaf Augustus tot Diocletianus) waarin Rome en die Romeinse reg hulle hoogtepunte bereik, maawaarin (teen die einde) die ineenstorting reeds merkbaar word. Die Romeinsr wêreld verander en dan volg die dominaat waarin die keiser *Dominus et Deu*e is. Hierdie tydperk word, vir die doeleindes van hierdie boek, met Justiniasnus en sy wetgewende prestasies afgesluit.

Deur hierdie kort opsomming word slegs die raamwerk van die werk gegee, maar dit laat nie juis die diepte daarvan blyk nie. Dit is egter reeds genoem dat die skrywer sy Romeinse geskiedenis, sy Romeinse reg en sy Romeinse regsbronne ken. Die verwagting dat 'n werk van hoogstaande gehalte gelewer is, word dan ook nie verydel nie. Uit die aard van die saak sal die leser, vanweë sy persoonlike voorkeure, miskien meer deur die een afdeling as die ander beïndruk word. [Aldus moet die resensent erken dat hy veral gelukkig voel oor die uiteensetting van die inhoud van en die kommentare op die *Lex xii tabularum* (§ 19 sqq); die stuk oor die vroeë na-klassieke regswetenskap (§ 308 sqq), die uiteensetting betreffende die republikeinse juriste (§ 139 sqq) en die breë en diepgaande uiteensetting van die algemene geskiedkundige agtergrond]. Aan die ander kant spreek dit amper vanself dat die leser miskien onduidelikheid mag hê oor sekere punte of dat vrae by hom mag opkom waar hy meer inligting sou verlang. Die skrywer stel ook somtyds 'n standpunt wat by die leser twyfel mag laat ontstaan of dit die enigste is. Enkele punte van hierdie aard mag hier as voorbeeld genoem word. So het ek die indruk dat, na verhouding, baie meer oor die *censor* gesê word (§ 47 sqq), wanneer die inligting oor die *praetor* en *curules aediles* daarmee vergelyk word; meer besonderhede kan gevra word oor die *rex* as wetgewer en sy *leges* (§ 6 en 73); daarmee hou verband die *Ius Papirianum* (§ 14) en hier kom dieselfde vrae na vore: In hoeverre kan die *ius gentium* as Romeinse reg beskou word en wat is dit eintlik (§ 129 en 132)? Daar is die stelling dat die *Lex xii tabularum* "geen enkel formulier dat bij het voeren van processen in acht genomen moest worden" geken het nie, en dit laat by my die vraag

ontstaan of ek die skrywer verkeerd verstaan wanneer ek na Gaius 4 17a kyk (§ 135). Is die Germaanse reg werklik van noemenswaardige betekenis vir die *Vulgarrecht* (§ 375, 447)? Word die *Quinquaginta decisiones* so genoem in die verwysings daar aangehaal, nl in noot 2 op bl 237 waar tekste aangetref word waarin na *nostrae decisiones* verwys word? Is dit korrek om van die *Lex Romana Wisigothorum* (§ 432 sqq) te praat? In ieder geval lees Haenel se uitgawe, wat in noot 1 op p 228 aangegee word anders as wat daar geskryf staan. Is die gewoontereg so onbelangrik as wat dit gestel word (§ 93 teenoor 94 en ook § 103 en 198)? Ens. Miskien struikel ek onnodig oor soortgelyke punte, maar my vraag is of dit nie die oningewyde 'n verkeerde indruk kan gee nie.

Om die geheel weer in perspektief te stel: dergelike punte wat die leser miskien sal raaksien (of miskien 'n verkeerde indruk gee) is nie baie belangrik wanneer die werk in sy geheel beoordeel word nie. Dit is dikwels daaraan te wyte dat die beoordeling van sekere verskynsels nie by iedereen dieselfde hoef te wees nie. Daar is en bly altyd baie teenstrydighede oor die Romeinse reg, die geskiedenis en die bronne daarvan. Dit is ook een van die bekoringe van die hele gebied en ook die rede waarom die Romeinsregtelike wetenskap in sy wydste sin, so 'n besondere hoë peil bereik het.

Daar is verskeie ander punte wat die leser ook sal tref. Dit is interessant dat die skrywer die sg *Leges Romanae Barbarorum* behandel, terwyl dit dikwels tuisgebring word onder die "post-Romeinse" geskiedenis. Die rede is egter duidelik: dit is miskien die belangrikste bron vir die kennis van die sg *Vulgarrecht* wat na die tweede wêreldoorlog sterk onder die soeklig gekom het. Verder kan ook gemeld word dat verbasend veel materiële reg in die boek verwerk is en vir hierdie doel word bykans uitsluitend gebruik gemaak van en verwys na Kaser se standaardwerke en Kaser-Wubbe, *Romeins Privaatrecht*.

Van besondere belang vir die student is die feit dat die boek ondermeer vir die student geskryf is, of, soos dit in die voorwoord gestel is, vir die *cupida legum iuventus*. Die gebruik van hierdie Justiniaanse terminologie deur 'n skrywer in die jaar 1975 toon 'n opbeurende optimisme. Hy is nie die enigste wat in die jongste tyd hierdie geloof getoon het dat daar werklik nog sulke regstudente bestaan nie! Miskien omdat die werk ten dele vir die student (in besonder die Nederlandse student) bedoel is, sê die skrywer dat hy afgesien het van 'n uitgebreide literatuuropgawe en verwys hy na ander werke waarin dit te vind is (noot 1 op die eerste bladsy van die voorwoord). Dit wil egter voorkom of die literatuur waarna verwys is wel die belangrikste en mees resente bevat. Hiermee word aan die leser 'n belangrike diens gelewer. Omdat die skrywer selektief te werk gegaan het en meer as net die belangrikste en noodsaaklikste literatuur noem, sal die leser miskien ook vind dat van die literatuur waarna verwys word agterweë gelaat kon word. Dit word steeds 'n groter probleem om te weet wat nie gelees moet word nie, eerder as om te weet wat gelees moet word. Dit is opvallend dat, na verhouding, na heelwat moderne Engelse literatuur verwys word wat seker ook geskied met die oog op die behoeftes van die Nederlandse student.

Daar is ten slotte 'n baie volledige en nuttige chronologiese tabel en 'n uitvoerige register oor die inhoud van die einde van die werk wat dit

soveel meer nuttig maak. Verder is die versorging uitstekend en drukfoute min.

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DE SOCIALE COMMUNICATIEMEDIA IN BELGIË

deur J M VAN BOL

Brussel 1975; 183 bl

Hierdie studie is nr 304 in die reeks *Teksten en Documenten* wat deur die Belgiese ministerie van buitelandse sake, buitelandse handel en ontwikkelingsamewerking uitgegee word en aan 'n verskeidenheid instansies gratis voorsien word. Die resensent wil hiermee veral die aandag op die bestaan van hierdie reeks vestig, aangesien die *Teksten en Dokumenten* heel dikwels interessante regsmateriaal (wetstekste, hofuitsprake ens) bevat asook studies van vooraanstaande regsgeleerdes of ander deskundiges in hulpwetenskappe.

Die onderhawige studie is taamlik tipies in hierdie opsig. Dit bevat baie goed gedokumenteerde ontledings van die geskiedenis van die kommunikasiemedia in België, veral die pers, van die "anatomie" van die hedendaagse pers, die geskiedenis en opset van die Belgiese radio en televisie en informasieverbruik deur die verskillende media. Maar afgesien daarvan bevat dit ook 'n heel interessante, hoewel oorsigtelike, skets van die juridiese raamwerk waarbinne hierdie kommunikasiemedia funksioneer. Die behandeling van begrippe soos vryheid van meningsuiting (persvryheid), vryheid van informasie (met aan die ander "pool" die beskerming van sg nasionale geheime), die beroepsgeheim van die joernalis, die reg op antwoord en dergelike meer sal vir enigeen wat in hierdie afdeling van die reg belangstel, van waarde wees.

Waar België in baie opsigte vandag as die middelpunt van die Europese gemeenskap beskou kan word, is die *Teksten en Documenten*, insluitende die onderhawige studie, van besondere belang vir enigiemand wat homself van nuwe ontwikkelinge op die gebied van die regs- en ander wetenskappe op die hoogte wil hou.

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LEASE VALUATION TABLES

by M S DOYLE

Juta and Co Ltd, Wynberg, Cape Town 1975; pp 47; price R5,00.

This book of tables is directed at the property practitioner who is faced with the task of establishing present values of escalating income flows and who has to evaluate lease back opportunities. As such it will be a useful addition to existing standard compound interest tables based on the ordinary annuity.

Two pages of explanatory examples are provided. A number of printing and other errors in these examples should be corrected through the insertion of an errata slip. It is especially necessary to correct the logic error which appears in Application 2 in the calculation of "Nett Income year 16" (see page 5.)

Forty-two pages of tables provide present values for increasing annuities. Escalation rates range from 1% per annum to 7% per annum in ½% increments. Discount rates are annual only and range from 5% to 25% for periods from 1 to 25 years.

The usefulness of the tables could be increased if in possible future editions provision is also made for monthly, quarterly and semi-annual compounding of interest. This will be an improvement because, although escalations normally take place annually, periodic repayments and rental payments are predominantly made more frequently than annually. Furthermore, payments are made in advance, ie at the beginning of the period, which calls for the use of annuity due, rather than ordinary annuity tables.

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BOEKAANKONDIGING

The Case for Legal Reform by R B Turkstra, Legal Reform Club, Hartebeespoort, pp 102.

Although the purpose of this booklet, which, according to the introduction, is "to present the reader with a case for reform of the English Legal System," is, I am sad to say, never achieved, the reader is assured of a few hours of good entertainment. Beginning with a prologue lamenting the "greatest catastrophe of human history, the fall of the Roman Empire," the author (BCom and first year LLB) instructs us on *The Law and Nature of Legal Systems, The Principles of Justice, The History of the Legal Systems of Egypt, Greece, Rome, England* and the *Continent*, all in a matter of 50 odd pages. An attempt to classify the miscarriages of justice then follows and thrown in for fun is a note on advocates who have throughout the ages been famous for "the art of misleading without actually telling lies" and attorneys who in England "have changed their name to excape (sic!) the odium attached to the word 'attorney'." *Cracks in the Ceiling of the English Legal System* are then dealt with followed by an instructive chapter *Of Languages*, helping the lawyer along with Latin, French, English and Afrikaans verbs and expressions - all expertly dealt with in the amazing scope of 10 pages! The book ends on a high note - 4½ pages setting out exactly *How to Change the Legal System* – FRANCIS BOSMAN.

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Diskresie, Regsdwaling en die Hersieningshof: Redelikheid in die Administratiefreg

J A v S d'Oliveira

Justisie-opleiding

SUMMARY

The judgment of Jansen JA (Van Blerk ACJ concurring, and Hofmeyr JA agreeing for different reasons) in *Theron v Ring van Wellington* 1976 2 SA 1 (A) is a milestone in the development of our administrative law. This case may prove to be the *Anisminic* of South African Law.

The case concerned the extent of a reviewing court's power to interfere with the findings of fact and of law of a domestic tribunal. The respective justices were all ad idem that domestic tribunals and statutory tribunals were to be similarly treated where review was concerned. As "judicial" or "quasi-judicial" functions were involved, the decision is of great importance to the question of the review of discretionary functions. In fact, principles relating to the latter were relied on by both sides.

In the discussion following it is observed that both English and South African law judge the legality of a tribunal's conduct with reference to *jurisdiction*, or *vires* or both. Neither system operates with a "pure" concept of jurisduction. The latter, seen as a "freedom to err within certain limits" has in English law undergone steady erosion and only retains its broad contours. Both English and South African law have rather been concerned with determining the ambit of "the merits" and interference has been granted or refused according to the width recognised. It is mooted that our law would benefit by approaching the question of legality from the angle of the requirements for valid administrative conduct rather than in terms of review and grounds of review.

Both the court a quo and the minority adopted the traditional stance of reflecting an hesitation to interfere with the exercise of discretionary powers. This is largely contained in a dictum (perhaps obiter) in *UG v Union Steel Corporation* 1928 AD 220 237, recently affirmed in inter alia *Administrator, Tvl and The Firs Investments v Johannesburg City Council* 1971 1 SA 56 (A). In terms of this approach unreasonableness as a compound of the grounds of review, but never per se, could be a ground for interference. The traditional approach to errors of law was also adhered to.

This approach, with its wide notion of "the merits", was dubbed the "formal" yardstick by Jansen JA who went further to recognise the "extended" formal yardstick. In terms hereof unreasonableness per se is an independent ground for interference and the traditional preserve of the error of law is invaded.

This recognition of per se unreasonableness as a ground is based, firstly, on the common law presumption against unreasonableness or unfairness. Hereby impetus is lent to the opinion of a growing body of protagonists. Secondly, support is sought and found in English law which has outgrown the hemming interpretation of *Wednesbury*. And, thirdly, observing that the reasonable authority criterion has often been unconsciously applied in our law, Jansen JA turns to cases involving contractual tribunals (and which were not upset) in which this reasonableness criterion was applied. (That this criterion was not to be restricted to such cases appears from the insistence upon rather regarding cases such as *Firs Investments* in a category of their own.)

As the reasonableness criterion was anchored in common law, its operation could be excluded only by a clear indication from the legislature or the parties. The same would apply to the court's power of interference in errors of law, which power was based on the function of our courts.

In particular, regarding errors of law, a court which had to determine whether there was "evidence" which supported a finding had necessarily to apply correct legal criteria. If a wrong interpretation of law by a tribunal led to the wrong kind of things being regarded as "evidence", a reviewing court could a fortiori interfere. As a result of this it is submitted that interference upon such matters is allowed when the party affected is prejudiced by a wrong finding of law.

In agreeing with the judgment of Jansen JA the writer submits that substance has been lent to the courts' declared intention of ensuring the due and proper exercise of discretion.

In concluding the writer however raises the question as to the validity of the apparent assumption that discretion should receive a different treatment where considerations of desirability and efficiency are involved (as in *Firs Investments*).

Although *Theron* represents a distinct landmark, he opines that it does not contain the last word on the unlawful exercise of discretionary powers.

Dit is miskien as gevolg van die feit dat *Theron v Ring van Wellington van die NG Sendingkerk in SA*[1] uit kerklike aangeleenthede ontstaan het dat die atmosfeer besonder bevorderlik was vir die oorweging van administratiefregtelike beginsels. Daar was maw nie die addisionele "politieke" oorwegings aanwesig nie wat, soos heeltemal verstaan kan word, 'n geregtelike instansie se benadering tot statutêr verleende diskresies kon beïnvloed het, en aldus 'n oordrewe terughoudendheid met betrekking tot owerheidsgesag kon bewerkstellig het.

ALGEMEEN

Omdat daar in *Theron* verwys is na oa aspekte van hersiening wat slegs met 'n verwysing na die Engelsregtelike agtergrond verduidelik kan word, is dit miskien dienstig om 'n bespreking van die saak in te lei met 'n paar algemene opmerkings wat die leser in staat sal stel om die regsgeskilpunte in die regte perspektief te sien.

1 Tereg wys wn hr Van Blerk[2] op die funksie van die howe as die beskermer van die regte van die landsburger, en Rose Innes[3] wys op die taak van die howe om dmv hersiening 'n gemagtigde binne die bestek van sy bevoegdhede te hou. Dit is egter ook waar dat die wetgewer, of die partye in die geval van 'n huishoudelike liggaam, hersiening deur die howe kan uitsluit (hoewel die ooreenkoms in lg geval oa nie strydig met die openbare belang mag wees nie).[4] Uitsluiting van hul jurisdiksie word egter nie deur ons howe geredelik aanvaar nie en dit is algemeen bekend dat hulle in sekere gevalle ten spyte van 'n uitsluitingsklousule hersieningsbevoegdheid sal uitoefen en regstelling sal beveel.[5] Een van die vrae in *Theron* was juis of daar van so 'n geval sprake was.

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[1] 1976 2 SA 1 (A).
[2] *Theron* 9E–F.
[3] *Judicial Review of Administrative Tribunals in SA* 89–91.
[4] *Theron* 9D.
[5] Rose Innes aw hfst 5.

2 Een aspek waaroor daar in *Theron* volkome eensgesindheid geheers het, was dat – wat hersiening betref – dieselfde behandeling huishoudelike liggame te beurt val as 'n statutêr gemagtigde persoon of liggaam. Die hof was dit eens dat dieselfde beginsels van toepassing is.[6] Dit was egter by die stel en toepassing van die beginsels dat verskille na vore getree het.

3 (a) Die *Theron*-saak het as agtergrond Engelsregtelike regsontwikkeling wat aktueel is insoverre sekere begrippe wat aan daardie stelsel ontleen is, deel van ons regswoordeskat geword het. 'n Mens dink aan uitdrukkings soos "jurisdiction", "an error going to the jurisdiction", "preliminary or collateral questions", esm.[7] Hoewel dit buite die bestek van hierdie kort artikel val om 'n breedvoerige ontleding van die *jurisdiksiebegrip* te onderneem,[8] val iets hieroor gesê te word, te meer omdat *ultra vires* wat later in tyd sy verskyning gemaak het ook meeding om die hersienbaarheid van bevindings en beslissings te bepaal.[9]

> "Jurisdiction", sê De Smith,[10] "means the authority to decide. Whenever a judicial tribunal is empowered or required to inquire into a question of law or fact for the purpose of giving a decision on it, its findings cannot be impeached collaterally or on an application for certiorari but are binding until reversed on appeal".

Hiervolgens gaan dit oor 'n "freedom to err within the limits of jurisdiction" wat slegs deur appèl gekontroleer kan word.[11] Die vryheid om te besluit is bestand teen direkte hersiening en teen die indirekte aanval dmv 'n deliksaksie (*collaterally*). Vanaf die sewentiende eeu het die hersiening van "judicial acts" – dws die funksies van "justices" wat nie bloot "ministerial" was nie – dmv *certiorari* geskied.[12] Die bevelskrif van *certiorari* kon gebruik word om handelinge wat sonder jurisdiksie plaasgevind het, nietig te verklaar, maar aan "erroneous acts within jurisdiction" kon niks gedoen word nie, tensy die "error was apparent on the face of the record".[13] Laasgenoemde grond is waarskynlik met die verdere ontwikkeling van die onderskeid tussen "errors within jurisdiction" en "errors going to the jurisdiction" meestal in die tweede kategorie opgeneem sodat dit geen verdere aandag hoef te kry nie.[14]

Hoewel die Engelse reg in die rigting van 'n meer eenvoudige hersieningsaksie wil neig[15] word hersiening nog gekenmerk deur die eeue-oue jurisdiksie-begrippe. Buite die sfeer van jurisdiksie is inmenging deur die howe moontlik, en wel gebiedend, waar 'n tribunaal bv sonder magtiging optree of sy bevoegdhede oorskry of omdat die "condition precedent" nie aanwesig is nie, of omdat daar eenvoudig nie magtiging bestaan nie. Na hier-

[6]Kyk bv 12G 13H 21D 35E.
[7]Kyk bv na 15 C–F 35 B–D.
[8]Vgl A Rubinstein *Jurisdiction and Illegality* 1965.
[9]Oor jurisdiksie en *vires* vgl SA de Smith *Judicial Review of Administrative Action* 3e Uitg hfst 3.
[10]aw 96.
[11]Vir die onderskeid tussen appèl en hersiening, sien bv Rose Innes aw hfste 1 en 3 veral bl 37–38.
[12]De Smith aw 338–339.
[13]ibid 81 94–96.
[14]ibid 105–6.
[15]Vgl *Remedies in Administrative Law* Law Commission Working Paper 40.

die soort aspekte word verwys as "preliminary or collateral questions". 'n Tribunaal wat egter aanvanklik reg te werk gegaan het, kon sy jurisdiksie verloor deur 'n fout te maak "which goes to the jurisdiction"; in hierdie gevalle kon die hersieningsinstansie ingryp.

Watter foute op jurisdiksie slaan en watter nie, is juis in die lig van die regspraak die onopgeklaarde vraag op die huidige stadium van ontwikkeling. Daar word tradisioneel geleer dat bv regsdwalings binne die immuniteitsfeer (ook die *meriete* genoem) nie op jurisdiksie slaan nie tensy die dwaling daartoe lei dat die tribunaal sy bevoegdhede verkeerd vertolk het. Dit staan egter vas dat waar irrelevante oorwegings in ag geneem is, mala fide opgetree is ens, die jurisdiksie wel oorskry is. Hierdie soort vrae is "collateral to the merits".

(b) Deesdae kan regs- en feitedwalings egter as die grys gebied beskou word en alles hang daarvan af hoe wyd of hoe eng die hof se siening van *jurisdiksie* of die *meriete* is. Hierdie punt word duidelik geïllustreer deur die onderskeie uitsprake in die belangrike *Anisminic Ltd v The Foreign Compensation Commissioner*[16] waar Lord Reid (een van die meerderheid) 'n enger begrip van jurisdiksie voorgestaan het[17] sodat 'n regsdwaling (in casu die vertolking van sekere wetlik voorgeskrewe vereistes ten opsigte waarvan die *Commissioner* tevrede moes gewees het) buite die jurisdiksie geval het en dus die besluit blootgestel het aan inmenging. Aan die anderkant het Lord Morris of Borthy-gest die wyer en tradisionele begrip aangehang en saam met die minderheid bevind dat die regsdwaling binne die jurisdiksie geval het en dus teen inmenging op hersiening bestand was.[18] Hierdie verskil van mening is 'n aanduiding van die huidige stand van die Engelse reg ten opsigte waarvan De Smith die volgende sê:

> "Yet the courts continue to pay lip-service to the existence of the time-honoured distinction between jurisdictional and non-jurisdictional error . . . (m)any of these decisions are contradictory, and . . . the distinction is of little practical importance";[19] en later: "Where the courts have wished to exert wide supervisory powers they have shown few compunctions about treating errors as collateral to the merits".[20]

(c) Omdat—

> "(a)cting *ultra vires* and acting without jurisdiction have essentially the same meaning,"[21]

het dit gebeur dat *ultra vires* in die breë sin (d w s nie beperk tot die enger beoordeling of die statutêre *vires* oorskry is of nie) en jurisdiksie deurmekaar gebruik word, of dat partykeer *ultra vires* as die enigste maatsataf gebruik word. De Smith[22] lig dit nader toe:

> "(but) it is usual to speak of *vires* when considering administrative and subordinate orders, and of jurisdiction when considering judicial decisions, or orders having a judicial flavour".

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[16] 1969 1 All ER 208 HL.
[17] 213H.
[18] 221 I – 223D.
[19] a w 100.
[20] ibid 102.
[21] ibid 92.
[22] ibid 93.

Hy voeg by dat anders as in die geval van jurisdiksie enige wesenlike regs- of feitedwaling die optrede van 'n gemagtigde aan inmenging kan blootstel, hoewel 'n soortgelyke immunteitsfeer geskep kan word deur aan die beslissing 'n kwaliteit van finaliteit te gee. Omdat dit bekend is dat frases soos "the decision shall be final" egter relatief is, word teruggekom op die vraag nl in welke gevalle ingemeng kan word, want hersiening word nie daardeur uitgesluit nie.[23]

Ultra vires word veral toegepas by statutêr verleende *diskresionêre bevoegdhede*.[24] Omdat die diskresiefiguur ook 'n immuniteitsfeer (ook *meriete* genoem) omvat, is dit nie verbasend dat die toepaslike reëls (vir diskresie) ook aangewend word in die gevalle van jurisdiksie nie. Wanneer gekyk word na Wiechers se ontleding van die begrip *kwasie-judisieel* waarvan die diskresie 'n hoofkomponent is[25] word die alternatiewe toepaslikheid van jurisdiksie en *vires* heeltemal goed begryp.

(d) Die wesenlike gelykheid van die twee blyk ook in ons reg soos beskryf deur Rose Innes waar 'n "manifest absence of jurisdiction" deur *ultra vires* optrede daargestel word[26] en waar hersieningsgronde wat aangetref word onder die uitgebreide betekenis van *ultra vires* beskou word as "gaande na die jurisdiksie".[27] Tog trag Rose Innes (ibid 92–94) om te verskil van *Estate Geekie v Union Government*[28] waar die hele gebied van hersiening gelykgestel word aan 'n toepassing van die *ultra vires*-leerstuk. Ietwat inkonsekwent beroep hy hom skielik op die enger *ultra vires*[29] terwyl hy kort tevore die sg gemeenregtelike hersieningsgronde as "the exercise of powers not conferred by statute".[30] Hy meen ook dat daar in geval van jurisdiksie 'n verskil is tussen die onderskeie onreëlmatighede (sommige lei tot nietigheid, ander tot vernietigbaarheid) terwyl die posisie in geval van *ultra vires* handelinge oënskynlik anders is (ab initio nietig). Afgesien van die feit dat,

> "(b)ehind the simple dichotomy of void and voidable . . . acts lurk terminological and conceptual problems of excruciating complexity",[31]

kom dieselfde onderskeid ook by *ultra vires* voor. Dit sal hierdie bespreking nie baat om verder lig te soek in die braakgebied van nietig- en vernietigbaarheid nie.

(e) Daar kan volstaan word met die stelling dat ook in ons reg daar 'n deurmekaar aanwending en/of 'n de facto gelykstelling van *vires* en *jurisdiksie* is, en dat die diskresionêre bevoegdheid dikwels as proefkonyn vir hul aanwending dien. Hierdie stelling dra egter nie veel by tot die oplossing van die probleem waarmee die hof in *Theron* te kampe gedoen het nie.

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[23]Vgl Rose Innes a w 58.
[24]De Smith a w 84.
[25]*Administratiefreg* 1973 127 e v.
[26]a w 62.
[27]ibid 91–92.
[28]1948 2 SA 494 (N) 502.
[29]ibid 93.
[30]ibid 91.
[31]De Smith a w 130–131.

Bogenoemde oorsig is mi nodig om *Theron* met 'n mate van perspektief te lees, veral omdat die beslissing 'n tweespalt openbaar wat belangrike gevolge inhou vir *die beoordeling* van die legaliteit van *administratiewe optrede*. Soos Wiechers[32] tereg daarop wys, is ons miskien te geneig om te praat in terme van hersiening en hersieningsgronde. 'n Meer gesonde benadering sou wees om te begin met die vraag na die geldigheidsvereistes. Indien nie daaraan voldoen is nie kom onregmatigheid ter sprake; dan kan die howe in beginsel ingryp tensy daar faktore aanwesig is wat hulle hersieningsbevoegdheid duidelik uitsluit.

FEITE EN UITSPRAKE

Die geval *Theron* spruit voort uit 'n tugverhoor voor die Wellingtonse ring van die NG Sendingkerk (hierna die ring genoem) deur wie die leraar Theron en 'n aantal kerkraadslede skuldig bevind is aan sekere klagtes. Oor die skuldigbevinding val niks te sê nie; dit was by tugoplegging dat daar na bewering onreëlmatighede plaasgevind het, en in hoër beroep na die Algemene Sinodale Kommissie (hierna ASK) het daar ook na bewering onreëlmatighede plaasgevind. Dit was veral oor die beslissing van die ASK waaroor dit in die hooggeregshof gegaan het.[33]

1 Op *10 Mei* is by die ring vier tugvoorstelle ingedien. Daar is gestem en die eerste voorstel nl dat die leraar slegs vermaan word, is aangeneem. Onmiddellik hierna, te midde van heftige protes, is die vergadering in wanorde uiteen omdat daar oënskynlik lede was wat hulle nie aan die meerderheidsbesluit wou onderwerp nie. Die vergadering is toe verdaag tot 12 Mei.

2 Op *12 Mei* het die ring twee voorstelle, nl 'n ernstiger waarskuwing of skorsing oorweeg. Daar was 'n staking van stemme en die voorsitter het sy beslissende stem ten gunste van eg uitgebring.

3 Daarop het appellante hulle tot die ASK gewend en hul appèl daarop gegrond dat die beslissing van 12 Mei (die tweede vergadering) ongeldig was omdat art 175(e) van die Kerkwet bepaal dat geen beslissende stem in tugsake uitgebring kan word nie, en verder dat die ligter vonnis in die geval van staking gevel moes gewees het.

Die ASK het egter die standpunte van die tweede vergadering (oënskynlik) verontagsaam en mero motu die aandag alleen op die eerste vergadering toegespits. Applikante was blykbaar nie aangehoor nie. Na 'n sorgvuldige ondersoek (deur sy regskommissie) het die ASK bevind dat:

(i) die voorstelle van 10 Mei (wat ook sake geraak het wat nie ad rem vir vonnis was nie) so wydlopend was dat hulle verwarring onder die ringlede kon veroorsaak het en dat

(ii) regl 1(12) van die Kerkwet (oor stemming oor 'sake') nie nagekom is nie.

Gevolglik besluit die ASK dat die besluit van 10 Mei ongeldig was en derhalwe dat die daaropvolgende besluit van 12 Mei ook ongeldig was.

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[32] aw 180–182.
[33] a quo 1974 2 SA 505 (K); appèl 1976 2 SA 1 (A).

4 Die saak is na die ring terugverwys vir behoorlike tugoplegging. Op 16 September besluit die ring om appellante te skors.

5 In die hof a quo is die besluite van die ASK aangeval.

(a) R Van Zijl verwerp egter die betoog dat weens die ASK se mero motu aandagbesteding aan die eerste vergadering nagelaat is om die appèl wat aan hom gerig was te oorweeg. Die regter sê dat as die ASK van beskouing was

> "dat die geldigheid van die besluite van 12 Mei afhanklik was van die geldigheid van die besluit van 10 Mei, dan was dit vir die Kommissie nie nodig om verder oor die geldigheid van die beslissing van 12 Mei te besluit nie. *Dit mag wees dat hierdie beskouing op 'n regsdwaling gegrond is, maar dit is 'n beskouing wat die meriete* raak . . . Die (ASK) *mag tot 'n verkeerde besluit gekom het,* maar dit was nie omdat applikante se saak behoorlik verhoor was nie."[34]

(b) Die regter meen ook dat die feite sodanig was dat die ASK *rederlikerwys* tot die besluit gekom het dat die wydlopendheid van die voorstelle die ringlede kon verwar het:[35]

> "Dit synde so kan daar nie gesê word dat die Sinodale Kommissie se bevinding so *in botsing met die feite* is dat daar daarvan moet afgelei word dat die Kommissie in werklikheid nie 'n oordeel oor die feite gevel het nie."[36]

(c) T o v regl 1(12) bevind die regter dat die applikante gelyk gehad het en dat art 175(e) en nie regl 1(12) nie, stemming in tugsake gereël het.[37] Tog was hy van mening dat dit 'n kwessie van uitleg van die Kerkwette was en dat—

> "'n Verkeerde uitleg van die Kerkwette nie op sigself 'n grond vir hersiening [is] nie. Die uitleg van die wette berus by die (ge)regsinstansies van die Kerkgenootskap. *Die Howe sal inmeng as die uitleg nie* bona fide *geskied het nie, of as die bepalings van die Kerkwette nie oorweeg was nie, of as die wette op 'n wyse uitgelê was wat die genootskap se regsinstansie magte toeken wat die instansie in werklikheid nie toekom nie.* Die feit dat daar verkeerdelik besluit was beteken nie dat daar in kwaaie trou gehandel was nie . . .".[38]

(d) Die gronde vir die verwerping van die betoog t o v die tug wat op 16 September opgelê is (en wat nie in die appèl geopper is nie) word genoem, om kennis te neem van die hof se houding. Op die betoog dat die tug sodanig was dat "geen redelike man dit sou opgelê het nie", antwoord r Van Zijl:[39]

> "Waar 'n Hof gevra word om in te meng met die straf wat deur 'n huishoudelike regbank opgelê is op grond dat die straf onredelik was, kan die Hof nie sy diskresie in die plek van die diskresie van die huishoudelike regbank stel nie. Die Hof kan alleenlik inmeng *as die onredelikheid so grof is dat daar op 'n oorwig van waarskynlikheid gesê kan word dat by die strafoplegging die Ring* mala fides *of arbitrêr opgetree het* . . . *Claassens v Landdros Bloemfontein* 1964 4 SA 4 (O) . . ."

6 In die uittreksels uit die redes van die Kaapse hof kom wesenlik al die geskilpunte voor wat die aandag van die appèlhof geniet het.

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[34] 514A–B. My kursivering.
[35] 513H; 514F.
[36] My kursivering.
[37] 516E–517A.
[38] 515A. My kursivering.
[39] 522A–B. My kursivering.

Die besware teen die ASK gerig kan soos volg opgesom word:
Teen sy *regsbevindings:*

(i) sy siening dat die beslissing van 10 Mei eerder as die van 12 Mei die *crux* was;

(ii) sy vertolking of uitleg van die bepalings van die Kerkwet.

Verder, 'n *feitebevinding* (of die regs- en feitevraag):

(iii) of die voorstelle soos op 10 Mei wel die ring kon verwar het met die gevolg dat verwarring die neem van 'n behoorlike tugbesluit verhinder het.

En dan *addisioneel,* en weens (i),

(iv) of die ASK korrek opgetree het toe hy appellante nie aangehoor het nie. Wat (i) (ii) en (iii) betref was dit respondente se standpunt dat 'n burgerlike hof nie eers by hierdie vrae kan uitkom nie. Hierdeur is die hele vraag van die toelaatbaarheid en omvang van hersiening geopper.

7 Die appèlhof beslis met drie teen twee dat appellante gelyk gegee moet word.

Om te beweer dat daar 'n meerheidsratio is op die *vraag van inmenging* op regs- en feitebevindings is mi (ongelukkig!) egter nie korrek nie. My ontleding is soos volg:

Wn hr Van Blerk het hom met die redes van uitspraak en motivering van ar Jansen vereenselwig, en met die konklusies en bevele van lg en van ar Hofmeyr saamgestem. Ar Hofmeyr het hom aangesluit by die konklusies en bevele van ar Jansen maar was van oordeel dat die saak kort afgehandel kon word op die gronde dat die ASK die beginsels van natuurlike geregtigheid geskend het en appellant ernstig benadeel het deur sonder om die partye aan te hoor die beslissing van 10 Mei mero motu te opper.[40] Dit was trouens ook 'n grond wat deur ar Jansen genoem is.[41] 'n Meerheidsratio bestaan wel tov *audi alteram partem,* en daar is slegs twee uitsprake onder die meerderheid tav die vraag oor inmenging.

Aan die anderkant het beide die minderheidsregters (arr Botha en Muller) op wesenlik dieselfde gronde gemeen dat die appèl oor die inmengingsvraag van die hand gewys moet word. Ar Muller het verder beslis dat die beginsels van geregtigheid nie geskend was nie.[42]

Oor die hoofvraag soos weerspieël in besware (i) (ii) en (iii) is die hof dus gelyk verdeel. Die *Theron*-saak wys dus op 'n tweespalt in ons reg oor watter hersieningsgronde daar in die geval van diskresie of jurisdiksie bestaan. Dit maak die saak besonder aktueel.

DIE REDES

1 Dit wil voorkom of daar geen besondere moeite gedoen is om die presiese aard van die ASK as tribunaal of van sy handelinge te karakteriseer nie,

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[40] 46E.
[41] 29C–E.
[42] 44A–G.

soos Wiechers[43] bv voorstel. Ar Botha aanvaar dat dit 'n *kwasi-judisiële tribunaal* is;[44] ar Muller skyn voort te gaan op die basis dat dit 'n kerklike huishoudelike *hof* is[45] hoewel hy meermale eenvoudig van "tribunaal" praat; ar Jansen werk met *handelinge van 'n regsprekende aard* of 'n tribunaal van *suiwer regsprekende aard*.[46] Hierdie punt het lg klaarblyklik van belang geag.[47]

In die lig van die inleidende opmerkings en ook van die feit dat beide ons en die Engelse praktyk die begrip *judisieël* nie wetenskaplik beperkend uitlê nie[48] sou dit mi verkeerd wees om die toepaslikheid van die dicta tot regsprekende handelinge (vgl Wiechers hierbo) te beperk. Die beginsels wat bespreek is, is onteenseglik van toepassing ook waar dit 'n gemagtigde is wat 'n statutêr verleende diskresie uitoefen al is hy nie bv 'n tugtribunaal nie. Die toepassingsgebied kan egter wel soos volg beperk word: die gebied beslaan die gevalle waar 'n bevinding gemaak of 'n besluit geneem word wat die regte van die betrokkene nadelig kan raak. (So gesien sluit dit die gevalle in waar *audi alteram* van toepassing is). Of soos De Smith[49] dit stel t a v statutêr gemagtigdes in die Engelse regspraak:

> ". . . in (the context of certiorari) 'the term "judicial act" is used in contrast with purely ministerial acts'; and . . . *in general a judicial act was one which involved the exercise of some right or duty to decide a question affecting individual rights*".

Hierdie toepassingsgebied kom voor by beide liggame wat regterlike funksies uitoefen sowel as by statutêre liggame of gemagtigdes wat met 'n diskresionêre bevoegdheid beklee is. In beide gevalle kom daar 'n area voor, beter bekend as "die meriete" ten opsigte waarvan daar 'n eie verantwoordelikheid bestaan en wat inherent immuun is teen hersiening. Hieroor was die onderskeie regters in *Theron* dit eens.[50] Die vraag was egter hoe en waar die gebied afgebaken moes word.

2 Die uitgangspunt is natuurlik die funksie van die howe wat, soos daar aanvanklik op gewys is, die seggenskap het oor die kwessie van onregmatigheid of illegaliteit. Deur van hierdie standpunt uit te gaan, kan die redes bespreek word na aanleiding van die gerieflike indeling wat deur ar Jansen gemaak is.

(a) *Formele Maatstaf*.[51] Die vrae of 'n liggaam sy diskresie uitgeoefen het of na die *wyse* waarop die handeling tot stand gekom het kan en moet deur die hof gestel word. Hierteenoor slaan die vrae *hoe* die bevoegdheid uitgeoefen is of na die *inhoud* van die handeling op die meriete. Eersgenoemde is vrae wat jurisdiksionele feite raak, preliminêre of kollaterale kwessies, of vrae wat daarop gerig is om te bepaal of regs- of feitedwalings "na die jurisdiksie gegaan" het, ens.[52] (Die geleerde regter blyk egter nie gelukkig te wees met hierdie *jurisdiksie*-terminologie nie).

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[43] a w 95 ev; 127 ev.
[44] 11C.
[45] vgl 36 in fine.
[46] 20E 20H 21C–D 21G.
[47] Vgl 20B–D.
[48] bv De Smith a w 339.
[49] a w 339. My kursivering.
[50] 12F 13G 15C 34G 35D.
[51] 13G.
[52] 15C–F.

(b) *Uitgebreide Formele Maatstaf.*[53] Deur *meriete* of *jurisdiksie* nie te wyd op te neem nie, word 'n wyer gebied aan hersiening blootgestel. Bo en benewens die gebruiklike vrae wat tot die formele maatstaf behoort, is dit ook toelaatbaar en gebiedend om aan die gemeenregtelike vermoede teen onredelikheid en onbillikheid werking te verleen. Dit bring mee dat die hof ook om die regmatigheid al dan nie daarvan te bepaal, kan vra of die bevinding of besluit redelik was. Verder hou die uitgebreide maatstaf in dat die hof die finale seggenskap oor regsdwalings behou.

3 Die *formele maatstaf* wat die tradisionele benadering van ons positiewe reg weerspieël, vind uitdrukking in die hersieningsgronde deur bv Rose Innes[54] genoem. Dit sluit die bykomstige vrae uit wat deur die uitgebreide formele maatstaf toegelaat is, soos blyk uit die dikwels aangehaalde dictum in *Union Government v Union Steel Corporation*:[55]

> "There is no authority that I know of, and none has been cited, for the proposition that a court of law will interfere with the exercise of a discretion on the mere ground of unreasonableness. It is true the word is often used in the cases on the subject, but nowhere has it been held that unreasonableness is sufficient ground for interference; emphasis is always laid upon the necessity of the unreasonableness being so gross that something else can be inferred from it, either that it is 'inexplicable except on the assumption of *mala fides* or ulterior motive; . . . or that it amounts to proof that the person on whom the discretion is conferred, has not applied his mind to the matter . . ."

(Dit is miskien te laat om te vra of hierdie dictum werklik nodig was vir daardie beslissing, gesien die bevindings van ar De Villiers op 232 met wie ar Stratford op 236 saamgestem het. Die dictum volg op 'n veronderstelde situasie ("if . . ." – bl 236). Ook het die hof bevind dat daar nie sprake van 'n regsdwaling was nie.[56] Die dictum is egter as 'n beginselstelling bekragtig in sake soos *Administrator, Transvaal and The Firs Investments v Johannesburg City Council;*[57] *Johannesburg City Council v Administrator, Transvaal and Mayofis;*[58] *National Transport Commission and Another v Chetty's Motor Transport (Pty) Ltd.*[59]

Rose Innes[60] huldig ook hierdie standpunt. Ook uit wat hy oor regs- en feitedwalings in hoofstuk 14 sê dui aan dat hy teen 'n *uitgebreide formele maatstaf* gekant sou wees.

In *Theron* het die minderheid op grond van o a bo-aangehaalde gesag geweier om verder as die *formele maatstaf* te gaan.[61] Die beskouing was dat dit strydig met ons reg sou wees om dit te doen. Dit is egter interessant om daarop te let dat wat die *uitgebreide maatstaf* en veral onredelikheid betref, ar Botha, t o v die ASK se feitebevindings, sy eie oorwegings as "van blote akademiese belang" beskou het omdat hy dit met ar Muller eens was

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[53] 16B 20E.
[54] a w 8–9.
[55] 1928 AD 220 237.
[56] op 234.
[57] 1971 1 SA 56 A.
[58] 1971 1 SA 87 A.
[59] 1972 3 SA 726 A.
[60] a w 91–92 211–215.
[61] Vgl ar Muller op 34A–35B.

"dat die Sinodale Kommissie se bevinding . . . geensins onredelik was nie."[62]

T o v die erkende foutiewe interpretasie van die reglemente was sy houding dat

"waar 'n aangeleentheid aan die diskresie van 'n by wetsbepaling gemagtigde opgedra word, laasgenoemde se *bona fide* beslissing op die meriete daarvan finaal is, en 'n geregshof nie daarin kan ingryp nie, selfs nie op grond van 'n *bona fide* regsdwaling nie, behalwe waar die regsdwaling betrekking het op die gemagtigde se bevoegdheid".[63]

4 Die oorwegings wat ar Jansen gelei het tot 'n aanvaarding van die uitgebreide maatstaf is hoogs belangrik vir die ontwikkeling van ons administratiefreg. Veral wat betref die erkenning van die redelikheid as faktor word eerbiediglik in oorweging gegee dat die motivering suiwer is en dat sy uitspraak 'n mylpaal in ons reg is.

5 (a) *Redelikheid.* Die erkenning van die redelikheidsmaatstaf, of (om dit formeel te onderskei van die redelike man-toets in die deliktereg kan dit genoem word die *reasonable authority test*), word deur die geleerde appèlregter gestaaf deur 'n beroep op (i) die gemeenregtelike vermoede (ii) die huidige posisie in die Engelse reg en (iii) die aanwending (dikwels onbewus) van die maatstaf deur ons eie howe.

(i) *Die vermoede.* Op 15G–16B verklaar die geleerde appèlregter:

"By benadering van hierdie inherente probleem by toepassing van die formele maatstaf is dit egter belangrik om in gedagte te hou dat aanvaarding daarvan dat die verlening van 'n diskresie deur die wetgewer, ook verlening is van die bevoegdheid om op daardie terrein onredelik op te tree, strydig met die gemeenregtelike vermoede 'dat die wetgewer nie 'n onbillike, onregverdige, of onredelike resultaat beoog nie' sou wees (Steyn *Uitleg van Wette* 4de uitg bl 106). Op die onderhawige gebied bring hierdie vermoede, volgens *Steyn*, a g w, bl 245, mee 'dat ook by 'n statutêre magsverlening vermoed moet word dat die wetgewer nie die bevoegdheid tot onbillike, onregverdige of onredelike optrede of voorskrifte wou verleen nie'.

Dit sou beteken dat, tensy anders bepaal, die verleende bevoegdheid as deur die redelikheidsmaatstaf begrens beskou moet word, m a w dat onredelike optrede buite die bevoegdheid val. Elders (bl 254) wys die skrywer, na aanleiding van die onderskeiding tussen algemene en spesifieke bevoegdhede, op die volgende:

'Dit lyk veel meer redelik, en prinsipieel meer gesond, met die oog op die regsbeskermende funksie van ons howe wat veral by kwessies van onredelikheid onmisbaar is, om aan te neem dat die wetgewer in iedere geval waar hy 'n diskresie verleen, hoe beperk ook al, daardie diskresie verleen met die vermoedelike bedoeling dat dit nie op onbillike, onregverdige of onredelike wyse uitgeoefen sal word nie. Die blote feit dat die aard van die gemagtigde handeling nader omskryf word, kan nie voldoende wees om, vir sover daar nog 'n diskresie oorbly, hierdie vermoede te weerlê nie.'

In dié mate wat die toepassing van die formele maatstaf aan hierdie vermoede afdoen, is dit strydig met die grondbeginsels van ons gemene reg . . . Dit sou dus beter met ons eie reg strook om waar twyfel oor die bedoeling van die wetgewer kan bestaan, die formele maatstaf eerder uit te brei as eng toe te pas, m a w om in daardie geval die 'meriete' nie te breed op te neem nie."

Met bostaande motivering word heelhartig saamgestem. Die benadering

[62] 11–12.
[63] 12F.

ondersteun ook die sienswyse dat ons in werklikheid te doen het met 'n gemeenregtelike regsreël en nie net met 'n vermoede van uitleg nie.[64]

Dat *onredelik* hier verskil van die onredelikheid wat maar 'n *versamelnaam*[65] is vir die gronde wat binne die tradisionele beskouing of formele maatstaf val, is ook duidelik. Onredelikheid is m a w 'n selfstandige grond vir ongeldigheid en is reeds as sodanig aanvaar deur ar Schreiner in sy minderheidsuitspraak in *Sinovich v Hercules Municipal Council*[66] en bepleit deur sekere skrywers.[67] Sonder verdere bespreking kan daar ook gevra word of die redelikheidsmaatstaf wat in die geval van die sg verweer van statutêre magtiging aangewend word[68] nie op verdere steun vir ar Jansen se standpunt neerkom nie.

(ii) *Die Engelse Reg.* Die Engelsregtelike standpunt word weergegee deur De Smith,[69] volledig aangehaal deur ar Jansen.[70] Dié passasie het veral betrekking op die vermindering van die teësinnigheid om in te meng met die bevindings van 'n tribunaal – soos dit gestel word:

> "erosion of the proposition that an inferior tribunal has freedom to err within the ambit of its jurisdiction".

Daar sal dus meer geredelik bevind word dat 'n foutiewe bevinding "na die jurisdiksie gaan".

Meer betekenisvol egter, is die Engelse standpunt t o v die onredelike uitoefening van 'n diskresie.[71] Die vonnis waarom alles draai is *Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[72]. Die gedeelte waarop teenstanders van die redelikheidsmaatstaf staatmaak nl:

> "Theoretically it is true to say – and in practice it may operate in some cases – that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is right *but that would require overwhelming proof,* and in this case the facts do not come anywhere near such a thing."[73]

is nie alleen "words . . . extending far beyond their immediate context" nie, soos De Smith tereg opmerk nie, maar rym nie met ander gedeeltes van die uitspraak nie. Nadat hy daarop gewys het[74] dat onredelikheid in een sin wyd gebruik word (om bv gebrekkige aandagbesteding of absurditeit in te sluit), erken Lord Greene die ander en tweede betekenis nl die *reasonable authority* maatstaf (supra). Telkens beklemtoon die regter dat dit nie die hof se funksie is om te sê dat 'n bevoegde besluit verkeerd ("wrong") is omdat dit onredelik is nie[75] maar dit is duidelik dat hy dit hier het oor redelikheid in 'n

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[64]Wiechers a w 41 e v.
[65]Steyn a w 250.
[66]1946 AD 783 802.
[67]Steyn a w 255; Wiechers a w 254 e v; Van Aswegen 1974 *THRHR* 49.
[68]Kyk b v McKerron *Law of Delict* 7de uig 75–77.
[69]a w eerstens op 105–106.
[70]op 16D–G.
[71]De Smith a w 303 e v veral 308–311; ar Jansen op 17A.
[72]1947 2 All ER 680 CA.
[73]683E. My kursivering.
[74]682H–683A.
[75]683D.

derde sin nl reg of verkeerd op die meriete. Dit blyk uit Lord Greene se verwysing na "different views" en die "correctness of one view over another". Daar is die plaaslike owerheid die arbiter.[76]

Dit bly egter die hof se taak om te oordeel of daar met oorskryding van bevoegdhede gehandel is of nie. Hier kom redelikheid (in die tweede sin) ter sprake. So sê Lord Greene[77]:

> "I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether the condition imposed by the local authority is one which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose."

Laer af som die regter weer die beginsel op:[78]

> "Once that question (nl of ontoelaatbare faktore in ag geneem is) is answered in favour of the local authority, *it may still be possible to say that the local authority, nevertheless, has come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere.*"

Dit is mi baie duidelik dat die regter die bestaan van 'n redelikheidsmaatstaf naas die versamelnaam-maatstaf erken. Die vereiste tov die kwantum van bewys in die gewraakte gedeelte kan nie hier van toepassing wees nie omdat die normale bewysmaatstaf nl oorwig van waarskynlikhede, nie sy plek ontsê is nie. (Dit is egter miskien argumenteerbaar dat "overwhelming proof" vereis sou word indien daar gepoog word om dmv die "correctness of views"-maatstaf – of redelikheid in die derde sin – die *legaliteit* aan te val, want lg maatstaf het per se niks met legaliteit te doen nie).

Weliswaar het ar Ogilvie Thompson in *Fir's Investments*[79] na Lord Greene se *reasonable authority* toets verwys as "apt to be misleading" maar dit is omdat hy dit as onversoenbaar met die versamelnaam-redelikheid (wat hy in daardie saak toegepas het) beskou het. (Of die geleerde appèlregter korrek was om die uitgebreide redelikheidsmaatstaf in daardie geval uit te sluit, word vir die huidige daar gelaat).

Dit word respekvol in oorweging gegee dat ar Jansen in *Theron* tereg aanvaar het dat die huidige Engelse reg hom steun.

(iii) *Ons howe*. Met die stelling dat die geykte formulering van die redelikheidsmaatstaf (soos in *Union Steel*) ook nie sekere tersaaklike verwikkelings in ons regspraak voldoende openbaar nie[80] begin ar Jansen met die derde grond.

Hy onderskei tussen sake soos *Firs Investments* (supra) waarop die minderheid[81] gesteun het, waar dit gegaan het oor wye statutêr-verleende magte waarin doelmatigheids- of wenslikheidsoorwegings ter sprake was, en sake waar die tribunale "van 'n regsprekende aard" – soos die onderhawige –

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[76] 683F–G.
[77] op 684–685.
[78] 685C. My kursivering.
[79] supra 80F.
[80] op 17C.
[81] *Theron* 10–11.

was,[82] en beklemtoon dat weens die gemeenregtelike vermoede die dicta in eg sake,

> "streng tot die soort geval wat gedien het, beperk word".

Vanaf 17D toon die geleerde appèlregter aan dat in sake van lg soort, soos *SA Medical and Dental Council v McLoughlin;*[83] *Lipron v SA Medical and Dental Council*[84] en *Van Duyker v District Court Martial,*[85] die regters die (uitgebreide) redelikheidsmaatstaf toegepas het en dat die appèlhof nog nooit uitdruklik van dié sake afgewyk het nie. Laer af[86] vervolg ar Jansen:

> "Maar dit moet onthou word dat hierdie maatstaf (die 'uitgebreide formele maatstaf') nog nie voorheen pertinent bespreek is na aanleiding van kontraktuele tribunale nie en dat die maatstaf self eers met die *McLoughlin*-saak, supra, sterk na vore getree het".

Op hierdie drie gronde, dus, moes die (uitgebreide) redelikheidsmaatstaf toegepas word. (In casu word bevind dat daar geen getuienis was waarop redelikerwys tot die feitebevinding – nl dat die aard van die voorstelle of die stemprosedure die verwarring op die eerste vergadering kon veroorsaak het – gekom kon word nie.) Die verwarring het plaasgevind *nadat* gestem is.[87]

Terwyl gronde (i) en (ii) 'n wyer gebied as net kontraktuele tribunale gedek het, was (iii) oënskynlik daartoe beperk; dit was heelwaarskynlik alles wat nodig was vir die onderhawige saak en hiervan behoort mi nie afgelei te word dat hierdie redelikheidsmaatstaf nie buite die gebied van huishoudelike liggame toegepas moet word nie. Inteendeel, omdat die *beginsels* eweneens van toepassing is op beide kontaktuele en statutêre tribunale (soos hierbo aangedui) en omdat hulle ook die uitoefening van diskresie dek, beslaan die aanwendingsgebied ook alle gevalle waar regte deur die uitoefening van 'n bevoegdheid om te bevind of te besluit, geraak kan word (supra).

(b) *Regsdwaling*. Omdat—

> "by aanwending van die uitgebreide formele maatstaf die Hof *noodwendig* regtens korrekte maatstawwe sal moet toepas om die *facta probanda* te bepaal en om te oordeel wat in die bepaalde geval as 'getuienis' aangemerk kan word. (Dit is inherent in diè maatstaf – asook in die maatstaf of daar enige getuienis hoegenaamd is waarop tot die bevinding geraak kan word) . . . (sou dit) in 'n bepaalde geval kon meebring dat 'n statutêre liggaam as gevolg van 'n regsdwaling ten opsigte van die *facta probanda*, bv, as gevolg van die verkeerde betekenis aan 'n wetsbepaling te heg, sou kon ingryp."[88]

Met 'n beroep dus op die hof se plig om te kontroleer of daar darem 'n voldoende feite-basis is waarop 'n tribunaal se beslissing *redelikerwys* gegrond *kon wees*, motiveer die geleerde appèlregter dus die hof se bevoegdheid om in sekere gevalle te kom ingryp. (Dit dien daarop gelet te word dat dit

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[82] 20A–D.
[83] 1948 2 SA 355 (A).
[84] 1949 3 SA 277 (A).
[85] 1948 4 SA 691 (A).
[86] 21H.
[87] 30F–H.
[88] 20F–H; hakies aangebring. Vgl ook die dictum uit 'n Engelse saak aangehaal op 24E–G.

nie daarop neerkom dat die hof op die feite anders sou beslis het nie[89] en ook nie 'n kwessie van die vervanging van die liggaam se besluit "op die meriete" met dié van die hof nie).

Die vasstelling van die feite-basis impliseer noodwendig 'n vraag of die feite toelaatbaar is om in ag geneem te word. Dit kan miskien soos volg gestel word: 'n liggaam is verplig – hoe wyd sy oordeelsvryheid ookal mag wees – om bv aandag te skenk aan relevante oorwegings en om irrelevante oorwegings buite rekening te laat. (Dit word selfs in die minderheidstandpunt erken). Daar is dus 'n area van *toelaatbare feite*. 'n Foutiewe uitleg of regsbevinding kan meebring dat ontoelaatbare feite in ag geneem word. Dit word dus deel van die hof se plig om ook regsvrae in oënskou te neem.

Lg beteken mi nie dat in die geval van alle regsvrae ingemeng sal word nie (nóg beteken dit dat die bewysregtelike begrip van toelaatbaarheid hier ingevoer word); soos die hof dit stel: "in 'n bepaalde geval". Aan die anderkant, beteken dit ook nie dat ingryping beperk is slegs tot gevalle waar 'n gemagtigde persoon of liggaam weens 'n regsdwaling sy magte verkeerd verstaan het nie. Inmenging is ondergeskik aan die sentrale vraag of daar materiaal is waarop 'n besluit redelikerwys kon berus. Inmenging tov regsbevindings sal mi ook deur 'n ander vraag beïnvloed word nl of die betrokkenes deur die regsdwaling in hul regsposisie benadeel sou word.

Ar Jansen erken (met verwysing na sake soos *Administrator SWA v Jooste Lithium Myne (Edms) Bpk*)[90] dat die *klaarblyklike* bedoeling van die wetgewer egter kan wees om aan 'n tribunaal uitsluitende jurisdiksie oor 'n betrokke regsvraag te verleen, dat maw die *meriete* wyer strek.[91] In hierdie geval sal die omvang van die hof se bevoegdheid beperk wees. Die situasie word mi dan aanloog met die duidelike uitsluiting van die vermoede teen onredelikheid; 'n regsinstansie se finale seggenskap oor regskwessies word dan op soortgelyke wyse in 'n mate uitgesluit. Die regter konkludeer:

> "Of die regsvraag deel van die 'meriete' uitmaak, hang dus van die bepaalde wetgewing of en die beleid wat daaruit blyk. Dit skyn egter die geval te wees dat by handelinge van 'n statutêre liggaam van suiwer regsprekende aard, die uitgebreide formele maatstaf by hersiening toegepas moet word tensy uit die betrokke wetgewing 'n ander bedoeling blyk."[92]

In casu het die regter, net soos wn hr Van Blerk bevind dat die sinode of die ASK nie uitsluitende jurisdiksie besit het om die Kerkorde te interpreteer nie.[93] (Dit wil dan ook voorkom of die blote feit dat 'n huishoudelike liggaam sy eie tribunale geskep het nie per se die vermindering van 'n hof se seggenskap oor regskwessies uitsluit nie. Daar sal ook 'n duidelike uitsluiting moet wees).

Uit 5a en b blyk dit dus dat die uitgebreide formele maatstaf gemanifesteer deur die redelikheidsmaatstaf en deur die seggenskap oor regskwessies uiteindelik op die gemene reg in die een geval en op die howe se

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[89]20E–F.
[90]1955 1 SA 557 (A).
[91]20H–21B.
[92]21C.
[93]Vgl 29F.

funksie in die ander berus. Dit is maw stewig gegrondves. Gevolglik moet hierdie maatstaf altyd in beginsel toepassing vind *tensy* die wetgewer of die kontrakterende partye deur ooreenkoms duidelik anders bedoel het. Dit sal mi meebring dat in gevalle van twyfel die uitgebreide maatstaf voorrang sal geniet.

SLOTOPMERKINGS

Dit sal uit die voorgaande afgelei kan word dat die uitspraak van ar Jansen hartlik verwelkom word en wel omdat dit, met eerbied gesê, 'n voorwaartse stap in die uitbouing van die reg, veral tov diskresieuitoefening verteenwoordig.

Die verlening van diskresionêre bevoegdhede is, soos tereg deur Henning in sy ongepubliseerde proefskrif[94] opgemerk, nie slegs 'n noodsaaklike nie maar ook die vernaamste middel ter beskikking van die wetgewer in sy reëling van die gekompliseerde moderne administratiewe staat. Omdat die masjinerie van die staat in 'n snel ontwikkelende samelewing egter dreig om die reg in sy ordenings- en beskermingsfunksie ver agter te laat, word die uitdaging aan die reg gestel om die verhouding staat-onderdaan betekenisvol te reël. Dit geld veral die uitoefening van diskresionêre bevoegdheid wat die onderdaan se regte in gedrang stel.

Ons howe se aandrang in lg geval, op bv die nakoming van die *reëls van natuurlike geregtigheid* en op die vasstelling of 'n diskresie *werklik uitgeoefen* is[95] toon aan dat hulle daarop gesteld is om die uitdaging die hoof te bied. In sy uitspraak het ar Jansen egter getoon dat ons reg ook verder sal nagaan of die diskresie regtens *behoorlik uitgeoefen* is, en daardeur word substansie aan die dictum in *Britten and Others v Pope*[96] verleen:

> "Now it has been repeatedly laid down that where a matter has by law been left to the discretion of a public officer or body, and where that discretion *has been duly exercised,* and a decision arrived at, a court of law cannot interfere with the result on the merits."

Die een werklike beperking wat egter uit die uitspraak blyk is dat die formele maatstaf blykbaar alleenheerser is in die gevalle waar die verleende bevoegdheid die inagneming van doelmatigheids- of wenslikheidsoorwegings (soos openbare belang, openbare welsyn, ens) meebring.[97] Sonder om breedvoerig hierop in te gaan, kan hierdie uitsondering, soos respekvol ter oorweging gegee word, in die algemeenheid van sy stelling bevraagteken word. Die problematiek kan met die volgende vrae of stellings aangedui word:

(a) Waar 'n onderdaan se regte geraak kan word, sal die uitsondering ook geld?

(b) Beteken die verlening van 'n bevoegdheid om 'n onbepaalde regs- (of wets-) begrip te vertolk en op die feite toe te pas noodwendig dat die

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[94] *Oor die Begrip Diskresie in die SA Reg* UNISA 1967.
[95] Vgl ar Botha op 10B.
[96] 1916 AD 150 157. My kursivering.
[97] *Theron* 20B–D.

hof nie kan kontroleer of die vertolking en/of toepassing volgens die redelike owerheid-toets rederlikerwys (in die breë gesien) kan geskied nie?

(c) Het ons nie in lg geval ook met "elements of discretion" te doen nie?

(d) Indien die hof se kontrolebevoegdheid in geval (b) per se uitgesluit is, is die aanwending van frases soos "in the Minister's opinion" oorbodig, of is dit nie juis dmv sulke woorde dat die gemeenregtelike vermoede of hersieningsfunksie tov regsvrae duidelik uitgesluit word nie?

(e) Waar die bevoegdheid verleen word om wenslikheidsoorwegings ens in ag te neem, kan gesê word dat die diskresie *vry* is (in teenstelling met 'n sg *gebonde* diskresie). Is alle diskresies nie *per definitionem* vry nie? Of is daar 'n beginsel- en nie slegs 'n kwantumverskil tussen 'n *vrye* en 'n *gebonde* diskresie nie?

Hierdie vrae sal hopelik aandui dat die laaste woord oor regmatige diskresie-uitoefening nog nie gespreek is nie, maar hierdeur wil natuurlik nie te kenne gegee word dat daar nie in die *Theron*-saak hoogs belangrike ontwikkeling plaasgevind het nie. □

Die aard en omvang van die administratiewe proses en die moderne staat neig daartoe om die enkeling te oorweldig en hom, in plaas van hom te erken as burger, te degradeer tot blote leek. Die moderne tegnokrasie en burokrasie laat die enkeling verbluf en magteloos staan teenoor benadelende administratiewe ingryping in sy sfeer. Niks kan meer verblydend wees nie as die wete dat ons howe gereed staan om diskresionêre administratiewe optrede op die mees diepgaande en doeltreffende wyse te hersien en op hierdie wyse die administrasie op díe deur wetgewer en gemene reg gestelde weë te hou.

M Wiechers *Administratiefreg* 298

The Competence and Compellability of Spouses in Criminal Proceedings in South Africa

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OPSOMMING

Gades se onbevoegdheid om namens of teen mekaar te getuig, is afkomstig uit die Engelse "common law". Hierdie reël is in die 19de eeu dmv wetgewing uit die Engelse reg verwyder. Die posisie in Suid-Afrika, soos gereël deur artikels 226 en 227(1) van die Strafproseswet 56 van 1955 ingevolge waarvan die beskuldigde gade, behalwe vir 'n paar uitsonderingsgevalle die getuienis van die ander gade kan uitsluit, word bespreek.

Die redes vir hierdie reël word behandel en daar word aan die hand gedoen dat die bevoegdheid van 'n gade om vir die verdediging te getuig nie afhanklik behoort te wees van die "aansoek van die beskuldigde nie", maar dat die diskresie by die hof behoort te berus om sodanige getuienis uit te sluit waar dit tot benadeling van die beskuldigde sou lei en hierdie feit swaarder weeg as oorwegings soos bv die verdediging van 'n medebeskuldigde, die erns van die aanklag en die noodsaaklikheid van sodanige getuienis vir die regverdige beregting van die saak. 'n Gade wat bevoeg is, behoort ook verplig te wees om te getuig.

Die reël dat gades nie teen mekaar mag getuig nie, berus op die idee van die eenheid van eggenotes en die gedagte dat die huwelik as instelling onaantasbaar behoort te wees. Die skrywer betoog dat 'n gade wat bereid is om teen die ander te getuig, toegelaat moet word om dit te doen en dat so 'n reëling nie noodwendig die huwelik as instelling sal bedreig nie.

Vervolgens word die beskerming van vertroulike mededelings tussen gades bespreek met verwysing na die Engelse beslissing van *Rumping v DPP* [1962] 3 ALL ER 256, en die vraag word gestel of sodanige verklarings ingevolge die "common law" reël deur derdes wat dit gehoor het, openbaar gemaak kan word. Artikel 229(1) van die Strafproseswet verseker egter net beskerming van die gade aan wie die mededeling gemaak is en nie van die gade deur wie die mededeling gemaak is nie. Dit is in direkte teenstelling met a 232 wat getuienis oor mededeling van 'n kliënt aan sy regsadviseur afhanklik maak van die kliënt se toestemming. Wysiging van hierdie artikel word voorgestel en wel om die gade wat die mededelings gemaak het te beskerm. Of die mededelings vertroulik was al dan nie, sal van die omstandighede van elke saak afhang.

The general rule in our law is that every person not expressly excluded by the Criminal Procedure Act[1] from giving evidence, is competent and

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[1] s 223. S 212(1) of the same act provides that the court may enquire into the failure or refusal of a witness to testify when required to do so and may sentence a recalcitrant witness to up to 12 months imprisonment except where such witness has a just excuse.

compellable to give evidence in any criminal proceedings. This rule stands in marked contrast to the numerous and diverse rules of disqualification (on account of pecuniary interest, infamy, affinity and bias) which prevailed in the English courts until the middle of the last century.[2] It is based on the principle that our courts have unfettered access to all evidence which might assist them in ascertaining the truth. Only a principle greater than this could justify either the disqualification of a witness or a right to refuse to testify.[3]

One such principle has always been that the duty to testify should in no way endanger or disrupt the institution of marriage. The English common law and, subsequently, statute law has always reflected to a greater or lesser degree an abhorrence for the spectacle of one spouse incriminating the other and has shown a readiness to dispense with relevant evidence rather then rupture marital equanimity. Likewise the South African law of evidence generally excludes the competence of one spouse to incriminate the other in criminal proceedings.[4] While not disputing the significance of marriage for communal life and the interest which society has in the protection of that institution, the writer nevertheless, is of the opinion that those provisions of the Criminal Procedure Act relating to the competence and compellability of spouse witnesses[5] are in need of reappraisal.

Sir Edward Coke in his *Commentarie on Littleton* (1628) 6(b) wrote that "[i]t hath been resolved by the justices that a wife cannot be produced

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An excuse, to be just, must relate either to the physical or mental condition of the witness, in which event the court will investigate its sufficiency, or to some common or statutory law provision which relieves the witness of the duty to testify. See the judgment of Rumpff JA as he then was, in *S v Heyman and another* 1966 4 SA 598 (A). See also *S v Pogrund* 1961 3 SA 868 (T); *S v Govender and others* 1967 2 SA 121 (N); *S v Ntanjana* 1972 4 SA 635 (E).

[2]Wigmore *On Evidence* (3rd ed) II § 576.

[3]The following passage from Wigmore *On Evidence* VIII § 2192(3) was quoted with approval by Rumpff JA in *Heyman's* case (supra) at p 610: "It follows, on the one hand, that *all privileges of exemption from this duty are exceptional,* and are therefore to be discountenanced. There must be good reason, plainly shown, for their existence. In the interest of developing scientifically the details of the various recognised privileges, judges and lawyers are apt to forget this exceptional nature. The presumption against their extension is not observed in spirit. The trend of the day is to expand them as if they were large and fundamental principles, worthy of pursuit into the remotest of analogies. This attitude is an unwholesome one. The investigation of truth and the enforcement of testimonial duty demand the restriction, and not the expansion, of these privileges. They should be recognised only within the narrowest of limits required by principle. Every step beyond these limits helps to provide, without any real necessity, an obstacle to the administration of justice." (my italics.)

[4]The residuary s 292 of the Criminal Procedure Act, 56 of 1955 provides that in those cases "not expressly provided for" in the act or any other law, the law as to the competency of witnesses in force in respect of criminal proceedings on the thirtieth day of May 1961 shall apply. It was decided in *Ex parte Minister of Justice: In Re Rex v Demingo* 1951 1 SA 36 (A) at 40E that Act 31 of 1917 (now Act 56 of 1955) did not fully provide for the incompetence of witnesses and that the English rules were therefore applicable in terms of s 360 (now s 292). See LH Hoffmann *The South African Law of Evidence* (2nd ed 1970) 14.

[5]Herman Cohen in *Spouse Witnesses in Criminal Cases* (Stevens and Haynes London 1913) 5 uses the phrase *spouse-witness* "to express a witness whose wife or husband is a party to a legal proceeding, though the practical necessity for such a term is confined to the case where the defendant in a criminal case is the husband or the wife of the witness."

either for or against her husband-*quia sunt duae animae in carne una*." This latter justification for the resolve of the justices has been dismissed as a piece of mediaeval scholasticism.[6] Be that as it may, it would seem that at an early stage the marital disqualification to testify *for* a spouse and the rule that spouses cannot testify *against* each other, were fused in judicial pronouncements, into the general rule that spouses could testify neither for nor against each other.[7]

Whatever the propriety of such fusion, an analysis of the general rule must, at the outset, take cognisance of its dichotomous origin; for the rule that spouses may not testify for each other was based on considerations different to those for the rule that they may not testify against each other.

THE DISQUALIFICATION TO TESTIFY FOR EACH OTHER

The incompetence of spouses to testify for each other was one of a number of testimonial disqualifications at English common law. The arbitrary exclusion of evidence emanating from certain classes of persons is perhaps best described as a precautionary exception of evidence based on the likelihood (on account of pecuniary interest in the outcome of the action, bias, infamy, infancy etc) that the prospective witness might perjure him or herself.[8] As Chief Baron Gilbert wrote in 1727:[9]

> "Some, indeed, are incapable of being biased even latently by the greatest interest; many would betray the most solemn obligation and public confidence for an interest very inconsiderable. An universal exclusion, where no line short of this could have been drawn, preserves infirmity from a snare, and integrity from suspicion; and keeps the current of evidence, thus far at least, clear and uninfected".

This fallacy was the object of scathing criticism[10] and by the mid-nineteenth century the English legislature was busy relegating considerations of interest and bias to their proper place in the law of evidence as factors relating to the weight of the evidence rather than its admissibility.[11] However the legislature tread warily in respect of the common law disqualification by marital relationship and was initially constrained to entrench rather

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[6]Wigmore *On Evidence* II § 601.

[7]Wigmore (op cit VIII § 2227) is of the opinion that the rule that one spouse may not testify against the other, preceded in time, the disqualification to testify for each other and substantiates this proposition by reference to the early English case of *Bent v Allot & Colston* Cary 135 (31 ER 50). See *Rumping v DPP* (1962) 3 All ER 256, especially the cases mentioned in the opinion of Viscount Radcliffe at 262, and the 1955-65 *Stanford Law Review* 420 n 4.

[8]Wigmore *On Evidence* II § 576, particularly the extract from the second report of the English common law practice commission 1853 quoted at 689.

[9]*Evidence* 119 (Loft's ed 223) quoted by Wigmore II § 576 at 686.

[10]See Jeremy Bentham's *Rationale of Judicial Evidence* b IX part III c III quoted by Wigmore II at 687.

[11]Wigmore (§ 488) lists fully the English statutes in this regard. These legislative changes were characterised by the desire that fuller information be placed before the courts and that unnecessarily restrictive disqualifications be eliminated – see the preamble to Lord Denman's Act 1843 (6 & 7 Vict c 85) (Wigmore II 525).

than retrench it.[12] This reluctance, initially, to confer competence on spouse witnesses, at least to testify for each other, would seem to indicate that the sole reason for the rule was not the mendacity producing affinity, affection and partisanship which flows from marriage.[13] Sargent J in *Kelly v Proctor*[14] expressed the view—

> "...[t]hat the true reason why a wife should not be allowed to testify either for or against her husband at common law has always been a sort of compound reason, founded partly in interest, to be sure, and the identity of the persons, but partly also upon conditions of public policy ... We think that considerations of public policy – the fear of sowing dissensions between man and wife, and of occasioning perjury ... are equally satisfactory reasons why they should not be allowed to testify in each other's favour". In other words, where one spouse is competent to testify for the other such competence itself might rupture the marital bliss to the extent that the party spouse might wish the witness spouse to abuse such competence to his (the party spouse's) favour. However, as Wigmore points out, such a policy consideration deprives honest causes of upright testimony for the sake of preventing dishonest causes from using false testimony."[15]

A further reason advanced for the marital disqualification was that a witness ostensibly testifying in his or her spouse's favour may during cross-examination have to concede facts disadvantageous to the cause of the party spouse thereby jeopardising the marital relationship. In this regard the English common law practice commission of 1853 reported as follows:

> "Should any fact be thus brought to light which would otherwise have remained unproved, the interests of truth will be thereby promoted and any transient interruption of conjugal harmony from such a circumstance, or from disappointment occasioned by the evidence falling short of what was expected, would be a trifling evil compared to the mischief which must result from the exclusion of testimony essential to the ends of justice and truth."[16]

Whatever the true reasons for the disqualification may have been, it was

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[12]Lord Denman's Act (supra n 11) contained the following proviso: provided that this shall not render competent "any party to any suit," "or the husband or wife of such persons." (Wigmore II 525).

[13]This is even more apparent when one considers that at English common law the rule did not extend to other familial relationships where the temptation to perjury must logically have been as great. Such an illogical restriction of disqualification was not to be found in the Roman or Ecclesiastical law which recognised a much wider disqualification based not solely on marital but on familial ties (see *D* 22 5 4). It would seem that in Voet's time the Norman laws excluding many persons from giving evidence on the ground of race, religion, relationship, occupation or status had been largely relaxed. See the translator's note to 22 5 of the *Selective Voet being the Commentary on the Pandects* translated by Percival Gane (Butterworth 1956). By the same token the right to refuse to testify contained in s 52(1) of the German Criminal Procedure Code (*Zeugnisverweigerungsrecht*) is extended not only to the wife of the accused but to his fiancee and a number of close relatives either by marriage or consanguinity. See also Huber's *Jurisprudence of my Time* (Gane's translation) 2 27 28, the reasons for the disqualificatiou set out in the second report of the English common law practice commission quoted by Wigmore II § 601, and the reference to the *King v Inhabitants of Cliviger* 100 ER 143 by Cross in 1961 *MLR* 32 36 n 16. S 13 of Ord 72 of 1830 (Cape) expressly stated that no person shall be incompetent to give evidence for or against a relation either by consanguinity or affinity.

[14]41 NH 139 142 quoted by Wigmore II § 601(4).

[15]Wigmore *On Evidence* II § 601. See also *Stapleton v Crofts* (1852) 18 QB 367 377 (118 ER 137).

[16]Quoted by Wigmore II § 601.

statutorily excised from the English law during the latter half of the nineteenth century.[17] Relief came much earlier in civil proceedings and it was only in 1898 that the Criminal Evidence Act[18] secured the competence of spouse witnesses for the defence at every stage of the proceedings. Once the accused was made a competent witness for the defence no logical reason could remain for excluding his spouse.

In South Africa by section 227(1) of the Criminal Procedure Act 56 of 1955—

> "the wife of husband (as the case may be) of every accused, shall be a competent witness for the defence at every stage of the proceedings, whether the accused is charged solely or jointly with any other person:[19] provided that–
>
> (a) . . . .
>
> (b) the wife or husband of an accused shall not be called as a witness for the defence, except upon the application of the accused."

The spouse witness is therefore divested of any incompetence on account of interest or bias, but the competence to testify, which the section confers, is conditional according to whether the accused is inclined to consent to such testimony or not. The disqualification of the common law is now a privilege to exclude spouse evidence for the defence and this right is conferred by sub-section (b) on the accused. The creation of such a privilege vested in the accused spouse reserves to him or her the right to exclude the evidence for whatever reason he or she might have. One can only surmise as to what might persuade an accused that his wife should not testify in his favour but the legislature had in mind, no doubt, when it created the privilege at least one of the reasons given for the English common law disqualification.[20] The English common law practice commissioners reported as follows:[21]

> "It seems difficult to assign any reason why the law should be more tender of the domestic happiness of married persons than they are themselves disposed to be; the only danger that can be suggested is, that evidence might be extracted from the witness, by the adverse party, prejudicial to the interest of the married plaintiff or defendant, and that some bitterness of feeling might arise in consequence; but of the probability of such a result the married couple are themselves the best judges."

Perhaps the legislature had this latter observation in mind when it enacted that a spouse witness for the defence was only to be called on the application

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[17]See Wigmore *On Evidence* § II 488.

[18]1898 (61 & 62 Vict c 36). In this regard s 6 of Act 13 of 1886 (Cape) provided: "In any proceeding against any person for any crime or offence, such person and the wife or husband as the case may be, of such person may, if such person thinks fit, be called, sworn, examined and cross-examined as an ordinary witness in the case." Cf s 14 of Ord 72 of 1830 (C).

[19]At English common law where the spouse of a witness was charged jointly with another, then the witness could testify for neither as their interests were joint. The witness might ostensibly be testifying for the non-spouse accused but such testimony would be for the benefit of both. See the appendix to Cohen "*Spouse Witnesses in Criminal Cases*". The relevant provisions of s 227 are substantially the same as those of s 1 and sub-s 1(a) of the English Criminal Evidence Act of 1898.

[20]Wigmore *On Evidence* II § 601.

[21]Quoted by Wigmore II § 601.

of the spouse accused. However the risk of the wine turning to vinegar is a consideration to be taken into account by the defence in calling any witness, and not only the spouse of the accused. Should the accused decide to take that risk, and the evidence turn out to be unfavourable, then the proviso contained in sub-section (b) will not exclude possible marital dissension. It is difficult to imagine any defence witness being called except upon the application of the accused (or his legal representative). Thus where the accused is charged solely the only purpose of the proviso would be to prevent the court from calling the spouse witness in terms of s 210 of the Criminal Procedure Act. Section 210 empowers the court to examine any person if his evidence appears to it essential to the just decision of the case. In *R v Jamba*[22] the accused suggested during the course of her evidence that her husband had inflicted the fatal blow and denied that she had administered the blow. The court held that it could not call her spouse without the consent of the accused[23] even where such evidence was essential to a just decision of the case and the court would have deemed it necessary to call such witness had he or she been anyone other than the spouse of the accused. The effect of the privilege, as illustrated by *Jamba's* case, is therefore to prevent the court from calling evidence necessary to a just decision of the case, and in a situation where no policy consideration remains to justify its exclusion. Where the accused, in the course of giving evidence, has incriminated his or her spouse no public interest remains that that particular marriage be protected from the one spouse confirming or denying the allegation of the other.

Where the evidence of the spouse witness is relevant not only to the defence of the accused spouse but also to that of his co-accused, then the impropriety of regarding the spouse accused as "the best judge" is even more apparent, for what may be dispensable in his own defence may be indispensable in that of his co-accused. Should the spouse accused nevertheless be entitled to exclude the evidence of his spouse for whatever reason might be present to his mind and thereby materially prejudice the defence of his co-accused? Is this not also an instance where public policy, concerned to protect marriage from dissension which might flow even from favourable testimony, should yield to the essential requirements of justice and truth?[24] As the law stands the exclusionary power of the spouse accused is absolute and there is no provision for any judicial assessment of his reasons for

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[22]1947 4 SA 228 (C).

[23]In terms of the overriding provisions of s 264 of Act 31 of 1917 (now s 227 of Act 56 of 1955).

[24]Cohen (in the appendix to "*Spouse Witnesses in Criminal Cases*) comments on the common law in this regard as follows: "The mere fact that A's refusing to call his wife might deprive B of his sole or sufficient defence would not, so to say, have weighed with the common law, for, in the matter of spouse-witnesses, it has always avowedly overridden every other consideration, at any rate as regards third persons, in favour of that which it held the most sacred. Now, there is a very strong presumption that if A does not call his wife, it is because her testimony will hurt his case.
But there must be cases in which this will not be so and, in some of these, A (suppose out of spite to B) may still refuse to apply for her as a witness. If the rule . . ., was that one defendant might call another's wife but she should not be at liberty to give any evidence whatever touching her husband, the latter would be amply safe-guarded and his co-defendant would get the benefit of his testimony."

excluding his spouse's evidence in terms of sub-section (b), even where in so doing he is depriving his co-accused of evidence vital to his defence. Admittedly one could argue that the co-accused would then have a good case for a separation of trials; but would the interests of justice not be better served if the discretion whether to allow the spouse witness to testify on behalf of the other spouse or his co-accused were vested in the court? The spouse accused would then be free to make representations as to why his spouse should not be allowed to testify, and it would remain for the court to weigh up the demands of policy and the interests of the proper administration of justice in any particular case. This would ensure that the evidence is not excluded simply because the spouse accused is indifferent to the defence of his co-accused or because of some fanciful or personal consideration entirely divorced from legitimate policy considerations. One might argue that having to disclose that he wishes that his wife's evidence be excluded because such evidence will be against him would prejudice the accused. But would the effect not be the same where the accused excludes the evidence of his spouse without giving any reason?[25] At least by insisting on an explanation the court would know whether the reason is an innocuous one or not. Such judicial control would also introduce flexibility whereby the court could take into account the seriousness of the offence with which the spouse accused, or his co-accused, is charged. In the case of less serious offences, or where other evidence is forthcoming, the court might feel constrained to sacrifice the evidence. A discretion in the hands of the court would also mean that the court could call the spouse of the accused in terms of section 210 where such evidence appeared to be essential to a just decision of the case.

For the above reasons it is submitted that the competence of spouse witnesses for the defence should not depend on the "application of the accused"; but that the court exercise its discretion to exclude such evidence where it legitimately prejudices the spouse accused, and such prejudice outweighs other considerations such as the defence of a co-accused, the seriousness of the charge and the necessity of the evidence for a just decision in the case.

A further problem which arises in connection with section 227 is whether, once the accused has applied that his spouse be called as a witness for the defence, such spouse may be compelled to testify. The section describes the wife or husband of the accused as being competent for the defence but is silent on the question of compellability. Similarly section 1 of the Criminal Evidence Act (1898) in England refers to competence only.[26] The approach of the English courts has been, in this regard, that where an act of parliament purports to change the existing law it must do so specifically and leave nothing to inference; so where the spouse witness was incompetent at common law, and therefore not compellable, any statute conferring com-

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[25]ibid.

[26]The section provides as follows: "Every person charged with an offence, and the wife or husband, as the case may be, of the person so charged, shall be a competent witness for the defence at every stage of the proceedings, whether the person so charged is charged solely or jointly with any other person."

petence on such a spouse does not also by inference confer compellability.[27] Where however a statute simply confirms the competence of a witness, who was already competent and compellable at common law, then such a witness is also compellable.[28] The argument that s 227 does not make the spouse witness compellable is all the more forceful in the light of the fact that s 226 (which regulates the situation where one spouse testifies against the other) confers competence and compellability in certain cases and distinguishes the latter from those cases where the spouse witness is competent only.[29]

There is no reason in principle of policy why a spouse witness competent to testify for the defence in terms of s 227 should not also be compellable. Where the accused is charged solely, and he calls his spouse on his behalf but she is unwilling to testify, is there at that stage in the proceedings any policy reason why she should not be compelled to testify? Already there is a difference of opinion and any policy consideration aimed at preserving matrimonial harmony must be ineffective and, what is more, might have the undesirable side effect of excluding evidence vital to the defence. This is particularly so where the charge against the accused is one in which the spouse would be a competent and compellable witness for the prosecution in terms of s 226.[30] This would also mean that where the spouse accused is charged jointly, his co-accused would be able to compel the spouse to testify on his behalf, as he would had the trials been separated. This would have the added advantage of bringing s 227 into line with the general rule in our law that competent witnesses are also compellable.[31] In the light of the English decisions and the wording of s 226, it would seem compellability will only be achieved where the section confers it explicitly.[32]

THE DISQUALIFICATION TO TESTIFY AGAINST EACH OTHER

Section 226 of the Criminal Procedure Act prescribes those cases in which the husband or wife of an accused person is competent and compellable to give evidence for the prosecution, contrary to the general rule that

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[27]*Leach v R* (1912) AC 305 311; *R v Boal* (1965) 1 QB 402 416, also in (1965) 2 All ER 269 275 I. Cohen op cit 20. In Leach's case the court rejected the argument that because at common law a competent witness is also a compellable one, where competence is conferred by statute, then according to the common law such a witness is also compellable.

[28]*King v Lapworth* (1931) 1 KB 117 122 – Avory J held as follows: "[I]f the known state of the law is such as to confer competence without a statute, then compellability follows as a matter of course from that fact." This case involved an exception to the rule that spouses may not testify against each other based on necessity. The exception existed at common law and was confirmed in the legislation.

[29]See L H Hoffman 273. S 1 of Law 37 of 1888 (Natal) provided that spouse witnesses "shall be competent but not compellable."

[30]See s 4 of the English Criminal Evidence Act 1898 (61 & 62 Vict c 36) (reproduced by Wigmore II 526). This section reads: "for the prosecution *or defence*" (my italics). Cf s 226 of Act 56 of 1955.

[31]See s 223 of Act 56 of 1955.

[32]See 1955/56 *Stanford Law Review* 420 435 n 100 where the writer states that in eighteen American states the "For" privilege in both criminal and civil proceedings has been completely abolished.

spouses may not testify against each other. These include not only the English common law exception where one spouse is prosecuted for an offence against the person of the other, but also offences under chapter III of the Children's Act, 33 of 1960, committed in respect of any of the children of either of the spouses, bigamy, incest, abduction, contraventions of certain specified sections of the Immorality Act, 23 of 1957, and the Maintenance Act, 23 of 1963, and, in certain circumstances, charges of perjury and the statutory offence of making a false statement in any affidavit or solemn or attested declaration. Sub-section (2) of the same section confers competence only, where the spouse accused is prosecuted for an offence against the separate property of the wife or husband or for any offence under section 16 of the Immorality Act. At the outset, it would seem that the purpose of section 226 is simply to augment the list of exceptions to the general rule at English common law[33] without altering the general rule itself. This is not, however, immediately apparent on reading the section, for it declares the spouse witness to be competent and compellable to give evidence for the prosecution "without the consent of the accused". Does this mean that where an accused consents to his spouse testifying against him then such witness is a competent witness for the prosecution?

Section 263(1) of Act 31 of 1917 (the predecessor to Act 56 of 1955) was identically worded and section 12 of Proclamation 16 of 1902 (Transvaal) reads as follows:

> "The wife or husband of the person charged is competent and compellable to give evidence either for the prosecution or defence, and *without the consent of the person charged*, where such person is prosecuted for any offence against the person or separate property of the wife or husband of such person."[34]

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[33]It may well be argued that the list of exceptions contained in s 226 is exhaustive for not only does it contain exceptions additional to those known to the common law but includes the most important common law exception viz where one spouse is prosecuted for and offence against the person of the other. However in the light of the decision in *Ex Parte Minister of Justice: Re R v Demingo* 1951 1 SA 36 (A) it would seem that s 226 supplements s 292. Cohen op cit 23 sets out the common law exceptions as follows (quoting from Archbold Cr Pl (24th ed) 464):

"(a) In cases of high treason. But this is very doubtful.
(b) When the husband is indicted for personal injury to the wife, or vice versa.
(c) On an indictment for forcible abduction and marriage the wife is a competent witness against the husband, even though the marriage is valid, or if voidable, has not been annulled. This rule is based by some on the view that the marriage, being under coercion, is null; by others on the view that the force used is a personal wrong to the wife.
(d) On an indictment for bigamy the second wife is a competent witness on the first marriage being proved. But this is only an apparent exception."

[34]No reference was made to the consent of the accused in s 1 of Ordinance No 21 of 1904 (T) which rendered the wife or husband of the accused a competent and compellable witness for the prosecution on a charge of bigamy. Similarly s 15 of Ordinance 72 of 1830 (C) omits any reference to the consent of the accused. S 6 of Act 13 of 1886 (C) was framed in very wide terms declaring the accused person or the husband or wife of such person capable of being called, sworn, examined, and cross-examined as an ordinary witness in the case "if such person thinks fit"; no doubt the legislature was thinking of evidence for the defence but provided the accused consented there seems no reason why the spouse could not be called for the prosecution. S 4(1) of the English Criminal Evidence Act 1898 (61 & 62 Vict c 36) reads however: "The wife or husband of a person charged with an offence under any indictment mentioned in the schedule of this Act

Section 4 of the English Criminal Evidence Act of 1898 (the section is reproduced in note 34) also refers to the consent of the person charged. Sub-section (2) of section 4 purports to preserve the common law exceptions to the general rule in the following terms:

> "Nothing in this Act shall affect a case where the wife or husband of a person charged with an offence may at common law be called as a witness *without the consent of that person*." (My italics.)

The sub-section is misleading for it infers that at common law the acquiescence or disapproval of the accused was a factor to be taken into account in determining whether the spouse of the accused could testify for the prosecution, an inference which is not supported by the cases.[35] The South African courts have attached scant weight to the words "without the consent of the accused" and have not interpreted the section as altering the English Common law rule that spouses are incompetent ipso iure to testify against each other.[36] In *R v Mpenza*[37] Hoexter J in declaring the spouse

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may be called as a witness either for the prosecution or the defence and *without the consent of the person charged*" (my italics).

[35]In *Shenton v Tyler* (1939) 1 All ER 827 831 Sir Wilfred Greene MR commented as follows when referring to the rule of the English common law that one spouse may not testify against the other: "The third rule is the rule that existed at common law that a spouse was not a competent witness against his or her spouse. I say competent advisedly, since the English authorities appear to have excluded the evidence in such a case on the ground that the witness was incompetent, and not on that of privilege". In *Monroe v Twistleton* (1802) Peake Add Cas 219 (170 ER 250) it was held: "It is true a wife cannot, while she remains so, be a witness either for or against her husband: not for him, because she has an interest to support his cause; nor against him, because the policy of marriage is to create a unity of interest and affection. When two persons are placed in the situation of man and wife, the law precludes every inquiry from either which might break in on the comfort and happiness of the married state, and therefore it will not suffer one to give evidence which may affect the other, because such evidence might as Lord Hale expresses it, 'create implacable quarrels and dissensions between them'." Tindall CJ, following *Monroe v Twistleton* in *O'Connor v Marjoribanks* (1842) 4 Man & G 435 (134 ER 179 182) was emphatic "[T]hat a wife never can be admitted as a witness either for or against her husband; she cannot be a witness for him, because her interest is precisely identical with his; nor against him on grounds of public policy, because the admission of such evidence would lead to dissension and unhappiness, and possibly to perjury". Maule J in the same case held: "and so the policy of the law (in order to ensure conjugal confidence) has laid down a definite rule, that, in no case, shall husband and wife be allowed to give evidence for or against each other." Likewise in *Rumping v DPP* (1962) 3 All ER 256 Lord Reid at 258 was of opinion that "Before the enactment of a series of statutes beginning in 1851 it had been a long standing rule that no party to a civil action, no accused person, and no husband or wife of such a party or person could give evidence at all." At 261 Viscount Radcliffe considered the policy of the exlusionary rule at English common law and at 261F he refers to the rule as a "disqualification" which would suggest that as a matter of law one spouse was precluded from testifying against the other irrespective of their consent or otherwise. See also the judgment of Pickford J in *DPP v Blady* (1912) 2 KB 89 90. Wigmore (VIII § 2227) refers to the rule as a "privilege" but as the above cases illustrate, this was not so in the English common law.

[36]*R v Bonthuys* 1922 TPD 446; *R v Kahn* 1928 CPD 328; *R v M* 1939 NPD 210; *R v Izaks* 1936 2 PH H 159 *Dhlamini and Butelezi v R* 1943 NPD 312; *R v Zuco* 1944 NPD 7. See also *R v Herlihy* 1910 WLD 33 decided in accordance with s 12 of Proclamation 16 of 1902 (T). Gardiner and Lansdown (6th ed) vol 1 507 state the law as follows: "in no other cases than those enumerated supra (the exceptions to the general rule) may the husband or wife of an accused person give evidence for the prosecution."

[37]1946 EDL 38 39.

evidence inadmissible, included in his judgment a reference to the following note made by the magistrate on the record of the proceedings in the court a quo: "Court refers to s 263 of Act 31 of 1917 – Witness duly warned – Mr Attorney McIntyre, on behalf of the accused, raises no objection to her giving evidence in the case". In *R v Bonthuys*[38] the evidence of the spouse was tendered solely for the purpose of proving the commission of the offence in terms of section 286 of Act 31 of 1917 (the accused had pleaded guilty). In ruling that the evidence was inadmissible, the court does not appear to have considered whether the accused, despite his plea of guilty, was averse to his spouse testifying or not.

The history of the rule that one spouse may not testify *against* the other is obscure, save that it would appear to have existed before the disqualification of spouses to testify on behalf of each other.[39] The rule was variously justified through the ages on the basis of the civil unity of the persons of husband and wife[40]; because to allow otherwise would be contrary to the legal policy of marriage[41] and to preserve the peace of families.[42] On considering the policy of the rule Wigmore[43] comments as follows:

> "The record of judicial ratiocination defining the grounds and policy of this privilege forms one of the most curious and entertaining chapters of the law of evidence. It is curious because the variety of ingenuity displayed, in the invention of reasons 'ex post facto' for a rule so simple and so long accepted, could hardly have been believed but for the recorded utterances. It is entertaining (if any error in the law can ever be entertaining) because of its exhibition of the subtle power of cant over reason and of the solemn absurdity of explanations which do not explain and of justifications which do not justify. We behold the fantastic spectacle of a fundamental rule of evidence, which had only questionable reasons for existence, surviving nonetheless through two centuries upon the strength of certain artificial dogmas – pronouncements wholly unreconcilable with each other, with the facts of life and with the rule itself, and yet repeatedly invoked, with smug judicial positiveness, like magic formulas to still the spector of forensic doubt."

Whatever the policy considerations behind the rule, they are invariably based on the sanctity of the ideal marriage, a concept which conjured up in the minds of men notions of spiritual unity and marital harmony which should, in the interests of society, remain inviolate. The marriage ideal, detached from reality, is placed on a pedestal to the exclusion of the spouse evidence, irrespective of the present state of the marital relationship in ques-

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[38]See n 4.

[39]Wigmore *On Evidence* VIII § 2227, *Bent v Allot* supra.

[40]per Hale LCJ 2 *History of the Pleas of the Crown* 279 (Emlyn ed 1736) quoted by Wigmore VIII § 2228. See also Blackstone, 1 *Commentaries* 431 (1765): "If they were admitted to be witnesses *for* each other, they would contradict one maxim of the law, 'Nemo in propria causa testis esse debet'; and if *against* each other, they would contradict another maxim, 'Nemo tenetur se ipsum accusare'."

[41]Buller J *Introduction to the Law Relative to Trials at Nisi Prius* 270 (1767) 286a (7th Ed Bridgman 1817) quoted by Wigmore VIII 214.

[42]*Barker v Dixie* 95 ER 171.

[43]VIII § 2228. Jeremy Bentham 5 *Rationale of Judicial Evidence* 339 (1827) (quoted by Wigmore VIII § 2228) comments as follows: "Let us, therefore, grant to every man a licence to commit all sorts of wickedness, in the presence and with the assistance of his wife: let us secure to every man in the bosom of his family, and in his own bosom, a safe accomplice: let us make every man's house his castle; and, as far as depends upon us, let us convert that castle into a den of thieves."

tion, the gravity of the charge against the accused, the availability of other evidence and the willingness of the witness to testify.[44]

It would be unfair to attribute complete oblivion of these latter factors to the English judiciary of the eighteenth and nineteenth centuries, for they did, at the formative stage of the English law of evidence, recognise that the rule in cases of "necessity" must admit exceptions.[45] However they did not allow their notion of necessity to extend beyond the needs of the spouses themselves and the rule was only relaxed in those cases of personal injuries committed by the spouses against each other.[46] However, as Wigmore points out,[47] the common law exceptions are open to explanation,

> "as instances in which the very reason of the privilege – at least the reason most frequently advanced – is lacking. That is to say, if the promotion of marital peace, and the apprehension of marital dissension, are the ultimate ground of the privilege, it is an overgenerous assumption that the wife who has been beaten, poisoned or deserted is still on such terms of delicate good feeling with her spouse that her testimony must not be enforced lest the irridescent halo of peace be dispelled by the breath of disparaging testimony".

The legislature has from time to time created new exceptions in cases the nature of which does not necessarily rupture the "delicate good feeling" between the spouses.[48] These exceptions would seem to be based on considerations of expedience, not least of all the availability of other evidence.

Surely policy does not demand that the marriage ideal be protected indiscriminately irrespective of whether the marriage in question conforms to such ideal or not. Yet this would seem to be the effect of the rule that one spouse is incompetent to incriminate the other, a result which has been recognised and justified by the courts.[49] It is submitted that this approach is wrong and whatever policy might have dictated in bygone times, the exclusion of spouse evidence for reasons of policy which do not obtain between the spouses whose evidence is is sought to exclude, cannot be justified in the light of the legitimate demands of the proper administration of justice. The spectacle of one spouse incriminating the other does not per se constitute a threat to the institution of marriage and therefore an eventuality which should be prevented even at the expense of relevant evidence. Society might well have an interest in granting to spouses the right to refuse to incriminate each other, a privilege which, it is submitted, should vest in the witness

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[44] In *S v Groesbeek* 1969 4 SA 383 (D) Erasmus J expressed the following opinion at 386E: "Dr Yutar, aan die anderkant, het spottend na die huidige huwelik verwys en gesê dat die verhewendheid en reinheid van die gewyde huwelik nie daarmee vergelyk kan word nie. Dit gaan myns insiens nie op nie, want dit is duidelik dat die gemene reg hom ten doel stel om die instelling self te beskerm en hom nie met die besoedelheid wat daarin mag skuil bemoei nie."

[45] Wigmore *On Evidence* VIII § 2239; *Bentley v Cooke* 3 Dough 422 (99 ER 729).

[46] *Reeve v Wood* 8 Cox Crim Cas 58.

[47] VIII § 2239.

[48] e g where the accused spouse is prosecuted for an offence against any of the children of either of them.

[49] See the remarks of Maule J in *O'Connor v Majoribanks* supra and of Lord Sumner in *Jones v Jones* (1916) 2 AC 481 500 quoted with approval by Lord Goddard CJ in *R v Algar* [1954] 1 QB 279 286. See also the address of Mr Evarts in *Tilton v Beecher* City of Brooklyn NY 49–50 (1875) quoted by Wigmore VIII 215.

spouse. This submission is based on the assumption that where one spouse indicates a willingness to incriminate the other the exclusion of the evidence at that stage will do little to foster the marriage ideal and will only serve to obstruct the administration of justice. Likewise no legitimate policy consideration could be served by vesting in the accused the right to prevent such testimony for, were he to exercise such right, it would only serve to exclude the incriminating evidence and could in no way ameliorate the marital relationship. Of course there are those cases where neither spouse is averse to the evidence being heard (eg *R v Bonthuys* supra) but, because the present law relates to competence rather than compellability, the evidence is inadmissible. Where the spouses are co-accused and the one intends laying the blame at the feet of the other, to order a separation of trials in the name of marital felicity might well achieve no more than an obstacle in establishing the truth.

D 22 5 4 provides –

> "that a man, *if unwilling, cannot be compelled* to give testimony in court against his father-in-law, his son-in-law, his step-father, his stepson, his cousin, whether male or female, his cousin's child or any of those who are related in a nearer degree". (my italics.)[50]

Although the section does not refer to the evidence of one spouse against the other, it was clearly intended to embrace the members of the Roman family unit be they related by blood or marriage. It would seem that Gaius held that the betrothed of a daughter and the father of the betrothed woman were to be included in the term "son-in-law" and "father-in-law" respectively.[51] The Roman law therefore recognised the agony of a witness unwillingly incriminating a near relative pursuant to a duty to testify. Where familial loyalty was strong such compulsion might even be conducive to perjury and what is more, such testimony, however involuntary, might have disruptive repercussions within the family itself. However, what is of importance here, is that it was recognised that the remedy lay within the realm of compellability and not competence, for where the witness is willing to testify no justification remains for the exclusion of the evidence. Voet[52] was of the opinion that "a wife cannot be *heard* against her husband even with her consent". He attributes the absence of any reference to husband and wife in *D* 22 5 4 as indicative of the fact that far from being not of a class of witnesses not to be compelled to testify, they had been "shut out from uttering testimony each against the other".[53] According to Orlowsky[54] despite the

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[50]Paulus on the *Lex Julia et Papia* Book II translated by SP Scott in *The Civil Law*.

[51]*D* 22 5 5.

[52]22 5 5 (Gane's translation).

[53]Huber's *Jurisprudence of my Time* (translated by Percival Gane) 2 27 28: "Still, some persons are excepted as not being compelled to give evidence against each other, such as children and parents, sons-in-law and parents-in-law, step children and step-fathers, uncles and nephews, sisters and brothers, and their children. Indeed I am not compelled to give evidence against him who stands in the relationship of sister's son to me, nor he against me. But this is not extended to the wives or husbands of such persons, as was ruled by the court between the Attorney-General and Elizabeth Indischeraven: 19th December 1680."

[54]Wedigo Orlowsky *Die Weigerungsrechte der Minderjährigen Beweisperson im Strafprozess* (J C B Mohr – Paul Siebeck – Tübingen 1973) 34–39.

reception of Roman law in Germany, the affinity of the witness to the accused remained simply a factor to be taken into account in assessing the value of the evidence and it was only in the eighteenth century that attention was drawn to the fact that a relative of the accused testifying involuntarily, might find himself in an invidious position.

It was Mittermaier[55] who stated that the juxtaposition of personal loyalty and credibility in cases where the witness was related to the accused could be solved in one of two ways: either by excluding the evidence altogether or by giving the witness the right to refuse to testify (*Zeugnisverweigerungsrecht*) in which event his inner conflict between telling the truth and incriminating his relative would be resolved, while still enabling him to testify *for* the accused. These ideas were only hesitatingly followed by the legislature, although in Württenberg and Baden in 1843 and 1845 respectively[56] legislation provided a right to refuse to testify for those related to the accused by blood or marriage to a specific degree, and placed on the presiding officer a duty to inform the witness of his right. This was entrenched in section 51 of the Imperial Criminal Procedure Code of 1877 and is today contained in section 52 of the West German Criminal Procedure Code.[57] I mention the German developments as an example of a system of procedure which has recognised where the true policy considerations lie in cases where a witness is related to the accused. Connubial bliss might well be disturbed where one spouse is compelled to incriminate another (and the reliability of such evidence may be open to question) but where the testimony is voluntary no policy consideration can remain for its exclusion.

It is submitted therefore that section 226 of Act 56 of 1955 should be amended to make the spouse of an accused person competent but not compellable to give evidence for the prosecution and a duty should be placed on the court to inform the witness of his or her right to refuse to testify.[58]

The scope of the rule that spouses may not incriminate each other is considerably curtailed in South Africa in terms of section 225(3) of the Criminal Procedure Act which provides that persons married in accordance with Native law of custom are, for the purposes of the law of evidence in criminal cases, in the same position as unmarried persons.

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[55] *Die Lehre vom Beweis im Strafprozess* Darmstradt (1834) referred to by Orlowsky op cit 36.

[56] *Württenbergischen St P O* (1843): *Badischen St P O* (1845)-referred to by Orlowsky op cit 37.

[57] This section is quoted by Orlowsky op cit 39 and reads as follows: "521(a) The following have the right to refuse to testify–

1. The fiancé(e) of the accused;
2. The spouse of the accused, even where the marriage no longer subsists;
3. Those persons related to the accused in the direct line by consanguinity, affinity or in the collateral line to the third degree by consanguinity or to the second degree by affinity, even where the marriage, on which such affinity is based, no longer subsists" (my translation).

[58] This submission is made with only the husband-wife relationship in mind, and on the assumption that where one spouse is unwilling to incriminate the other then the law should take cognisance of such feeling for policy reasons. It follows that whether a right to refuse to testify be extended to other near relatives of the accused will involve an assessment of policy considerations other than those related to marriage, and falls outside the scope of this article.

THE CONFIDENTIALITY OF MARITAL COMMUNICATIONS

No discussion of the competence and compellability of spouses would be complete without reference to the "privilege arising out of the marital state" as it is referred to in the headnote to section 229 of the Criminal Procedure Act.[59] This section provides:

"(1) A husband shall not be compelled to disclose any communication made to him by his wife during the marriage, and a wife shall not be compelled to disclose any communication made to her by her husband during the marriage.

(2) A person whose marriage has been dissolved or annulled by a competent court shall not be compelled to give evidence as to any matter or thing which occurred during the subsistence of the marriage or supposed marriage, and as to which he or she could not have been compelled to give evidence if the marriage were subsisting."

The confidentiality of communications between spouses adds a new dimension, as it were, to the confrontation of public policy and the administration of justice in relation to spouse evidence.[60] Discussion until now has been confined to the classic situation of one spouse deposing to facts relevant to a case in which the other spouse is a party. Where such testimony in criminal proceedings is adverse to the accused spouse then such evidence is excluded by virtue of the general common law rule that spouses are incompetent to testify against each other. This general rule, applied in the classic situation described above, serves to exclude all adverse spouse evidence drawing no distinction between evidence which originated in a communication by one spouse to the other and that which did not.[61] However, there are situations which do not fall within the ambit of the general rule and which raise pertinently the question of the confidentiality of marital communications. Here one is faced not with the spectacle of one spouse incriminating the other but rather the exposure of marital communications either by one spouse in a case in which the other is an indifferent third party[62] or by a third party who has overheard or intercepted such communications. The problem then is not that one spouse is incriminating the other but that what the one has said to the other is about to be divulged. Does policy demand that such communications remain inviolate, irrespective of whether persons, other than the spouses themselves, are in a position to testify as to what the communications were? Or was the policy of the common law simply to preclude only the spouses from divulging such communications? The former contention was advanced on behalf of the appellant in *Rumping v DPP*.[63] The appellant had been convicted of non-capital murder. The evi-

[59]For the South African legislative antecedents see: s 4 of Act No 4 of 1861 (C); s 16 of Ord 11 of 1902 (OFS); s 13 of Proc 16 of 1902 (T) and s 296 (1) & (2) of Act 31 of 1917.

[60]D Zeffert in "Confidentiality and the courts" 1974 *SALJ* 432 435 says: "The rules of privilege emerge from the endless jarring of irreconcilable policies. On the one hand justice demands that all relevant evidence should be ventilated; on the other hand there are many necessary activities whose proper fulfilment would be stultified by the disclosure of secrets."

[61]See the judgment of Viscount Radcliffe in *Rumping v DPP*, [1962] 3 All ER 256 261B.

[62]Wigmore VIII § 2333.

[63]See n 62.

dence for the prosecution included a letter which the appellant was alleged to have written to his wife in Holland and which was tantamount to a confession. The letter had been written by the appellant on the day of the killing on board his ship after it had left Menai Bridge (the place where the crime was committed) for Liverpool. He handed the sealed letter to a member of the crew requesting him to post it at a port outside England; however the appellant was arrested at Liverpool and the crew member surrendered the letter to the captain of the ship who in turn surrendered it to the police. It was not at any stage disputed that the letter was addressed to the appellant's wife, nor was she called as a witness; in this regard the Crown relied on the testimony of the crew member, his captain and that of the translator of the letter. The crisp point in issue was whether the letter, proved as it had been by witnesses other than the spouse of the appellant, was nevertheless inadmissible at English common law. The majority opinion was that the evidence was admissible because there was no rule at common law that it should be inadmissible despite "many clear and forcible expressions of opinion that it is contrary to public policy to require disclosure of confidential communications between husband and wife."[64] This finding was based largely on the observation that section 3 of the Evidence Amendment Act 1853 (Lord Brougham's Act)[65] is irreconcilable with the existence of such a rule. Section 3 (as is the case with section 229 of Act 56 of 55) simply confers on the spouse to whom the communication is made, a privilege not to disclose such communication and Lord Reid[66] found it "impossible to suppose that this section could have been framed in this manner if Parliament, or those who advised Parliament, had thought for a moment there was any such rule as that now contended for."

Viscount Radcliffe, in a strong dissenting opinion, expressed the view that the principle of the common law was to prevent not only a testimonial confrontation between spouses. It went further and protected marital confidences as such;[67] and "it would be a dangerous assumption that in matters not directly regulated by the terms of those Acts[68] the principles of law which give special protection to the confidence of marriage have somehow been abrogated or fallen into abeyance".[69] In support of his opinion he quotes[70] the following from the second report (dated 30 April 1853) of the commissioners enquiring into the process, practice and system of pleading in the superior courts of common law where they deal with the communications of married persons inter se:

> "So much of the happiness of human life may fairly be said to depend on the inviolability of domestic confidence, that the alarm and unhappiness occasioned to society by invading its sanctity, and compelling the disclosure of confidential communications between husband and wife, would be a far greater evil than the disad-

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[64]From the opinion of Lord Reid in *Rumping's* case at 258G.

[65]This section, which is reproduced at 259B of the report of Lord Reid's opinion, is almost identical to s 229 of Act 56 of 1955.

[66]259C.

[67]260–267.

[68]He refers here to the Evidence Amendment Act 1853 and the Criminal Evidence Act 1898.

[69]261I–262A.

[70]264F.

> vantage which may occasionally arise from the loss of the light which such revelations might throw on questions in dispute. The conclusions to which the foregoing observations lead us is, that husband and wife should be competent and compellable to give evidence for and against one another on matters of fact; but that all communications between them should be held to be privileged."

Wigmore[71] expresses the view that:

> "[T]he policy which should lie at the foundation of every rule of privileged communications appears to be satisfied in the privilege of communications between husband and wife."

He bases this proposition on the fact that the communications originate in confidence, the confidence is essential to the relation, the relation is one which ought to be encouraged by the law, and the injury that would inure to it by disclosure is probably greater than the benefit that would result in the judicial investigation of the truth.[72]

It is submitted that in the light of the aforegoing considerations section 229(1), as it is presently formulated, does not give effect to the policy considerations it purports to reflect. The section places in the hands of the spouse to whom the communication is made the right to ensure its confidentiality but offers no protection to the spouse who has made the communication believing that it will remain confidential. The reasons of policy for fostering the privacy of communications between husband and wife are not dissimilar to those advanced for other privileged communications.[73] Yet section 232, which relates to lawyer-client communications, makes the competence of legal advisers dependent on the consent of the communicating client, whereas section 229(1) relates only to the compellability of the spouse to whom the communication is made. It is submitted that if the legislature had made the revelation of marital communications dependent on the consent of the communicating spouse then, provided the communication was meant to be confidential, policy would be effectively implemented and problems such as those in the *Rumping* case would not arise. Whether the communication was confidential or not would depend on the fact of each case. In this regard the circumstances in which a third party overheard such communications might well be a determining factor.

CONCLUSION

The implementation of the aforegoing submissions would necessitate an amendment of the Criminal Procedure Act to give the court a discretion whether to compel one spouse to testify for the other, where (a) the other is a co-accused and the non-spouse accused wishes that the evidence be called in his defence, or (b) where the court wishes to call a spouse witness in terms of section 210. Furthermore the amendment would make spouses competent but not compellable witnesses against each other, except that confidential marital communications may only be divulged with the consent of the communicating spouse. Such an amendment, it is submitted, would be wholly reconcilable with the legitimate demands of policy. □

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[71] VIII s 2333.
[72] See Zeffert supra 443.
[73] ibid.

Eiendomsoorgang en Verdiskontering*

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SUMMARY

Ownership of a thing sold on hire-purchase is employed to afford the creditor security. Concerning discounting of a hire-purchase agreement, there is uncertainty in South African law about the means of transferring the ownership retained by the hire-purchase seller to the finance company. This uncertainty has arisen because the practice of discounting was introduced into South African law from Anglo-American law. In the latter systems ownership can be transferred by simple agreement. Consequently ownership can be freely transferred when a hire-purchase agreement is discounted. The situation differs, however, in systems based on *traditio*. Such systems require either actual or fictitious control by the transferee who wishes to acquire ownership of a moveable.

A study of relevant South African case law has not shown any generally accepted principle satisfying the requirement of delivery in all instances of discounting. Actual delivery is impossible in these circumstances, whilst the various forms of fictitious delivery are inadequate in many respects.

From this exposition of case law it is clear that delivery as a requirement for transfer of ownership is based mainly on two considerations, to wit for the purpose of publicity and to enable the transferee to exercise his right of ownership. These reasons do not apply to discounting.

Possession fulfils no function of publicity under these circumstances, since the hire-purchaser controls the object of the sale, whereas the company becomes its owner. Accordingly, the presumption that the possessor of a moveable is also owner thereof, is of no value as far as publicity is concerned.

Furthermore, the finance company has no interest in actually exercising its right of ownership, except when the hire-purchaser does not fulfil his obligations under the contract.

In other words, if the company exercises control over the *res vendita* it is in the position of a creditor exercising a right of real security against his debtor. Thus the actual control which the company desires as well as the relevant circumstances differ completely from the actual control required for delivery as a means of transferring ownership.

In principle, therefore, there is no objection to abolishing the requirement of delivery for the purpose of discounting. The conclusion has been reached that transferring ownership by means of the mere real agreement when a hire-purchase agreement is discounted cannot legally be to the detriment of any one of the parties involved.

INLEIDING

K wil 'n saak van V koop en dit graag onmiddellik gebruik maar hy kan nie kontant daarvoor betaal nie. Om in hierdie behoefte van K te voorsien,

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*Hierdie artikel is grootliks gebaseer op 'n verhandeling wat ek in 1974 aan die Randse Afrikaanse Universiteit vir die graad LL M ingedien het.

het die huurkoopkontrak in die middel van die negentiende eeu ontstaan.[1] Hierdie kontrak het in sowel die koper as verkoper se behoeftes voorsien: die koper het dadelik besit van die saak verkry maar in paaiemente oor 'n termyn daarvoor betaal en die verkoper het sekuriteit gehad omdat die partye ooreengekom het dat eiendomsreg nie by oorhandiging van die saak dadelik op die koper sou oorgaan nie maar eers as die koopprys ten volle betaal is.

Namate hierdie soort kontrak toegeneem het en duurder artikels, soos motorvoertuie, die voorwerp daarvan geword het, kon die gemiddelde handelaar die transaksies nie meer so geredelik finansier nie. Finansieringsmaatskappye het toe die terrein betree[2] en vandag kom finansiering van huurkoopkontrakte[3] deur 'n derde vry algemeen voor. 'n Finansieringsinstansie sal egter slegs bereid wees om krediet te verleen as hy ook sekuriteit verkry. Dié probleem is opgelos deur die eiendomsreg van die koopsaak as sekuriteit aan te wend. Wat gewoonlik in die praktyk gebeur, is dat die handelaar aanvanklik die huurkoopooreenkoms met die koper sluit en eiendomsreg van die saak voorbehou. Die saak word by sluiting van die ooreenkoms aan die koper gelewer en die handelaar dra sy regte uit die kontrak, asook die eiendomsreg van die saak, aan die finansieringsmaatskappy oor teen betaling van 'n geldsom. In werklikheid koop die maatskappy die regte van die handelaar uit die huurkoopkontrak asook die eiendomsreg wat die handelaar voorbehou het. Hierdie finansieringsmetode staan bekend as verdiskontering.

Die vraag is egter nou hoe om eiendomsreg aan die maatskappy oor te dra aangesien die saak fisies nie aan hom nie, maar aan die huurkoopkoper gelewer word. Dit is immers die gedagte by die huurkoopkontrak dat die koper onmiddellik genot van die koopsaak verkry sonder om die koopprys dadelik ten volle te betaal. Andersyds is een van die vereistes vir eiendomsoordrag van 'n roerende saak in ons reg dat die eiendomsverkryger feitelike beheer – synde die *corpus*-element van besit – oor die saak verkry. Die doel van hierdie artikel is hoofsaaklik om te ondersoek hoe verdiskontering as wyse van finansiering by die beginsels van eiendomsoorgang in die Suid-Afrikaanse reg ingeskakel is en of hierdie inskakeling in die praktyk bevredigend funksioneer.

DIE TRADISIONELE LEWERINGSVORMS EN VERDISKONTERING

Een van die vereistes vir eiendomsoordrag van 'n roerende saak in ons reg is dat die partye die bedoeling moet hê om eiendomsreg oor te dra en te ontvang. Die oordraer moet die *animus transferendi dominii* hê terwyl die

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[1]Sien in die algemeen Fischer en Frank *De Wettelijke Regeling van den Koop en Verkoop op Afbetaling* (1936) 1; Goode en Ziegel *Hire-Purchase and Conditional Sale* (1965) 8; Diemont en Marais *The Law of Hire-Purchase in South Africa* (1965) 1.

[2]Sien Seligman *The Economics of Instalment Selling* bd 1 (1950) 33 e v vir die ontwikkeling van die finansiering van afbetalingskontrakte.

[3]of van kontrakte met dieselfde strekking alhoewel hulle onder ander name bekend mag staan.

animus accipiendi dominii by die verkryger aanwesig moet wees.[4] In werklikheid het mens hier met 'n saaklike ooreenkoms te doen. So sê hoofregter De Villiers in *Greenshields v Chisholm*:[5]

> "The mere delivery is not enough; there must be an acceptance by the purchaser, 'in order that thus', to use the language of Voet, 'the minds of both contracting parties may concur and consent to the transfer of the property'."

Afgesien van die verbintenisskeppende ooreenkoms tussen die partye moet daar dus ook wilsooreenstemming tussen hulle bestaan wat spesifiek op eiendomsoorgang gerig is anders gaan eiendom nie oor nie. Aangesien die saaklike ooreenkoms gewoonlik met lewering van die saak saamval, is dit egter prakties moeilik om die twee elemente te onderskei. Die bedoeling van die partye om eiendomsreg onderskeidelik oor te dra en te ontvang, blyk gewoonlik uit die verbintenisskeppende ooreenkoms wat meesal voorafgaan.

Verder word vereis[6] dat besit van die saak verskaf moet word. Sowel die fisiese as psigiese element moet by die vestiging van besit aanwesig wees.[7] Besit kan op verskillende wyses aan die verkryger verskaf word solank hy maar in staat gestel word om beheer oor die saak uit te oefen. Dit is egter gebruiklik om tussen werklike en fiktiewe lewering te onderskei.

Van werklike lewering word gepraat as daar 'n liggaamlike oorhandiging van die saak aan die ontvanger plaasvind en hy dit aanneem met die bedoeling om besit en daardeur eiendom te verkry. Sodoende word aan die fisiese sowel as psigiese element voldoen. In *Groenewald v Van der Merwe*[8] omskryf hoofregter Innes werklike lewering soos volg:

> "In the great majority of cases the physical factor takes the form of handing the movable in question bodily to the transferee, who accepts it with the requisite intention and thereby becomes owner."

Al die gevalle waarin daar nie 'n liggaamlike oorhandiging van die saak plaasvind nie word onder die hoof fiktiewe lewering saamgevat. Gewoonlik word onderskei tussen *traditio longa manu, traditio symbolica, traditio brevi manu, constitutum possessorium* en *attornment*. Vanselfsprekend kan hierdie verskillende vorms van fiktiewe lewering nie hier bespreek word nie. Dit is egter belangrik om daarop te let dat 'n roerende saak in ons reg gelewer word òf deur 'n verandering in die feitelike toestand (*traditio vera* waarby ook *traditio longa manu* en *traditio symbolica* gereken kan word)[9] òf deurdat die

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[4]Voet 41 1 35; *Greenshields v Chisholm* (1884) 3 SC 220 227–228; *Marcus v Stamper and Zoutendijk* 1910 AD 58 78; *Groenewald v Van der Merwe* 1917 AD 233 238–239; *Weeks v Amalgamated Agencies Ltd* 1920 AD 218 230–231; *Commissioner of Customs and Excise v Randles, Brothers and Hudson Ltd* 1941 AD 369 411.

[5](1884) 3 SC 220 228.

[6]Oor die ander vereistes van eiendomsoorgang sien Hahlo en Kahn *The Union of South Africa* (1960) 588; Maasdorp *The Law of Property* (1971) 48 e v en Wille *Principles of South African Law* (1970) 198 e v.

[7]*Groenewald v Van der Merwe* 1917 AD 233 238; *Meintjes v Wilson* 1927 OPD 183 188; *Prinsloo v Venter* 1964 3 SA 626 (O) 628DE.

[8]1917 AD 233 238–239.

[9]*Traditio longa manu* en *traditio symbolica* kan bloot as uitbreidings van *traditio vera* beskou word. Die verkryging van fisiese beheer is by hierdie twee vorms van fiktiewe lewering ook van wesenlike belang. Dit geskied egter net minder ooglopend weens die aard van die voorwerpe wat gewoonlik op hierdie wyses gelewer word, bv swaar masjinerie.

persoon wat die saak beheer 'n wilswysiging[10] ondergaan (*traditio brevi manu, constitutum possessorium* en *attornment*).

In laasgenoemde twee gevalle word geag dat die wilswysiging van die houer die verkryger feitelike heerskappy besorg.[11] In die geval van werklike lewering word sodanige heerskappy deur oorhandiging van die saak bewerkstellig. By *traditio brevi manu* is die posisie anders want hier dien die wilswysiging om die posisie in ooreenstemming te bring met wat as die ware toestand geag word, naamlik dat die besitter van die saak ook eienaar daarvan is. Die vraag is nou hoe lewering by verdiskontering van 'n huurkoopkontrak aan die hand van die gemeenregtelike vorms van lewering *kan* geskied.

Werklike lewering

Dit is duidelik dat werklike lewering in sy basiese vorm van 'n oorhandiging *de manu in manum* hier nie ter sprake kan kom nie. Dit sou geheel en al onprakties wees en strydig met die moderne handelspraktyk om te vereis dat aldrie partye byeenkom en die saak dan heen en weer tussen hulle oorhandig word.

Wat werklike lewering betref, is daar egter nog 'n moontlikheid in die sin dat die huurkoopverkoper die saak aan die huurkoopkoper lewer en dié dit ontvang met die bedoeling om besit en dus eiendomsreg vir die maatskappy te verkry. Teoreties is hierdie vorm van lewering langs die weg van die verteenwoordigingsfiguur wel moontlik. Juridies sal daarvoor nodig wees 'n verteenwoordigingsverhouding tussen die maatskappy en sowel die verkoper as die koper. Die verkoper sal die saak as verteenwoordiger van die maatskappy aan die koper moet oorhandig en die koper weer sal die saak as verteenwoordiger van die maatskappy moet ontvang met die bedoeling om besit en eiendomsreg vir die maatskappy te verkry.

'n Vlugtige blik op hoe verdiskontering in die praktyk geskied, laat onmiddellik blyk dat hier van werklike lewering eintlik nie sprake is of kan wees nie. Gewoonlik lewer die huurkoopverkoper die saak aan die huurkoopkoper en daarna verdiskonteer hy die huurkoopkontrak by 'n finansieringsmaatskappy. Op hierdie stadium is die huurkoopkoper dus reeds in beheer van die saak. Die regsverhoudinge tussen die huurkoopverkoper en die maatskappy word gewoonlik in 'n algemene ooreenkoms tussen hulle gereël maar dit is nie noodwendig dat die huurkoopverkoper slegs met een verdiskonteringsmaatskappy 'n algemene ooreenkoms het nie. Wanneer die saak aan die huurkoopkoper gelewer word, staan dit derhalwe nie noodwendig vas waar die kontrak verdiskonteer gaan word nie. 'n Verteenwoordi-

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[10]By *traditio brevi manu* en *constitutum possessorium* is die wilswysiging wat die persoon ondergaan wat beheer oor die saak uitoefen nie van die saaklike ooreenkoms te onderskei nie. In geval van *attornment* word die saaklike ooreenkoms tussen oordraer en verkryger gesluit en van die persoon wat direkte beheer oor die saak voer, word vereis dat hy sy wil verander om nie meer vir die oordraer nie maar vir die verkryger te hou (sien hieronder).

[11]*Meintjes v Wilson* 1927 OPD 183 189; *Hearn and Co (Pty) Ltd v Bleiman* 1950 3 SA 617 (K) 625–626; *Trust Bank van Afrika v Ebrahim* 1961 4 SA 336 (T) 338; *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel* 1972 1 SA 270 (A) 275.

gingsverhouding tussen die huurkoopverkoper en elkeen van die maatskappye waarmee hy 'n algemene ooreenkoms het, sou wel in sodanige ooreenkomste gereël kan word maar uiteraard kan so 'n verhouding tussen die huurkoop*koper* en die maatskappy nie bestaan nie. Verder is dit in elk geval onrealisties om elke persoon wat 'n huurkoopsaak in sy besit het, wat deur 'n finansieringsmaatskappy gefinansier is, as verteenwoordiger van die maatskappy te beskou: dit sal 'n gebied wat reeds gekompliseerd is sonder regverdiging net nog meer ingewikkeld maak.

Fiktiewe lewering

Wat die fiktiewe wyses van lewering betref, moet onderskei word tussen die geval waar verdiskonteer word terwyl die saak nog by die huurkoopverkoper is en dié waar dit reeds aan die huurkoopkoper oorhandig is. As die huurkoopverkoper nog in besit van die saak is, kan hy die eiendomsreg *constituto possessorio* aan die maatskappy oordra en dan die saak as verteenwoordiger van die maatskappy aan die huurkoopkoper lewer. Hierdie moontlikheid is egter net van akademiese belang want in die praktyk word gewoonlik verdiskonteer eers nadat die huurkoopkoper die saak reeds het.

Daar is ses wyses denkbaar waarop 'n saak gelewer kan word wat in die hande van 'n derde (met ander woorde die huurkoopkoper) is:[12] drie met medewerking van die derde en drie daarsonder.

Lewering met medewerking van die derde

(a) Die eerste moontlikheid is by wyse van *attornment:* tussen oordraer, ontvanger en derde (houer) vind 'n ooreenkoms plaas waarvolgens die derde verklaar dat hy die saak voortaan nie meer vir die oordraer nie maar vir die ontvanger sal hou. *Attornment* kan slegs plaasvind as die houer ten tye van die *attornment* beheer (of 'n beheersreg) oor die betrokke saak uitoefen.[13] Hierdie wyse van lewering het al wel by verdiskontering van huurkoopkontrakte aanwending gevind.[14]

(b) Tweedens kan die derde in opdrag en as verteenwoordiger van die oordraer die saak aan die ontvanger lewer hetsy deur feitelike oorhandiging, hetsy deur *constitutum possessorium.* Fisiese oorhandiging is by verdiskontering natuurlik buite die kwessie want die huurkoopkoper wil uit die aard van die saak feitelike beheer behou. Waar die derde die saak *constituto possessorio* as verteenwoordiger van die oordraer lewer, bestaan daar groot ooreenkoms tussen hierdie wyse van lewering en *attornment* maar tog is daar verskille. So word die saaklike ooreenkoms by *attornment* direk deur oordraer en ontvanger gesluit terwyl dit hier deur die derde en die ontvanger aangegaan word.

Toegepas op die situasie by verdiskontering van huurkoopkontrakte sou dit beteken dat die huurkoopkoper in opdrag van die verkoper die koopsaak *constituto possessorio* aan die verdiskonteringsmaatskappy lewer. Die enigste wyse waarop dit moontlik sou kon geskied, sou wees om die koper self

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[12]Drion 1942 *WPNR* 118 ev.
[13]*Hearn and Co* (*Pty*) *Ltd v Bleiman* 1950 3 SA 617 (K) 626A.
[14]Sien hieronder.

die huurkoopkontrak wat hy aangegaan het, te laat verdiskonteer en dan die saak *constituto possessorio* aan die maatskappy te lewer. Dit behoef geen betoog nie dat sodanige praktyk vanuit 'n handelsoogpunt gesien veels te riskant is om ernstige oorweging te geniet. Nòg die verdiskonteringsmaatskappy, nòg die handelaar sou daarvoor te vinde wees.

Hierdie metode sal in die verdiskonteringspraktyk geensins aanvaarbaar wees as oplossing vir die probleem van eiendomsoordrag nie. In die eerste plek benader die howe lewering by wyse van *constitutum possessorium* met groot versigtigheid en dit is te betwyfel of hulle grootskaalse uitbreiding daarvan geredelik sal aanvaar. Tweedens bots hierdie metode te veel met gebruike wat in die verdiskonteringspraktyk reeds gevestig geraak het, byvoorbeeld die verhouding tussen die verkoper en die finansieringsmaatskappy. Derdens bied dit in elk geval geen veilige, regsekere oplossing nie.

(c) Lewering met medewerking van die derde kan ook by wyse van *traditio brevi manu* plaasvind. So kan die eienaar van die saak die besit en eiendomsreg by wyse van *traditio brevi manu* aan die derde as verteenwoordiger van die ontvanger oordra.

Toegepas op die situasie by verdiskontering van huurkoopkontrakte sou dit beteken dat eiendomsoordrag op hierdie wyse kan plaasvind slegs indien die derde volmag van die finansieringsmaatskappy het. Daar is reeds aangetoon dat dit volgens die heersende praktyk nie moontlik is nie sodat ook hierdie konstruksie onaanvaarbaar is.

Lewering sonder medewerking van die derde

(a) Eerstens kan *traditio brevi manu* aangewend word om eiendomsreg van 'n saak wat deur 'n derde gehou word sonder sy medewerking oor te dra. Indien die ontvanger die saak reeds namens die eienaar hou en 'n derde dit weer namens die ontvanger hou, kan die eienaar die saak *brevi manu* aan die verkryger oordra sonder medewerking van die derde. Die verhuurder verkoop die saak byvoorbeeld aan die huurder terwyl dit in die hande van 'n onderhuurder is en lewer *brevi manu*. Vanselfsprekend is die medewerking van die derde nie nodig nie maar weens die besondere omstandighede wat hier aanwesig moet wees, kan dié metode by verdiskontering geen toepassing geniet nie.

(b) Die saak kan ook by wyse van *constitutum possessorium* sonder medewerking van die derde gelewer word. Die oordraer-verhuurder lewer die saak *constituto possessorio* aan die ontvanger en hulle spreek af dat die oordraer die saak in die vervolg van die verkryger sal huur. Die saak word dus aan die verkryger gelewer sonder medewerking van die derde wat tot die oordrag huurder was en daarna onderhuurder word. Tussen oordraer en derde bly effektief dieselfde regsverhouding bestaan maar 'n tweede regsverhouding ontstaan tussen oordraer en verkryger.

Dit is moeilik om hierdie metode op die verdiskonteringsituasie toe te pas sodat dit effektiewe aanwending vind. Moontlik sou eiendomsoordrag op hierdie wyse bewerkstellig kon word as die huurkoopverkoper en die verdiskonteringsmaatskappy ooreenkom dat eersgenoemde die koopsaak weer van laasgenoemde terugkoop. Dat die partye egter so 'n omslagtige transak-

sie sou aangaan bloot om die eiendomsreg oor te dra, is ondenkbaar. Ook hierdie metode bied dus geen oplossing nie.

(c) Die derde vorm van lewering sonder medewerking van die derde is dié wat in die beslissing van die *Hoge Raad* van 1 November 1929[15] ter sprake gekom het en waarna appèlregter Rumpff in *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel*[16] verwys het. Hiervolgens word die saaklike ooreenkoms tussen oordraer en verkryger gesluit en 'n mededeling of opdrag aan die derde (houer) gestuur. Die medewerking van die houer word egter veronderstel. Hy kan hom met ander woorde nie van die wil wat aan hom toegeskryf word om namens die verkryger te hou, bevry nie.

Ander vorms van fiktiewe lewering

Die enigste twee vorms van fiktiewe lewering wat oorbly, is *traditio longa manu* en *traditio symbolica*.

Die vereistes vir *traditio longa manu* is dat die saak *in praesenti* uitgewys moet word en veral dat die verkryger in staat gestel moet word om fisiese beheer daaroor uit te oefen. Verder vind dit slegs aanwending waar die saak weens sy aard of omvang nie *de manu in manum* gelewer kan word nie. Hierdie vereiste maak *traditio longa manu* ongeskik om as leweringsvorm by verdiskontering van huurkoopkontrakte gebruik te word. Verder is *traditio longa manu* bestem om toepassing te vind waar 'n moeilik hanteerbare saak tussen twee partye gelewer moet word – hoe dit alleen aangewend kan word waar drie partye by die transaksie betrokke is, is in elk geval moeilik begryplik.

In plaas daarvan om besit van die saak aan die verkryger te verskaf, kan 'n simbool aan hom oorgedra word wat dit vir hom moontlik maak om beheer oor die saak uit te oefen. Simboliese lewering leen hom egter ook nie as leweringswyse by verdiskontering nie. Net soos *traditio longa manu* is hierdie vorm van lewering bedoel vir gevalle waar die goedere van so 'n aard of omvang is dat dit nie *de manu in manum* gelewer kan word nie. Die gedagte is ook om aan die *verkryger self* beheer te verskaf en nie aan die verkryger deur middel van 'n derde nie. 'n Verdere probleem is dat simboliese lewering slegs bewerkstellig kan word by wyse van 'n simbool wat beheer oor die saak verskaf. Die enigste simbool wat by alle sake wat gewoonlik op huurkoop verkoop word, soos motors, meubels ensovoorts, aangewend kan word, is 'n dokument.[17] Sover vasgestel kon word, is die enigste dokument wat in die Suid-Afrikaanse reg gelewer kan word as simbool van die goedere wat daarin beliggaam word 'n ladingsbrief of kognossement.[18] Al dokument wat gewoonlik by verdiskontering van 'n huurkoopkontrak aan die finansieringsmaatskappy gelewer word, is die huurkoopkontrak. Teoreties is sekerlik geen beswaar daarteen in te bring dat dié dokument gelewer word as sim-

[15]1929 *NJ* 1745.
[16]1972 1 SA 270 (A) en sien hieronder.
[17]In die geval van 'n motor kan natuurlik ook die sleutel gelewer word.
[18]Sien bv *Birkbeck and Rose-Innes v Hill* 1915 CPD 687; *Standard Bank of South Africa Ltd v Efroiken and Newman* 1924 AD 171; *Garavelli and Figli v Gollach and Gomperts (Pty) Ltd* 1959 1 SA 816 (W).

bool van die goedere wat daarin beliggaam word nie. Dit is egter onaanvaarbaar dat die dokument in die algemeen dien as beliggaming van die soort verbruikersgoedere wat normaalweg voorwerp van huurkoopkontrakte is. Dit sou uiters onbevredigend wees om eiendomsoordrag van sodanige goed uitsluitlik van oorhandiging van die dokument afhanklik te stel. 'n Bevredigende algemene oplossing bied simboliese lewering dus ook nie.

Uit die voorgaande is duidelik dat, behalwe *attornment*, die gemeenregtelike vorms van lewering slegs in 'n baie beperkte mate toepassing kan vind by verdiskontering van huurkoopkontrakte. Die moontlikhede wat daar wel bestaan, is so gekunsteld en omslagtig of bots in so 'n mate met reeds gevestigde gebruike in die praktyk dat hulle eintlik buite rekening gelaat kan word.

Voordat ondersoek word op welke wyse dan by verdiskontering gelewer behoort te word, moet eers nagegaan word waarom lewering as vereiste vir eiendomsoorgang in ons reg gestel word en dan kan gekyk word of hierdie redes in die verdiskonteringsituasie aanwesig is.

REDES VIR LEWERING

Hoofsaaklik twee redes kan uit die beslissings van ons howe afgelei word waarom lewering van 'n saak vereis word ten einde eiendomsreg oor te dra: Eerstens moet daar publisiteit aan die oordrag van die eiendomsreg verleen word en tweedens wil die verkryger besit van die saak hê ten einde sy nuut verkreë reg uit te oefen.

Die publisiteitsbeginsel

In *Fivaz v Boswell*[19] word gesê "to make a transfer of the right to the property of moveable goods, the transfer of possession must be open and notorious."

Hierdie stelling word heeltemal tereg deur appèlregter Solomon verwerp in *Zandberg v Van Zyl.*[20] Hy meen dat die feit dat daar iets geheimsinnigs aan die transaksie kleef wel van belang kan wees by die vasstelling of eiendomsreg oorgedra is "but to go further and to hold that, unless the transfer is open and notorious, the property cannot pass, is as far as I know entirely unsupported by any authority."[21]

Per slot van sake is die vereiste nie dat publisiteit aan die eiendomsoordrag verleen word nie maar dat die saak gelewer word, met die onderliggende gedagte om sodoende publisiteit aan die eiendomsoordrag te gee. Die publisiteit word egter nie deur die leweringshandeling self gegee nie – so is dit geen vereiste dat daar byvoorbeeld getuies by die leweringshandeling teenwoordig moet wees wat die eiendomsoordrag dan wêreldkundig moet maak nie. Die publisiteit is eerder geleë in die feit dat die verkryger die

[19](1852) 1 Searle 235 239; Sien ook *Le Riche v Van der Heuvel* (1887) 4 HC 395 396–397; *Policansky Brothers v Hanau* (1908) 25 SC 670 673.
[20]1910 AD 302 316; sien ook bl 308 van die verslag.
[21]316.

bevoegdhede wat hy verkry het openlik uitoefen. Sodoende bestaan daar dan ook 'n weerlegbare vermoede in ons reg dat die besitter van 'n roerende saak die eienaar daarvan is.[22] Die doel van hierdie vermoede is hoofsaaklik beskerming van bona fide-derdes. Besit skep sodoende 'n skyn van 'n reg en handhawing van hierdie skyn is by roerende sake die enigste wyse waarop beskerming verleen kan word aan derdes wat met die besitter onderhandel. Hulle moet op hierdie skyn kan vertrou om te verhoed dat hulle benadeel word.

Aan die ander kant moet hierdie vermoede nie te ver gedryf word nie. Daar bestaan in ons reg geen reël wat 'n persoon verplig om sy bates steeds in sy onmiddellike besit te hou nie. Daar rus ook geen plig op iemand wat sy saak byvoorbeeld te goeder trou in bruikleen aan 'n ander afstaan om hierdie feit wêreldkundig te maak nie.[23] Die vermoede moet dus altyd in die lig van die omstandighede van die betrokke geval beskou word. Dit is egter belangrik om daarop te let dat die onus om sy eiendomsreg te bewys op die persoon rus wat beweer dat hy eienaar is van 'n saak wat in besit van 'n ander is.[24]

Uitoefening van eiendomsreg

In die tweede plek word die saak aan die verkryger oorhandig om hom in staat te stel om beheer daaroor uit te oefen.[25] Dit is nie nodig dat die saak *de manu in manum* aan die verkryger oorhandig word nie – as dit op so 'n wyse in die teenwoordigheid of bewaring van die verkryger geplaas word dat hy en hy alleen na hartelus daarmee kan handel, is dit voldoende. Modderman[26] stel dit soos volg:

> "(D)e *traditio* is voltooid, zoodra er iets gebeurd is, waaruit onder de bestaande omstandigheden blijkt, dat de zaak is gekomen in de macht van den ontvanger al heeft eene *corporalis adprehensio* ook nog niet plaats gehad; zoodra voor den ontvanger feitelijke heerschappij mogelijk is geworden, is de overdracht van het bezit voltooid."

"Mag" en "feitelike heerskappy" beteken volgens waarnemende regter Roberts[27] vandag niks anders nie "than the legal right to deal with the property as owners."[28]

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[22]*Policansky Brothers v Hanau* (1908) 25 SC 670 672; *Zandberg v Van Zyl* 1910 AD 302 308; *Gobo v Davies* 1915 EDL 136 139; *Weeks v Amalgamated Agencies Ltd* 1920 AD 218; *Terry v Sham's Garage* 1934 NPD 407 408; *M G Naidoo v Ismail, M N Naidoo v Ismail* 1935 NPD 227 232; *Gleneagles Farm Dairy v Schoombee* 1949 1 SA 830 (A) 836.

[23]*Policansky Brothers v Hanau* (1908) 25 SC 670 672; *Gleneagles Farm Dairy v Schoombee* 1949 1 SA 830 (A) 837–838. In gepaste omstandighede kan estoppel natuurlik in sodanige geval in werking tree – *Gleneagles Farm Dairy v Schoombee* 838.

[24]*Zandberg v Van Zyl* 1910 AD 302 306; *Gleneagles Farm Dairy v Schoombee* 1949 1 SA 830 (A) 836; *De Lange v Transvaal Lewende Hawe Ko-op Bpk* 1958 1 SA 17 (T) 20E.

[25]*Knight Ltd v Lensvelt* 1923 CPD 444 447; *Meintjes v Wilson* 1927 OPD 183 189; *Trust Bank van Afrika v Ebrahim* 1961 4 SA 336 (T) 338E–H; *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel* 1972 1 SA 270 (A) 275A.

[26]*Handboek voor het Romeinsche Recht* (1884) vol 2 par 148 III; sien ook *Groenewald v Van der Merwe* 1917 AD 233 239. Volgens ar Rumpff is "lewering" niks anders nie as om die verkryger in staat te stel om die mag uit te oefen wat die oordraer gehad het – *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel* 1972 1 SA 270 (A) 275A.

[27]*Trust Bank van Afrika v Ebrahim* 1961 4 SA 336 (T) 338H.

[28]Hierdie uitlating van die regter word hieronder krities ontleed.

Albei elemente van besit moet verder by die verkryger aanwesig wees. Hy moet dus nie slegs in staat gestel word om fisies beheer oor die saak uit te oefen nie maar moet ook die wil hê om beheer ten behoewe van homself en tot uitsluiting van andere uit te oefen.[29]

Die onderliggende gedagte by die oordrag van die saak in die mag van die verkryger is om hom in staat te stel om sy eiendomsreg uit te oefen. So sê appèlregter Innes in *Zandberg v Van Zyl*:[30] "A man buys an article . . . because he wishes it to belong to him, so that his interests may be thereby advanced." Dit verklaar dan ook die omsigtigheid waarmee die howe geskille benader waarin 'n persoon eiendomsreg verkry sonder dat die besit van die saak aan hom verskaf is.[31]

EIENDOMSOORGANG IN DIE VERDISKONTERINGSITUASIE

Die vraag is nou hoe eiendomsreg in die verdiskonteringsituasie tussen die verskillende partye oorgedra word. Eerstens sal ondersoek word hoe die huurkoopkoper na behoorlike afloop van die huurkoopkontrak eienaar word en tweedens hoe eiendomsoorgang na die verdiskonteringsmaatskappy plaasvind.

Eiendomsverkryging deur die huurkoopkoper

Sonder om die aard daarvan te ondersoek, kan aanvaar word dat die huurkoopkontrak 'n vorm van koopkontrak is waarin ooreengekom word dat die koper ten spyte van lewering aan hom eers eiendomsreg gaan verkry by volle betaling van die koopprys. Dit beteken dat die saaklike ooreenkoms aan 'n opskortende voorwaarde onderworpe is.

By 'n koopkontrak gaan eiendomsreg van die koopsaak normaalweg by lewering oor indien die koopprys betaal is of krediet verleen is.[32] Die gevolg van die newebeding dat eiendomsreg nie oorgaan voordat die koopprys ten volle betaal is nie is dat die verkoper eienaar bly ondanks die feit dat krediet verleen is en lewering ingevolge die koopkontrak plaasgevind het. Dat eiendomsreg wel langs hierdie weg voorbehou kan word, is reeds in vroeë beslissings aanvaar.[33] In *Fazi Booi v Short*[34] en *Quirk's Trustees v Assignees of Liddle and Co*[35] is egter beslis dat die eiendomsvoorbehoudsklousule tot gevolg het dat daar geen koopkontrak[36] bestaan voordat die

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[29] *Groenewald v Van der Merwe* 1917 AD 233 238 239.

[30] 1910 AD 302 312; sien ook *S v Dorfler* 1971 4 SA 374 (R AD) 377D.

[31] *Zandberg v Van Zyl* 1910 AD 302; *Goldinger's Trustee v Whitelaw and Son* 1917 AD 66; *Groenewald v Van der Merwe* 1917 AD 233.

[32] *Daniels v Cooper* (1880) 1 EDC 174; *Crockett v Lezard* 1903 TS 590; *Bold v Cooper* 1949 1 SA 1195 (W); *Eriksen Motors (Welkom) Ltd v Protea Motors Warrenton* 1973 3 SA 685 (A).

[33] *Fazi Booi v Short* (1882) 2 EDC 301; *Martin and McElney v Savory* 1904 TS 180.

[34] (1882) 2 EDC 301.

[35] (1885) 3 SC 322. Sien verder *Leo v Loots* 1909 TS 366; *Provident Land Trust Ltd v Union Government* 1911 AD 615; *Mitchell's Piano Saloons v Theunissen* 1919 TPD 392; *Laing v South African Milling Co Ltd* 1921 AD 387; *Fichardts Motors (Prop) Ltd v Nienaber* 1936 OPD 221; *Odendaalsrust Municipality v New Nigel Estate Gold Mining Co Ltd* 1948 2 SA 656 (O).

[36] Alhoewel daar tog sekerlik 'n "kontraktuele verhouding" moet bestaan – sien De Wet en Yeats *Die Suid-Afrikaanse Kontraktereg en Handelsreg* (1964) 101 vn q.

voorwaarde vervul is nie, met ander woorde voordat die laaste paaiement betaal is nie. Hierdie houding kan nie aanvaar word nie. Dit berus onder meer op 'n stelling van Voet[37] waar hy sê dat 'n afspraak dat die koper nie eiendomsreg sal verkry nie, strydig is met die wese van 'n koopkontrak. Voet se stelling het egter nie betrekking op 'n voorwaardelike opskorting van eiendomsreg nie maar op 'n afspraak waarby die bedoeling is dat die ander persoon *nooit* eienaar sal word nie.[38] Suid-Afrikaanse skrywers[39] oor die huurkoopkontrak kan dan ook geen rede sien waarom eiendomsoorgang by 'n koopkontrak nie uitgestel kan word nie.[40]

Die korrekte opvatting sou dan wees dat die verbintenisse tussen die partye onvoorwaardelik en ongekwalifiseerd in werking tree maar alleen die saaklike ooreenkoms opgeskort word. By vervulling van die voorwaarde, dus as die koopprys ten volle betaal is, gaan eiendomsreg op die huurkoopkoper oor.[41] Dit is onnodig om in dié verband te vereis dat die koper eiendomsreg deur *traditio brevi manu* verkry.[42] Ter uitvoering van die huurkoopkontrak is die koper reeds in fisiese beheer gestel. Die volle werking van die saaklike ooreenkoms is egter opgeskort hangende die vervulling van die voorwaarde. Word die voorwaarde vervul, verkry die saaklike ooreenkoms volle werking en die koper sonder meer eiendomsreg. 'n Tweede fisiese oorhandiging kom dus glad nie ter sprake nie.

Alhoewel die volle werking van die saaklike ooreenkoms uitgestel is, verkry dit nogtans sakeregtelike beslag in soverre dat dit aan die eiendomsreg kleef. Dra die huurkoopverkoper met ander woorde sy eiendomsreg aan 'n verdiskonteringsmaatskappy oor, *bly die reg* aan hierdie opskortende voorwaarde onderworpe. Die verkoper kan immers nie meer regte oordra as wat hyself het nie. Word die voorwaarde vervul, met ander woorde word die laaste paaiement aan die *maatskappy* betaal, gaan eiendomsreg oor op die huurkoopkoper sonder dat weer 'n saaklike ooreenkoms of fisiese oorhandiging hoef plaas te vind.

Eiendomsverkryging deur die verdiskonteringsmaatskappy

Die onsekerheid oor die wyse van eiendomsoordrag by verdiskontering van 'n huurkoopkontrak is toe te skryf aan die feit dat dié figuur vanuit die Anglo-Amerikaanse reg na Suid-Afrika gekom het.[43] Vanselfsprekend lewer eiendomsoorgang in sodanige omstandighede nie probleme op as eiendom deur ooreenkoms oorgedra kan word nie. In 'n regstelsel waar eiendomsoorgang op die *traditio*-beginsel gegrondves is, is dit egter heel anders ge-

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[37] 18 1 26.

[38] *Wolf v Richards* (1884) 3 HC 102 118–119; De Wet en Yeats a w 246; Flemming *Huurkoopreg* (1974) 6–7; Diemont en Marais *The Law of Hire-Purchase in South Africa* (1964) 14 e v.

[39] De Wet en Yeats a w 246; Diemont en Marais a w 16; Flemming a w 6.

[40] Flemming a w 9 toon aan dat dit in elk geval moeilik is om enige verskil vas te stel tussen 'n huurkoopkontrak wat dan na bewering nog geen koopkontrak is nie en 'n gewone onvoorwaardelike koopkontrak.

[41] *Pennefather v Gokul* 1960 4 SA 42 (N) 43–44; Diemont en Marais a w 17.

[42] *Pennefather v Gokul* 1960 4 SA 42 (N) 44B; *Forsdick Motors Ltd v Lauritzen* 1967 3 SA 249 (N) 253FG.

[43] Van Waasdijk *Hire-Purchase Credit in South Africa* (1956) 78; Diemont en Marais a w 133.

steld. In die verdiskonteringspraktyk voldoen eiendomsoordrag nie altyd duidelik aan die besondere vereistes van *traditio* nie. In die omstandighede is dit goed begryplik dat in die regspraak nog nie 'n algemene beginsel uitgekristalliseer het wat in alle gevalle van eiendomsoorgang by verdiskontering toepassing kan vind nie.

Die wesenlike vraag is of fisiese oorhandiging hetsy werklik, hetsy fiktief nodig is ten einde eiendomsreg aan die finansieringsmaatskappy oor te dra. Om die vraag te beantwoord, moet eiendomsoorgang by verdiskontering getoets word aan die redes waarom lewering in die algemeen vir eiendomsoorgang vereis word. Hierbo is gesien dat besit van die saak verkry moet word om publisiteit aan die sakeregtelike verandering te verleen en tweedens om die verkryger beheer oor die saak te laat verkry sodat hy sy eiendomsreg kan uitoefen. Hierdie twee vereistes moet nou in die lig van die verdiskonteringsituasie ondersoek word.

Daar is vroeër op gewys dat verskuiwing van besit die enigste wyse is waarop die sakeregtelike verandering by roerende goed aan derdes bekend gemaak kan word. Die agterliggende gedagte is dat aangesien besit en eiendomsreg dikwels in dieselfde hand verenig is, besit die funksie vervul om prima facie die eienaar aan te dui – daarom die weerlegbare vermoede dat die besitter ook eienaar is.

Die waarde van die publisiteitsdoel van lewering is egter hoogs twyfelagtig om die eenvoudige rede dat besit en eiendomsreg van 'n saak toenemend in verskillende hande setel. In die omstandighede by verdiskontering van 'n huurkoopkontrak *kan* besit nie publisiteit aan die sakeregtelike verandering verleen nie. Selfs al word aanvaar dat besit regtens aan die verdiskonteringsmaatskappy verleen kan word, sal sodanige besitsverskaffing nie 'n publisiteitsfunksie vervul nie. Die koper het immers fisiese beheer en dit dui prima facie op besit en eiendomsreg. Die weerlegbare vermoede dat hy wat in beheer van 'n roerende saak is ook eienaar daarvan is, mag in die verdiskonteringsituasie waarde hê wat die bewyslas betref, maar sover dit publisiteit aangaan, is dit nutteloos. Die eerste rede waarom lewering van 'n saak vereis word, val dus weg.

Die tweede rede waarom die eiendomsverkryger besit van die saak moet verkry, is om hom beheer daaroor te verleen sodat hy sy nuut verkreë reg kan uitoefen.[44] 'n Mens koop tog 'n saak omdat jy dit wil gebruik ten einde jou belange te bevorder.

As 'n mens nou na die situasie by verdiskontering kyk dan blyk die volgende: Die verdiskonteringsmaatskappy verkry die regte van die huurkoopverkoper uit die huurkoopkontrak, dit wil sê hoofsaaklik die huurkoopverkoper se regte op die betaling van die uitstaande paaiemente en hiervoor betaal die maatskappy 'n geldsom. Dan word ook ooreengekom dat die maatskappy die eiendomsreg van die saak sal verkry, maar nie om hierdie eiendomsreg uit te oefen in die sin dat hy die saak wil gebruik nie – dit wil die huurkoop*koper* immers doen. Die maatskappy wil die eiendomsreg van die saak bloot hê as *sekuriteit* vir die krediet wat hy verleen het. In feitelike be-

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[44]Sien die opmerkings in *Zandberg v Van Zyl* 1910 AD 302 308 312 318 319 320.

heer oor die huurkoopsaak is hy hoegenaamd nie geïnteresseerd nie. Die maatskappy se wins is geleë in die finansieringskoste wat hy hef op elke huurkoopkontrak wat by hom verdiskonteer word en daarom stel hy daarin belang dat die huurkoopkoper sy paaiemente na behore betaal. Slegs as die koper sy verpligtinge nie nakom nie wil die maatskappy feitelike beheer en dus besit van die koopsaak verkry want dan word sy sekuriteit in gevaar gestel. Met ander woorde as die maatskappy oor die saak beskik, beskik hy daaroor soos 'n saaklikgeregtigde skuldeiser wat sy skuldenaar uitwin. Dit is verstaanbaar as in ag geneem word dat eiendomsreg hier die funksie vervul van 'n saaklike sekerheidsreg omdat 'n besitlose saaklike sekerheidsreg nie erken word nie. Dit is dus duidelik dat die feitelike heerskappy waarin die maatskappy belang stel en die omstandighede waaronder dit daarin belang stel, ver verwyderd is van die feitelike heerskappy wat as rede ter sprake kom waarom lewering van 'n saak vereis word ten einde eiendomsreg oor te dra.

Albei redes waarom lewering moet plaasvind ten einde eiendomsoorgang te bewerkstellig, ontbreek dus in die verdiskonteringsituasie. Dit wil dus voorkom of dit by verdiskontering nie nodig is dat die saak hoegenaamd gelewer word nie. Bied ons praktyk in hierdie verband enige aanknopingspunt?

BENADERING IN DIE PRAKTYK

Heel dikwels word daar in sake waar verdiskontering van huurkoopkontrakte ter sprake kom, verwys na eiendomsoorgang tussen die huurkoopverkoper en die verdiskonteringsmaatskappy. In sodanige gevalle word dan gewoonlik slegs gemeld dat die handelaar al sy regte uit die huurkoopooreenkoms asook die eiendomsreg wat hy voorbehou het aan die maatskappy "gesedeer" of oorgedra het.[45] In 'n paar gevalle het die eiendomsoordrag egter direk ter sprake gekom.

In *Credit Corporation of Rhodesia Ltd v Fifth Avenue Investments (Pvt) Ltd*[46] is die vraag aangeraak of die verdiskonteringsmaatskappy eienaar van die huurkoopgoedere geword het. Met betrekking tot die besitsverhouding tussen die verkoper en die maatskappy verwys die regter na *constitutum possessorium*. Hy het blykbaar in gedagte dat die huurkoopverkoper die huurkoopkontrak eers verdiskonteer, die eiendomsreg aan die maatskappy oordra en dan die saak aan die huurkoopkoper oorhandig. Die vraag is egter dan hoe die koper die saak verkry. *Constitutum possessorium* is as leweringsvorm tog slegs geskik om tussen twee persone gebruik te word. Sodra meer as twee persone by die transaksie betrokke is, wil dit nie sê dat hierdie figuur hoegenaamd geen aanwending kan vind nie maar iets meer sal moet bykom. Die verkoper sal dan die saak as verteenwoordiger van die maatskappy aan die koper moet besorg. Hiervan rep die regter niks, maar miskien moet 'n mens aanneem dat hy die nodige volmag veronderstel. Nogtans sal hierdie metode in die huidige verdiskonteringspraktyk slegs beperkte aanwending kan geniet: daar is reeds op gewys dat die saak gewoonlik eers aan

[45]Bv *Milner v Union Dominions Corporation (SA) Ltd* 1959 3 SA 674 (K) 677A; *Van Zyl v Credit Corporation of SA Ltd* 1960 4 SA 582(A) 587C; *Rahim v Minister of Justice* 1964 4 SA 630(A) 632–633; *Barnard v Centenary Finance Co (Pty) Ltd* 1970 1 SA 107(T) 110G.
[46]1960 4 SA 704 (R).

die huurkoopkoper gelewer word en die kontrak daarna verdiskonteer word. In elk geval was die regter se opmerkings in hierdie verband bloot obiter.

In *Miller v Trust Bank of South Africa*[47] sê regter Snyman dat die bepaling in die algemene ooreenkoms tussen die verkoper en die verdiskonteringsmaatskappy dat laasgenoemde eienaar van die huurkoopgoedere sal word as hy die verkoper se regte koop en die huurkoopooreenkomste aan hom gelewer word nie baie goed uitgedruk is nie. Volgens die stukke voor hom is dit duidelik dat die huurkoopgoedere (in hierdie geval trekkers) aan die huurkoopkoper gelewer is toe die huurkoopooreenkomste aangegaan is. Waar die algemene ooreenkoms dus bepaal dat die verdiskonteringsinstansie eienaar van die betrokke sake sal word ten tye van die oordrag van die huurkoopkontrakte, kan dit slegs beteken dat die verkoper se "rights of ownership" op hierdie stadium op die maatskappy oorgaan. Die maatskappy kan egter net "actual owner" van die betrokke sake word as hy sy "rights of ownership" uitoefen deur besit van die sake te neem. Die maatskappy het egter in casu nooit besit van die trekkers geneem nie en 'n mens moet dus aflei dat hy nooit "actual owner" geword het nie maar slegs die "rights of ownership" gehad het.

Die regter se redenasie is, met respek, uiters moeilik om te volg. Dit wil voorkom of hy meen dat wat eiendomsoordrag aan die maatskappy betref nie aan die leweringsvereiste voldoen is nie. Die maatskappy kon dus nie werklike eienaar ("actual owner") word nie maar hy het slegs die bevoegdhede van 'n eienaar ("rights of ownership") verkry.[48] 'n Persoon kan egter slegs eiendomsreg verkry as aan sekere vereistes voldoen word een waarvan lewering van die saak is. As aan *al* die vereistes voldoen is en die verkryger het eienaar geword, vloei daar vir hom sekere bevoegdhede uit sy eiendomsreg voort. Maar om die bevoegdhede te kan hê en te kan uitoefen, moet hy *reeds* eiendomsreg hê – in die woorde van die regter moet hy reeds "actual owner" wees. Hoe 'n persoon die bevoegdhede wat uit eiendomsreg ("rights of ownership") voortvloei, kan hê sonder dat hy eienaar is, val nie lig te begryp nie. Dit wil natuurlik sê as die regter se "rights of ownership" wél hierdie bevoegdhede is – wat dit anders kan wees, is in elk geval nie duidelik nie.

Wat hierdie saak betref, is dit in die eerste plek onseker of eiendomsreg op die maatskappy oorgegaan het. As eiendomsreg wél oorgegaan het, is dit tweedens onseker wat die aard van hierdie eiendomsreg is en hoe by die leweringsvereiste verbygekom is.

In *Trust Bank van Afrika v Ebrahim*[49] het eiendomsoordrag tussen die verkoper en verdiskonteringsmaatskappy weer eens ter sprake gekom.

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[47] 1965 2 SA 447 (T).

[48] Die regter se beroep op *Van der Merwe v Karroo* (*sic*) *Vleisbeurs Bpk* 1963 3 SA 831 (K) werp nie lig op die aangeleentheid nie. In hierdie saak is beslis dat waar 'n koopkontrak deur 'n hofbevel gekanselleer word dit nie tot gevolg het dat die verkoper weer outomaties eienaar van die saak word nie – eers as die saak weer aan die verkoper gelewer is, sal hy eienaar word (835H). Die saak bied geen gesag vir die stelling dat 'n persoon die bevoegdhede van 'n eienaar ("rights of ownership") kan hê sonder dat hy ook werklik eienaar ("actual owner") is nie.

[49] 1961 4 SA 336 (T).

Waarnemende regter Roberts sê dat die beginsel is dat die eiendomsverkryger feitelike heerskappy moet verkry.[50] Die doel van die onderskeiding tussen die verskillende vorms van fiktiewe lewering is slegs om voorbeelde te verskaf van hoe dié beginsel toegepas word.[51] Volgens die regter beteken feitelike heerskappy in die moderne reg slegs "the legal right to deal with the property as owner."[52] Sodanige beheer word aan die verkryger gegee "by the transference of whatever rights were possessed by the previous owner."

Die regter beroep hom op *Meintjes v Wilson*[53] en Modderman.[54] Die beroep op hierdie gesag is nie volkome geslaagd nie. Modderman beklemtoon weliswaar dat *traditio* eintlik op die gee van feitelike beheer neerkom, maar daar moet in gedagte gehou word dat dié skrywer oor die Romeinse reg skryf. Al wat hy te kenne wil gee, is dat daar vroeër in die Romeinse reg 'n *corporalis adprehensio* vir besitsverkryging vereis is maar dat hierdie vereiste later verslap is sodat die verkryger beheer oor die saak kon verkry op enige wyse wat hom volgens die gemeenskapsopvattinge in staat gestel het om sy eiendomsreg uit te oefen. Nogtans was dit daadwerklike fisiese beheer. In die *Meintjes*-saak het dit inderdaad ook gegaan oor die feit of 'n persoon aan wie na bewering *brevi manu* gelewer is sodanige beheer verkry het.

Die verdiskonteringsmaatskappy stel nie belang in die fisiese beheer waaroor Modderman dit het nie. Dit wil tog voorkom of die regter dit ook so insien waar hy feitelike heerskappy gelykstel bloot aan die reg om as eienaar op te tree. Hierdie stelling is egter nie heeltemal duidelik nie. Die argument is, met respek, nie oortuigend as lewering as vereiste vir eiendomsoordrag gestel word nie. Die verkryger moet tog eers eienaar word voordat hy as eienaar met die saak kan handel en om eienaar te word, moet die saak aan hom gelewer word. Hy moet met ander woorde fisiese heerskappy verkry. Deur dus nou te sê dat die verkryger feitelike heerskappy het as hy eienaar is, word glad nie aangedui hoe by die leweringsvereiste verbygekom moet word nie – daar word eenvoudig daarvan uitgegaan dat wel gelewer is.

Andersins kan dit wees dat die regter lewering in dié omstandighede onnodig ag en van mening is dat dit voldoende is as die verkryger die reg verkry om as eienaar op te tree – ook al het hy geen fisiese beheer verkry nie. Die enigste wyse waarop dit by verdiskontering sou kon geskied, is by wyse van eiendomsoordrag deur ooreenkoms. In casu bevind die hof egter dat wel aan die vereistes van 'n fiktiewe leweringsvorm, *attornment*, voldoen is. Dus was dit nie nodig om te beslis of van lewering in sy gewone vorms afgewyk kon word nie.[55]

In hierdie saak het die regter dit onnodig gevind om vas te stel of "constructive delivery of this kind" kan plaasvind in omstandighede waar

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[50] 338FGH.
[51] 338E.
[52] 338H.
[53] 1927 OPD 183 189.
[54] a w vol 2 par 148 III.
[55] 339A.

die toestemming van die houer nie nodig is om eiendomsoordrag tussen die oordraer en die verkryger te bewerkstellig nie.[56] In casu is die vereiste toestemming wel teenwoordig en het die verdiskonteringsmaatskappy eienaar geword – moontlik reeds toe die huurkoopkoper kennis van die oordrag verkry het maar beslis toe die koper dit erken het.[57]

In *Caledon en Suid-Westelike Distrikte Eksekuteurskamer Bpk v Wentzel*[58] het eiendomsoordrag aan 'n verdiskonteringsmaatskappy direk ter sprake gekom. Die feite van die saak is soos volg: V verkoop 'n aantal motorvoertuie op huurkoop aan K. Die huurkoopkontrak bevat 'n klousule waarvolgens V onmiddellik na sluiting van die kontrak sy regte uit die ooreenkoms sowel as die eiendomsreg wat hy voorbehou het aan C gaan oordra. K stem toe tot die oordrag en onderneem om C se regte te erken en om die voertuie namens C te hou wanneer die oordrag plaasvind. Kort na sluiting van die huurkoopkontrak vind die oordrag plaas. C stel K daarvan in kennis en versoek hom om 'n skriftelike erkenning te teken. K teken die erkenning en stuur dit aan C terug. Op hierdie stadium het K egter reeds een van die voertuie aan D verkoop wat dit weer op sy beurt aan E op huurkoop verkoop het. C stel nou sy *rei vindicatio* teen E in ten einde hierdie voertuig terug te kry. Die kernvraag was of C in dié omstandighede eiendomsreg van die motor verkry het.

In die verhoorhof voer die eiser aan dat hy eiendomsreg deur *attornment* verkry het. Regter Hiemstra beslis egter dat lewering hier nie deur *attornment* plaasgevind het nie.[59] Dit is naamlik volgens die regter 'n vereiste vir lewering by wyse van *attornment* dat daar wilsooreenstemming tussen aldrie partye bestaan. As die derde aan sy wil uiting gee, moet hy òf *detentio* van die saak, òf ten minste 'n beheersreg daaroor hê.[60] Toe die kennisgewing aan C teruggestuur het waarin hy onderneem het om die motor namens C te hou, het hy dit egter reeds aan D verkoop. Hy het dus nòg *detentio* van die voertuig, nòg 'n beheersreg daaroor gehad. Lewering kon dus nie aan C plaasgevind het nie. Derhalwe het C nie eienaar geword nie en sy eis misluk.

Die eiser se advokaat het aangevoer dat die versending van die kennisgewing deur C aan K nie eens nodig was nie omdat die huurkoopkontrak 'n bepaling bevat het waarvolgens V aan K kennis gegee het dat hy sy regte uit die huurkoopooreenkoms sowel as die eiendomsreg wat hy voorbehou het onverwyld spesifiek aan C gaan oordra. Die koper het tot hierdie oordrag toegestem en hy het ook onderneem om die maatskappy se regte te erken en die saak namens hom te hou nadat die oordrag plaasgevind het. Wilsooreenstemming is sodoende tussen V en K bereik dat eiendomsreg onverwyld aan C (wat by name genoem is) oorgedra sou word en dat wanneer die oordrag geskied het K namens C sou besit. Wilsooreenstemming tussen aldrie die betrokke partye het daarna tot stand gekom toe die oordrag plaasgevind het.

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[56] 339A.
[57] 339B.
[58] 1971 2 SA 466 (T) en 1972 1 SA 270 (A).
[59] 467H.
[60] 468.

Regter Hiemstra[61] is egter van mening dat volgens die grondliggende beginsels van die kontraktereg aanvaarding van 'n wilsverklaring slegs kan geskied as 'n mens van die wilsverklaring bewus is. Hy meen dat die drievoudige wilsooreenstemming nie sonder skakeling tussen K en C kon plaasvind nie. V was nie verplig om eiendomsreg oor te dra nie. Die betrokke bepaling in die huurkoopkontrak is slegs 'n kennisgewing van 'n voorneme om dit oor te dra sodat K nie kon weet wanneer die oordrag sou plaasvind nie, indien ooit. Die regter is van mening dat die partye die saak self ook so ingesien het, daarom is K versoek om ontvangs te erken. Syns insiens is die erkenning van ontvangs 'n onontbeerlike deel van die drievoudige wilsooreenstemming en is K se wilsverklaring om voortaan namens C te besit. Die argumente van die advokaat word dus verwerp.

Die eiser appelleer teen hierdie uitspraak. Appèlregter Rumpff verwerp die uitspraak van die provinsiale hof en beslis dat eiendomsreg wel oorgegaan het. Die hof aanvaar wél dat *attornment* voldoen aan die vereistes vir lewering van roerende goed in die Romeins-Hollandse reg. Appèlregter Rumpff onderskryf egter nie sonder meer dat *attornment* 'n vorm van *traditio brevi manu* is nie en hy aanvaar ook nie dat waar 'n roerende saak in die hande van 'n derde is dit slegs by wyse van *attornment* gelewer kan word nie.[62] In hierdie verband verwys die hof na die Nederlandse reg en meer in die besonder na die artikelreeks van Drion[63] en beslis dat dit vir eiendomsoordrag voldoende was dat K ten tye van die sluiting van die huurkoopooreenkoms ingestem het om C se regte te erken en om namens C te hou wanneer die oordrag ook al plaasvind.[64] Die bepalings van die huurkoopkontrak waarvolgens K onderneem het om die saak namens C te hou en waarin hy ook onderneem het om sy aanname skriftelik te erken, kan volgens die appèlhof nie as 'n opskortende voorwaarde beskou word nie waarvolgens K onderneem om eers dan die voertuig namens C te hou wanneer hy kennis van die oordrag gekry het en 'n skriftelike erkenning van die aanname gedoen het.[65] Kennisgewing aan die koper is slegs nodig om onder andere te verseker dat betalings vanaf die datum van ontvangs van die kennisgewing aan die maatskappy geskied. Die skriftelike erkenning is volgens appèlregter Rumpff slegs 'n bevestiging deur die koper teenoor die finansieringsmaatskappy van wat reeds plaasgevind het en waarvan die maatskappy vanweë die oordrag reeds kennis dra. Die gedagte word soos volg uitgedruk:[66]

> "Die belangrikheid lê nie in sy (koper se) kennis van die datum van die sessie nie maar in sy wilsuitdrukking om die voertuig as besitter te hou namens die toekomstige sessionaris."

Die effek van hierdie beslissing is dat die appèlhof 'n nuwe vorm van fiktiewe lewering naas die erkende vorme geskep het.[67] Waar die eiendomsreg van 'n saak wat in die hande van 'n derde is, oorgedra moet word, is dit

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[61] 469.
[62] 273FG.
[63] 1942 *WPNR* 109 ev.
[64] 274B.
[65] 274C.
[66] 274E.
[67] Van der Merwe en Neethling 1973 *THRHR* 87.

wat die leweringsvereiste betref voldoende as die houer verklaar om in die toekoms namens die verkryger te hou wanneer die oordraer die eiendomsreg aan die verkryger oordra. Wanneer sodanige oordrag dan plaasvind, gaan eiendomsreg inderdaad op die verkryger oor ongeag of die houer ten tye van die oordrag daadwerklike beheer oor die saak uitoefen. Hierdie nuwe vorm van lewering vertoon ooreenkoms met ongeveer al die tradisionele vorms van fiktiewe lewering maar is nie met een van hulle heeltemal identies nie.[68]

Dit is duidelik dat die leweringsvorm wat in die *Wentzel*-saak ter sprake gekom het hom goed leen om in sekere omstandighede in die verdiskonteringspraktyk aangewend te kan word. Dit wil sê in gevalle waar die algemene ooreenkoms en die huurkoopkontrak bepalings bevat wat meld dat die huurkoopverkoper sy regte aan 'n spesifieke verdiskonteringsmaatskappy gaan oordra en die huurkoopkoper daartoe instem en onderneem om die saak namens die spesifieke maatskappy te hou wanneer die oordrag plaasvind. Wat die posisie sal wees waar die maatskappy nie by name genoem word nie en die huurkoopkoper die nodige onderneming nie teken nie blyk nie uit hierdie saak nie. Die *Wentzel*-saak stel dus nie 'n algemene beginsel daar wat vir die verdiskonteringspraktyk in sy huidige vorm in alle omstandighede 'n oplossing bied nie. Ook die res van die positiewe reg soos hierbo uiteengesit, bied sodanige beginsel nie. Die enigste aanknopingspunt in dié verband is *attornment* en juis die *Wentzel*-saak toon aan dat *attornment* nie die antwoord op die probleem bied nie.

Hierbo is daarop gewys dat besit van 'n roerende saak in die Suid-Afrikaanse reg aan die verkryger verskaf word deur òf 'n verandering in die feitelike toestand, òf deurdat die persoon wat daadwerklike beheer oor die goed uitoefen 'n wilswysiging ondergaan. Die nuwe vorm van lewering wat die appèlhof hier in die lewe roep, verskil in dié opsig van die tradisionele opvatting dat 'n wilsverklaring van die houer weliswaar nog aanwesig is maar nie gemaak word terwyl hy *detentio* van of beheer oor die saak het nie.

Appèlregter Rumpff gaan egter verder. In 'n obiter dictum stel hy na aanleiding van die Nederlandse reg[69] die vraag[70] of die persoon wat beheer uitoefen oor die saak wat gelewer moet word, in gevalle soos die onderhawige "by 'n sessie van eiendomsreg" waar daar geen verandering in die feitelike toestand beoog word nie, kan weier om sy wil te wysig om namens die "sessionaris" te hou. Die appèlregter stel dit soos volg:[71]

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[68]Van der Merwe en Neethling a w 87 e v.

[69]Hoofsaaklik n a v die uitspraak van die *Hoge Raad* van 1 November 1929 en die artikelreeks deur Drion.

[70]274H–275A.

[71]275A. In die omstandighede wat by verdiskontering van 'n huurkoopkontrak geld, kan geen beswaar daarteen wees dat van die leweringsvereiste afgesien word nie. As die verkryger nie fisiese beheer oor die sake wil hê, in die sin dat hy sy eiendomsreg wil uitoefen nie, is daar geen rede waarom lewering vereis moet word nie. Waar die verkryger egter wel in fisiese heerskappy belang stel, al is dit dan ook om dit deur 'n ander persoon uit te oefen, is dit moeilik om in te sien hoe sonder meer van die tradisionele beskouing dat die derde 'n wilswysiging moet ondergaan, afgewyk kan word. Die kriteria wat die regter stel, nl "sessie van eiendomsreg" waar geen verandering in die feitelike posisie

"Wanneer die koper geen nadeel ondervind deur 'n sessie nie kan selfs met reg gevra word of die besitter kan weier om sy wil te wysig en of kennisgewing van die sessie aan die koper nie voldoende behoort te wees om lewering te laat plaasvind nie. Deur sessie en so 'n kennisgewing sou die sessionaris tog in staat gestel word om die mag uit te oefen oor die saak wat die sedent as eienaar gehad het. Dit is immers hierdie instaatstelling om daardie mag uit te oefen wat 'lewering' is."

Al "mag" wat die oordraer (huurkoopverkoper) by verdiskontering het, is die bevoegdheid om sy eiendomsreg uit te oefen as die huurkoopkoper sy verpligtinge nie nakom nie. Verdere inhoudsbevoegdhede het hy nie en hy verkry nie daadwerklike fisiese beheer oor die saak nie. Om hierdie "mag" oor te dra, is die appèlregter bereid om van die tradisionele vorms van lewering af te wyk.[72]

'n Mens kry hier dus dieselfde benadering as in die Nederlandse reg waar met 'n veronderstelde wil van die houer van die saak gewerk word. In werklikheid het 'n mens eintlik met 'n onwerklike konstruksie te make waar die houer hom nie van die wil wat by hom veronderstel word, kan onthef nie.[73] As die oordrag afhanklik gestel word van 'n (saaklike) ooreenkoms tussen V en C tesame met 'n mededeling aan en medewerking van K en K kan nie weier om saam te werk nie, dan word die oordrag in der waarheid slegs van die ooreenkoms tussen V en C tesame met die mededeling aan K afhanklik gestel.

So beskou word die wilsverklaring van die houer wat nog altyd in ons reg vereis is ten einde besit en eiendomsreg oor te dra waar werklike oorhandiging van die saak nie plaasvind nie in die obiter dictum van die appèlhof prysgegee in gevalle waar die saak in die hande van 'n derde is en die derde geen nadeel deur die eiendomsoordrag ondervind nie. In die omstandighede wat by verdiskontering van 'n huurkoopkontrak geld, is dit in elk geval baie moeilik om 'n voorstelling te maak van hoe die huurkoopkoper ooit deur sodanige oordrag benadeel sou kon word. Nie alleen word sy regte en verpligtinge in die huurkoopkontrak wat hy met die verkoper aangegaan het, vasgelê nie maar word hy ook deur die Huurkoopwet[74] beskerm.

'n Laaste vraag is waarom die kennisgewing aan die houer deel van die eiendomsoordrag moet vorm. Appèlregter Rumpff beslis immers self in

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beoog word nie en die derde geen nadeel deur die "sessie" ondervind nie, bring 'n mens op sigself ook nie verder nie – die derde kan immers weier om namens die verkryger te hou en hoe iemand feitelike beheer deur 'n ander kan uitoefen as die ander weier om dit namens hom te doen, is moeilik voorstelbaar. Sodra die verkryger egter nie feitelike beheer oor die saak wil uitoefen nie verander die situasie uiteraard. Die maatstaf van feitelike beheer moet dus by die kriteria kom wat die regter noem en moet ook deurslaggewend wees – eers as die verkryger nie feitelike beheer oor die saak wil hê nie kan van die leweringsvereiste afgewyk word.

[72]In hierdie saak was daar drie partye by die eiendomsoordrag betrokke en eintlik kan die obiter dictum slegs toepassing geniet as die saak wat oorgedra moet word in die hande van 'n derde is. "Sessie van eiendomsreg" kan natuurlik ook tussen twee persone ter sprake kom waar daar geen verandering in die feitelike posisie beoog word nie in welke geval die nadeelvereiste asook die kennisgewing nie eers ter sprake sal kom nie. Daar is egter genoeg vorms van fiktiewe lewering wat tussen twee persone aangewend kan word sodat daar geen regverdiging vir "sessie" in dié verband bestaan nie.

[73]Pitlo *Het Zakenrecht naar het Nederlands Burgerlijk Wetboek* (1972) 113.

[74]36 van 1942.

hierdie saak dat kennisgewing aan die koper nodig was om te verseker dat die betalings vanaf die ontvangs van die kennisgewing aan die "sessionaris" gedoen word.[75] Dit is ook die posisie in die "normale" geval van sessie, naamlik waar vorderingsregte gesedeer word. In sodanige geval is dit geen vereiste vir die oordrag dat kennis van die sessie aan die skuldenaar gegee word nie.[76] Waar egter nie aan die skuldenaar kennis gegee word nie en hy aan die sedent voldoen, het die sessionaris slegs homself te verwyt.[77] Waar die kennisgewing aan die houer deel vorm van die oordragshandeling kan, soos reeds aangedui, streng gesproke nie van "sessie van eiendomsreg" gepraat word nie. As die beginsel egter soos by sessie van vorderingsregte toegepas word, het 'n mens hier te doen met 'n werklike geval van sessie van eiendomsreg. Gesien in die lig van wat so pas gesê is oor die wil wat toegedig word aan die persoon wat beheer oor die saak voer, gaan die reg met ander woorde bloot deur die saaklike ooreenkoms oor. So 'n standpunt lyk heeltemal aanvaarbaar. Wat die huidige stand van die regspraak betref, kan nie gesê word dat hierdie ontwikkeling reeds bereik is nie maar in die lig van die obiter dictum van appèlregter Rumpff lyk sodanige ontwikkeling, sover dit eiendomsoorgang by verdiskontering van 'n huurkoopkontrak betref, nie onwaarskynlik nie.

Die feit dat eiendomsreg deur 'n blote saaklike ooreenkoms oorgedra word, bring vir die maatskappy geen ekstra risiko ten opsigte van sy sekuriteit mee nie. Daar is drie gevalle denkbaar waar die maatskappy sy eiendomsreg wil gebruik. In die eerste plek kan dit gebeur as die huurkoopkoper die saak vervreem voordat eiendomsreg op hom oorgegaan het in welke geval die maatskappy die saak met sy rei vindicatio kan opeis. In die tweede plek kan die koper met sy paaiemente agterstallig raak. Ook dan kan die maatskappy egter van sy rei vindicatio gebruik maak, mits die vereistes wat die Huurkoopwet stel, nagekom word.[78] Derdens bestaan die moontlikheid van insolvensie van die koper. In sodanige geval word die maatskappy se eiendomsreg in 'n hipoteek omskep[79] sodat hy in elk geval beskerm word. Hieruit is duidelik dat die maatskappy die juridiese beheer wat hy nodig het net sowel deur blote ooreenkoms kan verkry.

Nou kan 'n mens vra of die huurkoopverkoper en uiteindelik die verdiskonteringsmaatskappy nie maar *deur die huurkoopkoper* fisiese beheer uitoefen nie. Aangesien hulle egter hoegenaamd nie in fisiese heerskappy oor die saak belang stel nie kan dit nie die geval wees nie. Besit vereis tog ondermeer 'n *corpus*-element. Die korrekte posisie blyk dus te wees dat die maatskappy eienaar van die saak is maar die huurkoopkoper besitter.

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[75] 274C.

[76] *J McNeil v Insolvent Estate of R Robertson* (1882) 3 NLR 190 194–195; *Jacobsohn's Trustee v Standard Bank* (1899) 16 SC 201 203; *Eastern Rand Exploration Co Ltd v Nel* 1903 TS 42 53–54; *Rothschild v Lowndes* 1908 TS4 93 499; *Van Aswegen v Pienaar* 1967 3 SA 677 (O) 680H.

[77] *Rothschild v Lowndes* 1908 TS 493 499; *Katz v Katzenellenbogen* 1955 3 SA 188 (T) 191AB; *Trust Bank van Afrika Bpk v Oosthuizen* 1962 2 SA 307 (T) 308EF; *Brook v Jones* 1964 1 SA 765 (N) 767CF.

[78] Sien art 12 en 13 van die wet.

[79] Sien art 84 van die Insolvensiewet 24 van 1936.

SAMEVATTING

Uit bostaande is duidelik dat die tradisionele wyses van lewering beswaarlik in die verdiskonteringsituasie aanwending kan vind. Aangesien albei redes waarom 'n roerende saak gelewer moet word ten einde eiendomsreg oor te dra by verdiskontering afwesig is, kan daar dogmaties gesien geen rede wees waarom eiendom by verdiskontering van 'n huurkoopkontrak nie bloot deur 'n saaklike ooreenkoms kan oorgaan nie. Alhoewel die regspraktyk hom nog nie ondubbelsinning op hierdie standpunt gestel het nie is daar in twee sake aanduidings dat die howe nie ongeneë sal wees om te erken dat eiendomsreg by verdiskontering deur blote ooreenkoms kan oorgaan nie. □

Daar moet algemene reëls wees waarvolgens elkeen sy handel en wandel moet inrig; regte en pligte moet afgebaken word sodat almal, dieselfde pad opgaande, mekaar nie in die gedrang in die wiele ry nie. En verder, omdat met die toenemende getal van die geheel die getal ook toeneem van die deel wat slegte burgers is en misdade pleeg en hulle medeburgers op allerlei wyse te kort doen en veronreg, moet daar voorsiening wees vir straf en vir vergoeding. Met ander woorde, die eerste taak van die wet is om te sê wat elkeen se regte is, en die tweede om daardie regte vir elkeen te handhaaf.

Die wet dan is die beskermer. Hy maak reëls of instellings of bepalings om die burger te beskerm, in sy roem sodat hy nie belaster word nie, in sy lyf en lewe sodat hy nie aangerand of vermoor word nie, in sy eiendom sodat hy nie beroof en besteel word nie, in sy aansprake sodat hy nie tekort gedoen word nie. En vernaamlik in sy vryheid sodat hy deur niemand vervolg of verslaaf word nie, ook nie deur sy eie gesag nie.

C J Langenhoven *Die Goeie Burger*

Whither the Constitution?*

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OPSOMMING

Dit is vandag 'n algemene verskynsel dat die owerheidsgesag toenemend in die hande van die uitvoerende gesag setel. Dit is ook in Suid-Afrika die geval. Die posisie in Suid-Afrika verskil egter in twee opsigte van dié in ander lande. In die eerste plek geskied die regsontwikkeling dikwels uitsluitlik deur administratiewe optrede – soos weerspieël deur byvoorbeeld die bevoegdhede van die uitvoerende gesag ten aansien van die ontwikkeling van staatsregtelike instellings vir die Bantoetuislande en die wye magte van die uitvoerende gesag met betrekking tot die vasstelling van burgerlike vryhede en diskriminasie op grond van ras of kleur.

Hierdie toedrag van sake laat noodwendig die vraag na kontrole oor die uitvoerende gesag ontstaan. Soos in Engeland is kontrole oor die uitvoerende gesag in die Suid-Afrikaanse staatsreg vernaamlik moontlik deur middel van die parlement, die openbare mening (kiesers) en die howe. Sover dit parlementêre kontrole betref, is daar verskeie weë waarlangs die immer ontwikkelende en ingewikkelde stelsel van moderne regering gekontroleer kan word. Die vernaamste daarvan is gespesialiseerde parlementêre komitees, 'n effektiewe prosedure vir die hantering van klagtes teen die administrasie (ombudsman) en die doeltreffende benutting van vraetyd in die parlement. Anders as in Engeland is nie een van hierdie metodes hoogs verfynd in Suid-Afrika nie.

Die openbare mening is voorts een van die magtigste wapens in die demokratiese arsenaal, maar ten einde werklik doeltreffend te wees, moet die publiek behoorlik ingelig wees. In Suid-Afrika verhinder bepaalde wetgewing (soos die Wet op Amptelike Geheime, die Verdedigingswet en die Wet op Gevangenisse) die doeltreffende voorsiening aan die Suid-Afrikaanse publiek van inligting wat noodsaaklik is vir die handhawing van kontrole deur die openbare mening.

As kontrole-orgaan is die howe tradisioneel en uiteraard nie begaan oor die wenslikheid van of beleid onderliggend aan administratiewe optrede nie. Die sogenaamde reëls van natuurlike geregtigheid verteenwoordig die uiterste stap deur die howe ter kontrolering van administratiewe optrede. Die toepassing van hierdie reëls deur die Suid-Afrikaanse howe kan in historiese fases ingedeel word: tot die laat veertigerjare is die toepassing van die reëls nie algemeen vereis nie; tot die laat vyftigerjare het die howe die reëls meer algemeen begin vereis (veral na aanleiding van *Pretoria North Town Council v AI Electric Ice Cream Factory (Pty) Ltd* 1953 3 SA 1 (A)); die laat vyftigerjare en die vroeë sestigerjare is gekenmerk deur onsekerheid en 'n uiteindelike terugkeer na sekere voorbehoude sover dit die toepassing van die reëls betref; sedert die vroeë sestigerjare het daar, met die geleidelike aanvaarding deur die howe van die wye bevoegdhede wat veral deur die sogenaamde veiligheidswetgewing van die jare vyftig en sestig aan die uitvoerende gesag verleen is, 'n voldonge terugkeer na die beperkte toepassing van die reëls van natuurlike geregtigheid plaasgevind. Verskeie faktore het daartoe aanleiding gegee – die reeds genoemde veiligheidswetgewing (met inbegrip van wette soos die Groepsgebiedewet), die verskynsel dat die soewereine parlement dikwels beslissings waarin nakoming van die reëls vereis is, deur latere wetgewing omvergewerp het, die vermind-

*Inaugural lecture by Professor W H B Dean of the department of public law of the University of Cape Town, delivered on 2 October 1975.

erde invloed van die Engelse reg op die Suid-Afrikaanse staats- en administratiefreg, en ten laaste die huiwering van die howe om by polities-omstrede aangeleenthede betrokke te raak.

Om aan die Suid-Afrikaanse uitvoerende gesag steeds meer en groter bevoegdhede te verleen sonder die daarstelling van doeltreffende kontrole, mag lei tot algehele konstitusionele agteruitgang.

It is a commonplace of constitutional development in many countries today that the powers of government are becoming increasingly concentrated in the hands of the executive.[1] This has occurred in South Africa as well but with what I would regard as two very significant differences. In the first place, it seems to be becoming increasingly common for the determination and development of the "law" to be entrusted almost entirely to administrative action. In the second place, whereas the growth in executive power elsewhere has been accompanied by continuing attempts to ensure that such power is subject to adequate controls and safeguards, particularly from outside the administration, there seems to be a great resistance to any proposal along these lines in South Africa. The growth of administrative power has, as I will later attempt to show, been accompanied by a decline in potential control over the powers granted.

I want to discuss the first point, the grant of the control and development of the law to the executive, by reference to three areas:

I THE DEVELOPMENT OF GOVERNMENTAL INSTITUTIONS IN THE BANTU HOMELANDS

The pace of such development and the detailed form of the institutions created has by and large been in the hands of the executive which has exercised its power subject to broad guidelines laid down in parliamentary legislation. There was, perhaps, less objection to this as long as the institutions created were principally of a local government nature.[2] When, however, the stage for conferring what are normally regarded as central government powers[3] on these institutions was reached in the early sixties, the need for greater control by the legislature was indicated. This was recognised by the establishment of the Transkei constitution by act of the Republic's parliament.[4] The Transkei Constitution Act detailed the structure, mode of functioning and the powers of both legislature and executive in the Transkei. Unfortunately the example of the Transkei has not been followed and the machinery for the establishment of similar institutions in the other homelands has reverted to the older model. Subject to important

[1]For a South African view where some of the relevant authorities are cited, see P J van R Henning "Die Administratiewe Staat" 1968 *THRHR* 1.

[2]For example, those created in terms of the Bantu Authorities Act 68 of 1951 and the Promotion of Bantu Self Government Act 46 of 1959.

[3]For example, the administration of justice (including the establishment of courts of law), the protection of life, persons and property, the transfer of land and so forth – part B of the first schedule to the Transkei Constitution Act 48 of 1963.

[4]Transkei Constitution Act 48 of 1963.

guidelines[5] the Bantu Homelands Constitution Act[6] once again gives the executive control over the pace of development towards self government[7] and the structure of the governmental institutions established in each homeland. The degree of control is not limited to detail. Fundamental constitutional issues, such as whether the executive should be parliamentary or presidential, what form of representation should be adopted and whether the legislature should be wholly or partly elected, are all determined by the Republic's executive government either "after consultation by the minister" of Bantu administration and development with the already established legislature for the territory or in its own discretion.

One illustration of how such powers can touch fundamental constitutional principles even in the Transkei relates to the high court established there in 1973. One of the cornerstones of most western constitutions today is the independence of the judiciary which is in part secured by making judges almost irremovable from office other than in the most exceptional circumstances[8] and then usually only by the legislature.[8] In the Transkei, however, by proclamation of the state president, judges of the Transkei high court can, in effect, be removed from office by the executive government of the Republic "on the grounds of misbehaviour or incapacity".[9]

The only direct control over these wide powers is that the proclamation must be tabled in parliament and can be invalidated by a resolution of both houses.[10]

II THE DETERMINATION OF THE SCOPE OF CIVIL LIBERTIES

Here are a large number of examples but, for obvious reasons, I will limit myself to only one. In *S v Turrell and others*[11] Mr Justice Van Zijl held:[12]

> "Freedom of speech and freedom of assembly are part of the democratic rights of every citizen of the Republic and Parliament guards these jealously for they are part of the very foundation upon which Parliament itself rests. Free assembly is a most important right for it is generally only organized public opinion that carries weight and it is extremely difficult to organise it if there is no right of public assembly."

Notwithstanding its fundamental character, its extent can be determined by the executive which has wide powers to forbid or allow any

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[5]Which, inter alia, lay down the powers to be enjoyed by legislatures; the control exercisable by the Republic's government over legislation and the control of finance (sections 3 – 10; 29 – 32 and 35 of the Bantu Homelands Constitution Act 21 of 1971).

[6]21 of 1971.

[7]In the sense used in the act (ss 26 – 33).

[8]Judges of the supreme court in the Republic can only be removed from office "by the State President upon an address from both Houses of Parliament in the same session praying for such removal on the ground of misbehaviour or incapacity" (section 10(7) of the Supreme Court Act 59 of 1959).

[9]Reg Gaz 1815 of 20 7 1973 reg 6(a).

[10]s 37 of Act 21 of 1971. By virtue of s 13 of the General Law Amendment Act 62 of 1973 tabling has been discontinued and replaced by a list of all the relevant delegated legislation which is supplied to all members of parliament.

[11]1973 1 SA 248 (C).

[12]256GH Steyn J concurring.

assembly.[13] The Riotous Assemblies Act[14] empowers a magistrate, who "has reason to apprehend that the public peace would be seriously endangered" by a "gathering" in his district, to prohibit that "gathering" or every "gathering" in his district.[15] The minister of justice has power to prohibit "gatherings" throughout the country.[16] The "gatherings" to which the act applies may consist of any number of persons and may be on public or private property. The act is wide enough to empower the prohibiton of a family gathering in a private home.

Once again, the only direct control over the power of the minister of justice is a report of the action taken to both houses of parliament.[17] The extent to which the magistrate's or minister's decision can be questioned in a court of law is probably very limited.[18] With powers such as these the executive can prevent or permit assemblies virtually at will. The scope of the right of assembly is at its mercy.

III DISCRIMINATION ON THE GROUNDS OF RACE OR SKIN COLOUR

Such discrimination, of course, takes many forms. Here I am concerned with only two examples, the use of public facilities and public entertainments.

Although the authority to discriminate in the use of public facilities is contained in an act of parliament, the Reservation of Separate Amenities Act,[19] the act simply authorises any person in charge of public premises or a public vehicle "whenever he deems it expedient" to reserve the whole or part of the premises "for the exclusive use of persons belonging to a particular race or class".[20] Public premises and vehicles are very widely defined and include lavatories to which the public have access, trains, buses, vessels, aircraft etc.[21] Thus the whole process of segregation and, of course, desegregation of public premises can be achieved simply by administrative action.

The same is true of public entertainments which are covered by a proclamation[22] under the Group Areas Act[23] by which occupation of premises is defined as including being "present . . . upon land . . . for any substantial period of time or for the purpose of attending any place of public entertainment or partaking of any refreshments as a customer" at a licensed

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[13]s 9 of the Suppression of Communism Act 44 of 1950 and s 2 of the Riotous Assemblies Act 17 of 1956.
[14]See n 13. The act was amended in 1974 (Riotous Assemblies Amendment Act 30 of 1974) to close the "loopholes" upheld in *Turrel's* case supra.
[15]ss 1 and 2(1).
[16]s 2(3).
[17]s 19.
[18]A S Mathews *Law, Order and Liberty in South Africa* (1971) 234.
[19]49 of 1953.
[20]s 2.
[21]s 1.
[22]Proc R 228 1973.
[23]36 of 1966. The proclamation was issued under s 1(4).

restaurant, tea room or eating house which "involves the use of seating accommodation". Any person engaging in these activities, for example attending a cinema, eating in a restaurant, participating in or watching any form of sport, will be deemed to be in occupation of the premises and, if the wrong colour,[24] will be guilty of an offence unless a prior permission has been obtained from the minister of community development.[25]

The degree to which integration between the races can occur at events such as theatrical productions, cinemas, restaurants and sporting fixtures can therefore be controlled simply by administrative directive. An example of this in operation was the desegregation of the Nico Malan opera house.[26]

Even where no provision for direct administrative controls is made, reliance is still had on change by administrative action rather than change by law. Earlier this year, it was claimed instructions had been issued by attorney generals that prosecutions under the Immorality Act[27] were to be instituted only with prior approval.[28] In this way the partial or even total repeal of parliamentary legislation can be achieved without parliamentary intervention.

Provisions such as those that I have just mentioned do, I think, support the view that in a number of areas, and very often in critical areas, change and development of the law, if it is going to come about at all, will come about through administrative action alone rather than administrative action combined with judicial and legislative activity.[29] To achieve this objective, the administration has either to be given a very wide degree of discretion in the way in which it can exercise its powers or the legislation has to be drafted sufficiently vaguely so as to grant a discretion in effect to those concerned with its administration.[30] These powers can be used to achieve the same effect as the use of legislation.[31]

The use of administrative action to develop the "law" has distinct advantages for governments particularly where major change is needed in a society. It provides, in the first place, an effective, expeditious and

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[24] ie a person other than a member of the group for whose members occupation of the premises in that area has been reserved.

[25] ss 21 and 46.

[26] The opera house was financed out of public monies. Initially it was set aside for exclusive use by whites and was as a result boycotted by many white people in Cape Town. It was recently opened to use by coloured and white persons by the provincial administration, the local government body which controls it. See also the prime minister's reply to a question on elimination of discrimination in South West Africa ((1975) Hansard *House of Assembly Debates, Questions and Replies* cols 329–30) and the minister of community development's reply on the possible desegregation of the Johannesburg Civic Centre (ibid 892).

[27] 23 of 1957, s 16 of which makes certain kinds of sexual activity between persons of different races a criminal offence.

[28] *The Cape Argus* 2 4 1975.

[29] Compare, for example, the process of desegregation in the United States of America – *Law and Social Change: Civil Rights Laws and their consequences* H R Rodgers Jr and C S Bullock III (1972).

[30] P Henning *Administratiefregtelike Diskresie Uitoefening en Geregtelike Hersiening* 1968 *THRHR* 156 n 7.

[31] Henning ibid 158.

hightly flexible instrument. At the same time fundamental changes normally meet with popular resistance and change through administrative action makes it possible on the one hand to say that things have not changed, while on the other changing them in fact. Control of prosecutions under the Immorality Act[32] is a good example of this kind of exercise in South Africa at present.

At the same time this situation produces two fundamental problems for the constitutional lawyer. In the first place, the use of administrative action creates a great deal of uncertainty. This is true even where the action takes the form of delegated legislation. Delegated legislation does not appear in a readily accessible form in South Africa[33] and establishing what it provides can often be very difficult. The homeland constitutions are a good example. As far as I have been able to establish thus far, they are contained in at least forty-two government gazettes issued over a period of about seven years. Many are now out of print. There has been little or no attempt to consolidate. As a result the task of simply establishing what the provisions of these constitutions are is, to say the least of it, arduous.

In many cases there is no delegated legislation. The administrative body is simply given a very wide discretion which is presumably exercised, partly at least, on the basis of policy guidelines adopted within the relevant departments. No indication is normally given as to what these policy guidelines are.[34] This uncertainty can be exacerbated in times when government policy is in a state of flux[35] – the present uncertainty as to where and on what occasions restaurant facilities can be made available to blacks, being an example.

The result for the lawyer is that these areas are effectively pockets of lawlessness where it is impossible to advise on what can or cannot be done. This was one of the principal objections of the old federal supreme court of the Federation of Rhodesia and Nyassaland to the attempt to segregate

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[32]supra n 27. In the newspaper mentioned in n 28 the following remark by Mr J H van Rooyen, senior lecturer in criminal and procedural law at the University of South Africa was reported: ". . . the legislation will probably be shelved administratively otherwise it will have to be scrapped which would mean decisions from a party political conference. The National Party (has) tried to entrench its policies in criminal law but (is) now faced with the difficulty of wanting to alter those policies."

[33]S 16 of the Interpretation Act 33 of 1957, requires that, subject to any provision to the contrary, "any by-law, regulation, rule or order . . . made by the State President, an Administrator or a Minister" etc to be published in the Government Gazette.

[34]See, for example, the refusal by the minister of prisons to provide any information in relation to the system of parole which has apparently been introduced by administrative action, (1975) Hansard *House of Assembly Debates, Questions and Replies* col 882. See also the prime minister's statement referred to in n 26 supra.

[35]The present uncertainty in relation to the use of restaurant facilities by black people is a good example of this (see (1975) Hansard *House of Assembly Debates, Questions and Replies* cols 450–1; and cols 585–6). One of the difficulties in these cases is determining who is responsible. The first question was directed at the minister of transport (an airport restaurant was involved) and the second at the minister of community development who indicated that there were no restrictions under the Group Areas Act (supra). This of course left open the position under the Liquor Act 30 of 1928 for the administration of which the minister of justice is responsible.

swimming pools in Salisbury by resolution rather than by-laws. As Sir Frances Briggs pointed out:

> "If such a right, ie admission to the baths, could be taken away by resolution, no one would ever know his rights in relation to such a place of public resort. On one day his attendance might be lawful and on the next he might unconsciously be a trespasser."[36]

Apart from the understandable uncertainty which power of this type creates, there is also the possibility of abuse. Abuse does not necessarily involve a corrupt motive, a deliberate manipulation of the powers granted for improper purposes such as personal gain or spite. Abuse is much more likely to arise from pressure of work which means that relevant issues are less likely to be fully canvassed or from genuine mistakes or from unconscious prejudices which affect all human beings even those who strive to be objective.[37] The wider the discretion, the greater is the possibility of such abuse. This then speaks for the need for safeguards to ensure that every case is fairly and fully considered and that adequate provision is made for complaints to be aired and incorrect decisions corrected. The provision of such safeguards and correcting procedures can only strengthen an administration which is inherently sound and root out inefficiency and maladministration where this exists. It is to the problem of control that I now want to turn.

Our constitution,[38] even though republican in form, remains essentially patterned on the English constitution and this is important because control of the executive has to be seen in the context of the constitution as a whole. Parliament is sovereign[39] so that it can make and unmake any law whatsoever. Our courts cannot question the validity of its acts.[40] They can interpret them and because words can bear different meanings, this does give them a certain amount of control over the effect of legislation. Apart from limited exceptions, the executive derives all its powers directly or indirectly from parliamentary legislation. Parliament also theoretically controls the policy adopted by the executive.

These considerations dictate the basic outlines of the mechanisms which can be created for controlling executive action. For a variety of reasons[41] the courts are not concerned with the merits of administrative action, whether it is good or bad, moral or immoral, expedient of inexpedient,

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[36]*City of Salisbury v Mehta* 1962 1 SA 675 (FC) 702H. See also Sir John Clayden at 696GH. The objection is not, of course, to the grant of discretionary powers per se. The objection arises only when the discretion granted is so wide as to create uncertainty and to be uncontrollable. Even Dicey, who is considered to be the arch-opponent of discretionary power, limits his attack to "wide arbitrary or discretionary powers" and his subsequent discussion indicates that the "or" should read "and". (A V Dicey *An Introduction to the Study of the Law of the Constitution* (1959) 188–9).

[37]See the remarks of the late Mr Justice Williamson in *Publications Control Board v William Heinemann Limited* 1965 4 SA 137 (A) 164–5.

[38]Republic of South Africa Constitution Act 32 of 1961.

[39]ibid s 59(1).

[40]s 59 (2) Constitution Act. There may be limited exceptions, see B Z Beinart 1958 *MLR* 887 603–4 and E Kahn 1956 *Annual Survey of South African Law* 13 15.

[41]Some of which are canvassed by Lord Diplock in *Home Office v Dorset Yacht Co Ltd* [1970] 2 ALL ER 294 (HLE) 330 and 331–2.

they are simply concerned with the authority in law for it.[42] Controls with regard to the merits of the action taken and the handling of complaints can be constructed within the executive but, for obvious reasons, control from outside is more desirable. Parliament, in particular, must act as the chief watchdog of the executive. Finally, public opinion is one of the most effective means of checking arbitrary executive action.[43]

The constitution, therefore, provides a broad framework within which each of the organs of government, executive, legislature, judiciary and electorate can be used to check possible abuse of power. The interlocking nature of these controls must be emphasised. To criticise any one without having any regard to the others is to miss the point for each can make its own unique contribution to making overall control adequate and effective.[44]

1 **Parliament**

The growth and the complexity of modern government and the strength and solidarity of political parties have had a serious adverse effect on the more traditional forms of parliamentary control. The complexity of the administrative arm of government makes it more difficult for individual members to find out what is going on in government departments and party solidarity makes those supporting the government of the day less willing or able to criticise.[45]

In any event bringing down the government or individual ministers, which is the traditional form of control, is the ultimate weapon to be sparingly used. As a result parliaments in a number of countries have tried to develop new ways of exercising the control which they theoretically have over the executive. In South Africa these ideas have fallen upon stony ground but I want to briefly deal with three of them.

(a) *The development of specialist committees*

The obvious impossibility of any single individual or even a group of individuals being able to acquire sufficient information or expertise to maintain a critical overview of the whole of state administration and the equally obvious inappropriateness of the ordinary procedure followed in Westminster model parliaments to deal with detail have led to the develop-

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[42]This was established in English law as long ago as 1765 *Entick v Carrington*; D L Keir and F H Lawson *Cases in Constitutional Law* (1967) 312.

[43]H W R Wade *Towards Administrative Justice* (1961) 19 et seq.

[44]Criticism that courts of law play far too limited a rôle under Westminster constitution often ignores this fact – see for example Henning n 1 supra 160–161.

[45]As Professor Finer has pointed out in relation to the English constitution: "If each, or even very many charges of incompetence were habitually followed by the punishment, the remedy would be a very real one: its deterrent effect would be extremely great. In fact that sequence is not only exceedingly rare, but arbitrary and unpredictable. Most charges never reach the stage of individualisation at all: they are stifled under the blanket of party solidarity." Party solidarity in this country is far stronger than it is in the United Kingdom and one has the impression that Professor Finer's remarks may apply with even more force to the South African constitution but no real research on the subject has been undertaken in South Africa and the issue cannot be taken any further. (The passage quoted appears in Geoffrey Wilson *Cases and Materials on Constitutional Law* (1966) 71).

ment of specialist committees to investigate particular aspects of the state administration. Thus, for example, the United Kingdom parliament has established a number of specialised committees including[46] a permanent select committee on expenditure charged with the task of investigating whether the administration is achieving the policy objectives set for it in the most effective and least costly fashion.[47]

These committees are small enough to conduct thorough investigations of specific governmental activities. Through experience their members gain the knowledge and expertise to be able to make a critical appraisal of the activities with which they are concerned.[48] Government departments tend to be more careful and the committees are useful in providing parliament with independent information on government activity.[49]

Although involved in politically sensitive issues, the committees are more concerned with matters of good government than policy as such.[50] The approach is non-partisan and by convention many of the committees are chaired by members of the opposition.[51]

Although the committees have had their setbacks, they have on the whole been a success.[52] The South African parliament makes use of select committees but their function is much more limited than their English counterparts. An attempt was made in the late forties to establish a committee to scrutinise delegated legislation but it fizzled out in the middle fifties through lack of government support.[53] The only recent suggestion in this direction is the possible appointment of a committee on security legislation.[54]

(b) *The development of a procedure for dealing with complaints against the administration*

The need to develop such machinery has been widely recognized in recent years.[55]

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[46]Hood Phillips *Constitutional and Administrative Law* (1973) 192–7. From a lawyer's point of view, perhaps the most important of these committees is that which is concerned with delegated legislation. This committee scrutinizes all such legislation having particular regard to the unusual and unexpected use of the powers granted, ouster of the courts, lack of clarity in expression and so forth (F Stacey *The Government of Modern Britain* (1968) 196 et seq.)

[47]For a critical review of the early years of operation of this committee see P Byrne "Expenditure Committee: A Preliminary Assessment" (1974) 27 *Parliamentary Affairs* 273.

[48]But see the criticism by Byrne (loc cit 279–80) that there is too high a turnover of members in the expenditure committee.

[49]Byrne, however, points out that in many cases even this information is so technical that it raises little enthusiasm among members of parliament generally.

[50]Byrne loc cit.

[51]This is the case with the *Select Committee on Delegated Legislation* (Stacey op cit 201).

[52]S A de Smith *Constitutional and Administrative Law* (1973) 294–5.

[53]1948 1949 1950 1955 and 1957 *Annual Survey of South African Law* 16–7; 31–2; 33 37 and 333 respectively.

[54]Hansard (1975) *House of Assembly Debates Questions and Replies* col 1058. Details concerning the recommended composition, powers and functions of this body can be found in the *First Preliminary Report of the Commission of Enquiry into certain Organizations* (Schlebusch Commission).

[55]Walter Gellhorn *Ombudsmen and Others* (1967).

In some countries, notably the Scandinavian countries, New Zealand, the United Kingdom and now France,[56] an independent body, generally referred to as the ombudsman has been established to investigate such complaints.

The scope of the ombudsman's functions vary from country to country but the general idea is to provide a means for investigating and reporting on cases where the individual feels that he has been badly treated by the administration. This ranges from cases of "corruption, bias, unfair discrimination, harshness" and the "misleading of a member of the public as to his rights" to unreasonable delays in dealing with matters and "general high handedness".[57]

The ombudsman provides an independent official[58] with substantial powers of investigation[59] to whom people can take these complaints. In England, to preserve parliament's position, the parliamentary commission for administration, as he is known, can only be approached through a member of parliament.[60] He provides, in effect, a specialist investigatory service for them.

Although the institution has been criticised[61] its continuing adoption is proof of its basic success. Too much cannot be expected of it. It cannot, for example be used to reform a basically corrupt or inefficient administration but it can achieve a lot in individual cases and improve administrative procedures.[62]

Turning to South Africa, the proposal that an official similar to an ombudsman be appointed has received support from academic writers[63] and the appointment of a commission of enquiry to inquire into the desirability of such an institution was debated in the house of assembly in 1973.[64]

The motion was withdrawn when it became apparent that it lacked government support. Among the reasons for rejecting the idea, was the

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[56] L Neville Brown and Pierre Lavirotte "The Mediator: A French Ombudsman" 1974 *Law Quarterly Review* 211.

[57] De Smith op cit 629.

[58] In England his salary is fixed by legislation and he can only be removed from office on an address from both houses of parliament. The Parliamentary Commissioner Act 1967 ss 1 and 2.

[59] ibid s 8. Like other ombudsmen the commissioner cannot reverse administrative actions. His only weapon is publicity and persuasion (s 10).

[60] ibid s 6(3).

[61] Among the principal objections are the potentially adverse effect on attitudes within the administration, particularly the possibility of increased caution leading to increased delays and that the ombudsman deals with a very small number of cases which are often insignificant. Experience has shown that these objections are not as serious as they appear at first sight. Individual cases may lead to changes in general practices with far reaching effect. (Gellhorn op cit 133 et seq) and reaction within the administration has often been positive (ibid 44 and 144–9 for examples).

[62] Gellhorn ibid 438–9.

[63] Leonard Gering "Legal Institutions and Human Needs" 1974 *THRHR* 274 who cites the views of a number of other writers.

[64] (1973) Hansard *House of Assembly Debates* cols 3321–3360.

view that the cases considered by ombudsmen were insignificant;[65] that with the smaller constituencies South African MP's could deal with complaints;[65] that Blacks might not be able "to cope with an ombudsman";[65] that the institution was socialist in conception[65] and that complaints are fully investigated intradepartmentally.[65] Perhaps the most revealing remark, although probably not quite in the way intended was the following:

> "We can also picture to ourselves how these grievances, which eventually reach an ombudsman, are going to be used by the United Nations and how South Africa will be denounced for the fact that it is a police state . . . and that the State oppresses its . . . people . . . Such an ombudsman's office amongst us . . . can only result in its being a branch of the United Nations . . ."[66]

It is hardly surprising that we have no South African ombudsman.

(c) *Parliamentary questions*

Question time in the legislature is one of the few occasions on which individual members can come into their own and cabinet responsibility on specific issues has any real meaning. Many of the questions have to be answered orally and can be followed up by supplementary questions which can only be dealt with effectively if the minister concerned is on top of his job. This is how Professor de Smith describes question time in the house of commons:

> "For a few minutes the House comes to life . . . wit, feigned or genuine outrage, cheers and jeers intrude upon the solemnity of the proceedings; Government and Opposition are briefly locked in fascinating verbal combat."[67]

The South African parliament once again follows the Westminster pattern. There is a question time but it is a lacklustre affair by comparison. The vast majority of questions are simply aimed at eliciting information about the activities of government departments whereas questions in the house of commons are mainly concerned with policy.[68] Relatively few supplementary questions are put. A rough survey of the questions asked during the 1975 session indicated only about 10% of a total of just over one thousand questions for oral reply gave rise to supplementary questions and in most of these cases only one supplementary question was asked. On only one or two occasions was there anything approaching "fascinating verbal combat".[69]

There are two other striking features of South African parliamentary questions. During the whole of the 1975 session, only one question and one supplementary question was put by a member supporting the government.[70] Secondly, inability to answer questions seems to be fairly common. In the

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[65]ibid cols 3331 3334 3343 3354 respectively.

[66]ibid col 3335.

[67]op cit 292.

[68]It is quite obvious that policy questions are regarded as inappropriate in the house of assembly. Hansard (1975) *House of Assembly Debates Questions and Replies* cols 493 518 820 882 894 983.

[69]Hansard ibid cols 819 982 1153 and 1183.

[70]ibid cols 269 and 1055. One question was withdrawn (col 698) and there were two interjections (cols 1049 and 1151).

case of supplementary questions, the minister concerned would often ask for notice to be given[71] and quite often the reply was simply that no statistics were kept on the information required.[72] Refusal to answer questions was also common. There were obviously certain sensitive areas such as trade with the rest of Africa[73] and the diplomatic journeys undertaken by the government in furtherance of the policy of "detente".[74] On the other hand, the refusal to answer questions was often justified by the fact that statistics were not readily available and would be difficult and costly to extract,[75] or that it would not be in the public interest to disclose the information.[76] In one case, the answer by the minister of prisons was simply "I am not prepared to furnish a reason". This related to a decision not to supply the South African Financial Mail to certain prisoners.[77] While it is true that even in the house of commons there is no formal sanction for the refusal to answer a question[78] such refusal obviously appears more acceptable and more readily used in the house of assembly.

Question time in the house of assembly is therefore of a very different character to its English counterpart. It is principally a fact finding operation (and a very valuable one) but it is hardly a testing time for the government.

Parliament under Westminster model constitutions has a triple function. It produces and supports a government whose policies have the approval of the electorate. It controls such policies through legislation and it can function as a counterpoise to the powers of the executive. The three functions are not easy to combine and in the South African case the emphasis seems to be upon the first. This comes out very clearly in two recent debates in parliament. In the first, in 1973, a second session was proposed, one of the reasons advanced in support being that the government functioned throughout the year and the parliamentary watchdog should do the same.[79] In reply to the proposal the following point was made:

> ". . . today Parliament functions a good five times better and more effectively than was the case twenty-five years ago . . . In 1912 there were 104 sitting days and they only passed 30 Acts . . . and last year there were 90 sitting days with 103 Acts . . . (This) indicates that . . . Parliament has been made to run more smoothly. . . . Parliament's basic function is to pass laws not to rule the country but to pass laws."[80]

This view of parliament "as some sort of legislative sausage factory"[81] was confirmed in a debate last year in which the minister of economic

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[71]ibid cols 3 41 229 366 428 437 475 545 563 574 974 1096 and 1166.

[72]ibid col 64 (population of Chatsworth) col 79 (cases considered under s 5(4)(c) of the Population Registration Act 30 of 1950) are examples.

[73]ibid cols 426 516 and 896 for example.

[74]ibid cols 4 and 1179 for example.

[75]ibid cols 18 and 48 for example.

[76]This ranged from question relating to persons detained under s 6 of the Terrorism Act 83 of 1967 (ibid col 3) to the qualifications of members of the publications appeal board, directorate and committees set up under the Publications Act 42 of 1974 (col 578).

[77]ibid col 380.

[78]Erskine May's *Parliamentary Practice* (1971) 328.

[79]Hansard (1973) *House of Assembly Debates* cols 2040 2043.

[80]ibid cols 2054 2055 and 2056. See also col 2088.

[81]ibid col 2092.

affairs threatened to introduce a measure to prevent "unjust allegations" being made "against . . . public servants."[82] The allegations had been made in parliament but the minister denied that his measure would interfere with freedom of debate in the house.[83]

The development of specialist committees, the institution of an ombudsman and parliamentary questions are all devices designed to improve parliamentary control of the executive. They all flow from the belief that the need for good government transcends party differences and that the legislature is not there simply to provide the executive with the legislation it needs to implement its policies. It the provision of such legislation is to be the only function of the South African parliament[84] it is little wonder that these devices have not found approval here and there can be little hope that the South African parliament will make any greater effort towards effective supervision of the executive in the future. It seems to have accepted the executive as its master.

2 The Electorate

Public opinion is one of the most powerful weapons in the constitutional arsenal of democracies but to be effective such opinion must be informed and the most effective informant is the press. The common theme of series of articles on Watergate in an English law journal recently[85] was the part played by the American press in exposing the scandal. One contributor concluded:

> "Watergate could not happen here? Perhaps. But if it did occur, we would never know. The lesson of Watergate for us is: Are we content with a set of laws which make it immensely more difficult to expose high level corruption and criminal behaviour than it is in the United States?"[86]

The same can be said with even greater force of South Africa. Legislation protecting the secrecy of government departments[87] is such that information about them can only be published with their authority. In the case of prisons the legislation was the direct result of exposure of prison conditions by a South African newspaper.[88] The spirit of the present legisla-

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[82](1974) Hansard *House of Assembly Debates* col 6115.

[83]ibid cols 6705–6. Freedom of debate is guaranteed by s 2 of the Powers and Privileges of Parliament Act 91 of 1963. Cf s 16 of the Coloured Persons Representative Council Act 49 of 1964 which does not extend protection to "anything said or done . . . in regard to (parliament) . . . a court of law or statutory body or member thereof or an officer in the public service."

[84]One of the interesting suggestions made during the debate on the desirability of a second session was the need to equip each member of parliament with a state financed office and secretary in his constituency to deal with complaints (1973) (Hansard *House of Assembly Debates* col 3346) which would then presumably be directed to the appropriate ministry. Parliament would be entirely by-passed. It seems reasonable to infer that this is what is done at the moment.

[85]1974 *New Law Journal* 779 et seq.

[86]Professor Harry Street "Could English Law Cope?" ibid 796 797.

[87]Principally the Official Secrets Act 16 of 1956 (ss 2 and 3) the Defence Act 44 of 1957 and the Prisons Act 8 of 1955 (s 44).

[88]The official reason for the legislation was that it was necessary to protect the person in custody and his family ((1965) Hansard *House of Assembly Debates* 15 7305) but the

tion can best be summarised in the following remarks made in 1970 by Mr Volker, National Party MP for Klip River:

> "(I see) little merit . . . in newspaper exposés of government malpractice . . . Too much knowledge might shatter public confidence in institutions of this nature."[89]

If we are to look to public opinion to control executive action, the South African press will have to be given the capacity, which it at present lacks, to provide the South African public with the necessary information.

3 The Courts

What contribution can the courts make? Neither the training of the judiciary nor the procedure followed by courts can support the claim that the courts are more capable of evaluating policy than the executive. On the other hand, although the lawyer may lack the expertise or knowledge necessary to determine what is the right decision in specific cases, he has a very good idea of what is the best way of reaching fair and correct decisions in general because this is the essence of law. He will, for example, be in no better position than the intelligent layman to decide what the best route for a proposed motorway is. That is a matter for transport economists, environmentalists, civil engineers and the like but he will be able to say that wherever the merits lie, a fair and correct decision will be less likely unless certain fundamental principles evolved by the courts in trying disputes are observed.[90] Among the most important of these principles are the principles of natural justice which require that the decision be made by an impartial body after hearing all sides. Ensuring observance of principles such as these in the lawyer's main contribution to a fair and proper administration.

The principles of natural justice represent the furthest the South African courts will go in supervising executive action.[91] The courts have recognized these principles to be "basic in our own system of justice"[92] but have simultaneously recognized that they are not always applicable. Why not? I think there are at least three good reasons and one bad reason. In the first place, natural justice requires a hearing which in turn requires prior warning and takes time which in certain cases may defeat the whole object of the exercise. Secondly, the interests which will be adversely affected may be so insignificant that they do not justify the time, effort and expense of a hearing. One has to be very careful of what one means by insignificant. To deprive an ice cream seller of the opportunity to sell his wares may be insignificant to most but not to the seller. Thirdly, the procedure may be inappropriate for the particular kind of decision. The procedures adapted to establishing facts are inappropriate in the determination of broad policy issues and to apply them

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original motivation for the measure was quite clearly newspaper exposure of prison conditions ((1959) Hansard *House of Assembly Debates* 1731–2).

[89] Quoted by Trevor Brown "Free Press Fair Game for South Africa's Government" 1971 *Journalism Quarterly* 120.

[90] H W R Wade op cit 8–9.

[91] M Wiechers *Administratiefreg* (1973) 219.

[92] *South African Defence and Aid Fund and Another v The Minister of Justice* 1967 1 SA 263 (A) at 276D–G. This was a dissenting judgement infra.

in the latter case would serve no purpose. Finally, it is sometimes suggested that to grant a right to a hearing is to put the interests of an individual above those of the community as a whole. This misses the whole point. The ultimate decision, for example, to expropriate land for a roadway, may still give priority to the public interest over that of the owner of the expropriated land but to give him a hearing before expropriation of his land will not prevent that. What it will prevent is the expropriating authority being allowed to ride roughshod over the individual's interests and it will increase the likelihood of the ultimate decision *whichever way it goes* being fairer.

The way the courts operate is briefly, and very broadly, this. Parliament very rarely expressly indicates whether the principles of natural justice and, therefore, the right to a hearing, are applicable. As a result the courts first of all look at the power granted, decide whether a right to a hearing is appropriate, and then look at the legislation carefully to decide whether, although appropriate, it has in fact been expressly or impliedly excluded.

In deciding whether the power is appropriate for the application of the principles of natural justice, the South African courts have tended to use the judicial function as a paradigm. If the nature or form of the function is similar to that performed by an ordinary court of law, if it is what the lawyer calls a *quasi judicial* function, the courts are much more likely to hold the principles of natural justice applicable. Apart from the obvious point of familiarity, the reason for this is twofold. First, more obviously but less importantly, the reason is historical and has its basis in English law.[93] The more important but less obvious reason is simply that the principles of natural justice represent a distillation of the essence of the procedures followed by a court of law.[94] Those procedures have evolved over centuries for the fair and proper solution of particular kinds of problems.[95] Where the administration is given power to deal with similar problems, it it perfectly rational to expect the administrators to follow similar procedures. The adoption of these procedures, *in this kind of case,* is most likely to produce a fair and proper result.

A judicial decision normally involves an inquiry into disputed questions of law and fact and a solution which authoritatively and finally determines the legal rights of the parties by applying the law (as found by the inquiry) to the facts as so found.[96] Broad issues of policy such as the economic or political consequences of the decision rarely play a significant role. Thus the courts are more likely to hold natural justice appropriate where the administrative decision is based on findings of fact and law[97] and not

[93]Wiechers op cit 128–132.

[94]*Turner v Jockey Club of South Africa* 1974 3 SA 633 (A) 645.

[95]B O Nwabueze *Constitutionalism in Emergent African States* (1973) 12–13.

[96]Cf the definition contained in the *Report of the Committee on Minister's Powers* (the Donoughmore Committee) Cmd 4060 (1932) which was adopted by Kuper J in *Peri-Urban Areas Health Board and Another v Administrator Transvaal and Others* 1961 3 SA 699 (T) 674E–H.

[97]*Mofokeng v Minister of Native Affairs and Others* 1949 3 SA 784 (T) 791 (quoting *Board of Education v Rice* [1911] AC 179); *Hack v Venterspost Municipality and Others* 1950 1 SA 172 (W) 190; *Schoonwinkel NO v Fouche NO* 1954 4 SA 92 (O) 99 CDE and *Oberholzer v Padraad van Outjo en 'n Ander* 1974 4 SA 870 (A).

broader issues of policy.[98] Equally where the administrative decision has no legal effect (the body simply makes recommendations, for example) the courts are less likely to require observance of natural justice than where legal rights may be affected.[99] This can create problems because an individual may suffer considerably as a result of an administrative decision although it does not technically affect his legal rights.[100] Even where the administration's function is *quasi judicial* observance of natural justice may be waived because of a variety of special circumstances such as the need to act quickly particularly in an emergency,[101] the autocratic nature of the powers in question,[102] the need to protect state secrets,[103] the existence of other safeguards[104] and administrative inconvenience.[105]

The lack of express provision by the legislature and the wide variety

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[98]*Minister of the Interior v Mariam* 1961 4 SA 740 (A) 751H and *Defence and Aid Fund* case supra 285CD.

[99]*Laubscher v Native Commissioner Piet Retief* 1958 1 546 (A) 549–50; *Cassem v Ooskaapse Komitee van die Groepsgebied Raad en Andere* 1959 3 SA 651 (A) 659–60; the *Defence and Aid Fund* case supra 270GH; *Le Roux v Minister van Bantoe Administrasie en Ontwikkeling* 1966 1 SA 481 (A) 491; *Bell v Van Rensburg NO* 1971 3 SA 693 (C) 724–5 and *Administrateur van Suidwes-Afrika v Pieters* 1973 1 SA 850 (A) 861.

[100]See the cases cited in the previous note. To avoid this the courts have been prepared to interpret this requirement very liberally on occasions, see, for example, *Van Wyk v Van der Merwe* 1957 1 SA 181 (A) 188C and *Minister van Naturellesake v Monnakgotla* 1959 3 SA 517 (A) 521H. Many of those cases did involve some infringement of rights stricto sensu but the courts often do not rely on this fact – *Mofokeng's* case supra 793 and *Ramjee v Eastern Cape Committee Group Areas Board and Another* 1958 2 SA 67 (E) 72E.

[101]*Sachs v Minister of Justice* 1934 AD 11 38; *R v Ngwevela* 1954 1 SA 123 (A) 131; *Van Wyk's* case supra 188H; *R v Nomveti* 1960 2 SA 108E 121 D; *Defence and Aid Fund* case supra 273H and *Winter v Administrator in Executive Committee and Another* 1973 1 SA 873 (A) 890. In some cases the approach has been much more critical than others, compare *Ngwevela's* case supra with *Winter's* case supra.

[102]For example the powers enjoyed by the state president either as part of the "royal" prerogative *Minister of the Interior v Bechler* 1948 3 SA 409 (A) 439 or which originate in the powers of Bantu chiefs and Bantu customary law (*Mhlengwa v Secretary for Native Affairs* 1952 1 SA 312 (N) 319; *Kuena v Minister of Native Affairs* 1955 4 SA 218 (T) 287FG and *Nyangeni v Minister of Bantu Administration* 1961 1 SA 547 (E) 568–9 where the earlier appellate division authority is cited) Contra *Saliwa v Minister of Native Affairs* 1956 2 SA 310 (A). For criticism of these cases see D Welsh "The State President's powers under the Bantu Administration Act" 1968 *Acta Juridica* 81.

[103]*Bechler's* case supra 452. Whether this excludes the principles or modifies them is not clear, compare *Ngwevela's* case supra 129EF with *Winter's* case supra 890AB.

[104]Parliamentary provision for subsequent review of the decision taken *AI Electric Ice Cream Factory* case supra 12G; *Ngwevela's* case supra 127H; *Nyangeni's* case supra 566DE and *Publications Control Board v Central News Agency* 1970 3 SA 479 (A) 490CD. Other factors which have been regarded as relevant include the right to demand reasons for the decision (*S v Kathrada* 1963 2 SA 5 (T)), that the action is brought to the attention of parliament (*Kuena's* case supra 288 but contra *Saliwa's* case supra 318CD) that the expropriating authority may delay in taking possession of the property (*Modimola's* case supra 263AB) and that ministerial approval is necessary (ibid 264AB).

[105]*Perumal v Minister of Public Health and Others* 1950 1 SA 626 (A); *Cassem's* case supra 663E and the *Publications Control Board* case supra 490–91. The effect of this factor has varied considerably (compare Schreiner JA in *Perumal's* case 648 with Steyn CJ in *Cassem's* case) but has been particularly important where the action involves a large number of people (*Perumal's* case supra 637; *Salikan v Minister of Health* 1958 1 SA 784 (D) 779–80 and *Publications Control Board* case supra 490EFG. Once again the importance attached to this factor has varied, some courts being reluctant to recognize it – for example *Mofokeng's* case supra 794.

of relevant circumstances makes the scope of natural justice to some extent dependent on the readiness of the judiciary to read the requirement into the relevant statute. As Professor de Smith has shown of the English law,[106] the readiness of the English courts to do this has varied from time to time.[107] The same is true of the South African courts. The changes can, I think, be divided into four distinct phases:

(a) *The initial phases up until the late 1940's*

In this phase, following on a number of early decisions[108] which placed great emphasis upon the unreviewable nature of discretionary powers, the courts rarely held natural justice to be applicable when a discretion was granted to an administrative agency. As discretion is part and parcel of most executive powers, this meant that observance of natural justice was rarely required. This approach was even applied to the issue of trading licenses.[109]

(b) *The second phase – the late 1940's to the late 1950's*

This was the period during which there was a movement to substantially extend the scope of natural justice. The pattern was set by the unanimous decision of the appellate division in *Pretoria North Town Council v AI Electric Ice Cream Factory (Pty) Ltd*[110] where the court in effect rejected the utility of the *quasi judicial* classification.[111] This opened the way to applying the principles of natural justice to powers which bore little relation to ordinary judicial powers. The emphasis fell heavily on the potential effect or results of the exercise of the power, the appellate division unanimously holding in *R v Ngwevela*:[112]

> ". . . when a statute empowers a public official to give a decision prejudicially affecting the property or liberty of an individual that individual has a right to be heard before action is taken against him . . . unless the statute expressly or by necessary implication indicates the contrary".[113]

Applied literally this would have meant that the principles of natural justice would apply to virtually every power conferred upon the executive. The

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[106] S A de Smith "Judicial Review of Administrative Action" (1973) 134–171. The majority and dissenting judgements in the *Defence and Aid Fund* case show how the same rules can often be applied to produce different results in respect of the same statutory provisions.

[107] Broadly speaking the willingness of the courts to require observance of natural justice declined from about the end of the first decade of the present century until there was a revival in the early 1960's which has continued to the present – ibid.

[108] *Judes v The Registrar of Mining Rights* 1907 TS 1046 and *Shidiack v The Union Government* 1912 AD 642 were particularly influential.

[109] *Jooma v Lydenburg Licensing Board* 1933 TPD 477.

[110] 1953 3 SA 1 (A).

[111] ibid at 11C–F. In *Nchabaleng v Director of Education (Tvl) and Another* 1954 1 SA 432 (T) Roper J held that it was not necessary to classify the function with which he was concerned (and which he felt to be quasi judicial!) because (citing the *AI Electric Ice Cream Factory* case) "the right to a hearing depends not upon the classification of the Director's functions but upon the meaning and effect of the regulation read in its context" 440CD).

[112] supra.

[113] ibid 127EF. The rest of the judgement shows quite clearly how strong the evidence would have to be before the court would regard natural justice excluded by necessary implication.

results of this approach can be seen in the unanimous decision of the appellate division in *Saliwa v Minister of Native Affairs*[114] which concerned the power of the governor-general "whenever he deems it expedient in the general public interest" to order any individual Bantu or Bantu tribe to move from one place in the Union to any other.[115] Without any prior warning Saliwa had been ordered to move from Glen Grey to Pietersburg. Rejecting a whole line of earlier cases as not relevant[116] and applying *Ngwevela's* case,[117] the court held that Saliwa ought to have been given prior warning and an opportunity to make representations, and this notwithstanding the absolutely discretionary nature of the power.

(c) *The third phase – late 1950's to early 1960's*

This was a period of uncertainty. It is the nature of legal development by judicial decision that pioneering decisions, such as those just discussed, are followed by decisions which fill in detail and, perhaps inevitably, qualify the broad general principles stated in the earlier cases. These qualifying decisions started to appear in the late 1960's. In both *Sader and Others v Natal Committee Group Areas Board*[118] and *Laubscher v Native Commissioner Piet Retief*, for example, the appellate division placed important limitations on the board principles stated in the earlier cases[119] but in both it is quite clear that those principles are still regarded as fully applicable.[120] At the same time, however, there were indications that some members of the court were beginning to have doubts. In *Laubscher's* case both Mr Justice Reynolds and Mr Justice Hall based their decisions on the quasi judicial classification, the value of which had of course been doubted in the *AI Electric Ice Cream Factory* case.[121] Mr Justice Hall, after citing this decision, went on to add:

> "I would just say, that this classification appears to me to be very aptly expressed and I shall, therfore adhere to those terms."[122]

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[114]supra.

[115]Under s 5(1) of the Bantu Administration Act 38 of 1927.

[116]At 314–317 the court refused to interpret the powers in the context of Bantu customary law – ". . . we must interpret s 5(1)(b) in the same manner as we interpret any other Act of Parliament" (317 W). The contrary authorities are cited in n 102 supra.

[117]318 A.

[118]1957 4 SA 444 (A).

[119]supra.

[120]*Sader's* case was concerned with the proclamation of a group area by the governor-general which in terms of the act was preceded by an inquiry into the desirability of issuing such proclamations (ibid 448). The act made it plain that the board was obliged to give advanced notice of the proposed group area and was obliged to receive written representations but is also made plain that the board "was not obliged to hold a public enquiry or to hear oral evidence". (449 A). Notwithstanding that the board's proceedings were the subject of extensive express provision in the act (ibid 448) the court none the less indicated that the principles of natural justice might apply (449B–D) although this did not help the appellant (449F et seq). Although it is true that the court did mention that the board's functions were "not to make decisions" (449A) it is difficult to regard *Sader's* case as the logical forerunner of *Casem's* case supra (contra Kahn 1959 *Annual Survey of South African Law* 20). *Laubscher's* case was one where the court held there to be no right which could be infringed. Reliance was placed on the fact that the property was to all intents and purposes private property. It was not even stateland.

[121]supra.

[122]op cit 553G.

These doubts were confirmed by two subsequent decisions, both in 1959, *Minister van Naturellesake v Monnakgotla*[123] and *Cassem en 'n Ander v Oos-Kaapse Komitee van die Groepsgebiedraad.*[124] In *Monnakgotla's* case the court indicated that it might be more willing to accept the ouster of natural justice than in the past[125] while, in *Cassem's* case the court relied heavily on the concept of quasi-judicial function[126] to exclude observance of natural justice in the proclamation of a group area notwithstanding the serious consequences for individuals which could flow from such action.

(d) *The fourth and final phase – early 1960's to the present*

This period has witnessed the confirmation of those doubts. In a series of cases the appellate division has increasingly put the emphasis on the classification of functions to determine whether the principles of natural justice are applicable. Moreover, the courts have so defined *quasi judicial* functions that a power will not be regarded as *quasi judicial* unless it bears a very marked resemblance to a true judicial function – the very reverse of the position in the middle fifties. The emphasis in the modern judgments has tended to fall on the "judicial" rather than the "quasi".

Thus the previous emphasis upon the potentially adverse consequences of a decision has given way to an emphasis on factors such as the width of the discretion granted to the body exercising the power;[127] the fact that the ultimate decision need not necessarily be based upon the findings of the enquiry which precedes the decision;[128] the fact that the decision does not technically interfere with the individual's rights stricto sensu, although adversely affecting him in fact,[129] and, finally, the fact that to require the observance of natural justice would cause administrative difficulties and thwart the need for prompt action.[130] As a result the appellate division has held that an organisation may be declared unlawful and compulsorily liquidated without an opportunity to state its case;[131] that the Community Development Board may expropriate land without hearing the owner[132] and that a coloured attorney can be refused permission to enter South West Africa again without prior hearing.[133]

By making the "quasi judicial" more "judicial", the courts have severely limited the scope of the rules of natural justice in South African law and have thereby further limited their already limited power to ensure that a proper and fair decision is eventually reached.

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[123]supra.
[124]surpa.
[125]ibid 521FG. The approach has subsequently been adopted by the appellate division: *Cassem's* case supra 660; *Le Roux's* case supra 491B–D; *Defence and Aid Fund* case supra 270F; *Publications Control Board* case supra 488–9. The effect of this change can be seen in the approach adopted in *Winter's* case supra 888–9.
[126]op cit 660C–G. See also *Down v Malan NO en Ander* 1960 2 SA 734 (A) 741 FGH.
[127]*Mariam's* case supra 751; *Modimola's* case supra 260–1.
[128]*Defence and Aid Fund* case supra 278–82.
[129]*Pieter's* case supra 861.
[130]*Winter's* case supra 890 and *Publications Control Board* case supra 489H. (Compare the dissenting judgements in the *Defence and Aid Fund* case supra).
[131]*Defence and Aid Fund* case supra.
[132]*Modimola's* case supra.
[133]*Pieter's* case supra.

Why was there this change in the early sixties? Any answer must of necessity be tentative, but there are at least five possible reasons and my own feeling is that it is probably a combination of these.

In the first place, the cases in the early fifties all concerned either highly contentious legislation which by the standards of the time was also unusual – for example, the Group Areas Act[134] and the Suppression of Communism Act[135] – or the use of existing law to apply segregation more thoroughly than before.[136] There are indications that, by the end of the fifties, the courts were beginning to accept this kind of legislation and action. They were more sympathetic to the administrative difficulties involved[137] regarding inequality of treatment as to some extent inevitable. Indicative of this change are the remarks of Mr Justice Holmes in a unanimous decision of the appellate division in *Minister of the Interior v Lockhat and Others*:[138]

> "The Group Areas Act represents a colossal social experiment and a long term policy. It necessarily involves the movement out of Group Areas of numbers of people throughout the country. Parliament must have envisaged that compulsory population shifts . . . would inevitably cause disruption and, within the foreseeable future, substantial inequalities."[139]

Secondly, the early sixties saw the start in earnest of the more draconian security legislation[140] which is characterised by the granting of wide discretionary powers to the executive. Our courts, like courts elsewhere during emergencies,[141] have tended to be unwilling to interfere with the exercise of these powers.[142] The impact of these attitudes is, as Professor de Smith has shown in relation to England,[143] not limited to the emergency legislation itself. Indicative that this is so in South Africa is the fact that Mr Justice Diemont, in calling upon the publications control board to divulge the reasons for its decisions, felt it necessary to point out:

> "We are dealing here not with a matter of state security which may call for secrecy, we are dealing with the right of the citizen to read and enjoy the books and periodicals which are sold in the book shops of the Republic."[144]

Thirdly, the experience in the fifties had shown that it was often pointless to hold principles of natural justice applicable because parliamentary sovereignty could be used to reverse such decisions and this was done on numerous occasions.[145]

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[134] 36 of 1966 as amended. This replaced the earlier legislation.
[135] 44 of 1950 as amended.
[136] *Tayob v Ermelo Local Road Transportation Board* 1951 4 SA 440 (A).
[137] Compare the dissenting judgement of Schreiner JA in *Perumal's* case supra with that of Steyn CJ in *Cassem's* case supra.
[138] 1961 2 SA 587 (A).
[139] ibid 602EF. Compare *Ramjee's* case supra 72 E and G.
[140] For example, s 21 of the General Law Amendment Act 76 of 1972 and s 17 of the General Law Amendment Act 37 of 1963.
[141] The English courts, for example, in *Liversidge v Anderson* [1942] AC 206.
[142] A S Matthews op cit.
[143] *Judicial Review* supra 143.
[144] *Marshall Cavendish Limited and Another v Publications Control Board* 1969 4 SA 1 (C) 3F.
[145] 1954 1955 1956 1957 1969 and 1970 *Annual Survey of South African Law* 11 38 27–8 37 30 and 35 respectively.

Fourthly, the nineteen sixties saw the decline in the influence of English law upon the South African legal system. In the late fifties the influence of English law was still strong, courts often treating decisions of the English courts as having equal authority to those of our own.[146] By the late sixties, English law had come to be regarded as a foreign legal system and one which was so foreign that reference to it was, to put it at its lowest, misleading.[147] This is important here because just as the South African courts were beginning to move away from the approach they had adopted in the early fifties, the English courts were just beginning to move toward something like it in the early sixties.[148] The two systems passed one another like ships in the night.

Finally, the South African courts have on occasion expressed a desire not to become embroiled in politically sensitive issues. A good example of this is perhaps our censorship legislation. Notwithstanding the fact that they have managed to do an extraordinarily good job of making some sense out of almost nonsensical legislation,[149] the courts have quite obviously found their involvement extremely distasteful.[150]

Whatever the reasons for the change were, the change occurred. Its significance lies in the fact which I have already mentioned that the rules of natural justice represent the furthest that our courts are prepared to go in controlling the executive.[151] A retreat in this area can be regarded as a general retreat.

I have tried this evening to trace what I consider to be a fundamental development in South African constitutional law. There are I think two lessons to be learned. In the first place, South African constitutional lawyers must remember that there is such a thing as the South African constitution. Its strong but in many ways superficial similarity to the United Kingdom constitution makes one inclined to forget this. To quote the tart reply of

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[146]For example *Pretoria City Council v Osman Omar* 1959 4 SA 436 (T) 441.

[147]The major change came in the early 1960's with the decisions of the appellate division in *Trust Bank van Afrika Bpk v Eksteen* 1964 3 SA 402(A) and *Schlesinger v Commissioner for Inland Revenue* 1964 3 SA 389 (A) – see 1964 *Annual Survey of South AfricanLaw* 473 et seq. English decisions in the area under discussion have since this time been cited either in dissenting judgements (for example Williamson JA in the *Defence and Aid* case supra) or with a view of distinguishing them (for example, Steyn CJ in the *Defence and Aid Fund* case supra). One of the rare cases in which approval was expressed in a majority judgement was *Winter's* case supra. The cases cited dealt with aliens and are regarded as exceptional in English law (De Smith *Judicial Review* 157).

[148]De Smith *Judicial Review* supra.

[149]Dean "Judging the Obscene" 1972 *Acta Juridica* 61.

[150]*Brandwagpers (Edms) Bpk v Raad van Beheer oor Publikasies* 1975 2 SA 32 (D) 43F. It is noteworthy that the approach of the courts in cases dealing with "ordinary" administrative decisions tend to reflect the older approach much more strongly – see, for example, *Adjunk-Minister van Landbou en 'n Ander v Heatherdale Farms (Pty) Ltd en 'n Ander* 1970 (4) SA 184 (T) (slaughter of poultry suspected to be diseased); *Oberholzer's* case supra (closure of a road) and *Home Service Security (Pty) Ltd v Knysna Divisional Council* 1975 (2) SA 562 (C) (rejection of building plans) but see *Le Roux v Minister van Bantoe Administrasie en Ontwikkeling* 1966 1 SA 481 (A) (dismissal of local government official).

[151]M Wiechers op cit 219.

that great judge, the late Mr Justice Van den Heever to the suggestion that the South African parliament was simply a replica of the English parliament:

> ". . . the fact that our constitution is the creature of the British Parliament seems to me a fortuitous circumstance which is quite irrelevant . . . I would have been of the same opinion if it had been framed by a constituent assembly of the people made by Solon or extracted from the laws of Hammurabi . . . Only British bias could prompt the thought that since such a power resides in the legislature in Britain . . . our Parliament must necessarily have it too."[152]

Our constitution has been growing further and further away from the English model. The changes are often subtle and difficult to define but that they have occurred is beyond question. This is not in itself a bad thing. "Only British bias," to use Mr Justice Van den Heever's phrase, could prompt such an idea but what I have discussed this evening constitutes, I think a warning. The South African executive is increasingly being given greater and greater powers to bring about fundamental social, economic, political and legal change simply by administrative fiat. At the same time, no attempt is being made to provide for the necessary supervision of the way in which these powers are exercised.[153] Indeed, if my analysis of the approach of the courts to the principles of natural justice is correct, the reverse is true. Supervision of administrative action is, if anything, decreasing. If this continues larger and larger areas of government will fall under the exclusive and absolute control of the executive and the other organs of government will become increasingly insignificant, their rôle being reduced simply to the provision of support for the executive where the latter feels this necessary. The title of my lecture posed a question: "Whither the Constitution?" There are encouraging signs[154] but if the developments which I have outlined this evening continue, the constitution will cease to exist in all but the most formal sense. It will simply wither away but perhaps that is the fate of all African constitutions? □

Now as I understand the law, human rights or fundamental freedoms in our country are principles firmly embedded in our common law. These freedoms, and the correlative rights flowing from them, are interwoven in our common law which affords the necessary control and protection to the citizen as a possessor of the rights flowing from these freedoms.

per Van Wyk de Vries J in *Simonlanga and others v Masinga and others*
1976 2 SA (WLD) 740

[152] *Minister of the Interior and Another v Harris and Others* 1952 4 SA 769 (A) 191A–F.
[153] In fact the government increasingly appears to see the proper safeguard as the probity of the officials exercising the power 1967 (Hansard *House of Assembly Debates* cols 7027 7028) and has on occasions refused to translate safeguards contained in administrative directives into legislation ((1970) Hansard *House of Assembly Debates* vol 32 col 1441).
[154] See for example *Wood and Others v Ondangwa Tribal Authority and Another* 1975 2 SA 294 (A).

Aantekeninge

ACTIO PERSONALIS MORITUR CUM PERSONA

Alhoewel dit bo alle twyfel vasstaan dat die fundamentele aksies op grond van onregmatige daad in ons reg uit die Romeinse en Romeins-Hollandse reg stam, word 'n tipiese Engelsregtelike *common law*-reël soms ten aansien van die sogenaamde oorerflikheids- of oorganklikheidsprobleem by deliktuele eise (problem of survival or transmissibility of delictual claims) gebesig[1], naamlik *actio personalis moritur cum persona*. Selfs in die gloednuwe uitgawe van CJ Claassen se *Dictionary of Legal Words and Phrases* I[2] word dit nog as opskrif aangewend by die bespreking van die oorerflikheidsreëls tav genoegdoeningsaksies in die Suid-Afrikaanse reg. Hierdie spreuk herinner baie sterk aan 'n reël van die ou Franse praktyk, *de l'homme mort le plaid est mort*,[3] in die sin dat 'n aksie op grond van *tort* deur die dood van òf die eiser òf die verweerder onherroeplik beëindig word. Die vraag of die aksie al aanhangig gemaak is al dan nie – dws of litis contestatio al plaasgevind het – het hier geen rol gespeel nie. Dit was 'n algemene reël waarvan slegs in hoë uitsonderingsgevalle afgewyk is. Daar was in hoofsaak twee belangrike afwykings, nl in geval van aksies op grond van kontrakbreuk, asook aksies waarmee die eiser die opbrengs van gesteelde goedere van die oorlede dader se boedel opgevorder het.[4]

Dat die actio personalis-reël van die Engelse reg geen wortels in die Romeinse, kanonieke of Romeins-Hollandse reg het nie, staan bo enige twyfel vas.[5] Die vroegste melding daarvan word in 1479 gemaak[6] en die eerste noemenswaardige eksposisie daarvan vind ons in *Coke's Reports* onder die *Pinchon's Case* (1611).[7] Sedertdien het dit gegeld as 'n onwrikbare stelreël, totdat die eskalasie van die aantal sterfgevalle in motorongelukke – waardeur die onhoudbaarheid van die reël steeds op meer daadwerklike wyse geïllustreer is – die afskaffing daarvan deur wetgewing in 1934 genoodsaak het.[8]

Min reëls is ooit aan soveel geregverdigde kritiek onderwerp. Afgesien

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[1]Oor die geskiedkundige ontwikkeling van die oorerflikheidsaspek vgl Scott *Die Geskiedenis van die Oorerflikheid van Aksies op grond van Onregmatige Daad in die Suid-Afrikaanse Reg* proefskrif Leiden 1976.

[2]35.

[3]Vgl Reulos *Les Institutes Coustumieres de Loisel* Paris 1935.

[4]Vgl Clerk & Lindsell *on Torts* (13e uitg) 255: Ogus *The Law of Damages* (1973) 115.

[5]Winfield *on Tort* (8e uitg) 604. Sien ook Meijerès *Etudes d'Histoire du Droit* I (1959) 240 en Rohmann *Die Vererblichkeit des Schmerzensgeldanspruches* (1968) 102.

[6]Winfield loc cit.

[7]Vgl Holdsworth *A History of English Law* III (3e uitg) 576.

[8]Deur die *Law Reform (Miscellaneous Provisions) Act* (1934) 24–25 Geo 5 c 41.

van die inherente onbillikheid daarvan is selfs die terminologie waarin dit geklee is allerweë as onverantwoord en verwarrend bestempel:

> "In fact, the word 'personalis' may mean anything or everything. It and the maxim which contains it are worthless. They throw no light on the law of survival in actions on tort . . . The maxim would probably never have acquired such currency if people had not thought that a Latin quotation was an ornament to an opinion or argument."[9]

In ons eie regspraak kom geen voorbeeld van die *toepassing* van die Engelsregtelike reël voor nie. Tog vestig Roos in die *Cape Law Journal* van 1897,[10] in sy bespreking van die Statute van Batavia wat aan die Kaap regskrag sou geniet het,[11] die aandag op een van die bepalings daarvan – dit is naamlik vervat in 'n plakaat van 11 Januarie 1737 wat lui dat:

> "na regten alle straffen wegens personeele delicten werden g'extingueert door den dood van den misdadiger, die nog aan lichaam, nog aan goed mogen gestraft worden".[12]

Roos gee die inhoud daarvan soos volg weer:

> "*Actio personalis moritur cum persona*, 1737: All personal delicts are extinguished by death, so that neither the body nor the property of the deceased shall suffer."

Sy aanwending van die Engelsregtelike spreuk as opsomming van die inhoud van die bepaling is om veral twee redes ongelukkig: eerstens was die Engelsregtelike reël nie net van toepassing met betrekking tot passiewe onoorerflikheid nie, dog ook ten aansien van aktiewe onoorerflikheid. In die tweede plaas is die inhoud van die statuut kennelik slegs op suiwere strafaksies van toepassing[13] en gee dit in iedere geval die welgevestigde reëls van die gemene reg weer,[14] terwyl die actio personalis-reël ten aansien van privaatregtelike aksies op grond van onregmatige daad ter sprake kom.

In dieselfde uitgawe van die *Cape Law Journal* wys Morice[15] duidelik op die fundamentele verskille tussen die Suid-Afrikaanse deliktereg en die Engelse *law of torts* ten aansien van die aspek van oorerflikheid, deur 'n bondige geskiedkundige oorsig van beide stelsels te verskaf. Daarin beweer hy op geen stadium dat die Engelse maatreël ooit hier te lande geresipieer is nie.

Verwarring oor die aanwendbaarheid van die actio personalis-reël in Suid-Afrika word ook geskep deur Nathan:[16]

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[9]Fischer "Survival of Actions" 1886 *American Law Review* 48 ev. Vgl ook Winfield loc cit: "Like some other Latin maxims which have been invented or adapted by our law, we should have missed nothing if it had never found its way there".

[10]Roos "The Plakaat Books of the Cape" 1897 *Cape Law Journal* 18.

[11]Vgl Visagie *Regspleging en Reg aan die Kaap van 1652–1806* (1969) 63 ev, waarin die regskrag van hierdie statute bespreek word.

[12]Van der Chijs *Nederlands-Indisch Plakaatboek* IV 401.

[13]Dit is af te lei uit die inhoud van die brief van die Here Sewentien van 3 September 1735 (vermeld deur Van der Chijs loc cit) waarin opdrag tot dié uitdruklike voorskrif gegee word. In die brief word as gesag verwys na *D* 48 20 (*De Bonis Damnatorum*) en J Voet se kommentaar daarop (nr 6).

[14]Wat die ratio vir die passiewe onoorerflikheid van kriminele aksies aanbetref vgl *D* 48 19 20.

[15]"English and Dutch Law on Succession to Actions – A Contrast" 1897 *Cape Law Journal* 245–253.

[16]*The Common Law of South Africa* III (1906) § 1557.

> "But De Villiers, CJ has held (*Meyer's Executors v Gericke* F14) that this rule is not applicable to the full extent in Roman-Dutch law."

Die ware feit is dat slegs die aspek van die effek van litis contestatio in die saak van *Executors of Meyer v Gericke* Foord 1880 14 te berde gebring word. Geen verwysing na die inhoud van die Engelsregtelike stelreël of selfs die letter daarvan kom ooit ter sprake nie. Dit is myns insiens duidelik dat Nathan sonder meer die actio personalis-reël gelykstel aan die oorerflikheidsreëlings van die Romeins-Hollandse reg ten opsigte van die actio iniuriarum voor litis contestatio.

Sedertdien duik die woorde *persoonlike aksie* (*personal action*) met verwysing na aktiewe en passiewe oorerflikheid telkemale op in 'n konteks waarin ons dit moet verstaan as *deliktuele aksie* (delictual claim) gerig op die verhaal van genoegdoening op grond van iniuria. In die *South African Law Journal* van 1918[17] word met verwysing na die actio personalis-reël gesê:

> "Under our law a personal action perishes on the death of the person injured, or of the person who has caused the injury, and it does not pass to the executor unless the action had been commenced before his death, and the pleadings closed."

Die enigste afleiding hieruit te maak, is dat actio personalis sinoniem is met 'n eis gerig op genoegdoening op grond van iniuria – 'n eng gebruik van die term wat ook vreemd is aan die Engelse *law of torts* waaruit dit juis ontleen is. 'n Identiese aanwending van die Engelsregtelike reël word ook aangetref by Van Zyl,[18] Wille[19] en die *Dictionary of Legal Words and Phrases.*[20]

In die saak van *Spies' Executors v Beyers* 1908 TS 473[21] word deur die regter verwys na die actio personalis-reël in sy bespreking van die gemeenregtelike bronne. In casu beslis hy weliswaar dat dit nie van toepassing is op 'n aksie op grond van seduksie nie, dog daardeur word verkeerdelik die indruk geskep dat dit in ander gevalle, naamlik dié van iniuria-eise wel toepassing vind.

Ook in die saak van *Jankowiak v Parity Insurance Co Ltd* 1963 2 SA 286 (W) word deur r Kuper[22] melding gemaak van die stelling deur die advokaat van die verweerder dat hierdie reël van die *common law* onveranderd in Suid-Afrika geld. Hoewel die finale beslissing dui op die teendeel, is dit te betreur dat die regter hierdie bewering nie uitdruklik verwerp het nie.

Samevattend kan opgemerk word dat 'n beroep op die Engelsregtelike actio personalis-reël in Suid-Afrikaanse verband bewys lewer van 'n gebrekkige begrip van sowel die Engelsregtelike as Romeins- en Romeins-Hollandsregtelike reëls insake aktiewe en passiewe oorerflikheid van deliksaksies. In hoofsaak, die feit dat daar kans gesien word om ons gemeenregtelike reëls daaronder tuis te bring, laat opnuut die besef posvat hoe tereg ar Van den

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[17] Onder die rubriek "Notes" 60.
[18] *The Theory of the Judicial Practice of South Africa* I (3e uitg) 89.
[19] *Principles of South African Law* (6e uitg) 508.
[20] Onder die opskrif *actio personalis moritur cum persona*: "As regards torts or delicts the maxim applies to actions for *injuria* and actions for homicide."
[21] 476 479.
[22] 287.

Heever in die saak van *Preller v Jordaan* 1956 1 SA 483 (A) gewaarsku het teen die oorname van Engelsregtelike begrippe wat 'n ooreenkoms – of selfs, soos in die onderhawige geval, 'n skyn van ooreenkoms – vertoon met begrippe uit ons eie gemene reg.[23] Die ironie verbonde aan die pogings om die Engelsregtelike spreuk ten aansien van die oorerflikheid van deliksaksies as goeie Suid-Afrikaanse reg te bestempel, is dat daardie reël mank gaan aan vele gebreke terwyl ons gemene reg 'n maatreël bied wat na eeuelange ontwikkeling tot 'n bepaalde graad van volmaaktheid – indien so-iets in jurisdiese terme hoegenaamd moontlik is – ontwikkel het.

Alhoewel dit egter nooit sover gekom het dat die inhoud van die actio personalis-reël hier praktiese toepassing gevind het nie, behoort ar Van den Heever se gevierde waarskuwing genoegsame aansporing te wees tot die totale vermyding van die verwarringstigtende Engelsregtelike terminologie in hierdie verband.

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VERKLARING DEUR BESKULDIGDE – ERKENNING OF BEKENTENIS?

Die vraag of 'n verklaring deur 'n beskuldigde aan 'n polisiebeampte 'n erkenning of 'n bekentenis is, het in die jongste tyd heelwat aandag in ons howe geniet. Twee, op die oog af teenstrydige, uitsprake in die Transvaalse provinsiale afdeling (*S v Bodibana* 1975 3 SA 71 (T) en *S v January* 1975 3 SA 324 (T)) verdien ons aandag omdat hulle vir sowel landdros as praktisyn probleme skep. In beide gevalle het die beskuldigdes tereggestaan op aanklagte van oortreding van a 2 van Wet 41 van 1971 en in beide gevalle was dagga die bron van die kwaad. Hulle verklarings het erkennings van òf besit òf eiendomsreg t a v dagga geopenbaar en in beide gevalle het die raadsman vir die verdediging aangevoer dat die verklarings "bekentenisse" is. Indien 'n verklaring deur die hof as 'n "bekentenis" beskou word, is dit ontoelaatbaar. Indien dit egter as 'n "erkenning" beskou word, is dit toelaatbaar. Dit is duidelik dat die onderskeiding van verklarings as òf bekentenisse òf erkennings reeds tot 'n fyn spel ontwikkel het. In aansluiting by Zeffert (1971 *SALJ* 164 165) kan ons die vraag vra:

> "But has the great game not become just a little to esoteric for general popularity?"

Die somtyds gekunstelde onderskeiding tussen erkennings en bekentenisse deur ons howe het ons te danke aan die ingryping van ons wetgewer in die gemene reg (a 273 van Wet 31 van 1917 en die huidige a 244 van Wet 56 van 1955). Die gemeenregtelike vereiste dat 'n verklaring deur 'n beskuldigde vry en bereidwillig gemaak moet wees alvorens dit as getuienis teen hom toelaatbaar is, is deur die wetgewer verder uitgebrei deur dit ontoelaat-

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[23] Veral 504: "Here we have a phenomenon that appears all too often in our jurisprudence. A Roman-Dutch legal rule is compared with its English counterpart; with pleasure, if indeed not with joy, it is stated that there is no difference, and then the door is wide open for the reception of English law . . . Gradual adaptation to new circumstances and problems is a type of development that leads to strength; uncontrolled development on the other hand leads to malignant growths and decay."

baar te maak bloot vanweë die feit dat dit aan 'n vredesbeampte gemaak is. Die houding van ons howe m b t hierdie beperking blyk duidelik uit die bekende saak van *Hans Veren* (1918 TPD 218) en veral waar r Wessels verklaar (te 220):

> "[I]n none of the systems of law with which I am acquainted can I find reference to any such provision".

En voorts:–

> "But it is a proviso which one can see at the first glance is bound to cause a great deal of difficulty and trouble and may lead to justice not being done".

En dan die reaksie van die hof (te 221):

> "What I have said is sufficient to show that this is an unuausual proviso, with very far-reaching consequenses, and one which is entirely opposed to common law and to many of the principles of this very Criminal Procedure Code.
> That being so, according to all canons of interpretation the proviso has to be interpreted very strictly. We have to follow the exact meaning of the words as given in the proviso, and we have to interpret it as strictly as possible and not to give it an extensive or liberal interpretation."

Nou is dit ironies dat, hierdie uitspraak ten spyt, dit juis in die Transvaalse provinsiale afdeling is waar ons telkemale uitsprake kry wat neig om af te wyk van die genoemde beginsels. Dit is miskien raadsaam om eers kortliks die ontwikkeling van ons reg op hierdie gebied, wat kasuïsties geskied het, van nader te beskou.

Naas die *Hans Veren*-saak het ons die twee toonaangewende appèlhofuitsprake (*R v Becker* 1929 AD 169 en *R v Hanger* 1928 AD 459) waar die hof 'n "bekentenis" baie duidelik omskryf het. In *R v Becker* supra 171:

> "[A]n unequivocal admission of guilt, which if made in a court of law, would amount to a plea of guilty".

(Sien ook die resente uitspraak van ar Trollip in *S v Grove-Mitchell* 1975 3 SA 417 (A) 419F.) Hierna kry ons die geval waar die appèlhof onomwonde verklaar dat 'n verklaring waarin die beskuldigde erken dat hy *verantwoordelik* is vir sekere dagga nie op 'n bekentenis neerkom nie omdat die beskuldigde nog steeds kon aantoon dat hy 'n permit het wat hom magtig om in besit van die dagga te wees (*R v Xulu* 1956 2 SA 288 (A)).

Na die verordening van Wet 41 van 1971 was die moontlikheid om by wyse van 'n permit regmatiglik oor dagga te mag beskik vir 'n tyd lank deur die wetgewer uitgesluit. Die Natalse hof (in *S v Mahlangu* 1972 3 SA 679 (N)) het dan ook beslis dat 'n erkenning van eiendomsreg t o v daggaplante op 'n bekentenis neerkom, want "[it] involves not only an admission of ownership of the dagga but also an admission of the possession . . . and of the use of the dagga in question" (a 682B). Die argument dat 'n verklaring wat lui: "Dit is my dagga en ek gebruik dit as veevoer" nie 'n onomwonde erkenning van skuld is nie omdat die afwesigheid van wederregtelikheidbewussyn nie uitgesluit is nie, is miskien meer van akademiese belang en word daar gelaat. Uit wat hierna volg, is dit egter duidelik dat die dictum nie meer geld nie.

Ingevolge a 4A van Wet 41 van 1971 (ingevoeg deur Wet 80 van 1973) kan die minister nou *enige persoon* magtig om, vir doeleindes van navorsing,

enige afhanklikheidsvormende stof (bv dagga) "te besit, te gebruik, in te voer of uit te voer . . ." Ingevolge subartikel (2) van a 4A kan geen persoon nou skuldig bevind word nie "indien hy bewys dat die daad wat hom in die klagskrif ten laste gelê is, gemagtig is deur en verrig is ooreenkomstig die bepalings van 'n magtiging kragtens subartikel (1) [van a 4A] van genoemde wet aan hom uitgereik". Om hierna aan te voer dat 'n verklaring wat lui: "Dit is my dagga" vertolk moet word as 'n bekentenis sal tot geforseerde onderskeidings van *Becker* en *Xulu* se sake lei. (Sien 1973 *Die Landdros* 192 waar daarop gewys is dat na die verordening van a 4A die posisie dieselfde is as tydens die uitspraak in die *Xulu*-saak (supra)). R Kannemeyer som, met respek, die posisie raak op waar hy in *S v Henman* 1974 4 SA 277 (OK) 279 verklaar:

> "It would therefore appear that once more the decision in Xulu's case, supra, is operative because possession of dagga is not in itself necessarily an offence, as it might be authorised by permit."

Uit die uitspraak van war Van Zyl in *S v Mkize* 1975 1 SA 517 (A) blyk dit, alhoewel obiter, dat ook die appèlhof die mening toegedaan is dat 'n verklaring waarin die beskuldigde slegs eiendomsreg tav dagga erken nie *per se* op 'n bekentenis neerkom nie.

In *S v Bodibana* (supra) het die beskuldigde erken dat sy 'n land waarin dagga gegroei het, geskoffel het. Die hof bevind tereg dat sodanige handeling as "handel" beskou moet word. Tav die vraag of die verklaring dat sy die land geskoffel het op 'n bekentenis neerkom, verklaar r Hiemstra (te 72F):

> "It was suggested that the possibility that the present accused might have been in possession of such a permit was not excluded by her statement and that consequently her statement was not a confession. Practically approached, this is of course extremely far-fetched because in the surrounding circumstances it seems inconceivable that she, being a Black woman on a farm, and only 13 plants being involved, could by any stretch of imagination have had a permit for research purposes. *The position is, however, that even a fanciful possibility of defence must be excluded before the statement can rank as a confession.*" (Ek kursiveer.)

Die hof bevind egter heeltemal tereg dat die verklaring tog wel 'n bekentenis is omdat haar handeling buite die bestek van die gevalle waarvoor in a 4A voorsiening gemaak word, val. Dit is ook duidelik uit die regter se uitspraak dat die hof na die verklaring as sodanig moet kyk om vas te stel of dit 'n bekentenis is al dan nie en nie na die omringende omstandighede nie.

Direk in stryd met bogenoemde uitspraak is dié van r Trengove in *S v January* (supra) waar hy uitgaan van die volgende standpunt (te 328F):

> "Volgens ons gewysdes moet die juiste strekking van die eerste appellant se erkennings teen die agtergrond van die omringende omstandighede, waarin hy dit gemaak het, bepaal word. (*R v Swart* 1973 TPA 168 171; *S v Gumede* 1963 2 SA 439 (N); *S v Motlaung* 1970 3 SA 547 (T))."

In die lig van die omringende omstandighede van die betrokke geval kom die hof tot die volgende slotsom (te 329B):

> "Ek is van mening dat die erkennings nie vir 'n onskuldige uitleg vatbaar is nie en as ondubbelsinnige erkenninge van skuld beskou moet word."

Die verskil tussen hierdie twee uitsprake is daarin geleë dat die hof in eersgenoemde geval nie die omringende omstandighede in ag geneem het om te bepaal of die verklaring 'n bekentenis is of nie, en in laasgenoemde geval wel. Die vraag ontstaan nou welke een van die twee standpunte korrek is. Indien ons teruggaan na *Hans Veren* se saak vind ons dat r Wessels verklaar het (te 221):

> "It must therefore be a confession . . . And the word 'confession' here must be taken in its strict sense . . . It must be, not a mere statement to a police officer which, put together with other evidence, may lead to the conviction of the offender, but an absolute confession of guilt."

Hierdie standpunt is deur ons appèlhof bevestig in *R v Becker* (supra) waar die hof verklaar (te 171):

> "The admission by an accused of facts which, when carefully scrutinised and laboriously pieced together, may lead to the inference of guilt on the part of the accused, however, consonant that may be with the meaning of the term 'confession' in the abstract, is not a confession within the meaning of the Act".

Die sake van *Swart* 1937 TPD 168 en *Motloung* 1970 3 SA 547(T) waarop r Trengove steun as synde gesag vir die standpunt dat die omringende omstandighede in ag geneem mag word om te bepaal of 'n verklaring 'n bekentenis is, oortuig nie. In *Swart* se saak was die aanklag dat die beskuldigde beeste sonder 'n permit oor die grens gebring het. Hy erken nie net dat die beeste syne is nie maar voeg ook nog by: "Jy het my gevang. Ek is 'n arm seun." Schmidt *Die Bewysreg* 399 n 25 verklaar tereg soos volg:

> "Dat sy verklaring 'n ondubbelsinnige erkenning van skuld was, blyk, . . . inderdaad uit sy woorde self."

Hierbenewens blyk dit ook dat die omringende omstandighede wat wel deur die hof in ag geneem is, slegs gedien het om te bepaal of die beskuldigde geweet het wat die aanklag teen hom is en waarop hy geantwoord het soos voormeld.

In *Motloung* se saak was die aanklag teen die beskuldigde een van oortreding van a 61(1)(c) van Wet 13 van 1928, naamlik die besit van dagga vir verkoop of lewering. In die verklaring deel die polisiebeampte die beskuldigde skriftelik mee dat hy hom verdink dat hy "dagga verkoop het *sonder die nodige permit of lisensie*" (my kursivering). Hierop antwoord die beskuldigde (te 548G):

> "Baas ek wil net die waarheid praat. Hulle het dit by my gekoop . . ."

Hier is dit immers duidelik dat die waarskuwing deel van die verklaring is en dat ons wel met 'n bekentenis, d w s 'n onomwonde erkenning van skuld, te doen het. Die striemende aanval van Zeffert 1971 *SALJ* 164 op hierdie uitspraak van r Trengove gaan nie heeltemal op nie want die agbare regter stel die *ratio decidendi* self duidelik waar hy verklaar (te 549B):

> " . . . dat in elke bepaalde geval die Hof die verklaring as 'n geheel in oënskou moet neem en dit as 'n geheel moet uitlê en interpreteer."

Dit gaan duidelik hier nie om "omringende omstandighede" nie maar wel om wat die "verklaring" uitmaak en dit sou onsinnig wees om net na die beskuldigde se woorde te kyk om dit te bepaal.

Sy woorde word eers sinvol indien dit in samehang met die waarskuwing gelees word. Hoe hierdie sienswyse egter nou deur die hof in *January* se saak as gesag gebruik kon word vir die stelling dat die hof wel na die omringende omstandighede mag kyk om te bepaal of 'n verklaring 'n bekentenis is, is onbegryplik.

Die een saak waarin die hof wel verklaar het dat daar na omringende omstandighede gekyk mag word om te bepaal of 'n verklaring 'n bekentenis is, het die hof nie in *January* se saak na verwys nie, nl *R v Ikelheimer* 1948 1 SA 1081(T). Die rede hiervoor is moontlik daarin geleë dat r Ludorf in *S v Motara* 1963 2 SA 579(T) 584H ten aansien daarvan verklaar het:

> "It is clear from the cases that I have quoted that, with all due respect, the decision in *Ikelheimer's* case is wrong and although it is a Full Bench decision, we cannot follow it."

Dit laat geen twyfel nie dat laasgenoemde uitspraak getuig van 'n deurtastende ondersoek van ons reg op hierdie aspek deur r Ludorf. Die verwerping van die uitspraak in die *Ikelheimer* saak het op goeie grond geskied.

In *Motara* se saak het die beskuldigde tereggestaan op 'n aanklag dat hy op 'n perseel gewoon het in stryd met die bepalings van Wet 77 van 1957. Sy verklaring van "I live here" is nie as 'n bekentenis beskou nie ten spyte van baie sterk omringende omstandighede wat aanduidend was van die feit dat dit geïmpliseer het dat hy bedoel het om te sê "I live here illegally".

In *S v January* was die feite kortliks soos volg: Beskuldigde word by sy werk deur die polisie genader en vrae gevra aangaande dagga wat by sy huis gevind is. Hy ontken enige kennis van die dagga. Op pad vanaf sy werkplek na sy huis het die polisie hom ingelig aangaande die erns van dagga-oortredings en die strawwe daaraan verbonde maar hy hou vol met sy ontkennings. Tuis gekom, word hy met die dagga gekonfronteer en daarop erken hy dat dit syne is. Hy erken ook dat 'n verdere hoeveelheid dagga wat hierna gevind word syne is en later bevestig hy die erkennings.

Een van die omringende omstandighede wat die hof in ag neem, is die feit dat beskuldigde nooit uitdruklik of by implikasie beweer het dat hy skriftelike magtiging van die minister het om die dagga te besit nie. Dit was nooit nodig nie want die wetgewer het met a 4A(2) 'n bewyslas op die beskuldigde geplaas waarvan hy hom in die hof moet kwyt, soos die posisie ook tydens die beslissing in *Xulu* se saak was. Daar het dus op daardie stadium geen plig op hom gerus om dit te meld nie.

'n Kontrastering van hierdie feitestel met die in die *Motara*-saak laat die leser sonder aarseling tot die slotsom kom dat die omringende omstandighede in laasgenoemde saak baie meer verdoemend is as in die geval van die *January*-saak.

In aansluiting by Schmidt a w 399 kan verklaar word:

> "Die opvatting is vandag dat die omringende omstandighede nie in ag geneem kan word om leemtes in die verklaring te vul ten einde dit tot 'n bekentenis te verhef nie. Sulke omstandighede kan slegs in ag geneem word om te bepaal wat die werklike strekking van die verklaring self was."

Die outeur gaan egter dan voort en verklaar (a w 400):

> "Dit is duidelik dat daar behoefte is om ons reg op hierdie gebied op 'n natuurliker grondslag te plaas en van kunsmatighede te suiwer. Daar word aan die hand gedoen dat dit bewerkstellig kan word sonder om gesonde beginsels prys te gee deur telkens ten volle ag te slaan op wat by die beskuldigde se verklaring geïmpliseer is . . . By die vasstelling van wat by so 'n verklaring geïmpliseer is, moet die omringende omstandighede dan wel deeglik in ag geneem word, want dit is die agtergrond waarteen die verklaring afgelê word en wat dus verduidelik wat die verklaarder presies wou meedeel."

Teen hierdie voorstel, en ook teen die uitspraak in *January* se saak, moet die beswaar ingebring word dat dit indruis teen die stelling van r Wessels in die *Hans Veren*-saak dat die betrokke bepaling van die Strafproseswet beperkend uitgelê moet word en dat geen uitgebreide betekenis aan die woord "bekentenis" geheg mag word nie. Ons howe het immers nie die reg om as *custos morum* op te tree nie. Hoe verdoemend 'n "erkenning" deur 'n beskuldigde gemaak ook al is, soos in geval van die besit van dagga waar swaar strawwe voorgeskryf word, behoort dit nie die interpretasie wat aan die verklaring geheg moet word te beïnvloed nie. Veel eerder sou dit juis nou raadsaam wees dat ons wetgewer sy vertroue in die howe se integriteit bewys deur a 244 van die wetboek te verwyder. Wanneer dit dan bewys word dat sodanige verklaring, in ooreenstemming met ons gemene reg (*R v Barin* 1926 1926 AD 459), vrywillig gemaak is, moet die hof dit toelaat. Die gewig wat die hof daaraan gaan heg, sal afhang van die omstandighede en, soos in al die ander gevalle, in die diskresie van die hof wees. Dit is dus duidelik dat a 244 "seems to militate against the principle, which is also to be found in the Criminal Code, that every fact which bears upon the crime is evidence and ought to be tested in the ordinary way as to whether it is true or not" (per r Wessels in die *Hans Veren*-saak (supra) 221).

A J VAN WYK
Justisie-Opleiding

I will not say with Lord Hale, that "The Law will admit of no rival" . . . . . but I will say that it is a jealous mistress, and requires a long and constant courtship. It is not to be won by trifling favors, but by lavish homage.

Joseph Story, *"The Value and Importance of Legal Studies"-Inaugural address as Dane Professor of Law at Harvard University - 5 August 1829.*

(Kyk ook *R v Swane* 1976 1 SA 53 (N) –Red.)

Vonnisse

STOLP v KRUGER 1976 2 SA 477 (T)

Skadevergoedingsaksie - Eienaar versus huurkoper

Hierdie saak het voortgespruit uit 'n botsing tussen twee motors. Die botsing was te wyte aan nalatigheid van albei die bestuurders. Die een bestuurder was eienaar, die ander was huurkoper en nog nie eienaar nie. Die eienaar-bestuurder spreek die huurkoper-bestuurder vir skadevergoeding aan en laasgenoemde stel op sy beurt 'n teeneis vir skadevergdoeing as sessionaris van die eienaar teen die eiser in konvensie in. Die hoofeis is onderhewig aan vermindering vanweë die skuld van die eiser toegestaan en die teeneis is onverminderd toegestaan. Dit val op dat daar in die beslissing glad nie na *Smit v Saipem* 1974 4 SA 918 (A) verwys word nie en die vraag is of die saak onder bespreking in die lig van *Smit v Saipem* as korrek beslis beskou kan word. Volgens *Smit v Saipem* sou die huurkoper in eie naam skadevergoeding weens markwaardevermindering kon geëis het en art 1(1)(a) van die Wet op Verdeling van Skadevergoeding sou op dié vordering van toepassing gewees het. Of, as alternatief, die eienaar van die motor wat op afbetaling verkoop is, skadevergoeding kon geëis het, blyk minder duidelik uit *Smit v Saipem*. In *Rondalia Finansieringsmaatskappy van SA Bpk v Hanekom* 1972 2 114 (T) is beslis dat alleen die eienaar tov waardevermindering kan eis en dit lyk, met respek, verkieslik. In *Smit v Saipem* word nie in soveel woorde verklaar dat die eienaar nie 'n aksie het nie, maar daar word wel bespiegel oor hoe voorkom kan word dat houer en eienaar agtereenvolgens aksies tov waardevermindering instel (932B–F). Tog meen ons dat 'n konsekwente deurvoering van die argument waarop die regmatige houer se aksie in *Smit v Saipem* gebaseer is, tot 'n ontsegging van 'n soortgelyke aksie aan die eienaar moet lei. Inderdaad is *Rondalia v Hanekom* en *Smit v Saipem* soos teenoorgestelde kante van 'n muntstuk. Eersgenoemde staan op die standpunt *res perit domino* en verwerp die argument dat 'n eienaar wat in staat is om sy skade op 'n koper af te wentel, om dié rede geen skade ly nie, terwyl laasgenoemde juis hierdie argument aanvaar. Ar Jansen sê in soveel woorde dat as die koper-houer solvent is, die waardevermindering sý skade is en nie dié van die verkoper-eienaar nie.

> "As koper dra hy die risiko en moet hy die volle koopprys betaal al vergaan die saak. Alhoewel die saak nog die verkoper se eiendom is, is dit as sodanig (en die waarde wat dit het) nie vir hom 'n bate in ekonomiese sin nie. Dit staan deur die koopprys vervang te word, en die vordering op die koopprys gerig is die verkoper se werklike bate" (926H–927A).

Welke twyfels hierdie argumentasie ook al mag laat, is dit tog bindend en moet dit tot die slotsom lei dat die eienaar alleen deur die onregmatige daad

van die derde benadeel word, as die koper-houer insolvent is. Solank dit nie die geval is nie, het die eienaar dus geen aksie nie. 'n Mens moet dus tot die gevolgtrekking kom dat in die lig van *Smit v Saipem*, as aanvaar word dat die huurkoper solvent was, die sessie van die eienaar in *Stolp v Kruger* 'n nulliteit was, aangesien die eienaar geen aksie gehad het om te sedeer nie.

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ERASMUS v AFRIKANDER PROPRIETARY MINES LTD 1976 1 SA 950 (W)

Mede-eiendomsreg van onverdeelde aandeel in mineraleregte

Die betekenis van hierdie saak kan die duidelikste weergegee word in die woorde van r Trengove self. In sy beslissing stel hy dit so:

> "Thus, the very interesting problem of the respective rights and obligations of co-holders of mineral rights in undivided shares, *inter se*, arises for consideration. The grant of mineral rights to different persons in undivided shares creates a state of affairs, as the present dispute clearly illustrates, in which the exercise of their respective rights by the holder thereof could give rise to a conflict of interest and the question for consideration is what principles should be applied in reconciling such a conflict. . . . As far as I am aware this particular problem has not hitherto been considered in our courts" (op 958).

Die feite van die saak kan kortliks soos volg weergegee word. E en A was gesamentlik die reghebbendes van die minerale regte op 'n plaas. (Die „minerale" in hierdie geval, was steenkool.) E het 1/520 deel gehad en A die res. A was 'n mynmaatskappy wat naby die betrokke plaas steenkool gemyn het en was van plan om sy regte op die betrokke plaas uit te oefen. A het besluit om voort te gaan en die steenkool te myn vir 519/520 dele, as synde sy deel van die steenkool wat die plaas mag oplewer. Die twee partye kon nie ooreenkom nie. A het besluit om voort te gaan met die werksaamhede en dus die steenkool vir 519/520 dele te myn. E voer aan dat dit dan nie lonend vir hom sal wees om sy 1/520 uit te haal nie en vra 'n interdik aan om A te verhoed om te myn op die wyse wat A voorgestel het.

Die saak word beslis en (dit word met alle verskuldigde eerbied gesê) reg beoordeel ooreenkomstig die reg tav mede-eiendom. Die reg met betrekking tot mede-eiendom het natuurlik sy oorsprong in die Romeinse reg, dit is geassimileer in die Romeins-Hollandse reg en het telkemale in die Suid-Afrikaanse hofbeslissings ter sprake gekom. In hierdie betrokke saak is dit nie 'n kwessie van mede-eiendom nie, maar daar is medereghebbendes tav 'n saaklike reg, nl die minerale regte. Minerale regte is natuurlik, soos meermale al gestel, regte *sui generis*. Sommige wil dit sien as 'n eiendomsreg van die minerale onder die grond (alhoewel die regter in die huidige saak sê: "The joint holders of mineral rights are not the joint owners of the minerals not yet severed from the land." (960H); ander wil dit sien as 'n saaklike reg wat ooreenkoms met 'n vruggebruik toon, alhoewel dit nie 'n

vruggebruik is nie.[1] Daar sal opgemerk word dat in hierdie saak enkele reëls neergelê word tav die reg van medereghebbendes van minerale regte en dit is moontlik dat hulle nie ooreenstem met soortgelyke reëls tav die medereghebbendes van 'n vruggebruik nie.)

Die bronne (Romeinsregtelik, Romeins-Hollandsregtelik en die besliste sake) handel byna by uitstek oor mede-eiendom en gee nie juis veel leiding vir die gevalle waar daar ander medereghebbendes is nie.[2] Die belang van die onderhawige saak kan dus onder sulke omstandighede nie oorskat word nie. Vanuit hierdie oogpunt gesien, kom daar hoofsaaklik twee baie belangrike punte ter sprake.

Die eerste is dat E 'n interdik aangevra het om A te verbied om met sy beplande mynaktiwiteite voort te gaan. Die interdik word nie toegestaan nie, omdat bevind word dat die vereistes vir so 'n interdik nie aanwesig is nie.[3] Die gebruik van die interdik om die medereghebbende te verbied om die gemeenskaplike eiendom of ander reg uit te oefen, is die moderne toepassing van die sg ius prohibendi afkomstig uit die Romeinse en Romeins-Hollandse reg. In daardie regstelsels het die veto van die mede-eienaar (en dieselfde het vir die medereghebbende gegeld) 'n ander funksie. Die mede-eienaar was eienaar en hy kon dus die saak gebruik of nie gebruik nie, maar verder kon hy 'n ander mede-eienaar verbied om die saak te gebruik of op enige manier daaroor te beskik. Kortom, in die Romeinse reg was sy reg om te verbied 'n absolute reg en hy kon dit na willekeur uitoefen. Bonfante[4] maak die treffende vergelyking dat die mede-eienaar baie soos die Romeinse consul was: net soos die een consul die ander kon verbied om sy funksie

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[1]In die saak van *The Master v African Mines Corporation Ltd*, 1907 TS 925 is die reëls mbt vruggebruik op minerale toegepas. In daardie saak is beslis dat die vruggebruiker vir minerale kan myn, maar hy moet die eienaar van die grond vergoed. Die vruggebruiker word dus die eienaar van die minerale wat hy uithaal.

[2]Hierdie stelling is nie in alle opsigte korrek nie. In die Romeinsregtelike bronne is daar verskeie tekste waarin die reëls betreffende mede-eiendom (en betreffende 'n gemeenskaplike erfenis) op gemeenskaplike regte toegepas word (vgl *D* 10 2 16 4; *D* 10 3 4 1; *D* 10 3 7 pr–12; *D* 10 3 19 4) Wat gemeenskaplike vruggebruik betref, vgl *D* 7 1 13 3 en *D* 10 3 7 10. Wat die Romeins-Hollandsregtelike bronne betref, kan daar verwys word na oa Voet *ad Pand* 10 3 1 (wat van *domini utiles* praat en daarmee die vruggebruiker dek); Van Leeuwen *Cens For* I 4 27 8 (*usus rei communio*) en Van der Keessel *ad Gr Introd* 3 28 3 (wat weer met *dominium minus plenum* die vruggebruiker dek). Wat die hofbeslissings betref, is daar nie baie nie. Om by vruggebruik stil te staan; daar is in noot 1 verwys na *The Master v African Mines Corporation Ltd* en daar is die ou saak van *Parkin v Parkin* 1869 Buch 136 waar die reëls van verdeling van mede-eiendom op vruggebruikers toegepas was (vgl ook 1951 *THRHR* 253). Daar is verskeie sake wat handel oor die gebruik van die saak wat in mede-eiendom aan meer as een persoon toekom en hier word die gebruik daarvan duidelik beskou as 'n soort persoonlike serwituut wat aan die gebruiker toekom. Daar moet egter onthou word dat hierdie gebruik slegs 'n normale gevolg van die eiendomsreg is. Immers 'n eienaar (en ook 'n mede-eienaar) het die reg om die (gemeenskaplike) saak te gebruik. Hierdie benadering het, soos dit wil voorkom, die reg tav mede-eiendom aansienlik verander (vgl 1951 *THRHR* 255 ev). Daar is ook verskeie sake wat handel oor 'n gemeenskaplike muur of ander afskeiding (vgl 1951 *THRHR* 254) en dan is dit duidelik dat die geval enigsins beskou word asof dit gaan oor serwituutgeregtigdes.

[3]Daar word verwys na die vereistes soos geformuleer in *Setlogelo v Setlogelo* 1914 AD 221 227 (vgl 955 in fine ev van die verslag van die huidige saak).

[4]*Premesse critiche sull' ordinamento positivo del condominio* (1909) in sy *Scritti Giuridiche Varii*, vol III 376 ev.

te verrig (hy veto die optrede van die ander), so kon die een mede-eienaar die ander verbied om op te tree. Dit was ook die posisie in die Romeins-Hollandse reg. Presies hoe hierdie ius prohibendi uitgeoefen was, is 'n ander vraag. Miskien was die man wat wou verbied gedwonge om sy verbod te handhaaf deur tot verdeling oor te gaan. Meer waarskynlik kon hy 'n interdik aanvra, maar dan 'n suiwer onvoorwaardelike verbod. In die Romeins-Hollandse reg, waar die skrywers dikwels die Romeinse bronne net naskryf, is dit eweneens onseker hoe dit presies gebeur het. Dit is egter duidelik dat dit 'n onvoorwaardelike verbod was.[5] Van der Keessel praat ook van 'n verdelingsaksie om die verbod te handhaaf,[6] maar dit wil voorkom asof die beste metode sou gewees het om 'n besitsinterdik aan te vra. Daar is baie gevalle in die beslissings van die *Hooge Raad* waar die uitoefening van 'n reg met sulke interdikte beskerm is, ook al is die persoon nie die werklike reghebbende nie en al word hy beskou om in „besit" van die reg te wees. Dit is egter duidelik dat hierdie bevoegdheid om te verbied nie in die praktyk baie welkom was nie en daarom was daar veelvuldige plaaslike reëlings in hierdie verband.[7]

Wat die Suid-Afrikaanse reg betref, is die koeël al lankal deur die kerk en is die middel wat gebruik moet word die interdik – maar wel die interdik soos dit vandag bestaan met al die beperkings op die aanwending daarvan.[8]

Die belang van die beslissing onder bespreking is dat dieselfde reëls tav die verbod by mede-eiendom ook by medereghebbendes van minerale regte toegepas word.[9] Daar kan seker met veiligheid aanvaar word dat dit ook so aangewend sal word tav die verbod op uitoefening van ander soorte gemeenskaplike regte, as een van die medereghebbendes die ander wil verbied om die gesamentlike reg uit te oefen.

'n Verdere belangrike punt is dat die beslissing ook handel oor die bevoegdheid van die partye om die reg uit te oefen. In die betrokke geval het A te kenne gegee dat hy van plan was om sy pro rata deel van die steenkool uit te haal; daarna kon die ander medegeregtigde sy deel ook uithaal, as hy wou. So 'n benadering laat onmiddellik vrae na vore kom. 'n Onverdeelde reg kan immers nie ten dele uitgeoefen word nie.[10] Wat die steenkool self betref, word dit in die beslissing uitdruklik gestel dat die reghebbendes nog nie eienaars is terwyl dit nog nie gemyn is nie (960H). Die argument is egter dat die een medereghebbende sy deel kan myn, of die ander medeIregheb-

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[5]In die onderhawige saak word op bl 960 Voet *ad Pand* 10 3 n 7 aangehaal. Daar word slegs van die vertaling gebruik gemaak. As die oorspronklike gelees word, is dit baie duidelik dat Voet van die Romeinse ius prohibendi praat wat iets anders is as die aanvra van 'n interdik. Ons howe het dit egter van vroeg af so beskou dat die verbod met 'n interdik gehandhaaf moet word. Vgl 1951 *THRHR* 276 n 66.

[6]Van der Keessel *ad Gr Introd* 3 28 3.

[7]Van Leeuwen *Cens For* I 4 27 8 en in besonder Van der Keessel *ad Gr Introd* 3 28 4. Daar word gewys op plaaslike reëlings ivm die uitoefening van die ius prohibendi wat anders bly daar niks meer vir die partye oor nie as om tot verdeling oor te gaan.

[8]Vgl n 2.

[9]Vgl die saak van *Parkin v Parkin* in n 2 gemeld en die verwysing na 1951 *THRHR* 253.

[10]Vgl die saak van *The Master v African Mines Corporation Ltd* 1907 TS 925.

bende toestem of nie, solank dit nie die ander se moontlikhede in 'n toekomstige verdeling benadeel nie.[11]

Dit is duidelik dat die gedagte van redelike gebruik van die gemeenskaplike saak deur 'n mede-eienaar hier 'n rol gespeel het.[12] Die slotsom van die regter in die onderhawige beslissing is dat die medereghebbende van minerale regte sy reg kan uitoefen selfs al het die ander nie daartoe ingestem nie.[13] So 'n medereghebbende kan sy deel van die steenkool uithaal,[14] maar op so 'n manier dat hy nie nadeel aan die ander berokken nie. Verder word die steenkool wat so uitgehaal word, die mede-eiendom van die medereghebbendes.[15]

Dit wil met die eerste oogopslag voorkom asof hier 'n nuwe rigting ingeslaan word en anders as wat dit sou wees by vruggebruik. In geval van vruggebruik word die vruggebruiker (en seker ook die medevruggebruiker) eienaar van die vrugte deur skeiding van die vrugte van die hoofsaak en die daaropvolgende toeëiening. In hierdie saak word dit gestel dat die produk (die steenkool) mede-eiendom word. Hierdie reëling is ook anders as wat die geval is waar 'n mede-eienaar die gemeenskaplike saak gebruik en wins daaruit maak of selfs onkoste aangaan. In so 'n geval ontstaan daar persoonlike prestasies: die voordele moet verdeel word en die koste moet deur almal gedra word, om dit maar baie algemeen te stel en sonder om op die besonderhede in te gaan. Dit is moontlik om hierdie prestasies oor en weer op te vorder, maar daar kan ook gewag word tot oorgegaan

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[11] "The contention, in effect, was that pending partition, the applicant virtually had the right to veto any attempt by the respondent to exploit its coal rights on Brakfontein. On the other hand, the respondent's contention was that it was fully entitled to mine its proportionate share of the coal deposits on Brakfontein, whether or not the applicant agreed, provided it did not in any way prejudice the applicant's prospects in the outcome of the pending partition suit. By embarking on the proposed mining operations, so it was argued, the respondent would simply be utilising its rights for the very purpose for which they were granted." So staan dit op bl 958 van die hofrapport. Lees ook die aanhaling aan die begin van hierdie stuk wat direk op hierdie aanhaling volg.

[12] Vgl 958 ev en die bespreking van sake soos *Pretorius v Nefdt and Glas* 1908 TS 854, *Sauerman and Another v Schultz,* 1950 4 SA 455 (O), *Botha, Smit and Others v Kinnear* 3 (1880) Kotze 215 en *Oosthuysen v Muller* 1877 Buch 129.

[13] Vgl 961: „Now, in view of the general principles governing the relationship of co-owners of undivided shares in immovable property, *inter se*, as enunciated in the decisions quoted above, I am of the opinion that a co-holder of an undivided share in mineral rights, should not be restrained from exercising his rights on the mere ground that his co-holders have not consented or given their authority thereto. Something more than that is required. The court must also have regard to the effect, or the probable effect, of the exercise of the rights and, in my view, the court should not intervene unless it appears from the facts and circumstances of the particular case, that the like rights of the other co-owners are being, or are likely to be, adversely affected."

[14] Vgl 962: "I have already said that, in my view, the respondent has the right to mine its proportionate share of the Brakfontein coal deposits, provided it can do so without prejudice to the rights of the applicant."

[15] Vgl 964 in fine ev: "However, I shall, for the present purposes, accept that, even if the respondent were to restrict its mining operations to its proportionate share of the coal deposits, the coal actually mined would, as a result of its severance from the soil, nevertheless become the common property of the parties, in proportion to their undivided share in the coal rights. But, despite this, the respondent would, in my opinion, still be entitled to dispose of its *pro rata* share of the coal actually mined." (Vergelyk die ou saak van *The Master v African Mines Corporation Ltd* 1907 TS 925.

word tot verdeling en dan al sulke *praestationes personales* te verreken. As dit die bedoeling is dat die afgeskeide produk in die geval van minerale regte mede-eiendom word, dan beteken dit dat die ander mede-eienaar nou 'n saaklike reg het wat hy kan handhaaf teenoor derdes. Wat dit presies beteken kan 'n mens jou maklik voorstel as een van die partye nou insolvent verklaar sou word.

Die vraag is egter of dit die bedoeling presies weergee. Die woorde op bl 965: "But, despite this [nl dat die steenkool mede-eiendom word] the respondent would, in my opinion, still be entitled to dispose of its *pro rata* share of the coal actually mined" skyn die teendeel te bewys: immers hy sou nie oor die mede-eiendom kan beskik en dit vervreem nie, maar slegs sy onverdeelde deel sou vir sodanige beskikking vatbaar wees, indien hy slegs mede-eienaar van die gemynde steenkool is. As 'n mens die basiese beginsel van die leer van stare decisis in gedagte hou, soos reeds in die agtiende eeu in Engeland deur Lord Mansfield opgesom: "The reason and spirit of cases make law, and not the letter of particular precedents",[16] dan moet 'n mens tot die slotsom kom dat die beslissing slegs die gewone reël weergee, nl dat die medereghebbende wat die voordeel van die reg trek, alleeneienaar of alleenreghebbende van daardie voordeel word, maar natuurlik verplig is om die medereghebbende te vergoed vir wat hom toekom. Dit is verkeerd en gevaarlik om 'n beslissing te interpreteer asof dit 'n wetsartikel is.

P VAN WARMELO
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IN RE A HOLLIDAY EN M M HOLLIDAY

(Uitspraak by hersiening in die Oranje-Vrystaatse Provinsiale Afdeling op 15 Julie 1976)

Die Fout is soos die dood. Dit is orals te vinde en is menslik onafwendbaar. Waar die woorde et in Arcadia ego *reeds meermale in geskrifte en kunswerke in die Dood se mond gelê is, kan dieselfde ten aansien van die Fout gedoen word met die woorde* et in Judicio ego. *Homerus se gode sluimer soms in, so ook, maar net meer dikwels, die mens, en die daarmee gepaardgaande onoplettendheid open die deur vir die binnekoms van die Fout.*

per r M T Steyn

AMICUS CURIAE

[16]Soos aangehaal deur Allen *Law in the Making* (7e uitg) 217.

Boeke

INKOMSTEBELASTING IN DIE SUID-AFRIKAANSE REG

deur A F VAN NIEKERK

Butterworth 1976; 450 bl; prys R29 (losbladuitgawe met jaarlikse byhouerdiens)

Die verskyning van 'n eersteling wek altyd buitengewone belangstelling.

Inkomstebelasting in die Suid-Afrikaanse Reg is die eerste werk op dié vakgebied in Afrikaans, en ook die eerste wat verskyn uit die pen van professor A F van Niekerk.

Hierdie nuweling is die produk van 'n gesonde huwelik tussen die reg en die rekeningkunde: met 'n MCom (rekeningkunde), 'n LLB en synde boonop nog professor in die handelsreg, het ons in professor Van Niekerk sowel 'n rekeningkundige as 'n regsgeleerde.

Dit is hierdie samestelling wat mi vir een van die groot bydraes in die belastingreg in die afgelope aantal dekades verantwoordelik is. Ek verwys na die skrywer se benadering tot die inkomste/kapitaalprobleem aan die uitgawekant.

Die skrywer wys daarop dat dié onderwerp 'n tyd-dimensie het; dat die korrekte karakterisering van 'n uitgawe as kapitaal of inkomste daarvan afhang of dit wat deur die uitgawe bekom is op die laaste dag van die finansiële of belastingjaar reeds verbruik is of in inkomste omskep is – indien wel, is dit 'n "inkomste"-uitgawe; indien nie, (of in die mate dat dit nog nie gebeur het nie) is dit 'n kapitaaluitgawe.

Dat die benadering rekeningkundig suiwer is, ly geen twyfel nie en dat die howe hier te lande nog nie hierdie benadering as hulpmiddel tot karakterisering aanvaar het nie is net so seker. In *Palaborwa Mining Company Limited v CIR* 1973 3 SA 819 (A) is verwys na begrippe soos "the enduring benefit test" – 'n moontlike wandgeskrif dat professor Van Niekerk se siening vir die howe aanvaarbaar mag wees.

Hieruit moet nie afgelei word dat *Inkomstebelasting in die Suid-Afrikaanse Reg* 'n werk is wat uitsluitlik vir die deskundige of spesialis-praktisyn bedoel is nie. Dit is by uitnemendheid 'n boek vir die student en die algemene praktisyn. Die boek gaan veel daartoe bydra om die onverdiende mistiek waarin die belastingreg gehul is, te verwyder. Inhoudsopgawe, indeks en algemene aanbieding is daarop gemik om die nie-deskundige spoedig en pynloos by die onderwerp wat hy naslaan, te bring. Die boek is tegnies goed versorg.

Ek sien met belangstelling uit na toekomstige bydraes tot ons reg uit die pen van professor Van Niekerk.

A W MOSTERT
Regter van die Hooggeregshof, Transvaal

CIVIL PRACTICE AND PROCEDURE IN ALL BANTU COURTS IN SOUTHERN AFRICA

by J A M KHUMALO

(Second edition)

Juta & Company Limited 1975; pp xxii and 241; price R25

The first edition of this work, published by Lexington Publications (Pty) Ltd, appeared in 1969 in a looseleaf binder and it was anticipated to incorporate into it "very substantial revision services". No revision service came to light. The present edition is firmly bound and it is a neat and attractive publication.

The work consists of eight chapters dealing with the procedure in courts of chiefs and headmen, Bantu affairs commissioners' courts, maintenance courts and Bantu divorce courts in the Republic of South Africa only. The reference to "all Bantu courts in Southern Africa" in the title is therefore misleading. South Africa and Southern Africa is obviously not the same. However, according to an advertisement of the publishers the procedure obtaining in similar courts of other countries in Southern Africa will be incorporated in future supplements.

A perusal of the table of cases reveals that the case law is not up to date. It contains only two 1968 Bantu appeal court cases and none for subsequent years. No Bantu appeal court reports have appeared since 1971, but during the years 1969, 1970 and 1971 the reported decisions contained 18 judgments on practice and procedure and 16 on maintenance. Moreover, the judgments of subsequent years which were submitted for publication might have been placed at the writer's disposal had he asked for them. In interpreting these rules, decisions of the supreme court in civil procedure are equally important. Khumalo makes extensive use of them, yet the more recent decisions are few and far between. The most recent are four Prentice Hall cases reported in 1970.

There is no bibliography so that a reader is not given a bird's eye view of the author's scope and depth of research. It, however, soon becomes evident that he did not travel much further afield than Jones and Buckle *The Civil Practice of the Magistrates' Courts in South Africa* (1957). Other textbooks are sparsely quoted, incorrectly quoted or not referred to at all. I could, for example, find only two references to Seymour *Bantu Law in South Africa* (pp 27 and 40) The references are to the second edition, although a third edition was published as early as 1970. Seymour is an authority in his own right and what he says about substantive law and procedure in Bantu courts carries considerable weight. In dealing with aspects of sub-

stantive law no reference is made to Olivier *Die Privaatreg van die Suid-Afrikaanse Bantoe* (1969). A reference to Hoffmann *South African Law of Evidence* does not indicate what edition was relied on (p 76). No dates of publication of the works referred to are furnished.

The quantity of information collated by the author is impressive. There is no other textbook in which all this data can be found and in this respect the work fulfills a real need. The standard of application of rules of procedure in these courts is poor. In a paper entitled "Nie-nakoming van Prosesregtelike Voorskrifte in Bantoehowe" delivered at the congress of law teachers in 1975 at Port Elizabeth, I had occasion to refer to this unsatisfactory state of affairs and ascribed it partly to the dearth of literature on the topic. I do hope, therefore, that this book will enjoy a wide sale. It contains a vast quantity of useful and easily accessible information. I would, however, not regard it as "an authoritative work" as is intimated in the foreword. As a matter of fact, there are weaknesses in its contents which urge one to use it with care. I shall attempt to highlight some of the important defects.

On p 1 the author refers to Government Notice No 110 of 1957. In respect of KwaZulu it has been repealed and substituted by the KwaZulu Chiefs' and Headmens' Act No 8 of 1974. Writers of legal textbooks will have to keep a close eye on legal development in the Bantu Homelands. Further down on the same page it is stated that "criminal jurisdiction to hear cases between Bantu" may be conferred upon any Bantu chief or headman. There is, of course, no such thing as a criminal case *between* Bantu.

On p 2 one finds a superficial and incomplete description of the traditional Bantu court procedure. As authority is quoted, C H Blaine and G N Manning *Native Court Practice*, without indicating that the one and only edition appeared in 1931. The writer might have given us a more complete and scientific exposition had he cared to read Schapera *A Handbook of Tswana Law and Custom* 2 ed (1955) p 279 *et seq* and R D Coertze *Die Familie-Erf- en Opvolgingsreg van die Bafokeng van Rustenburg* (1971) p 135 *et seq*. Legal practitioners are not allowed to appear in chiefs' courts, nevertheless a correct and fairly complete sketch is important in a work of this nature, because there is a right of appeal to the Bantu affairs commissioners' courts. It is essential that judicial officers and legal practitioners should have an idea of the procedure followed in the court below.

The quotation on p 5 from the judgment in *Mogale v Mogale* 1912 TPD at p 95 is confusing because some words have been omitted. The second and last sentence should read "We must rather uphold his decisions than set them aside merely because the procedure he has adopted differs from ours".

On p 25 the author states that the jurisdiction of the Bantu affairs commissioner is *in some respects* concurrent with that of the supreme court (my italics). The effect of the decisions quoted as authority is simply that the supreme court has concurrent jurisdiction with Bantu affairs commissioners' courts – not only "in some respects". The real problem is whether the supreme court may apply Bantu law and custom and take judicial notice thereof.

The uncritical acceptance on p 25 of Hahlo and Kahn's statement might create the wrong impression. The fact of the matter is that Bantu litigants may conduct their cases in person and some do. Clerks of Bantu affairs commissioners' courts may and do prepare the necessary pleadings at a very low fee.

They may even prepare the summons and other process in divorce cases and thereby limit the costs of a divorce action to as little as R10. The fees are in fact much lower than in magistrates' courts. Even the messengers' fees are less. A further reason for the creation of these special courts is that they are supposed to provide Bantu with a simple procedure. To place the matter in its true perspective the author might have added that it is not generally agreed that the procedure is less formal than those applicable to magistrates' courts. Seymour p 25 states that the rules are similar to and no less formal than in other courts in the Republic.

Under the heading "What Law is Applied" on p 26 *et seq* there is no indication that current literature on the topic was consulted. Seymour's old edition is quoted only once. Khumalo's remarks do not add to our knowledge on this peculiar and intricate field of conflict of laws. He makes no reference to a whole chapter devoted to the subject by Olivier. The remark on p 52 that "service on a woman's protector is good service where the woman cannot be found" is not the whole truth. The two cases quoted in support are authority only in cases where a husband in Natal issues summons for dissolution of a customary union. In such cases the wife is obliged by law to seek the protection of her father or other person referred to as "the protector" (s 78 of the Natal Code of Bantu Law, Proc R195 of 1967). The statement on p 56 that a reconciliation must be attempted in "dissolution cases under Bantu custom" is also partly true as it is only a legal requirement in Natal in terms of s 78 of the Code. The case of *Mkize v Nqulunga* 1941 NAC (N & T) 25 quoted in support, was such a Natal case.

The greater part of chapter five on maintenance courts is an incomplete exposition of the substantive law on maintenance. Especially in this and the subsequent chapter more recent case law was necessary to make it a useful contribution to this branch of the law.

On p 167 a wrong impression is created concerning the constitution of the Bantu appeal courts. It is stated that "there are at present three *divisions* of the Bantu appeal court . . ." The courts are sometimes referred to as divisions but there are, in fact, three different Bantu appeal courts which are divisions of one court. The areas covered by the courts are also incorrectly described. (Cf Proc R 267 of 1968).

On the subject of Bantu appeal courts the author might have dealt with their wide powers to review, set aside, amend or correct an order, judgment or proceeding. The Bantu divorce courts consist of three courts, each with two divisions (See Proc R 266 of 1968). This position is not reflected accurately on p 191.

Chapter nine on Bantu divorce courts is as a whole disappointing. It contains extremely cursory and insufficient remarks on the grounds for divorce. The grounds are the ones applicable to all civil marriages, irre-

spective of race. The author should have left the matter in the hands of recognized authorities, to whom no reference is made.

On p 194 we find the misleading remark that Bantu divorce courts excercise jurisdiction over Bantu persons who are citizens of the Republic. Jurisdiction is in fact based on domicile. This topic deserves more careful analysis. In *Gwambe v Gwambe* 1949 NAC (NE) 113, quoted as authority, the plaintiff, whose domicile was in issue, was a prohibited immigrant and in terms of a convention was not freed from paying tribute to his former country. On that ground the Bantu appeal court held that he – not being a free agent – could acquire a domicile of his own free will. This decision was, however, reversed on appeal by the Transvaal provincial division and the latter court's judgment was reported under reference 1950 2 SA 643 (T).

There are no comments on the Bantu divorce court rules as such. The rules are merely reproduced. The chapter, therefore, contains nothing whatsoever, to guide a reader through the rules. It is a pity as the only other handbook on Bantu divorce courts, namely H P Kloppers *Native Divorce Courts – Guide to Practice and Procedure* (Juta, 1955) is out of print. This book is not even mentioned.

The manner of citation of Bantu appeal court reports is poor. Errors and omissions are too many to enumerate. Representative examples chosen at random must suffice. The author is fond of referring to "a recent case". None of the so-called recent cases are really recent. The "recent" case referred to on pp 4/5 is a 1961 case, the one on p 125 is a 1959 case, and the one on p 159 a 1965 decision. Names of parties are frequently misspelt. The following are some that were found without an intensive search: *Bacela v Bontsi* 1956 NAC (S) 61 (p 160) in stead of *Bacela v Mbontsi; Adonis v Ndzekebe and another* 1961 NAC (S) 52 (p 90) in stead of *Adonis v Ndsekene and another; Sibayone v Maseko* 1947 NAC (N & T) 67 (p 91) in stead of *Sibanyone v Maseko*.

The page numbers of reports are also frequently incorrect. *Kumalo v Kumalo* 1953 NAC (NE) quoted on p 7 is to be found on p 4 and not p 43 of the reports; *Dimaza v Gxalaba* 1955 NAC (S) also quoted on p 7 is to be found on p 93 and not p 94; *Sagwityi v Mvakwendlu* 1955 NAC (S) quoted on p 112 is to be found on p 60 and not on p 61.

Other errors in the references abound. Three cases are quoted on p 6 without the names of the courts concerned. The same applies to the case of *Magubane v Nzimande* on p 8. Contrary to established practice the author often gives the first names of the parties as well as the surnames (cf pp 9 and 78). On p 10 it is stated that the case of *Simelane v Bembe and another* was not yet published, but had been sent for publication. It had in fact been published in 1968 BAC (NE) 5. In *Cohen v Lewis* WLD 49 on p 50 no year is mentioned.

The references to Bantu appeal court cases could have been checked within an hour or two by comparing them with the index of cases in H W Warner's *Digest of South African Native Civil Case Law* (1961) and its two supplements. Few mistakes would have been found in that index.

References to legislation are also unsatisfactory in that there is no uniform style of reference. On the very first page three laws are referred to

in a different style viz "Bantu Authorities Act 1951", "Bantu Self-Government Act 46 of 1959" and "Bantu Administration Act". Throughout the book a uniform style of referring to legislation is lacking.

This book will probably be Mr Khumalo's swan song on civil procedure in what he calls "all Bantu Courts in Southern Africa". The government is moving inexorably towards granting independence to the Bantu Homelands in South Africa. Following the example of independent states elsewhere in Africa they are likely to switch to an integrated court system with rules that do not differentiate between Africans and non-Africans. About this development in independent Africa, Antony Allott in *New Essays in African Law* (1970) pp 1–2 says:

> "African countries have not been idle in promoting reform of their judicial and legal systems. Every country has in some way altered, and some countries have revolutionised, the systems of courts which they inherited at independence."

These alterations have implied the suppression of the traditional native courts or their integration into the national judicial system. A "Bantu" court in an independent African country is in any case a misnomer. "Bantu" will obviously not be an appropriate legal connotation to describe the citizens of, say, an independent Transkei. That is one of the reasons why there are no Bantu affairs commissioners' courts in a Bantu Homeland such as Bophuthatswana any more, but only Magistrates' courts excercising the jurisdiction formerly vested in Bantu affairs commissioners. (See ss 1 and 3 of the Bophuthatswana Magistrates' Courts Act No 10 of 1973). Khumalo gives no indication that he is aware of this development. If he wishes to write about courts in Southern Africa he will have to try another approach. The "Bantu" approach is on its way out. Separate courts smack of racial segregation which, as we are given to understand by some African leaders, will be taboo in future independent homelands. It is, however, conceded that traditional courts will continue to function in independent African states in some or other form not necessarily as chiefs' courts.

Be that as it may, for the present Khumalo's compilation should be a useful aid in handling Bantu court cases. It is however, not suitable for students who will not be able to separate the wheat from the chaff.

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CHILDREN ON TRIAL

A Study of Juvenile Justice

deur J MIDGLEY

Nimro Kaapstad 1975; 179 bl; prys R2,95 plus ses sent posgeld

Hierdie werk is die eerste in 'n reeks *South African Studies in Criminology* wat uitgegee word deur die Nasionale Instituut insake Misdaadvoorkoming, Posbus 10005, Kaapstad, vanwaar dit bestel kan word. Die skrywer, dr J

Midgley, voorheen lektor in sosiologie aan die Universiteit van Kaapstad, het 'n besondere belangstelling in strafhervorming en lewer hier positiewe bewys van die waarde van interdissiplinêre studie op hierdie gebied.

Ter inleiding word 'n historiese oorsig van die verskillende benaderings in die beregting van jeugmisdaad in verskeie lande gegee en word gewys op die jongste pogings tot hervorming in Engeland, die VSA en Europa. Daarna volg 'n interessante historiese oorsig van die ontwikkeling in die beregting van jeugmisdaad in Suid-Afrika en die huidige posisie word so saamgevat:

> "Procedures for dealing with children who commit criminal offences in South Africa conform clearly to the juvenile justice model. It is formalistic and maintains the supremacy of the criminal court. It separates the trial of children and adults and protects children from publicity. It permits the utilization of professional social work resources and allows for a variety of non-punitive sentences to be imposed."

Vervolgens word aan die hand van 'n objektiewe ontleding van 898 jeugmisdaadsake wat in 1968 in die Kaapstadse jeughof afgehandel is, aangetoon hoe hierdie "model" in die praktyk aanwending vind. Die resultate word uiteengesit en verduidelik na gelang van die ras, ouderdom en geslag van die verskillende oortreders en die aard van die gepleegde misdade. Van primêre belang is egter die strafpatroon wat uit die ontleding blyk. Uit die totale getal skuldigbevindings is–

8,4% van die oortreders gewaarsku of berispe
17% opgeskorte of uitgestelde vonnisse opgelê
± 1% onder toesig van 'n proefbeampte geplaas
± 6% boetes opgelê
57% lyfstraf opgelê
± 2% na 'n verbeteringskool gestuur en
± 4% tronkstraf opgelê.

Die neiging tot die oplegging van lyfstraf en die lae persentasie gebruikmaking van nie-strafmaatreëls en van proefbeampte-toesig is dan ook die hooftema wat behandel word. 'n Opvolgstudie van 432 van die gevalle toon dat 49,3% weer binne 5 jaar misdade gepleeg het. Verder word bevind dat in gevalle waar opgeskorte of uitgestelde vonnisse opgelê was, slegs 'n klein persentasie van die oortreders weer binne vyf jaar 'n misdaad gepleeg het terwyl van die oortreders wat lyfstraf opgelê was 57% weer binne dié tydperk aan strafregtelike oortredings skuldig bevind is. In die lig van hierdie feite word nie alleen die doeltreffendheid van lyfstraf nie maar ons hele stelsel van beregting van jeugmisdaad in twyfel getrek.

Alhoewel daar verskil van mening mag bestaan oor die wenslikheid van die *welsynsbenadering* wat deur dr Midgley voorgestaan word, sal hierdie studie elkeen wat dit lees tot besinning dwing. Die slotopmerking van die skrywer verdien minstens ernstige oorweging.

> "It is time that the arbitrary distinction between welfare needs and juvenile delinquency be eliminated. It is inconceivable that children with problems defined as unacceptable from a social control point of view be punished rather than helped. It is desirable that they now be taken out of the criminal justice system and helped through a more humane and effective approach."

Die oortuiging en erns wat uit hierdie werk straal, vergoed ruimskoots vir die enkele tegniese punte van kritiek wat deur die resensent geopper sou kon word. Die werk word by elkeen aanbeveel wat in enige mate gemoeid is met die jeugdige oortreder en strafhervorming in die algemeen.

FRANCIS BOSMAN
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BOEKAANKONDIGINGE

South African Yearbook of International Law
Suid-Afrikaanse Jaarboek vir Volkereg

Die eerste uitgawe van *South African Yearbook of International Law – Suid-Afrikaanse Jaarboek vir Volkereg* het pas verskyn. Dit word uitgegee deur die VerLoren van Themaat-sentrum vir Volkereg van die Instituut vir Buitelandse Reg en Regsvergelyking van die Universiteit van Suid-Afrika. Die redakteur is dr Hercules Booysen, senior lektor in die departement staats- en volkereg aan die Universiteit van Suid-Afrika.

Soos die naam aandui, gaan hierdie tydskrif eenmaal per jaar uitgegee word. Dit neem sy plek in naas die talle dergelike jaarboeke vir volkereg wat in verskeie lande verskyn. Soos die voorwoord laat blyk, is die oogmerk om verslag te doen oor volkeregtelike ontwikkelings wat Suid-Afrika raak, om regswetenskaplike artikels oor die volkereg te publiseer en om ons karige literatuur oor die volkereg aan te vul. Les bes kan 'n mens hieraan toevoeg dat dit sal bydra om die Suid-Afrikaanse regs- en politieke publiek meer bewus te maak van die belang van die volkereg vir die hedendaagse wêreld – Suid-Afrika nie uitgesluit nie.

Die eerste *Jaarboek* bewys dat veel van hierdie nuwe reeks verwag kan word. Dit sou 'n onbegonne taak wees om die bydraes afsonderlik te bespreek. Daar is artikels oor moontlike onttrekking aan die VV, oor terrorisme en krygsgevangenes, oor die seereg, oor SWA, oor satelliete, oor Angola, ens. Daar is ook aktuele rubrieke, soos die internasionale hof van justisie en SA se buitelandse beleid in die vergange jaar, verdrae, literatuur en dokumentasie. Vanselfsprekend word boekbesprekings ook ingesluit.

'n Lys van vonnisse en 'n goeie register maak die bundel des te bruikbaarder.

Die redakteur en sy bydraers – asook die aktiewe Instituut vir Buitelandse Reg en Regsvergelyking (insluitende volkereg, met dr Booysen saam met professor Schmidt en professor Wiechers aan die spits) – kan met hierdie eersteling van harte gelukgewens word. Geen juris, en geen burger wat in die buitelandse verhoudinge van ons land belang stel, sal in die toekoms sonder hierdie *Jaarboek* kan klaarkom nie.

Elke resensie bevat ook kritiek. Die kritiek geld hierdie keer nie die inhoud of beplanning van die werk nie, maar wel sy tipografiese versorging. Die werk verdien om in die toekoms deur 'n professionele drukker gehanteer te word.

Die *Jaarboek* (van ongeveer 250 bl) kos R10 per jaar (R7,50 vir bona fide-regstudente) en kan bestel word van die Instituut vir Buitelandse Reg en Regsvergelyking, Posbus 392, Pretoria 0001 – GUILLELMUS.

Tydskrif vir die Suid-Afrikaanse Reg

Redakteurs: J C van der Walt BA LLD (voorsitter), S W J van der Merwe BA LLD, I M Rautenbach BA LLD; Kaapstad, Juta, 1976; band 1, 129 bl, prys (vir twee uitgawes) R8 per jaar.

Tydskrif vir Regswetenskap

Redakteur: Dirk C du Toit; uitgegee deur die fakulteit regsgeleerdheid van die Uni-

versiteit van die Oranje-Vrystaat; jaargang 1 nommer 1 1976; prys (vir twee uitgawes) R4 per jaar.

"Aan die maak van boeke" (en 'n mens sal kan toevoeg: tydskrifte) "kom geen einde nie." Hierdie spreuk verbly die hart van die uitgewer en van die regsakademikus, ofskoon laasgenoemde verskoon kan word as hy die sug slaak: hoe moet ek alles lees wat op my lessenaar beland?

Graad wens die *Tydskrif* sy twee jong susters geluk met hul buiging voor die regspubliek. Albei pretendeer (en ons bedoel dit nie neerhalend nie) om nasionale regstydskrifte te wees. Daar is ook àl meer tydskrifte van regsfakulteite wat moontlik nie hierdie ambisie het nie. *Codicillus* van Unisa het sewentien jaar gelede die nuwe era ingelui, maar hy maak nie daarop aanspraak dat hy 'n ernstige regswetenskaplike blad is nie. Hy is eerder 'n fakulteitsblad met 'n besonder groot sirkulasie buite die kringe van studente en oud-studente.

Albei nuwe algemene regstydskrifte is mooi geproduseer. 'n Mens wil nie vergelykings maak nie, want dit is eintlik skaars moontlik. Die RAU se blad lê hom toe op deurwrogte regswetenskaplike artikels en gebruik die mooi moderne styl wat (mag dit in beskeidenheid gesê word) sedert 1967 deur die *Tydskrif* ontwikkel is; Bloemfontein se blad lê hom meer toe op die belangstelling van die prokuraat maar is (met enkele foute) besonder netjies gedruk en gebind.

Die vraag kan wel gestel word: is daar in ons land met sy betreklik klein regspubliek plek vir 'n toenemende getal algemene regstydskrifte? Is daar nie liewer behoefte aan vaktydskrifte in die kring van die regswetenskap nie? Binnekort gaan waarskynlik die nuwe *Tydskrif vir Strafreg en Kriminologie – Journal of Criminal Law and Criminology* aangekondig word. Hy sal geen afbreuk doen aan die twee standaard-tydskrifte: die *SA Law Journal* en die *Tydskrif* nie. Sou bv die RAU sy belangrike bydrae nie beter kon lewer met, sê, 'n *Tydskrif vir Handelsreg* nie? Hierdie vrae doen geen afbreuk nie aan die voorspoed wat die *Tydskrif* die twee nuwe tydskrifte toewens. Ons maak staat op hartlike samewerking. – REDAKTEUR

Kroniek

Vir die Suid-Afrikaanse regsgeleerde wat enigsins belangstelling toon vir die Romeins-Hollandse reg en die geskiedenis daarvan, is die *Vereeniging tot uitgaaf der bronnen van het oud-vaderlandsche recht,* of ten minste die "Werken" en "Verslagen en Mededeelingen" wat deur die vereniging gepubliseer is, nie onbekend nie. Omdat die *Vereeniging* geen regspersoon was nie, het dit aan die begin van hierdie jaar 'n gedaanteverwisseling ondergaan en is dit in 'n stigting omskep, nl die *Stichting tot uitgaaf der bronnen van het oud-vaderlandsche recht.*

Wat die doelstellings, werksaamhede en samestelling van die "Vereeniging" en die "Stichting" betref, het daar geen verandering gekom nie. Op die oomblik bestaan die bestuur van die stigting uit mr PJ Verdam (voorsitter), mr O Moorman van Kappen (sekretaris), mr P L Nève (penningmeester), mr B H D Hermesdorf, mr R Feenstra, mr M S van Oosten, mr J Th de Smidt, mr P Gerbenzon, mr L de Gou, dr B Z Beinart, dr P van Warmelo, dr C Dekker en mr F C J Ketelaar.

Net soos die bestuur van die "Vereeniging", doen die bestuur van die "Stichting" op almal wat belang stel in die Romeins-Hollandse reg en sy geskiedenis 'n beroep om die werksaamhede van die stigting te ondersteun: in die eerste plek deur as lid tot die nuwe stigting toe te tree. Die jaarlikse lidmaatskap bedra 25 gulden (ongeveer agt rand). 'n Instelling kan ook as lid toetree. Die toetrede geskied deur 'n persoon of instelling se naam en adres skriftelik by die penningmeester van die stigting (prof mr P L Nève, Instituut voor Rechtsgeleerdheid KU, Oranjesingel 72 Nijmegen, Nederland) aan te meld.

Nuwe lede ontvang die laaste aflewering van die "Verslagen en Mededelingen" gratis. Elke lid kan die ouere bronneuitgawes en ander publikasies (vir sover dit nog beskikbaar is) asook die toekomstige publikasies van die nuwe stigting teen 'n prys wat aansienlik verlaag is, verkry. Op aanvraag kan lede die lys van beskikbare publikasies bekom. Iedereen kan lid van die stigting word, in teenstelling met die gebruik by die voormalige "Vereeniging" toe lede uitgenooi of voorgestel was. – PvW

Briewe

Mr B Wunsh of P O Box 3370, Johannesburg writes:

I have read with interest the note in your February issue on *Pitluk v Law Society of Rhodesia*, on which I have two comments.

The first is: why is it necessary, on page 90, to quote Voet 2 14 18 in Latin when there are translations available?

The second is that when attorneys take from their clients cessions of possible claims for costs against the opposing party they do so *in securitatem debiti.* It is difficult to envisage any other circumstances in which an attorney would take cession of a client's claim for costs. To do so outright in full and final settlement of the attorney's claim for fees and disbursements from his client would clearly be unlawful. One could not imagine why any attorney would want to buy such a claim for valuable consideration.

Surely a cession of a claim for costs *as security* is distinguishable from all the situations dealt with by Mrs Scott and requires independent assessment. It is submitted that there is nothing unlawful or unethical in an attorney taking cession of a claim for costs as security.

If the client succeeds in the action and subsequently gets into financial difficulties, bearing in mind that the claim for costs against the defeated opponent is the client's claim and not the attorney's claim, why should the attorney not enjoy a preference above other creditors in respect of the costs? The attorney has rendered services which entitle the client to recover the costs from the other party. If those costs are paid to the (ex hypothesi) insolvent client in a concursus creditorum, why should the other creditors share in the proceeds?

I would appreciate it if your contributor would deal separately with this aspect.

Mrs Susan Scott replies:

Dear Mr Wunsh,

I have read with interest your letter in reaction to my case note on *Pitluk v Law Society of Rhodesia.*

As to your first comment, on my using the Latin text when there is a translation available, you gave the answer yourself; there is a translation available; if any reader is unable to read the Latin, he may use the translation.

The second comment puzzles me – the basis of your whole argument is that this is not a case of an ordinary cession but a cession in securitatem debiti. As you know, there is a controversy in our law as to the exact effect of a cession in securitatem debiti: the one view being, and this has been accepted by the appellate division, that a cession in securitatem debiti is an out-and-out cession coupled with an agreement to re-cede the claim. According to my way of thinking, it makes no difference whether one styles it a cession in securitatem debiti, or whether one treats it as an ordinary cession. The only difference is that with the cession in securitatem debiti one has to wait until it is clear that the client is unable to pay his costs, while in the other instance action for costs can be instituted at any time.

You have not given any arguments against the ratio of this decision, namely that the attorney would acquire a personal financial interest in the outcome of the suit and that this could have undesirable consequences.

Your reference to the unimaginable position that an attorney would want to buy such a claim for valuable consideration is difficult to understand. Surely he need not *buy*

the claim for *valuable consideration*? In our law, as I understand it, although I do not agree with this viewpoint, a causa for the cession is not required, therefore it is possible to donate it, probably in lieu of services rendered.

You have not indicated why the cession in securitatem debiti is distinguishable from an ordinary cession, and that is the only instance I had in mind.

As to the fact that it is not unethical or unlawful, I can only refer you to p 24A of the case involved and the authority to which I referred and which, to my knowledge, has not been repudiated in any one of our courts of law.

As to the question on the position on insolvency, I do not follow your argument. Why should the attorney receive preference above the other creditors? Surely their claims are also for services rendered?

Although it is not clear whether it is allowed, or should I say, practice, to cede the outcome of litigation, from your letter I gather that in practice it is usual only to take cession of the claim for costs.

[*Editor's note:* It is the policy these days of the *Tydskrif* to supply translations of Latin texts which an author wishes to quote in an article or note. It is a well-known fact that few lawyers (including academics) are able to read Latin. The interesting question arises: why does the Law Society insist on Matric Latin (or Special Latin) for the B Proc and statute law on Latin I for the LLB when everybody knows that a young lawyer with this particular qualification can hardly decipher a Roman text?

The editor, who happens to have spent many years on the study of Greek and Latin, finds the démise of Latin as part of school instruction deplorable. But, in the circumstances, does it make sense to insist on a qualifying course which does not enable the young lawyer to read the sources of Roman law?]

I ask myself, what is there to show for this half lifetime that has passed? I look into my book in which I keep a docket of the decisions of the full court which fall to me to write, and find about a thousand cases, many of them upon trifling and transitory matters, to represent nearly half a lifetime . . .

Alas, gentlemen, that is life . . . We cannot live our dreams.

We are lucky enough if we can give a sample of our best, and if in our hearts we can feel that it has been nobly done.

–Oliver Wendell Holmes Jr., *Collected Legal Papers,* (1920) p245-6.

Lucas Cornelius Steyn QC BA LLD†

Voormalige hoofregter van die Republiek van Suid-Afrika en voorsitter van die Vereniging Hugo de Groot*

Op 16 Augustus 1976 het sy edele hoofregter FLH Rumpff die volgende woorde ter huldiging van wyle oud-hoofregter Steyn in die appèlhof te Bloemfontein uitgespreek:

Ons het hier byeengekom om die heengaan te betreur van hom wat in sy lewensdae luister aan hierdie hof verleen het. Gewilliglik en met groot dank bring ons 'n huldeblyk aan Lucas Steyn, soos hy by ons bekend was, wat lank en vrugbaar en met groot waardigheid die amp van hoofregter van hierdie land beklee het.

Dit is onnodig om in hierdie korte stonde sy lewensloop van plaasskoolseun, skolier, student, dosent, prokureur-generaal, wetsopsteller, regsadviseur, regter, hoofregter en waarnemende goewerneur-generaal in detail weer te gee. Ons het dit pas in feitlik elke koerant gelees en kan dit ook weer lees in vaktydskrifte soos die *Law Journal* en die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg*. Ek doen dus maar 'n enkele greep uit hierdie groot verskeidenheid fasette om daardeur te belig wat hy vir ons gemene reg beteken het.

Gebore uit Vrystaatse grond, het hy hoog uitgestyg bo die groen van somermielies en vaal winterlande van hierdie streek. Sy gees het teruggegaan vèr in die verlede, daar waar oor eeue lank die Romeinse reg gebou en later deur denkers in die noorde van Europa uitgeplooi is. Dáár het hy geestelik lank vertoef, en hom meer as êrens anders voorberei vir wat later sy groot taak sou word. Hoewel hy konsensieus en met noukeurigheid die aangewese wette opgestel en ook as regsadviseur sy land 'n aantal jare by die VV gehelp en bygestaan het, het hy in sy beperkte vrye tyd lank en diep gedelf in die verborge skat wat ons ou skrywers oor die uitleg van statute nagelaat het. Wat hy daar gevind het, het hy saamgeweef met gewysdes van die howe van sy eie land en so het hy ons destyds heel beskeie boekery oor reg in Afrikaans met groot sukses verryk. Deur hierdie werk alleen het hy sy naam in ons regsisteem met onvergeetlikheid beklee. 'n Aanbod om ambassadeur in die diplomatieke diens te wees, is deur hom afgewys, hoofsaaklik weens sy ingetoë lewenswyse. Gelukkig was hy kort daarna bereid om in die Transvaal die regtersplig op hom te neem. Die feit dat hy nooit die vrye advokaatsberoep beoefen het nie, het daartoe gelei dat sekere oningeligtes uit daardie groep aanvaarding van sy amp as regter afgekeur het, met heeltemal onnodige gebaar. Vir hom was dit inwendig pyn, maar uiterlik het hy hom met groot waardigheid gedra. Dit moet tot eer van hierdie selfde groep gesê word dat hul besonder gou hul fout gesien en ruiterlik erken het, veral toe

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*Sien ook 1973 *THRHR* 337.

hy tot hierdie hof verhef is. Hy het al vroeg getoon dat hy met aangebore kundigheid en rype ondervinding die uitleg van 'n statuut kon doen, met groot besuiniging van woorde. Ook het 'n inherente deeglikheid hom altyd in sy werk geopenbaar. Hy het ook vroeg gewys dat hy nie net tevrede was om reg te laat geskied nie. Sy doel was ook om soos 'n bouer te herbou en op te bou waar in die verlede in ons ryke regstruktuur verkeerdelik in- of aangebou was.

Aanvanklik was hy nie in staat om te bereik wat hy beoog het nie omdat hy in die minderheid was, maar later het sy drang ook ander diep oortuig dat hy 'n pad bewandel wat ter wille van ons groeiende sisteem van reg met goeie vrug geloop kon word. Sy credo klink dan ook met helder klank in wat hy aldus in 'n gewysde geformuleer het:

> „. . . ek [wil] allermins te kenne gee dat alle verwysing na of oorweging van 'n ander regstelsel uit die bose is. Vergelykende oorweging kan, soos ten oorvloede uit talle van ons gewysdes en regsverhandelinge blyk, 'n besonder dienstige middel wees om tot helderheid te geraak omtrent die beste toepassing, aanpassing of uitbouing van ons eie beginsels. Om die bevrugtende inwerking van verwante regstelsels te wil uitsluit sou nie slegs 'n onbegonne taak wees nie, maar ook 'n verarmende kortsigtigheid waaraan ek geen deel sou wou hê nie. Maar dit is een ding om 'n ander reg te ondersoek ten einde ons eie meer doeltreffend te kan hanteer en 'n gans ander saak om 'n ander reg te benader asof dit 'n ingelyfde deel van ons erkende regsbronne is".

Met hierdie kaart en kompas het Lucas Steyn 'n reeks uitsprake in hierdie hof kon skryf waarvan bekendes o a handel oor die causae continentia, die versari in re illicita, estoppel, buurreg en die aanspreeklikheid vir 'n late. Sy hele ampstermyn as regter staan in die lig van hierdie bou- en suiweringsproses, wat hy met studie wat indringend was, en met sterk oortuiging voltooi of aangevoor het. So het hy dan 'n plek in die geskiedenis van hierdie hof verwerf, saam met ander in die ry van grotes, wat vir ons altyd sal bly leef. Die neiging om hom bondig en ter sake uit te druk, het hy bly behou en ook sal mens tevergeefs moet soek na tekens van lighartigheid of ligte luim in die produkte van sy gees. Die erns van sy werk as regter het hom nooit verlaat nie. Tog het hy getoon in sy vriendelike verkeer met sy kollegas en uit toesprake wat hy so nou en dan by funksies van regslui gehou het, dat hy 'n fyngeslypte sin vir humor had. Aansluitend by sy geestesdrang was hy 'n stigterslid van die *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* en jare lank voorsitter van die bestuursliggaam daarvan, die Vereniging Hugo de Groot. Ook jare lank het hy by die Regshersieningskomitee gepresideer. Op breër kultuurgebied was hy lid van die Akademie vir Wetenskap en Kuns en jare lank ondervoorsitter van die Stigting Simon van der Stel. Aan hom is toegeken die Dekorasie vir Voortreflike Diens asook 'n aantal ere-doktorsgrade. Nieteenstaande die posisie wat hy beklee het en die wye erkenning vir sy groot bydrae tot ons regsontwikkeling, was kenmerkend van sy lewenstyl, sy beskeidenheid, sy afkeer van vertoon en ook sy verknogtheid aan die lewe en wasdom op sy Viljoenskroonplaas, Eenkant, waaroor hy self geskryf het „sitplek om eendag DV daarna toe af te tree". Dit was dan ook aan hom gegun, al was dit nie besonder lank nie. Aan sy vrou en kinders wat nou treur, bied ons ons innigste simpatie. Ons self treur mee, maar voel terselfdertyd verryk omdat hy so lank en hooggeplaas hier in ons midde was.

Rescission of Consumer Contracts*

Evert P van Eeden

Office of the Deputy State Attorney, Johannesburg

OPSOMMING

'n Verbruiker is 'n persoon wat goedere of dienste koop of huur vir ander doeleindes as herverkoop of herverhuur en nie in die loop van of vir doeleindes van sy bedryf of besigheid nie. Standpunte oor wetgewing ter beskerming van die verbruiker is uiteenlopend en vanweë die hoë koste verbonde aan die implementering van sodanige wetgewing het die mees verligte beleid in die reg nl om mense hul eie sake op hulle eie manier te laat doen, 'n besondere aantrekkingskrag. Daar word egter algemeen aanvaar dat die ongeletterde en ongesofistikeerde verbruiker blootstaan aan uitbuiting. Die gedagte van die verlening van 'n sg "cooling-off" periode om die verbintenisse wat uit die kontrak voortvloei eers goed te oorweeg, word reeds redelik algemeen aanvaar. Doeltreffende wetgewing van hierdie aard kan dan ook beskerming verleen sonder 'n ooreenstemmende toename in staatsmasjinerie. Aldus skryf baie wette voor dat die verbruiker ingelig moet word oor sy reg en dat sodanige kennisgewing skriftelik aan hom gegee moet word. Die kennisgewing kan hy dan net teken en terugstuur aan die handelaar indien hy op opsegging van die kontrak besluit. 'n Voorbeeld van so 'n kennisgewing verskyn aan die einde van die artikel. 'n Oorsig van wetgewing in verskeie lande wat toon dat die verlening van so 'n reg die afgelope 15 jaar baie toegeneem het, word gegee. Vervolgens word die posisie in Suid-Afrika behandel en 'n verbruikerskredietwetsontwerp wat tans vir kommentaar versprei word, word krities bespreek.

I INTRODUCTION

As an example of the standard form contract the instalment credit agreement

> "is printed, having been prepared for one party to [a] transaction by lawyers instructed by that party. It is presented to the consumer in circumstances in which it would be unusual if he even read it, extraordinary if he could understand all its implications if he did, and unthinkable that he should take independent legal advice on it".[1]

At a time when consumer[2] protection legislation is being increasingly scrutinised in the realization that such legislation entails costs to the con-

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*This article is based on a paper which I submitted in the class on consumer credit conducted by Prof Robert Scott at the University of Virginia Law School during the Spring semester of 1975. I am greatly indebted to the Attorneys, Notaries and Conveyancers Fidelity Guarantee Fund and to the University of Virginia for financial assistance which made possible the relevant research.

[1]AL Diamond *Instalment Credit* 5 (1970); see further *Linstrom v Venter* 1957 1 SA 125 (SWA); *Western Bank Ltd v Sparta Construction Co* 1975 (1) SA 839 (W); Wolfgang Friedmann *Law In A Changing Society* (1972) 132.

[2]See DR Hall "The Consumer Affairs Act (Qld) 1970 to 1974" 8 *University of Queensland LJ* 131: "'Consumer' in common parlance means a person who buys or hires goods

sumer (as does most legislation), in addition to its expected benefits, the view that "the most enlightened judicial policy is to let people manage their own business in their own way" is particularly appealing,[3] not to mention the ordinary assumptions of economic analysis about man's ability to perceive and act in his self-interest.[4] The peculiar justification for a consumer right of contract rescission has already been canvassed in great detail.[5] Yet some of the need for a period of reflection to consider contractual obligations (since such opportunity is generally unavailable or unappreciated before commitment) may be perceived from an observation by Ian Macneil:

> "Humans are incapable of focusing on everything in a situation of any complexity (and all human physical and social situations are complex). They are therefore forced by neural processes to limit their attention to as many facets as they can physically handle."[6]

Obviously, uneducated and unsophisticated consumers are especially vulnerable to "abuse by unethical creditors".[7] Where there is a disparity of literacy between consumer and merchant or difference in the respective principal languages used by the parties, or used in transaction and contract, consumer problems may be compounded.[8] Further factors to be taken into consideration are the consumer's inability or reluctance to bargain, the vast reach of contracts of adhesion and standard form contracts, unconscionable sales practices, the unavailability and/or inaccessability of courts as a venue for redress of consumer grievances,[9] and contract doctrines like the parol evidence rule[10] and the "duty to read".[11]

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or services otherwise than for re-sale or letting on hire or than in the course of or for the purpose of a trade or business carried on by him, or for whom services are supplied for fee or reward otherwise than in the course of or for the purposes of a trade or business carried on by him."

[3]Justice Holmes in *Dr Miles Medical Co v Park & Sons Co* 220 US 373 411 (1911) quoted by Chapple "The Right of Rescission and the Home Improvement Industry" 1973 *Albany L R* 247 285.

[4]R Posner *Antitrust-Cases, Economic Notes, and other Materials* (1974) 19 and 1972 *Economic Analysis of Law* 1; F van den Bogaerde *Beginsels van die Prysteorie* (1974) 3. But see F M Scherer *Industrial Market Structure and Economic Performance* (1973) 20 and 330.

[5]See *Hearings before the Consumer Subcommittee of the Committee On Commerce* S 1599 (Door-to-Door Sales Regulation), US Senate, 90th Cong 2nd Session Ser No 90–63 (1968); *Committee on Consumer Protection, Final Report* Papers by Command no 1781 (1962) HMSO London (Molony Report); Brittenham, Henderman, Coombs, Mann and Reitner "Project – The Direct Selling Industry: An Empirical Study" 1969 *UCLA L R* 883; Sher "The 'Cooling-Off' Period in Door-to-Door Sales" 1968 *UCLA LR* 717; Cuming "Consumer Protection – The Itinerant Seller" 1967 *Saskatchewan LR* 113; Council of Europe *Memorandum on Door-to-door Sales* Strasbourg (1973) 29 478/05 5; Third annual report of the SA Co-ordinating Consumer Council 31 March 1974 par 5–6.

[6]"The Many Futures Of Contracts" 1974 *Southern California LR* 726.

[7]1968 *Annual Survey of American Law* 212; see further Cayne and Trebilcock "Market Considerations in the Formulation of Consumer Protection Policy" 1973 *University of Toronto LJ* 406; "The Direct Selling Industry Project" supra 913. Consecutive annual reports of the South African Co-ordinating Consumer Council bear this out.

[8]See Preston, "No Hablo Ingles" 1974 *San Diego LR* 415; "The Direct Selling Industry Project" supra 986–987.

[9]See Ison "Small Claims" 1972 *Modern LR* 18; 1969/70 *Annual Survey of American Law* 222 and 227; "Consumer Protection: The Proposed Cooling-Off Period" 1968 *Valparaiso University LR* 338 341 note 33; Mostert "De minimis non curat lex" *De Rebus-Procuratoriis* December 1969 483; Van der Vyver and Van Zyl *Inleiding tot die Regs*

Though it could be complex theoretically and empirically to determine the cost involved in the establishment of a legal regime it does not follow necessarily that

> "since having laws appears to impose large but as yet unmeasurable costs we ought to have fewer of them".[12]

This is not intended to deny that consumer interests are best served by a private enterprise economy.[13] But neither does it mean that state laws which are biased against consumers are acceptable. Ralph Winter aptly summarises:

> "Government regulation has failed, and the inefficiency and 'capture' by regulated interests alleged by the 'Nader Reports' is generally conceded . . . Regulatory failure, however, involves more than sins of omission. Even the FTC has approached 'effectiveness' in enforcing statutes within its jurisdiction which are designed to protect producers rather than consumers, and the work of the Interstate Commerce Commission (ICC) is a clear instance of government protecting monopoly interests in the economy. Professor George Stigler may thus well say, 'It is of regulation that the consumer must beware.' "[14]

William Warren warns against the same dangers:

> "Thus, over time, the regulated industry has come to have great influence in its own regulation: access to the market is limited to those concerns already in operation; prices are administered by legislative bodies with which the industry has established close relations; and activities are supervised by administrators often friendly to creditors."[15]

Indeed, it too often seems that "[l]aws are like spiders' webs, they hold the weak and delicate who are caught in their meshes but are torn to pieces by the rich and powerful".[16]

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wetenskap 238 and 253. Roscoe Pound complained even in 1913 that "it is a denial of justice in small causes to drive litigants to employ lawyers" – "The Administration of Justice in the Modern City" 1913 *Harv. LR* 302 318.

[10]See Childres and Spitz "Status in the Law of Contract" 1972 *New York University LR* 1.

[11]Calamari "Duty to Read – a Changing Concept" 1974 *Fordham LR* 341 361: "However, in the current era of mass marketing a party may reasonably believe that he is not expected to read a standardized document and would be met with impatience if he did. In such circumstances an imputation that he assents to all of the terms in the document is dubious law. An assertion that he is bound by them would place a premium upon an artful draftsman who is able to put asunder what the salesman and the customer have joined together."

[12]Schwartz and Tullock "The Costs Of A Legal System" 1975 *Journal of Legal Studies* 75 82. Consider the words of Sir Thomas More in *A Man for All Seasons*, by Robert Bolt "This country's planted thick with laws from coast to coast – man's laws, not God's – and if you cut them down . . . d'you really think you could stand upright in the winds that would blow then?"

[13]See D J Mouton *The Behaviour of the Firm and the Problem of Restrictive Trade Practices* (1974) 53 and 129; Henry Hazlitt *The Conquest of Poverty* (1973); the Star 15 October 1975 at 4, for comment by J Steyn, secretary of commerce; A Spies "Capitalism" *SA Financial Gazette* January 1, 1976, at 2; Alan Greenspan *The Assault on Integrity in Capitalism: The Unknown Ideal* (1970) by Ayn Rand; George J Stigler *The Government of the Economy* in Paul A Samuelson *Readings In Economics* (1973).

[14]*The Consumer Advocate versus The Consumer* (1972) 11 (foot notes omitted); see also Betty Furness "The Time Is Now" *Trial Magazine* August/September 1968 17; see also Scherer, supra n 4 528.

[15]"Consumer Credit Law: Rates, Costs and Benefits" 1975 *Standford LR* 951 955.

[16]Plutarch *Solon* (V 2) translation by B Cohen. Or in the words of Robert F Kennedy: "the poor man looks upon the law as an enemy, not as a friend. For him the law is

II SURVEY OF LEGISLATION AND DEVELOPMENT

Although the claim that the cooling-off period has found "almost universal favour"[17] may have been exaggerated, it has nevertheless become widely accepted. The official comment of the National Consumer Law Center in Massachusets on s 2501 of the National Consumer Act (see below) notes that most reputable merchants allow a consumer to rescind a transaction initiated by the consumer and consummated at the merchant's place of business. "Therefore this Act merely codifies what reputable merchants do as a matter of good business practice."[18] Amongst others the American insurance industry has also been receptive to a reflection period. New Hampshire Insurance Department Regulation no 4(k) provides:

> "The following provision or a substantially equivalent provision will be a requirement to appear conspicuously on the face page of the policy: 'This policy may, at any time within ten days after its receipt by the policyholder, be returned by delivering it or mailing it to the company or to the agent through whom it was purchased. Immediately upon delivery or mailing, the policy will be deemed void ab initio, and any premium paid on it will be refunded'."[19]

One company, for example, extends what is termed the "right of policy examination" as to all individual life insurance policies issued by that company.[20]

California requires a similar provision on policies under $10 000 by statute effective 1 June 1974, and New York's statute became effective 1 June 1975.[21] The majority of American states have required such a provision in individual health insurance policies for many years.[22] Aetna Life and Casualty has not been "overly concerned about the implications of this program."[23] The original New Hampshire Regulation no 4(k) required a three day period, while hearings have been held on a proposed amendment to make it 30 days.[24]

It is claimed that the most significant aspect of a cooling-off period is that it provides the buyer with a non-judicial remedy.[25] It has also been observed that cooling-off legislation, if effective, would provide increased protection to the consumer without corresponding increases in government

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always taking something away." See Mueller "Contracts of Frustration" 1969 *Yale LJ* 576 579.

[17]Duggan "The Cooling-Off Period in Victorian Door-to-Door Sales Legislation" 1973 *Melbourne University LR* 134 135.

[18]at 57; see also Sher supra 736. Conversely, delay or deferment is a common element of the credit application procedure. See SA Consumer Council press release CV 157/1975.

[19]Issued April 1973, revised on 1 August 1974, in force since 1 September 1974.

[20]Letter to the author from Paul G Delaney, Assistant Secretary, Actuarial Department Life Division, Aetna Life and Casualty, Hartford, Connecticut.

[21]ibid.

[22]ibid.

[23]ibid.

[24]ibid.

[25]Letter from the managing director of the National Remodelers Association, 7 December 1967, cited in 1968 *Valparaiso University LR* 338 345 346; see further *The Direct Selling Industry Project* supra 1013.

machinery.[26] The obvious importance of consumers being infomred of their rights has been vigorously emphasized.[27] Many statutes provide for a (detachable) notice to the consumer which he may sign and mail to the merchant. As may be discerned from the following discussion of statutes acceptability of the rescission right has grown markedly during the last fifteen years.

1 Austria

Bundesgesetz 279 vom 15 November 1961 über das Abzahlungsgeschäft (*Ratengesetz*)[28].

The Molony Committee (supra note 5) in 1962 described the idea of a right of withdrawal as novel and radical,[29] and some researchers have asserted that the British provision was the first enactment of its kind.[30] But the earliest modern regulation is probably the Austrian act.[31] Curiously enough the origins of the rescission idea go back in time even further. According to the explanatory comment to the Austrian draft act of 30 May 1961 the right of rescission "*beruht keineswegs auf einer neuen Erkenntnis.*"[32] This comment moreover notes that a draft act of 1931 (*Regierungsvorlage fur ein neues Ratengesetz 1931 42 der Beilagen IV GP*) had already envisioned a right of rescission, while a Swiss draft act on the law of obligations[33] of 26 January 1960 provided for a right of withdrawal within three days.

The act of 1961 applies to instalment sales with at least three payments additional to the deposit or first payment, for amounts up to approximately R2 250.[34] It is a requirement that for the seller the transaction be one that

[26]Walker and Ford "Can 'Cooling-Off Laws' Really Protect the Consumer?" 1970 *Journal of Marketing* 53 57, reprinted in David Aaker and George Day *Consumerism – Search for the Consumer Interest* (1971) 245 251.

[27]"A statutory right to cancel will be useless to the consumer unless he is fully informed of the right while he still has time to exercise it. A cooling-off statute that does not require such disclosure creates the illusion of consumer protection without in fact providing any": Sher supra 760; Meserve "The Proposed Federal Door-to-Door Sales Act: An Examination of its Effectiveness as a Consumer Remedy and the Constitutional Validity of its Enforcement Provisions" 1969 *George Washington LR* 1171 1178; Lawson "Protection of The Consumer in New Zealand – Some Recent Developments" 1973 *Otago LR* 49 53. *The Direct Selling Industry Project* supra 1013.

[28]In force since 1 March 1962. An amendment of this act is currently being considered – see *Regierungsvorlage, Bundesgesetz vom XXXXXXXX, mit dem das Ratengesetz geändert wird* (*1484 der Beilagen zu den stenographischen Protokollendes Nationalrates XIII GP 2 Februar 1975*).

[29]*Final Report of the Committee on Consumer Protection* Papers by Command no 1781 s 526.

[30]Sher supra 717; Kassis "A New Remedy for California Consumers: The Right to Cancel a Home Solicitation Contract" 1972 *Pacific LJ* 633 638; Balentine "Arizona's Home Solicitation and Referral Sales Act: An Evaluation and Suggestions for Reform" 1970 *Arizona LR* 803. Metzger and Wolkoff "Fulfilling a Promise: Extending a Cooling-Off Period to Retail Sales in General" 1974 *Minnesota LR* 753; 1969/70 *Annual Survey of American Law* 205.

[31]Bartsch "Privatrechtlicher Schutz des Verbrauchers bei Haustürgeschäften" 1973 *Zeitschrift fur Rechtspolitik* 219.

[32]*Regierungsvorlage vom* 30 5 1961 13.

[33]*ibid* 13 8.

[34]s 1(1). The amendment proposes a maximum of approximately R4 500 (see sec 1(1)).

is exercised as part of a trade, but not for the purchaser.[35] Where a contract is entered into away from the seller's regular office the purchaser may rescind within five days from the day he receives the instalment document or from the day of execution of the contract.[36] The right of rescission is unavailable where the purchaser himself took the initiative in communicating with the seller if there was prior oral communication.[37] Rescission is effected through written notice.[38] When the purchaser has rescinded, the seller is required to reimburse him without delay, including interest from the date that he received the first purchase money.[39] The purchaser must return the merchandise and compensate the seller for any impairment of it and for his use of the merchandise.[40] Mere delivery of the merchandise into possession of the purchaser is not considered impairment.[41]

2 Sweden

It is said that (apart from the socialist character of the economy) the degree of state intervention in consumer affairs is probably higher in Sweden than in other countries.[42] Provision of consumer information has been the responsibility of the state since 1940.[43] Ingredients of the Swedish consumer protection recipe are i a the following: censorship of improper contracts or contract terms,[44] regulation of marketing practices,[45] the consumer ombudsman[46] who is entrusted with enforcement of the statutes referred to in notes 44 and 45, the market court,[47] the public complaints board,[48] the Swedish national board for consumer policies,[49] the anti-trust ombudsman,[50] the national price and cartel office,[51] and criminal prosecution of misleading advertising under the Marketing Act.[52] Relevant here is the Door-to-Door Sales Act of 4 June 1971.[53] Through this act Swedish consumers

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[35] s 1(2).
[36] s 4(1).
[37] s 4(2).
[38] s 4(3).
[39] s 5(1)(1).
[40] s 5(1)(2).
[41] ibid.
[42] *Some Main Features of Swedish Consumer Policy* 1 (Office of the Consumer Ombudsman 16 November 1972).
[43] *Report of the Consumer Committee* 25. (Publication of the Swedish government SOU 1971 37).
[44] Act Prohititing Improper Contract Terms (SFS 1971 112 – *Lag om förbud mot otillbörliga avtallsvilkor*, 30 April 1971). For a translation of the act, see Donald B King *Consumer Protection Experiments in Sweden* (1974) 108.
[45] For the Marketing Practices Act (SFS 1970 412, 29 June 1970) see King supra 103.
[46] See Sheldon "Consumer Protection and Standard Contracts: The Swedish Experiment in Administrative Control" 1974 *American Journal of Comparative Law* 17 37–40; *Institutional Means for Implementing Consumer Policy in Sweden* (Ministry of Commerce 10 April 1973) 14–18; *Some Main Features of Swedish Consumer Pol cy* supra 1–3 and 7–8.
[47] *Institutional Means for Implementing Consumer Policy in Sweden* supra 11–14.
[48] ibid 10.
[49] ibid 6–10.
[50] ibid 18.
[51] ibid.
[52] *Some Main Features of Swedish Consumer Policy* supra 4.
[53] SFS 1971 238 – *Lag om hemförsäljning,* 4 June 1971, in force since 1 July 1971 (hereinafter "the act").

are entitled to rescind home sales contracts within seven days of entering into the contract and of being informed by the seller of their rights under the act.[54] The contract which is to be handed over to the buyer must refer to the right of rescission and the buyer must confirm that he is aware of this information by signature.[55] The act pertains to contracts for the sale of movable property intended mainly for private use, as well as to contracts by manufacturers and merchants for the provision of service or of continuous care or upkeep of property, or for the giving of instruction and of similar services.[56] The act only comes into play when credit is utilized, and this includes cases where the buyer receives credit from the seller himself or through his procurement.[57] Offer or acceptance may occur in the buyer's home or at any place elsewhere than the permanent business premises of the seller or his agent.[58] The act is therefore applicable to transactions in streets, in hospitals, in schools, or on temporary premises.[59] The buyer rescinds his offer or acceptance by informing the seller telegraphically or by letter.[60] After rescission the buyer is obliged to keep available to the seller, and essentially unchanged, whatever goods he has received.[61] The buyer is not held liable for destruction of or loss to the property through natural forces or changes inherent in the property or as a consequence of action that was required for the inspection of the property.[62] When the buyer has rescinded an agreement the seller must return within a reasonable time any compensation which he has received, and the buyer is entitled to retain the property until he has been refunded.[63] If the seller has not collected the property within three months it reverts to the buyer.[64] Where a contract for the furnishing of service has been rescinded part fulfillment of the commitment is no defence against a claim for a refund.[65] Contract terms that restrict these rights are invalid.[66] The seller is obliged to apprise the buyer of his rights of rescission by handing him a document to this effect which has been written in plain and straight-forward language.[67] The seller must further hand the buyer a coupon to be completed in the event of rescission being decided upon.[68] If these requirements are not met contracts are invalid.[69] The notice of rescission must contain a description of the property or ser-

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[54]See Bernitz "Consumer Protection And Standard Contracts" in Folke Schmidt 1973 *Scandinavian Studies in Law* 46.
[55]s 2 of the act.
[56]s 1.
[57]ibid.
[58]ibid.
[59]*Some Main Features of Swedish Consumer Policy* supra 9. Problems arising through abuses of telephone sales and cash purchases have already been under consideration – see Sheldon *Consumer Protection and Standard Contracts* supra 46.
[60]s 4.
[61]ibid.
[62]ibid.
[63]s 5.
[64]ibid.
[65]ibid.
[66]s 6.
[67]*Some Main Features of Swedish Consumer Policy* supra 9.
[68]No other documents may be attached thereto.
[69]*Some Main Features of Swedish Consumer Policy* supra 9; s 6.

vices as well as information about the seller's name and address.[70] It is claimed that certain firms neglect to hand over notification of rescission forms or otherwise sidestep the requirements of the act.[71] The market court has declared that failure by door-to-door salesmen to inform the buyer of his rights under the act constitutes improper marketing.[72] Investigation has revealed that the right of rescission is frequently exercised.[73] Where consumers are unaware of their rights the act is naturally meaningless. During April 1972 the consumer ombudsman launched an information campaign to acquaint consumers with the act.[74]

3 Belgium

The Instalment Sales Amendment Act of 8 July 1970 provides that a credit transaction which is entered into away from the business office of the seller, is consummated seven days later. The purchaser may withdraw from the agreement during this period which commences on the day after the purchaser has made the first payment.[75]

4 Netherlands[76]

It is stated in the memorandum of explanation to the initial draft act that, due to increasing complaints about aggressive sales methods in sales away from normal business premises, the minister of economic affairs on 1 November 1966 requested advice from the Social-Economical Council regarding the issue whether statutory regulation was required.[77] The report of the Social-Economical Council was published on June 14 1968.[78] The memorandum noted that it was particularly in home sales and related situations that the seller may easily act more aggressively because he might not be so concerned about maintaining the goodwill which is such a prerequisite for continued shop, street and market business.[79] The Social-Economical Council[80] was opposed to the introduction of a cooling-off period on the grounds that:

(a) Prescription of a cooling-off period for "normal" sales transactions at business premises therefore intended could not be justified. Neither was there a distinguishable line between these transactions and those where impermissibly aggressive sales methods were feared.

(b) It would be impracticably burdensome for the buyer who wanted to

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[70]SFS 239 4 June 1971.

[71]Sheldon *Consumer Protection and Standard Contracts* supra 46.

[72]*Institutional Means for Implementing Consumer Policy in Sweden* supra 22.

[73]ibid.

[74]*Some Main Features of Swedish Consumer Policy* supra 10.

[75]Bartsch supra 219.

[76]*Colportagewet* Netherlands State Statutes (edition Schuurman & Jordens) 119–11, edited by J Bos and C L de Vries-Hess.

[77]See the general comment in the above-mentioned edition by Bos and De Vries-Hess 43–58.

[78]ibid 43.

[79]ibid 44.

[80]ibid 52.

rescind a contract to prove when the contract was entered into, as well as when he decided to rescind.[81]

(c) The system could only work when there was a written agreement which would normally only be the case in hire-purchase transactions.[82]

(d) The cooling-off period would create uncertainty about the law and fickle consumers would abuse the provision.[83]

The memorandum of explanation answered these objections along the following lines. As regards objection (a) it was pointed out that in setting up a system of registration of salesmen (under the same statute) a distinction had already been drawn between selling at normal business premises and selling under the circumstances to which the new act would apply. This was attained through the proposed definitions of "instalment salesman" and "cash salesman."[84] Objection (b) was met by the reply that the requirement of registration of instalment sales agreements with the department of commerce would prevent any uncertainty as to the moment from which the period of rescission would commence.[85] Countering objections (b) and (c) it is averred that written instruments would henceforth be a requirement in all instalment sales agreements.[86] The fundamental objection in (d) came under close scrutiny. It was unavoidable that the proposed measure would affect not only those members of the credit business who resorted to dishonourable methods. It was further unavoidable that the measure would create the freedom to rescind contracts not only for those who were overwhelmed into committing themselves but also for those consumers who were unable or unwilling to make firm decisions. The cooling-off period was however essential for the protection of socially weaker members of society. An opportunity for reflection had already been granted voluntarily by many firms.

According to the act of 7 September 1973, a prospective door-to-door seller has to register with the department of commerce in order to obtain a special business licence which is issued for three years and which can be revoked by the ministry of commerce if the seller violates fair trade practice.[87] Contracts concluded by an unlicensed seller are void.[88] Agreements must be registered with the department of commerce and the eight days rescission period commences on the day of such registration.[89]

5 Denmark

Related legislation in the Scandinavian countries has been co-ordinated with the exeption of Denmark, where it was regarded as sufficient to amend

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[81]ibid 53.
[82]ibid.
[83]ibid.
[84]ibid 54.
[85]ibid.
[86]ibid.
[87]Bartsch supra 219.
[88]ibid.
[89]s 25 of the act.

existing trade regulations[90] and unnecessary to introduce a right of rescission for buyers as the existing legislation already contained certain prohibitions and limitations.[91]

6 Finland

A consumer protection code with similar regulation of home sales has been under consideration.[92]

7 Norway

Regulations similar to those in Sweden have been enacted.[93] The period of rescission extends for ten days.[94]

8 West Germany

(*Gesetz betreffend die Abzahlungsgeschafte* as amended on 15 May, 1974 (*BGBI* 1s 1169), in force since 1 October, 1974.)

The act covers all credit sales, including door-to-door sales.[95] The buyer is granted one week for rescission, which is required to be in writing. As soon as the buyer has been notified through conspicuously printed notice of this right the period of rescission is activated.[96] He must also be informed of a name and an address where the notice of rescission may be sent to and this must be specifically acknowledged by him.[97] In the event of litigation the burden of proof is on the seller that he has informed the buyer in the manner required by law.[98]

9 Switzerland

Loi Federale sur la vente par accomptes et la vente avec paiements prealables (23 March, 1962).

Instalment sales contracts are void when i a the buyer's right to announce within five days of agreement to the seller that he withdraws from the agreement, is not included.[99] A contract entered into by a married purchaser must contain the consent of the other spouse where the couple live together.[100] The contract comes into being, as regards the purchaser, five days after he has received a copy of the contract, signed by both parties.[101] Rescission must be in writing and prospective waiver is void.[102] If mer-

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[90]Act No 212 of 6 August 1966, see Bartsch supra 220.
[91]Bartsch supra 220.
[92]ibid.
[93]ibid.
[94]ibid. (under an act of 24 March 1972).
[95]Bartsch supra 222.
[96]ibid.
[97]ibid.
[98]s 1(b) of the act.
[99]s 226(a)(8).
[100]s 226(b)(1)
[101]s 226(c)(1).
[102]ibid.

chandise is delivered to the purchaser during the period of rescission, he may only use it to the extent of examining it, otherwise the contract becomes binding.[103] There is no penalty attached to the exercise of this right.[104]

10 France

Loi N/72–1137 relative a la protection des consommateurs en matiere de demarchage et de vente a domicile (act of 23 December, 1972.)

This consumer protection act grants the buyer a right of rescission for seven days after order or signing of a contract.[105] The act governs all sale, lease, and service agreements (with certain exceptions) which the consumer signs in his apartment or at any place of work.[106] The seller is prohibited from accepting any payment or cheques before expiration of the rescission period.[107] Substantial criminal sanction is provided for: on violation of the provisions of the act the seller becomes liable for imprisonment of between one month and one year and/or a fine of 1 000 to 1 500 francs.[108] If the seller exploits the buyer's lack of experience or weakness, imprisonment ranging from one year to five years and/or a fine of 3 600 to 36 000 francs is possible.[109]

11 England

The Molony Committee[110] recommended that in order to protect the householder from unfair selling pressure in his own home, persons signing hire-purchase or credit-sale documents other than at a retail establishment should be allowed a cooling-off period of 72 hours within which they may withdraw from the transaction.[111] The 1964 Hire-Purchase Act gave effect to this recommendation, and this was retained in ss 11–15 of the Hire-Purchase Act of 1965. The right of cancellation is not available where a contract is signed at "appropriate trade premises". Excluded from the definition of such premises are apparently stands at an exhibition, tents at an agricultural show or a mobile unit moving from place to place, from which goods are dispensed.[112] The following situations are also covered by the act: Signature of a contract by the hirer in his own home or at his bank or at the office of his solicitor and all mail order transactions involving a hire-purchase agreement.[113] Of particular interest here is the mode of notification to the consumer of his rights. Within seven days of agreement the buyer must receive a second statutory copy (the document signed upon agreement being the

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[103] s 226(c)(2).
[104] s 226(c)(3).
[105] Bartsch supra 220.
[106] ibid.
[107] ibid.
[108] ibid.
[109] ibid.
[110] supra.
[111] RM Goode *Hire Purchase Law and Practice* (1970) 174. See also A L Diamond *Introduction to Hire-Purchase Law* (1967) 100–106.
[112] Goode supra 176.
[113] ibid.

first statutory copy).[114] The consumer may rescind at any time after signing the relevant document and before the end of the period of four days, commencing from the day on which he receives the second statutory copy.[115]

12 Scotland[116]

The governing statute is substantially similar to the English act referred to above.[117]

13 New Zealand

Door-to-Door Sales Act, 126 of 1967, as amended by the Door-to-Door Sales Amendment Act, 42 of 1973.[118]

The rescission period is seven days.

14 Australia

Rescission periods vary from five to ten days. Legislation has been enacted in the following states:

New South Wales: Door-to-Door Sales Act, 36 of 1967; as amended by the Door-to-Door Sales (Amendment) Act, 50 of 1969; *Queensland:* The Door-to-Door (Sales) Act, 17 of 1966; *South Australia:* Door-to-Door Sales Act, 78 of 1971; *Tasmania:* Door-to-Door Sales Act, 67 of 1967; *Victoria:* Door-to-Door (Sales) Act, 7091 of 1963; as amended by division 3 of the Consumer Protection Act, 8276 of 1972; *Western Australia:* Door-to-Door (Sales) Act, 107 of 1964 as amended by Act 98 of 1973.

15 Canada

Legislation has been modelled on the British Hire-Purchase Act of 1964.[119]

Alberta: The Direct Sales Cancellation Act (28/1966); *British Columbia:* Consumer Protection Act, 23 March, 1967; *Manitoba:* The Consumers' Credit Act, 11 May, 1965, as amended 27 April, 1966; *New Brunswick:* Direct Sellers Act, 19 May, 1967, as amended 2 April, 1968; *Newfoundland:* The Direct Sellers Act, 1966; *Nova Scotia:* Direct Sellers Act, 25 April, 1969, as amended 24 April, 1970; *Ontario:* An Act to provide for the Protection of Buyers of Consumer Goods and for the Fair Disclosure of the Cost of Credit, 8 July, 1966; *Prince Edward Island:* The Direct Sellers Act, 25 June, 1970; *Quebec:* Consumer Protection Act, 14 July, 1971; *Saskatchewan:* The Direct Sellers Act, 1965.

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[114] s 5(1) of the act – unless the buyer receives the second statutory copy the agreement remains unenforceable.
[115] s 11(2).
[116] See the Hire-Purchase Act 1965 (ss 11–15).
[117] See generally JJ Gow *The Law of Hire-Purchase in Scotland* (1968) 20.
[118] See generally Flitton "Door-to-Door Sales Act 1967" 1968 *New Zealand Universities Law Review* 86; Lawson 1973 *Otago LR* 49.
[119] See Ziegel "Recent Legislative And Judicial Trends In Consumer Credit In Canada" 1970 *Alberta LR* 59 63.

16 United States of America

A Federal Legislation

Section 125 of the Consumer Protection Act[120]

Section 125 came into being unheralded and virtually by chance,[121] but nevertheless constitutes a significant contribution to consumer credit law. The act, otherwise known as the truth in lending act, is interpreted and clarified by regulation Z issued pursuant thereto by the board of governors of the federal reserve system.[122] The gist of section 125 is that in any credit transaction in which a security interest is or will be retained or aquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer may rescind that transaction until midnight of the third business day following the date of consummation of that transaction or the date of delivery of the disclosure (a clear and prominent notice of the right of rescission) required under the section, whichever is later, by notifying the creditor by mail, telegram, or other writing of his intention to do so.[123] Subject to waiver of the right of rescission due to a *bona fide* immediate personal financial emergency of the customer,[124] the creditor in any transaction subject to this section, other than an extension of credit primarily for agricultural purposes, shall not perform, or cause or permit until after the recission period has expired and he has reasonably satisfied himself that the customer has not exercised his right of rescission:

(i) disbursement of any money other than in escrow;

(ii) any physical changes in the property of the customer;

(iii) any work or service for the customer;

(iv) any deliveries to the residence of the customer if the creditor has retained or will acquire a security interest other than one arising by operation of law.[125]

Section 125 does not apply to i a:

(i) The creation, retention, or assumption of a first lien or equivalent security interest to finance the aquisition of a dwelling in which the customer resides or expects to reside.

(ii) A security interest which is a first lien retained or aquired by a creditor in connection with the financing of the initial construction of the residence of the customer, or in connection with a loan committed prior to completion of the construction of the residence to satisfy that construction loan and provide permanent financing of that residence, whether or not the customer previously owned the land on which that residence is to be constructed.

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[120]See Public Law 90–321; 15 USCA s 1635.

[121]H Kripke *Consumer Credit* (1970) 155; Neill "Truth in Lending: Problems with the Right of Rescission" 1971 *Willamette LJ* 121.

[122]12 CFR 226, effective 1 July 1969, amended 30 September 1974.

[123]Regulation Z s 226 9(a).

[124]Regulation Z s 226 9(e).

[125]Regulation Z s 226 9(c).

(iii) Any advance for agricultural purposes under an open end real estate mortage or similar lien, or under a written agreement.[126] The board has interpreted "security interest" (see regulation Z s 226 9(a)) to include mechanic's and material-men's liens.[127] Wilful and knowing violation of, or failure to comply with any requirements imposed under title I of the truth in lending act is punishable by fine of not more than $5 000 or imprisonment of not more than one year, or both.[128] Civil liability is also provided for.[129]

16 CFR s 429

This rule of the federal trade commission makes it an unfair and deceptive act or practice for any seller to fail to furnish a buyer in a door-to-door sale with a fully completed receipt or copy of any contract pertaining to such sale at the time of its execution, which is in the same language, e g Spanish, as that principally used in the oral sales presentation.[130] This document must contain the name and address of the seller, and in immediate proximity to the space reserved in the contract for the signature of the buyer, or on the front page of the receipt if a contract is not used and in bold face type of a minimum size of 10 points, a statement to the effect that the buyer may cancel the transaction at any time prior to midnight of the third business day after the date of the transaction.[131] The seller must also provide the buyer with a completed form in duplicate, captioned "Notice of Cancellation", attached to the contract or receipt and easily detachable, containing a full description of the right of cancellation as prescribed,[132] including the date of the transaction and the latest day and time of cancellation. To include any confession of judgment or any waiver of the right to which the buyer is entitled under this section (including specifically his right to cancel the sale in accordance with the provisions of this section) also constitutes an unfair and deceptive act or practice.[133] The seller is further obligated to inform each buyer orally, at the time he signs the contract or purchases the goods or services, of his right to cancel.[134] The buyer's right to cancel may not be misrepresented in any manner.[135] No notes or evidence of indebtedness to a finance company or other third party may be negotiated, transferred, sold or assigned prior to midnight of the fifth business day following the day the contract was signed or the goods or services were purchased.[136] Excluded from the scope of the act are transactions pursuant to prior negotiations in the course of a visit by the buyer to a retail business establishment having a

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[126]Regulation Z s 226 9(g).
[127]Interpretation of 5/26/69. See *N C Freed Company Inc v Board of Governors of Federal Reserve System* 473 F 2nd 1210 (1973) and discussion thereof by Griffiith 1974 *Ohio Northern LR* 1 8.
[128]Regulation Z, Statutory Appendix s 112.
[129]Regulation Z, Statutory Appendix s 130.
[130]CFR s 429 1(a).
[131]ibid.
[132]CFR s 429 1(b).
[133]CFR s 429 1(d).
[134]CFR s 429 1(e).
[135]CFR s 429 1(f).
[136]CFR s 429 1(h).

fixed permanent location where the goods are exhibited or the services are offered for sale on a continuing basis; or in which the buyer has initiated the contact, and the goods or services are needed to meet a *bona fide* immediate personal emergency of the buyer and the buyer furnishes the seller with a separate dated and signed personal statement in the buyer's handwriting describing the situation requiring immediate remedy and expressly acknowledging and waiving the right to cancel the sale within three business days; or conducted and consummated entirely by mail or telephone, without any other contact between the buyer and the seller or its representative prior to delivery of the goods or performance of the services; or in which the buyer has initiated the contact and specifically requested the seller to visit his home for the purpose of repairing or performing maintenance upon the buyer's personal property.[137]

This section is not construed to annul, or exempt any seller from complying with the laws of any state, regulating door-to-door sales, except to the extent that such laws, if they permit door-to-door selling, are directly inconsistent with the provision of this section.[138] Such laws which do not accord the buyer the right to cancel a door-to-door sale which is substantially the same or greater than that provided for in this section, or which permit the imposition of any fee or penalty on the buyer for the exercise of such right or which do not provide for giving the buyer notice to cancel the transaction in substantially the same form and manner provided for in this section, are among those which will be considered directly inconsistent.[139]

B State Legislation

Alabama – Code, title 5 s 323; Alaska – Statutes Supp sec 45 05 125; Arizona – Statutes s 44–5001; Arkansas – Statutes s 70–914; California – Civil Code title 5 chap 2; Colorado – Revised Statutes 1963 Vol 4 s 73–2–501; Connecticut – Statutes s 42–134; Delaware – Statutes chapter 44 6 s 4401; District of Columbia – DC Statutes title 28 s 3811; Florida – Statutes chapter 501 s 021; Georgia – Statutes chapter 96–9; Hawaii – Statutes title 26, Chapter 476; Idaho – Consumer Credit Code 28 32 502; Illinois – Statutes 121–1/2 s 262 B; Indiana – Statutes 24–5–3A–1; Iowa – Statutes chapter 713B; Kansas – Statutes 50–640; Kentucky – Civil Code, 9:3538; Louisiana – Statutes 367 420; Maine – Statutes 32 s 4661; Maryland – Ann Code art 83 s 28; Massachusets – CCH Statutes chapter 93 sec 48; Michigan – Statutes chapter 227 (P–H Consumer Credit – Mich: 651.); Minnesota – Statutes 325 933; Mississipi – Statutes 75–66; Missouri – Statutes 407 700; Montana – Codes of Montana 85–501; Nebraska – P–H Consumer Credit, Nebraska 651; Nevada – Statutes 598 140; New Hampshire – Statutes title XXXIII–A, Chapter 361–B; New Jersey – Statutes 17:16C–61 5; New Mexico – not available; New York – McKinney's Laws art 10–A s 425; North Carolina – General Statutes s 25A–38; North Dakota – Statutes chapter 51–18; Ohio – Code Supp chapter 1345; Oklahoma – Consumer Credit Code 14A s 2–501; Oregon – Statutes 83 710; Pennsylvania – Sta-

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[137]CFR s 429 1 Note 1 (a)1–5.
[138]CFR s 429 1 Note 2 (b).
[139]ibid.

tutes 73 s 201–7; Puerto Rico – CCH, Consumer Credit Guide par 6024 (title 10 sec 751); Rhode Island – Statutes 6–28–1; South Carolina – P–H Consumer and Commercial Credit par 354; South Dakota – Statutes 37 24–3; Tennessee – Statutes 47–16–101; Texas – Statutes art 5069–13; Utah – UCCC 70B–2–501; Vermont – Statutes title 9 s 2454; Virginia – Code Ann s 59 1–21 1; Washington – Code Supp 63 14 154; West Virginia – Statutes s 46A–2–132; Wisconsin – Statutes chapter 423; Wyoming – Statutes s 40–2–501.

C. Other

Uniform Consumer Credit Code, Section 3 501–3 505 (*Part 5*)

This provision applies to consumer credit sales of goods or services, except primarily for an agricultural purpose, in which the seller or a person acting for him personally solicits the sale, and the buyer's agreement or offer to purchase is made to the seller or a person acting for him, at a residence.[140] Sales made pursuant to a pre-existing open-end-credit account with the seller or pursuant to prior negotiations between the parties at a business establishment at a fixed location where goods or services are offered or exhibited for sale, or transactions conducted and consummated entirely by mail or telephone, are excluded from the operation of the section.[141] Sellers who sell by means of solicitation in the home can avoid the application of part 5 by having the contract or offer to purchase signed by the buyer at the office of the seller or at some place other than a residence.[142] The justification advanced for this provision is that if the buyer must go to the seller's office or some place to sign the contract or offer there is less likelihood of his acting as a result of undue pressure by the seller.[143] The same explanation is offered for the exception in the case where the buyer has already established a prior relationship with the seller by having a pre-existing open-end account or by having previously negotiated with the seller in respect of the sale at the seller's business establishment.[144]

III NEW DIRECTIONS

Part 5 (s 2 501) of the National Consumer Act (NCA) 1970 distinguishes between an "inside approval transaction" which is a consumer transaction initiated by the consumer and consummated at the merchant's place of business for a dollar amount exceeding fifty dollars, and an "outside approval transaction", initiated or consummated personally by a merchant at a place, other than the merchant's place of business. As regards inside approval transactions the merchant must present to the consumer a written statement of the consumer's right to cancel the transaction.[145] Outside approval transactions, in order to become binding must be affirmed by the

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[140] UCCC s 3 501.
[141] ibid.
[142] Official Comment to the 1974 text to s 3 501.
[143] ibid.
[144] ibid.
[145] s 2 505.

consumer who must be provided by the merchant with a statement of the necessity to affirm the transaction.[146] The consumer has at least three days within which to affirm.[147] This distinction does not appear in part 7 of section 2 of the Model Consumer Credit Act (1973) which now refers to direct solicitation transactions, which are described as consumer credit transactions, initiated, negotiated or concluded by the creditor, in whole or in part, at the residence of any consumer or at a place other than the normal place of business of the creditor or by a creditor who has no normal place of business, and includes a transaction initiated by the creditor by mail or telephone solicitation if it is negotiated, in whole or in part, at the residence of any consumer or at a place other than the normal place of business of the creditor.[148] The manner of approval as structured by the NCA for inside approval transactions is retained.[149] The National Law Center has given no formal explanation for the change, "though it probably represents a bow to political practicality".[150]

Spokesmen for the direct sales industry have contended that the same type of high pressure sales exists in retail sales and indirect sales and that therefore it is unfair to discriminate against the direct sales industry by subjecting only this industry to the right of rescission.[151] A proposal to remedy this alleged weakness in the present approach advocates extension of the cooling-off period to cover a much wider range of consumer transactions:

> "When a non-merchant buyer purchases consumer goods from a merchant seller, the buyer may, without cause, elect to cancel the transaction by delivering proper notice to the seller by the close of seller's regular business hours on the third full business day after the date upon which the transaction was consummated or the goods were delivered, whichever is later."[152]

Some existing statutes already cover more than the direct selling situation and this proposal is therefore not a radical innovation. The approach utilized by the 1970 NCA edition however differs principally from comparable legislation since it requires affirmation as a precondition for the consummation of contracts.

IV SOUTH AFRICA

Section 4 of the code of ethics of the Direct Sales and Service Association (February 1974) enjoins members to

> "give effect to a 'cooling-off' period of 3 days within which a customer may cancel or reduce the order and any money collected shall then be refunded".

Section 3 of the code of conduct of the Furniture Traders' Association (November 1975) commands members to undertake that:

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[146] s 2 503.
[147] s 2 502(2); 2 503(2)(b).
[148] s 2 701(1).
[149] s 2 705.
[150] Metzger and Wolkoff supra 753.
[151] Brittenham et al supra 1008–1010; see also *State v Direct Sellers Association* 108 Arizona 165 at 167; Meserve supra 1172; Sher supra 729.
[152] Metzger and Wolkoff supra 759.

> "Any customer who has offered to purchase an article other than a cash sale, shall have the right to cancel such an order within 48 hours after placing such order or before delivery of the article to the customer has taken place, whichever is the latest. I further undertake to refund all monies and/or return all goods received from the prospective purchaser provided that floor coverings, soft furnishings or any other goods, cut or made to order, or especially ordered on the special instance and request of the purchaser shall be excluded from this undertaking, if the order is not cancelled within 48 hours of placing such order, or before such goods were made or cut to order, whichever is the soonest."

Financial Mail (12 December 1975 1017) revealed that a new Consumer Credit Bill was being "circulated" for comment.[153] Section 14(2) of this bill reads:

> "If an agreement has been signed by any purchaser at a place other than the business premises of the seller, the purchaser may, at any time but not later than seven days of the date of the delivery to him of the goods to which the agreement relates, terminate the agreement by notice in writing sent to the seller by prepaid registered post and, if such goods have been delivered to the purchaser, provided he tenders to the seller the return of the goods."

The bill in its present form illustrates that although it is false to say that consumers never have legislation passed in their favour, it is nevertheless exceedingly difficult for them to effect this.[154] The dilemma is further demonstrated by the condition of irrelevance in which consumer credit law has been permitted to languish.[155] As early as 8 March 1972 the South African Co-ordinating Consumer Council recommended to the minister of economic affairs in a confidential memorandum that legislation, expecially regarding a right of rescission where transactions are entered into away from the normal business premises of the merchant, be considered to protect the public against malpractices in respect of direct sales. By 31 March 1973 the tide had turned, and in its annual report of that date in the section on direct sales, the Consumer Council declared solemnly:

> "It is noteworthy that certain other countries have been forced to pass restrictive, sometimes even repressive legislation to protect householders from dishonest salesmen."[156]

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[153]It is deplorable that the public is denied access to the "comment" on bills such as this one and the Trade Practices Bill. It may be appropriate to recall here the warning sounded by Adam Smith two centuries ago: "The proposal of any new law or regulation of commerce which comes from this order (ie merchants) ought always to be listened to with great precaution, and ought never to be adopted till after having been long and carefully examined, not only with the most scrupulous, but with the most suspicious attention" – *The Wealth of Nations* (Pelican ed 1974) 358.

[154]See Richard Posner "Reflections on Consumerism" 1973 *University of Chicago Law School Record* 19 25. President L B Johnson phrased the predicament neatly when he remarked that "for too long, the consumer has had too little voice and too little weight in government. As a worker, as a businessman, as a farmer, as a lawyer or doctor, the citizen has been well represented. But as a consumer he has had to take a back seat." – *Consumerism* supra 183.

[155]See Eugene Roelofse "The Consumer and the Law" 1975 *De Jure* 171 174; Coetzee J in *Western Bank v Sparta Construction Co* supra. Inadequacy in the legislative response to the particular consumer problem under discussion has also been mooted by PJ Brooks January 1974 *De Rebus Procuratoriis* 9. See further Holmes J (as he then was) in *Taylor v South African Railways and Harbours* 1958 1 SA 139 (D) 142 A.

[156]Par 4 6 p 10. See Press Release by the Consumer Council, supra and by the ministry of economic affairs, 8 December 1975.

With respect, it seems that the proposed legislation has not survived unscathed the vulnerable pre-parliamentary stage through which all legislation must pass. The committee-stage is yet to come. Considering the inherent dangers of disregarding–

> "influences emanating from lobbying by vested interests and representatives of organized commerce and industries, (and) the considerable political pressures exerted by powerful firms through political party affiliations".[157]

one wonders whether some kind of procedure to maintain proceedings in public view is not desirable, at least as far as economic regulation of the consumer interest is concerned. The American hearing process comes to mind.

V CONCLUSION

> "It takes a trained lawyer or accountant to comprehend, after careful study, the financial content of these respective rights and obligations. I am not sure that even we who sit in judgment on these matters do always determine reasonably accurately the precise effects of these terms in any given case . . . the ordinary layman who requires finance for the acquisition of a motorcar probably finds the printed form utterly unintelligible . . . A factor which further inhibits any careful study of this document and so contributes greatly to one's incomprehension is the unbelievably fine print."[158]

These remarks concern financial leasing contracts but are of course applicable to virtually all consumer contracts, whether governed or not by the largely irrelevant Hire-Purchase Act.

Clause 50 in the hire-purchase agreement of a well-known national retailing chain is a common example of contracts that were once said to be "designed for the protection of the seller"[159] It reads:

> "This agreement shall not be of any force or effect unless and until it has been signed by the seller, and the seller shall not be committed to the buyer in any way, prior to this signature, by reason of this agreement having been prepared or having been signed by the buyer only."

The rescission right of creditors is limited to fourteen days by statute[160], which directs the seller to provide the buyer with a copy of any agreement within fourteen days of the making thereof.

It is interesting to note that whereas the creditor is granted a 14 day period of rescission consumers are allowed no such right. The Consumer Credit Bill would grant consumers seven days. Yet of far greater importance to the consumer than the length of the cooling-off period is the manner in

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[157]Mouton supra 75. This thesis might explain the preponderance of law and regulatory systems responding rather to powerful industrial groups than to the needs of the consuming public.

[158]*Western Bank v Sparta Construction Co.*, supra. See further 11 supra.

[159]*Lindstrom v Venter*, supra.

[160]Sec. 4(2), Hire-Purchase Act no 36 of 1942 as amended; *Boerne v Harris* 1949 (1) SA 793 (AD) 799; see also SA Consumer Council Press Release supra; Sher supra at p 732 note 72. The consumer's right of rescission does not affect his right to revoke an unaccepted offer to purchase (however illusory this right may be) – see Naylor and Pierce 1970 *Nebraska LR* 788.

which he is to be informed of his right to cancel and the ease of effecting cancellation.[161]

It is then rather difficult to reconcile the reality of the said section 4(2) with the aims of a consumer rescission right since a period of seven days or less is apt to expire sooner than a period of fourteen days.

This writer disagrees with the view that the remedy advocated here should be limited to door-to-door situations.[162] Sher has however noted that such legislation would encounter tremendous opposition,[163] and we have to be equally sanguine about the chances of success. It is curious though that the FTA apparently supports the broader approach.[164] This support may be rather significant since FTA members handle approximately 90% of the volume of retail furniture sales in the country.[165] In the circumstances one may perhaps assume either that the FTA has declined to make any recommendations to the department of economic affairs with respect to a consumer rescission right or that it has been ineffective in lobbying for this broader approach in such representation as it may have tendered. In any event, given the incredible delays in effecting consumer-oriented credit legislation the hope is expressed that when the Consumer Credit Bill becomes law, the title "Consumer Credit Act" will not be entirely inappropriate.

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[161]Sher supra 758 note 184. Concerning dance studio contracts The California legislature has declared: "That such contract may be cancelled within 180 days after the date of receipt by the customer of a copy of the contract by written notice to the other party . . . and all moneys paid pursuant to such contract shall be refunded within 10 days of receipt of the notice of cancellation, except that payment shall be made for any dance studio lessons and other services received prior to such cancellation." (Cal Civil Code s 1812 54).

[162]See Sher supra 729 and Metzger and Wolkoff supra 756–7.

[163]ibid.

[164]Code of Conduct s 3.

[165]Press statement by the minister of economic affairs, 8 December 1975.

APPENDIX – NOTICE OF RIGHT OF RESCISSION

The following form is the form of notice of the right to rescind a transaction required to be given to customers under certain circumstances set forth in Section 226 9 of Regulation Z. Where the property on which the security interest may arise does not include a dwelling, the creditor may substitute the words "the property you are purchasing" for "your home" or "lot" for "home" where these words appear in the form of notice. This exhibit is set in capitals and lower case letters of 12 point bold faced type, the minimum size permissible under Regulation Z.

....

(Identification of Transaction)

NOTICE TO CUSTOMER REQUIRED BY FEDERAL LAW:

You have entered into a transaction on (Date).. which may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying

....

(Name of Creditor)

at..

(Address of Creditor's Place of Business)

by mail or telegram sent not later than midnight of (Date)..
You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction.

....

(Date) (Customer's signature)

The following paragraph shall appear on the face or the reverse side of the notice shown on the opposite page. If it appears on the reverse side of the notice, the face of the notice shall state, "See reverse side for important information about your right of rescission."

EFFECT OF RESCISSION. When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it. □

Die Verhaalsreg van die Koper in geval van Uitwinning

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SUMMARY

The nature of the buyer's remedy in case of eviction, especially where the res vendita has depreciated in value since the date of sale, is a contentious matter in both South African law and our common law. The basic question concerning this problem is whether the evicted purchaser is entitled to claim restitution of his purchase price or whether he is confined to his id quod interest, ie the value of the res vendita at the time of eviction?

The whole matter was recently examined by the appellate division in *Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A). The court decided that the purchaser was entitled by the actio empti to claim repayment of the purchase price but it was also obiter stated that the court may absolve the seller from repayment of the full pretium paid in cases of a rapidly depreciating asset. It is submitted that the dictum is open to objection. Firstly, the court should have applied the ordinary remedies for breach of contract and in doing so, restricted the purchaser to the recovery of damages ie the value of the res vendita at the time of eviction. Secondly, as the res vendita depreciated rapidly and considerably in casu, the application of the court's obiter dictum would have been most appropriate.

I

Die basis waarop die koper se verhaalsreg[1] in geval van totale of algehele uitwinning bereken word, was in onsekerheid vasgevang toe die appèlhof[2] onlangs oor die omstrede aangeleentheid uitsluitsel moes gee. Weliswaar het 'n provinsiale afdeling van die hooggeregshof enkele jare gelede oor die aspek standpunt ingeneem[3] maar dié beslissing het sulke ernstige kritiek uitgelok dat kwalik gesê kon word dat die regsposisie duidelik was. Hierdie toedrag van sake is daaraan te wyte dat die ou gemeenregtelike skrywers self onderling oor die juiste regsposisie verdeeld was. Alvorens die posisie in die Suid-Afrikaanse reg krities onder oë geneem word, is dit dienlik om 'n oorsigtelike blik op die gemeenregtelike posisie sowel as die situasie in enkele moderne regstelsels te werp.

II

In die Justiniaanse tydperk kon die uitgewonne koper sy id quod interest met die actio empti verhaal en wel onder andere op die grondslag

[1]Die bespreking sal beperk word tot die omvang van die koper se verhaalsreg indien die koopsaak na kontraksluiting in waarde verminder het.
[2]*Alpha Trust (Edms) Bpk v Van der Watt* 1975 3 SA 734 (A).
[3]*Hendler Bros Garage v Lambons Ltd* 1967 4 SA 115 (O).

dat indien die res vendita in waarde verminder het hy slegs op die waarde van die saak ten tye van eviksie geregtig was.[4] In die Hollandse reg het daar nie eenstemmigheid onder die ou skrywers bestaan oor die metode waarvolgens die koper se skadevergoeding bereken moes word indien die koopsaak na kontraksluiting in waarde verminder het nie. Grotius het verklaar dat die koper op skadevergoeding benewens sy koopprys geregtig is indien hy van sy koopsaak uitgewin word.[5] Verskeie ander skrywers het hulle met hierdie standpunt vereenselwig. Van Leeuwen was byvoorbeeld van oordeel dat die verkoper verplig was om aan die uitgewonne koper sy koopprys terug te betaal asook om hom te vergoed vir skade wat uit die uitwinning voortgevloei het.[6] Groenewegen deel ons eweneens mee dat

> "in case van evictie is de koper niet alleen geregtigt te eissen restitutie van de betaalde kooppenningen . . . maar ook alle schaden en interessen door de evictie van't verkochte goed met den aanval en gevolge van dien geleden."[7]

Hierdie sienswyse is ook deur Van der Linden gehuldig want volgens hom is die verkoper verplig om die koopprys met rente terug te betaal asook om gelede skade te vergoed.[8] In sy *Commentarius ad Pandectas* verklaar Voet in 21 2 25 dat die koper geregtig is op skadevergoeding (id quod interest) benewens die terugbetaling van die koopprys.[9]

Ten spyte van sy standpunt soos vervat in 3 14 6 het Grotius egter later in 3 15 4 verklaar dat die benadeelde koper 'n keuse het

> "of hy wil weder-eisschen de waerde van de zaeck, zulcks die was ten tijde van de koopdag, ofte alle't gunt hom daer aan was gelegen dat de zaecke niet uitgewonnen en waere geweest".

Die koper het dus 'n keuse om óf die betaalde koopprys óf sy skade as gevolg van uitwinning van die koper te eis. Die belang van hierdie standpunt was dat die koper altyd sy koopprys sou terugeis indien die res vendita sedert kontraksluiting in waarde verminder het. Voet[10] het daarop gewys dat hierdie standpunt nie in ooreenstemming met Romeinsregtelike beginsels was nie en hy skaar hom by die opvatting van Paulus[11] wat leer dat indien die koopsaak ten tye van uitwinning minder werd is as die koopprys, die koper hierdie verlies moet dra en derhalwe net hierdie mindere waarde kan verhaal.

Van der Keessel[12] het egter probeer om die twee botsende standpunte van Grotius[13] te versoen deur te verklaar dat Grotius in 3 15 4 nie die koopprys as een alternatief stel nie maar die werklike waarde van die saak ten tye van kontraksluiting wat die koper teen 'n laer waarde gekoop het

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[4] *D* 19 1 45; 21 2 70; 21 2 66 3.
[5] *Inleidinge tot de Hollandsche Rechtsgeleerdheid* 3 14 6.
[6] *Rooms-Hollands Regt* 4 18 2 en *Censura Forensis* 1 14 19 11.
[7] *Hollandsche Consultatien* VI(2) con 150.
[8] *Koopmans Handboek* 1 15 10 6.
[9] Vir 'n ooreenstemmende standpunt, sien ook verder Huber *Hedendaagse Rechtsgeleertheyt* 3 5 50; Schorer noot 9 en 10 *ad Grotius* 3 14 6.
[10] *Commentarius* 21 2 26.
[11] *D* 21 2 70.
[12] *Praelectiones* 3 15 4.
[13] *Inl* 3 14 6 en 3 15 4.

en wat, indien die koper eersgenoemde bedrag verhaal, sal meebring dat hy geen verdere belang het nie. Derhalwe kan die koper sy koopprys (laer waarde) plus sy interesse (verskil tussen twee waardes) verhaal en is die resultaat van die twee standpunte van Grotius nie werklik teenstrydig nie.[14] Word daar gelet op die stand van die praktyk gedurende hierdie tydperk, blyk dit volgens Huber dat daar in twee uitsprake telkens beslis is dat die bona fide koper die waarde van die res vendita ten tye van uitwinning kon verhaal maar ingeval die koopprys hoër was, hy dié koopprys kon verhaal.[15]

Mostert vat die regsposisie in die gemeenreg soos volg saam:

> "Romeinsregtelik geoordeel, is die beslissings[16] nie in orde nie, net soos wat De Groot (3 15 4) nie verklaar kan word nie. Voet en Van der Keessel staan nader aan die Romeinsregtelike opvatting waar die waardevermindering tot die verlies van die koper gereken is. 'n Waarskynlike oplossing vir hierdie verskil van mening is dat De Groot die uiteensetting gee wat in die praktyk gegeld het. Hierdie afleiding word bevestig deur die regspraak wat Huber aanhaal. Voet en Van der Keessel verkondig Professoren recht. In die reg van Holland sou die koper waarskynlik die koopprys kon terugvorder indien die res vendita in waarde verminder het."[17]

Uit bostaande bespreking behoort dit gevolglik duidelik te wees dat daar in die gemeenreg nie eenstemmigheid oor die aangeleentheid bestaan het nie en kan daar moontlik drie heersende standpunte aangestip word, te wete:

(i) die koper was geregtig op sy koopprys plus sy id quod interest;

(ii) hy kon slegs die waarde van die res vendita ten tye van uitwinning verhaal en

(iii) hy het 'n keuse gehad om óf die koopprys (waarde) van die saak ten tye van kontraksluiting óf dit wat dit vir hom ten tye van uitwinning werd was om nie uitgewin te word nie, van die verkoper te verhaal.

III

In die Engelse reg word die aspek deels deur wetgewing en deels deur die positiewe reg beheers. Die Sale of Goods Act van 1893 bepaal in a 12(1) onder andere soos volg:

> "In every contract of sale, . . ., there is–
>
> (a) an implied condition on the part of the seller that in the case of a sale, he has a right to sell the goods, and in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass; and
>
> (b) an implied warranty that the goods are free, and will remain free until the time when the property is to pass, from any charge or encumbrance not disclosed or known to the buyer before the contract is made and that the buyer will enjoy quiet possession of the goods except so far as it may be disclosed by the owner or other person entitled to the benefit of any charge or encumbrance so disclosed or known."

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[14]Van der Keessel vereenselwig hom blykbaar met die sienswyse van Grotius soos verduidelik in 3 14 6.

[15]op cit 3 5 62.

[16]Waarna Huber 3 5 62 verwys het – sien bespreking hierbo.

[17]1967 *Acta Juridica* 111–112.

Die artikel lê dus neer dat die onderneming van die verkoper in werklikheid twee basiese verpligtinge behels, te wete,

(i) 'n "implied condition" dat hy die reg het om die saak te verkoop, en

(ii) 'n "implied warranty" dat—

(aa) daar geen inbreukmaking ten aansien van die saak sal plaasvind nie, en

(bb) dat die koper ongesteurde besit van die saak sal geniet.[18]

Dié twee basiese verpligtinge laat wyd uiteenlopende gevolge in werking tree indien daar nie-nakoming daarvan plaasvind – hoofsaaklik as gevolg van die feit dat daar in die een geval 'n "condition" aanwesig is en in die ander bloot 'n "warranty".[19] Verder moet in gedagte gehou word dat 'n verbreking van die "condition" pari passu 'n verbreking van die "warranty" tot gevolg sal hê maar dat die omgekeerde nie waar is nie.

Indien daar ingevolge a 12(1)(a) 'n verbreking van die "condition" plaasgevind het, is die koper geregtig om die kontrak te repudieer.[20] Verder is hy op sterkte van die uitspraak in die sleutel-beslissing van *Rowland v Divall*[21] geregtig om die volle koopprys terug te eis as gevolg van 'n "total failure of consideration"[22] asook om enige skade wat hy gely het, te verhaal op grond van nie-lewering van die res vendita.[23] Die hof a quo het vroeër beslis dat daar nie 'n "total failure of consideration" plaasgevind het nie aangesien die koper die gebruik van die voertuig vir 'n geruime tyd voor uitwinning gehad het en dat die verbreking van die "condition" bloot as verbreking van 'n "warranty" behandel moet word. By appèl is hierdie benadering egter verwerp en verklaar die hof dat aangesien die koper nie dit waarvoor hy onderhandel het, ontvang het nie sy gebruik van die voertuig immaterieel was sodat daar inderdaad 'n "total failure" plaasgevind het.[24]

Dié uitspraak is hewig gekritiseer deur skrywers. Dit is beskrywe as "bad law",[25] onregverdig,[26] 'n beslissing wat lei tot "great difficulty"[27] ens. Daar kan egter volstaan word met die volgende opmerking van prof Guest oor die hof se hantering van die aspek:

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[18]Daar kan moontlik geargumenteer word dat die onderskeie verpligtings van (ii) (aa) en (bb) eintlik een en dieselfde is maar in die Engelse reg het elkeen 'n eie besondere betekenis wat nie nou vir ons doeleindes van belang is nie – sien egter *Niblett v Confectioners Materials Co* (1921) 3 KB 387 403.

[19]a 11(1)(b) van die betrokke wet lui soos volg: "Whether a stipulation in a contract of sale is a condition, the breach of which may give rise to a right to treat the contract as repudiated, or warranty, the breach of which may give rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated . . ."

[20]Sien voetnoot 19 supra.

[21](1923) 2 KB 500 en nagevolg in *Butterworth v Kingsway Motors* (1954) 1 WLR 1286 en *Margolin v Wright (Pty) Ltd* (1959) Arg LR 988.

[22]vgl ook a 54 van die betrokke wet.

[23]a 51(1).

[24]507 van die verslag.

[25]Fridman *Sale of Goods in Canada* 105.

[26]Macleod *Sale and Hire Purchase* 60.

[27]Fridman loc cit.

"[I]t is submitted that the rule in *Rowland v Divall* deserves reconsideration, and that any claim by the buyer should be limited to the recovery of the *actual loss* which he has sustained by reason of the defect of title."[28]

In die Amerikaanse reg reël a 2–312 van die Uniform Commercial Code die besondere verpligting van die verkoper en dit bepaal soos volg:

"(i) [T]here is in a contract for sale a warranty by the seller that–

(a) the title conveyed shall be good, and its transfer rightful;

(b) the goods shall be delivered from any security interest or other lien or encumbrance of which the buyer at the time of contracting has no knowledge."

Hierdie waarborg is 'n uitdruklike waarborg wat ipso jure in elke koopkontrak voorkom.[29] Dit word algemeen aanvaar dat die koper in geval van nie-nakoming van die waarborg geregtig op skadevergoeding sal wees. Die basis waarop dit egter bereken moet word, is nie duidelik nie. Squillante en Fonseca[30] doen aan die hand dat a 2–714 toepaslik is. Dit lui onder andere soos volg:

"(2) The measure of damages for breach of warranty is the difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted unless special circumstances show proximate damages on a different amount."

Wanneer die gesteelde saak die koper 'n ruk na kontraksluiting ontneem word, is dit volgens hulle 'n geval van "special circumstances" in terme van sub-art (2) en behoort die omvang van die skade die waarde van die saak ten tye van ontneming te wees. Op hierdie basis sal die koper dus kan verhaal wat hy inderdaad verloor het: derhalwe sal hy die voordeel ontvang indien die saak in waarde gestyg het maar aan die ander kant sal hy ook nie bevoordeel word indien die eiendom waarvan hy die gebruik gehad het, 'n waardevermindering ondergaan het nie.[31]

Hierdie benadering het ook in ander oorde aanklank gevind want so is daar onder meer verklaar:

"On principle it would seem clear that the normal measure of the buyer's damage is the full value of the goods, irrespective of the price paid for them".[32]

Steun vir die standpunt is te vind in 'n ou beslissing van die vorige eeu waarin onder andere gesê is:

"[T]he vendee was entitled to recover as damages the value of the property when it was taken from him . . . Unless we are to lose sight of the cardinal principle which governs when estimating and awarding damages in civil actions, which is simply compensation to the injured party . . ."[33]

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[28] Benjamin's *Sale of Goods* (1974) par 265. Sien verder Atiyah *Sale of Goods* (4e uitg) 46–7; Chitty on *Contracts* Vol II (23e uitg) par 1488 en Treitel 1967 *MLR* 139 145 ev.

[29] Die verskil tussen 'n stilswyende en 'n uitdruklike waarborg wat beide ipso jure in 'n kontrak voorkom, word uitvoerig deur Williston *On Sales* (4e uitg) vol 2 419–20 verduidelik.

[30] Williston *On Sales* vol 2 455.

[31] op cit 1975 Supplement 11.

[32] Williston *Law of Contracts* (2e uitg deur WHE Jaeger) vol II par 1395A.

[33] *Hendrickson v Back* 74 Minn 90 76 NW 1019.

Die onderhawige probleem word in die Nederlandse reg uitvoerig in die *Burgerlijke Wetboek* gereël. A 1528 bepaal dat die verkoper van regsweë nie alleen verplig is om die koper teen uitwinning te vrywaar nie, maar ook teen die bestaan van saaklike laste soos serwitute en erfdiensbaarhede ten opsigte van die koopsaak. Indien uitwinning sou plaasvind, is die verkoper verplig om die koopprys terug te betaal tensy die koper by kontraksluiting kennis gedra het van die ware toedrag van sake of andersins die risiko op hom geneem het.[34] Van besondere belang is egter a 1533 wat soos volg lui:

> "(1) Indien op het oogenblik der uitwinning het verkochte goed bevonden wordt in waarde verminderd, of aanmerkelijk vervallen te zijn, het zij door de nalatigheid van den kooper, het zij door overmagt, is de verkooper nietemin gebonden den geheelen koopprijs terug te geven.
>
> (2) Doch indien de kooper voordeel heeft genoten van de door hem toegebragte schaden, heeft de verkooper de bevoegdheid om eene met dat voordeel gelijk staande som van den koopprijs af te trekken."

A 1533(1) se betekenis en strekking is nie met welgevalle begroet nie. Die mening is deur Pitlo[35] gehuldig dat uitwinning nie meebring dat die koopkontrak as nietig beskou moet word sodat daar 'n herstel in die vorige toestand bewerkstellig moet word nie. Hy wys daarop dat indien die koopsaak tot niet sou gaan voordat uitwinning plaasvind, die verkoper nie aanspreeklik sou wees nie terwyl hy egter die volle koopprys sal moet vergoed indien die saak in waarde verminder het en uitwinning daarna plaasvind. Onder hierdie omstandighede verkry die koper 'n ongemotiveerde voordeel. Daar is ook daarop gewys dat die wetgewer nie die koopprys op die voorgrond moes gestoot het nie maar die gelede skade van die koper.[36] Die onbillikheid van die betrokke sub-artikel se werking is egter in 'n groot mate getemper deur die positiewe reg wat 'n besondere wye interpretasie aan a 1533(2) gaan heg het. Die regbank van Zwolle het in 1941[37] die betrokke sub-artikel toegepas in 'n geval waar 'n motorvoertuig uitgewin is. Die hof het die gebruiksgenot van die voertuig as 'n voordeel ingevolge sub-art (2) beskou en die normale slytasie as "door hem toegebrachte schade" ingevolge dieselfde bepaling. Derhalwe is die verkoper toegelaat om van die koopprys die waarde van die gebruiksgenot gedurende die periode wat die voertuig in die besit van die koper was, af te trek.

Volgens die Italiaanse reg is die koper geregtig om in geval van algehele uitwinning die koopkontrak te ontbind en die koopprys terug te vorder selfs al het die saak in waarde verminder. Die verhaalsreg word egter gekwalifiseer deurdat bepaal word dat indien die waardevermindering van die saak deur die koper veroorsaak is, die waarde van sodanige gebruik teen die verhaalsreg in verrekening gebring sal word.[38] In die *Bürgerliches Gesetzbuch* daarenteen word eenvoudig neergelê dat die verkoper verplig

[34] a 1531 van die *BW*.

[35] *Het Verbintenisrecht naar het Nederlands Burgerlijk Wetboek, Bijzonder Deel* (6e Druk 1974) 335.

[36] Asser *Handleiding tot de Beoefening van het Nederlandsch Burgerlijk Recht* (3e druk) derde deel derde stuk 79.

[37] 1941 *Nederlandse Jurisprudentie* 631.

[38] a 1479 van die *Codice Civile*; sien ook a 1483.

is om die saak aan die koper vry van regte van derdes wat teenoor so 'n koper afdwingbaar sou wees, oor te dra.[39] In geval van nie-nakoming van hierdie verpligting, geld die algemene beginsels in geval van kontrakbreuk[40] en volgens Palandt sal die koper geregtig wees op terugtrede uit die kontrak en ook skadevergoeding, sonder om laasgenoemde nader te spesifiseer.[41]

IV

Word die regsposisie in Suid-Afrika vervolgens in oënskou geneem, is dit dienlik om allereers 'n uiteensetting van die verskillende skrywers se standpunte oor die aangeleentheid te gee en daarna die posisie in die positiewe reg te bespreek.

Skrywers is nie dieselfde mening toegedaan oor die basis waarop die koper se skadevergoeding bereken moet word nie. Word daar eerstens gelet op skrywers wat Voet se standpunt dat die koper slegs geregtig is op die waarde van die koopsaak ten tye van uitwinning, ondersteun, dan blyk veral die volgende. Belcher[42] probeer 'n kompromie bewerkstellig. Hy verklaar dat die koper in geval van eviksie geregtig is om deur middel van die actio ex empto, onder andere, die koopprys terug te eis. Maar indien die gewraakte saak enigsins in waarde verminder het, is hy slegs geregtig op die waarde van die saak ten tye van uitwinning. Hy regverdig hierdie siening onder andere omdat die risiko op die koper oorgegaan het en hy derhalwe die waardevermindering moet dra.[43] Dit is nie duidelik waarom Belcher gedifferensieerde maatstawwe ten aansien van uitwinning wil toepas nie en voorts moet dit ook in gedagte gehou word dat die risiko-aspek per se niks met die berekening van skadevergoeding in geval van eviksie te doen het nie. Daar is ook op gewys dat vergoeding op hierdie basis aan die koper alleen maar billik is wanneer hy die gebruik van 'n vinnig depresiërende bate oor 'n lang tydperk gehad het.[44] Belangriker is egter die mening van Mostert wat dit soos volg motiveer:

> "Myns insiens is die Romeinsregtelike reël die mees aanvaarbare omdat dit op historiese en billikheidsgronde geoordeel, die beste is."[45]

Die standpunt van De Groot is deur 'n groot aantal skrywers ondersteun.

Wessels[46] meen dat dit die moderne neiging is om Grotius se benadering te aanvaar en ter motivering vereenselwig hy hom met die sienswyse van Dumoulin wat vra volgens watter beginsel 'n verkoper van 'n res aliena voordeel moet trek terwyl die onskuldige koper 'n verlies ly aangesien dit

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[39]a 434. Die opskrif van die betrokke artikel praat van 'n *Gewährleistung wegen Rechtsmängel*, dws 'n waarborg teen gebreke in die titel.

[40]a 440.

[41]*Bürgerliches Gesetzbuch* (34e uitg 1975) 426 *ad art* 434.

[42]Norman's *Purchase and Sale in South Africa* (4e uitg) 294.

[43]op cit 295.

[44]Lund 1968 *SALJ* 140–141. Sien ook Kahn *Contract and Mercantile Law through the Cases* 466.

[45]1968 *Acta Juridica* 39. Vgl ook Mostert ea *Die Koopkontrak* 168 ev.

[46]*Law of Contract in South Africa* vol 2 (2e uitg) par 4622.

veronderstel moet word dat hy nie sou gekoop het as hy bewus was van die ware toedrag van sake nie:

> "Cur qui, non dominus, et alium decepit versabitur in lucro, deceptus vero in damno?"[47]

Eweneens is De Wet en Yeats van mening dat die remedies van die koper in hierdie geval die gewone is:

> "Word hy geheel-en-al uitgewin kan hy uit die ooreenkoms terugtree, die koopprys terugvorder en skadevergoeding eis."[48]

Die skrywers aanvaar sonder meer dat dit die gemeenregtelike posisie is. Om te sê dat die koper op instandhouding van die kontrak geregtig is terwyl dit duidelik is dat hy nie meer eienaar van die res vendita kan word nie, lyk my nie suiwer nie. Mackeurtan se benadering tot die probleem sluit by die vorige aan. Hy verklaar dat in geval van uitwinning die verkoper se optrede op verbreking van 'n essensiële term van die kontrak neerkom wat die ontbinding daarvan tot gevolg het sodat die koper die keuse het om sy koopprys terug te vorder – 'n weg wat hy altyd sal volg as die saak, om watter rede ook al, in waarde verminder het.[49] Harker wys daarop dat die verbreking van die stilswyende waarborg dieselfde gevolge laat ontstaan as uitdruklike waarborgbreuk maar vervolg hy later:

> "[W]here the purchaser is evicted from a depreciating asset it would not be equitable to allow him to recover the full price, for account should be taken of the shortened life of the res caused by the purchaser's use and enjoyment."[50]

Die eerste beslissing waarin die aspek pertinent ter sprake gekom het, was in *Hendler Bros Garage v Lambons Ltd.*[51] Regter Hofmeyer verleen voorkeur aan die "deurlugte gesag van Voet"[52] en beslis onder meer dat die uitgewonne koper geregtig is op skadevergoeding op grond daarvan dat die koper in dieselfde posisie geplaas moet word asof die kontrak wel nagekom is[53] en derhalwe is die koper slegs op die waarde van die koopsaak ten tye van uitwinning geregtig.[54] In *Van der Watt v Alpha Trust (Edms) Bpk*[55] het die hof egter gevolg gegee aan die standpunt van Grotius omdat Voet konflikterende menings oor die probleem daarop nagehou het en verder omdat De Groot se standpunt ook deur ander skrywers van sy tyd ondersteun is. Die hof gee toe dat 'n koper wel 'n onbehoorlike voordeel kan verkry indien hy toegelaat word om die koopprys terug te vorder maar dit kan reggestel word deur 'n aksie op grond van ongeregverdigde verryking te erken.[56]

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[47] *De Eo Quod Interest* n 69.

[48] *SA Kontraktereg en Handelsreg* (3e uitg) 227; sien ook 1967 *Annual Survey of South African Law* 101–3.

[49] *Sale of Goods in South Africa* (4e uitg) 235.

[50] 1976 *SALJ* 265.

[51] 1967 4 SA 115 (O).

[52] 124 van die verslag.

[53] 125.

[54] 127.

[55] 1974 3 SA 860 (K).

[56] 862 per wr Burger.

In die appèlhof het bogenoemde saak onlangs neerslag gevind in *Alpha Trust (Edms) Bpk v Van der Watt.*[57] Die tersaaklike feite was kortliks soos volg: V het 'n Ford Thunderbird motorkar aan K vir 'n bedrag van R4 955 op huurkoop verkoop. Beide partye was egter daarvan onbewus dat E die werklike eienaar van die voertuig was. Twaalf maande later, toe K reeds 'n bedrag van R1 760 as deposito en R1 200 by wyse van paaiemente aan V betaal het, in totaal dus R2 960, word die voertuig van K opgeëis. K voer aan dat hy geregtig is op terugbetaling van R2 960 maar V daarenteen beweer dat K slegs op R1 900, die markwaarde van die voertuig ten tye van uitwinning, geregtig is maar dat hy teen hierdie bedrag 'n bedrag van R1 933 wat K nog ingevolge die huurkoopkontrak verskuldig was, in verrekening kon bring. Appèlregter Botha verklaar, na bespreking van 'n groot aantal ou skrywers se onderskeie standpunte, dat die terugbetaling van die koopprys in die geval van uitwinning, die algemeen aanvaarde reël in die Romeins-Hollandse reg was,[58] dat Voet 21 2 26 in stryd met ander tekste[59] van Voet is en dat Grotius 3 15 4 nie wesenlik strydig met die passasie in 3 14 6 is nie.[60] Voorts wys hy daarop dat die vergoeding volgens die waarde van die saak ten tye van uitwinning, in baie gevalle onbillik teenoor die onskuldige koper kan werk en daarenteen die verkoper sonder rede bevoordeel.[61] Die hof huldig ten slotte obiter die mening dat dit moontlik is

> "dat die koper van 'n snel slytende of verdwynende bate na 'n lang tydperk van ongestoorde besit en gebruik daarvan nie altyd by uitwinning op terugbetaling van die volle koopprys geregtig mag wees nie, want dit is moontlik dat betoog kan word dat so'n hof in so'n geval 'n aanpassing kan maak in die bedrag van die koopprys wat die verkoper aan die koper moet terugbetaal. Dit is moontlik omdat in die geval van 'n verdwynende bate dit wat van die koper uitgewin word nie meer dieselfde is as wat hy aangekoop het nie."[62]

V

Ten slotte sou dit wenslik wees om enkele opmerkings oor die probleemaspek te maak na aanleiding van die *Alpha Trust*-beslissing wat nou finaal uitsluitsel oor die aangeleentheid gegee het. Nòg op grond van billikheidsoorwegings, nòg op grond van juridiese gronde, is die beslissing bevredigend. Selfs al word argumentsonthalwe aanvaar dat die Grotius-beginsel in casu die korrekte een was om toe te pas, is die resultaat van die uitspraak vir sover dit die besondere feite aangaan nie aanvaarbaar nie, want in effek het die koper die gebruik en genot van die voertuig vir 'n tydperk van twaalf maande heeltemal kosteloos ontvang. Selfs teen 'n baie konserwatiewe huurtarief van R200 per maand, beloop K se gebruiksvoordeel van die voertuig R2 400 sodat sy werklike skade slegs R560 (R2 960–R2 400) bedra en nie R2 960 soos die hof beslis het nie. Dit is egter waar dat die hof oorweging aan sodanige verrekening geskenk het maar daarteen besluit het omdat die verkoper op sy beurt die voordeel van die gebruik van die koper se geld

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[57] 1975 3 SA 734 (A).
[58] 745 van die verslag.
[59] 746.
[60] 746–7.
[61] 747.
[62] 749.

gehad het.[63] Die argument is egter nie oortuigend nie want selfs al sou K die bedrag van R2 960 in een totale bedrag aan V betaal het en laasgenoemde dit teen die gunstige koers van 10% per jaar belê het, sou V slegs R296 in rente ontvang het, teenoor K se gebruiksvoordeel van minstens R2 400.

Die toedrag van sake kon reg gestel gewees het indien die hof sy weg oop gesien het om sy obiter-standpunt in casu te implementeer. Dit word ter oorweging gegee dat in hierdie betrokke geval aan die vereistes wat die hof vir die tempering of aanpassing van die Grotius-beginsel gestel het, voldoen word.

(i) Die bedoelde voertuig was 'n snel-slytende bate[64] want vanaf kontraksluiting tot en met uitwinning het dit met ongeveer R3 000 in waarde verminder; en

(ii) die koper het vir 'n lang tydperk die ongestoorde besit en gebruik van die saak gehad,[65]

met die gevolg dat "dit wat van die koper uitgewin is nie meer dieselfde is as wat hy aangekoop het nie".[66]

Andersins is die uitspraak uit 'n regsprinsipiële oogpunt gesien, ook nie suiwer nie. Waarom moet die uitgewonne koper in die posisie geplaas word waarin hy sou wees ten tye van kontraksluiting? Dit kan alleen geregverdig word op grond daarvan dat die kontrak ab initio nietig was maar in casu was dit ook nie die geval nie want die kontrak was geldig tot en met uitwinning.[67] Derhalwe word aan die hand gedoen dat die gewone beginsels van toepassing is by die berekening van skadevergoeding in geval van kontrakbreuk, ook ten aansien van hierdie oënskynlike uitsonderlike geval, toegepas moes word.[68] Dié besondere beginsels is soos volg in die sleutelbeslissing van *Victoria Falls and Transvaal Power Co Ltd v Consolidated Langlaagte Mines*[69] verduidelik:

> "[W]e must apply the general principles which govern the investigation of that most difficult question of fact – the assessment of compensation for breach of contract. The sufferer by the breach should be placed in the position he would have occupied had the contract been performed, so far as that can be done by the payment of money and without undue hardship to the defaulting party."[70]

Gevolglik behoort die koper deur die toekenning van skadevergoeding so na as moontlik in die vermoënsregtelike posisie geplaas te word as waarin hy sou gewees het as daar geen kontrakbreuk was nie en die kontrak behoorlik uitgevoer is. Die toepassing van hierdie beginsel verg dus 'n vergelyking tussen die vermoënsposisie soos dit sou gewees het as die kontrak

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[63] 748–9.
[64] 749 A–B.
[65] ibid.
[66] 749B–C. Vgl ook Pothier *Vente* (2) par 162–3.
[67] Dit is so omdat die verkoper nie eienaar van die koopsaak ten tye van kontraksluiting hoef te wees nie.
[68] Sien ook De Wet en Yeats op cit 227.
[69] 1915 AD 1.
[70] Per hoofregter Innes 22. Vgl ook *Lavery v Jungheinrich* 1931 AD 156; Jockie v Meyer 1945 AD 348 en *Thompson v Barclays Bank DCO* 1969 2 SA 160 (W) 164.

behoorlik nagekom is en die verskil tussen die twee bedrae verteenwoordig sy werklike skade.[71] So gesien, sal die verskil in casu in totaal R1 900 bedra en dit kan nouliks ontken word dat die koper inderdaad meer skade gely het as die verlies van 'n voertuig ter waarde van R1 900. Verder behoort dit ook duidelik te wees dat aangesien die koopkontrak geldig was tot en met die oomblik van uitwinning en die vermoënsposisie van die koper op hierdie stadium vir doeleindes van berekening van skadevergoeding deurslaggewend was, sy gebruiksvoordeel van die voertuig alvorens uitwinning plaasgevind het a consequenter nie in verrekening gebring kan word nie. Op hierdie basis van berekening sou die koper dus nog beter daaraan toe gewees het as wat hy sou wees indien die hof sy eie metode van berekening suiwer toegepas het.[72]

Om saam te vat, kan gesê word dat dit juridies onsuiwer is om 'n koper toe te laat om meer te verhaal as die verskil tussen die twee betrokke vermoënsposisies. Daardeur word hy in 'n beter posisie geplaas as dié waarin hy sou wees indien uitwinning nie plaasgevind het nie.[73] Dusdanig word afbreuk gedoen aan die klassieke gemeenregtelike reëling van Baldus[74] dat die uitgewonne koper geregtig is op "*omnia quae emptor esset habiturus, si res evicta non fuisset*". □

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[71] vgl ook De Wet en Yeats op cit 158–9.
[72] Volgens hierdie metode van berekening moes hy slegs R560 ontvang het (sien bespreking hierbo).
[73] Sien *Hoffman and Carvalho v Minister of Agriculture* 1947 2 SA 855 (T) 871.
[74] Sien Dilcher *Die Theorie der Leistungsstörungen bei Glossatoren, Kommentatoren und Kanonisten* (1960) 255.

Nalatige Wanvoorstelling as Aksiegrond in die Suid-Afrikaanse Reg

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SUMMARY

After an examination of the possibility of delictual liability in cases of negligent misrepresentation in Roman, Roman-Dutch, South African, German, Dutch and English law one is faced with three questions. The first is whether the ultimate stage in the so-called logical development of Aquilian liability has been reached, in other words whether our law recognises delictual liability in all cases where there is unlawful conduct accompanied by fault by one person causing patrimonial loss to another. From the South African case law it is clear that the actio legis Aquiliae has not reached this final stage.

Secondly, if one accepts the theory that unlawfulness means the infringement of a right, the question is to the nature of the right infringed in cases of negligent misrepresentation. It is submitted that it is impossible to identify such a right clearly, and therefore the view that unlawfulness can also be construed as the infringement of legal interests is favoured. This view is in accordance with the duty-of-care theory, English and Dutch law. The third, and last, question concerns the attitude of our courts in recognising delictual liability in cases of negligent misrepresentation. The writer concludes that they are in fact prepared to do so and that they have given certain directives as to the instances in which this liability will occur.

I INLEIDING

In hierdie eeu speel ekonomiese waardes 'n steeds toenemende rol. Daarom is dit nodig om opnuut vas te stel of daar aanspreeklikheid moet wees in gevalle waar 'n bepaalde persoon as gevolg van die nalatige wanvoorstelling van 'n ander, skade ly.

Hieronder volg 'n verskeidenheid gevalle van nalatige wanvoorstelling wat kontemporêre probleme illustreer en daarom as goeie voorbeelde dien:

(a) 'n Geswore waardeerder maak op nalatige wyse 'n verkeerde waardasie van grond, na aanleiding waarvan A aan B 'n verband oor die grond gee. B is nie in staat om sy verpligtinge na te kom nie en A ly skade aangesien die grond baie minder werd is as wat die waardasie aantoon. Kan A die taksateur aanspreek op grond van sy nalatige wanvoorstelling? Dieselfde vraag kan gestel word ten aansien van banke, rekenmeesters en ander professionele lui wat oor besondere kennis of bedrewenheid beskik.

(b) A, 'n dokter, adviseer B op nalatige wyse dat hy gesond genoeg is om sy beroep te beoefen; B se gesondheid gaan as gevolg hiervan agteruit en uiteindelik verloor hy sy inkomste.

(c) A, 'n dokter, adviseer B op nalatige wyse dat hy nie gesond genoeg is om sy beroep te beoefen nie, terwyl B in werklikheid wel daartoe in staat is. As gevolg van hierdie advies verloor B sy inkomste.

(d) A, die eggenote van oorledene C, versoek B, die eienaar van die motor wat in die ongeluk betrokke was, om aan A die naam van B se versekeraar te verskaf sodat A 'n aksie teen die versekeraars kan instel. B verskaf op nalatige wyse die verkeerde inligting as gevolg waarvan A teen die verkeerde maatskappy 'n eis instel en skade ly.
(e) A het 'n dringende besigheidsafspraak in Johannesburg. Hy is onseker oor die roete na die Burgersentrum en vra B langs die pad of hy vir A die pad kan aandui. A verduidelik dat dit baie dringend is en dat hy 'n belangrike afspraak het. B gee op nalatige wyse die verkeerde inligting as gevolg waarvan A nie die afspraak kan nakom nie en nie alleen baie brandstof vermors nie, maar ook 'n voordelige transaksie deur sy vingers laat glip.
(f) A koop 'n elektriese yster by 'n bekende kettingwinkel. Hy vra aan B, die kassier, of die gronddraad groen is en sy antwoord bevestigend. A konnekteer die drade en toe sy vrou die yster gebruik, ontplof dit en brand 'n gat in hulle duur Persiese tapyt.
(g) A gee op nalatige wyse voor dat hy eienaar van 'n perseel is en gee aan die huurders kennis om die plek te verlaat. Hulle verlaat die perseel en B, die ware eienaar, ly as gevolg hiervan skade. Behoort B teen A 'n aksie te hê?
(h) A die verkoper wys op nalatige wyse aan B, die koper, die verkeerde grense van 'n perseel uit. As gevolg hiervan ly B skade. Behoort B 'n deliktuele eis teen A te kan instel?

In hierdie ondersoek sal gepoog word om vas te stel of ons reg in sodanige gevalle 'n aksie sal toestaan of behoort toe te staan.

Daar is verskeie probleme wat in die ondersoek na vore sal kom. Eerstens ontstaan die vraag of die lex Aquilia al sy sogenaamde logiese eindontwikkeling bereik het. Dit gaan hier naamlik daarom of die lex Aquilia uitgebrei is om alle gevalle van vermoënskade wat op onregmatige en skuldige wyse veroorsaak is, te dek, en of ons reg nie meer afsonderlike onregmatige dade teen die vermoë ken nie.

Indien eersgenoemde wel aanvaar word, lewer die skuld en onregmatigheidsvereistes probleme. Aangesien sowel opset as nalatigheid voldoende is as skuldvorme by die lex Aquilia, behoort daar in beginsel geen onderskeid te wees tussen opsetlike en nalatige wanvoorstelling nie. Juis hier lê die probleem – omdat dit nie die posisie is nie. By onregmatigheid kom die vraag na vore waarin die onregmatigheid geleë is in gevalle van nalatige wanvoorstelling.

Aangesien die lex Aquilia die basis van aksies gerig op skadevergoeding vorm, sal daar waar toepaslik na die Romeinse en Romeins-Hollandse reg verwys word ten einde aanknopingspunte te verkry, en dan veral, om vas te stel in watter mate die lex Aquilia deur die Romeins-Hollandse skrywers uitgebrei is om ook gevalle van blote ekonomiese verlies te dek.

Vergelykenderwys sal daar kortliks na die Nederlandse en Duitse reg verwys word. Die Engelse reg sal volledig ondersoek word in die lig van die Engelse beïnvloeding wat ons regspraak oor nalatige wanvoorstelling ondergaan het.

Die Suid-Afrikaanse positiewe reg sal veral deeglik nagegaan word om te bepaal watter riglyne daarin gevind kan word vir die toestaan van die aksie. Vrae wat hier veral na vore kom is of woorde aan dade gelykgestel kan word, in die opsig dat 'n mens met woorde net so versigtig as met dade moet wees; of blote ekonomiese verlies verhaalbaar is, en indien wel, onder welke omstandighede.

Ten slotte sal daar gepoog word om sekere maatstawwe neer te lê vir toekomstige regsontwikkeling in gevalle van nalatige wanvoorstelling.

II REGSVERGELYKEND

1 Nederland

Vanweë die wye interpretasie wat aan die onregmatigheidsvereiste in die Nederlandse reg gegee word,[1] is dit moontlik om gevalle van nalatige wanvoorstelling onder artikel 1401[2] van die Burgerlijk Wetboek tuis te bring. Aldus is dit moontlik dat 'n persoon wat die bedrogaksie (1364) kan instel, hom ook op artikel 1401 kan beroep.[3]

Pitlo[4] toon aan dat dokters en advokate in 'n kontraktuele verhouding tot hulle kliënte staan en dat hulle aanspreeklikheid daaruit ontstaan. Die notaris is 'n amptenaar en aanspreeklikheid vir sy nalatige optrede ontstaan ingevolge artikel 1401. Hierdie aanspreeklikheid word goedgekeur, maar hy wys op die gevaar as die las wat op hulle rus te swaar sou wees-

> "door het stellen van eisen á outrance aan de ambtenaar het publiek een slechte dienst bewijst door het initiatief van het ambtenarencorps door vrees te verlammen".[5]

Dit wil voorkom asof die Nederlandse reg aanspreeklikheid op grond van nalatige wanvoorstelling tot beroepslui wil beperk. Die onregmatigheid hou nie verband met die vraag na die sorgvuldigheid wat van gemeenskapsweë verwag word nie, aangesien hierdie sorg in verband staan met 'n persoon of sy goed. Die onregmatigheid sal heelwaarskynlik geleë wees in die feit dat nalatige wanvoorstelling beskou word as sou dit in stryd met die goeie sedes wees. Aldus sluit dit aan by Pitlo se argument dat selfs amptenare nie te maklik aanspreeklik gehou moet word nie.

2 Duitsland

In die Duitse reg is onregmatigheid in normskending geleë: "*Rechtswidrig ist ein Verhalten, wenn es gegen eine Rechtsnorm verstösst*".[6] Fikentscher[7] maak die volgende indeling:

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[1]Asser-Rutten *Handleiding Tot De Beoefening van het Nederlands Burgerlijk Recht* 3e deel (1968) 415; Pitlo *Het Verbintenissen Recht* (6e druk) 221; Pitlo *Het Systeem van het Nederlandse Privaatrecht* (5e druk 1972) 354.

[2]"Elke onregtmatige daad, waardoor aan een ander schade wordt toegebragt, stelt dengenen door wiens schuld die schade veroorzaakt is in de verpligting om dezelve te vergoeden".

[3]Pitlo *Verbintenissenrecht* 221.

[4]Pitlo *Verbintenissenrecht* 69.

[5]ibid.

[6]Fikentscher *Schuldrecht* de Gruyter (1971 3 Auflage) 276.

[7]561.

A Opsetlike handelinge in stryd met die goeie sedes (826 *BGB*).
B *Sorgfaltsverletzungsdelikte* (823 *BGB*).

By laasgenoemde word onderskei tussen *Eingriffsdelikte* (8231), *Schutzgesetzdelikte* (82311) en 'n derde groep wat besondere gevalle insluit met die volgende stelreël in gedagte: "*Das Vermögen als solches ist deliktisch nicht geschütz.*"[8]

In hierdie sisteem is dit nie moontlik om deliktuele aanspreeklikheid op grond van nalatige wanvoorstelling daar te stel nie. Vir aanspreeklikheid ingevolge artikel 826 word opset vereis, terwyl artikel 823 ook nie vir sodanige aanspreeklikheid voorsiening maak nie. Die Duitse reg ken nie die reg op die integriteit van die voorstellingslewe as een van die gevalle wat deur die algemene persoonlikheidsreg beskerm word nie.[9]

Artikel 676 *BGB* bepaal dat geen vergoeding vir skade wat uit die verskaffing van advies of aanbeveling spruit, verhaalbaar is nie, uitgesonderd vergoeding weens kontrakbreuk of onregmatige daad. In ander gevalle kan daar wel aanspreeklikheid wees, maar dan word vereis dat die partye in 'n besondere verhouding tot mekaar staan, byvoorbeeld besigheidsondernemings teenoor hulle kliënte, banke teenoor diegene aan wie hulle inligting verskaf, die uitgewers van maatskappyprospektusse teenoor diegene wat reageer op die inligting verskaf in die prospektus. So 'n besondere verhouding sluit ook natuurlik dié gevalle in waar partye 'n kontrak aangegaan het om inligting te verskaf.[10]

Waar 'n verkoper 'n nalatige wanvoorstelling voor kontraksluiting aan die koper maak, word hy ingevolge artikel 45911 *BGB* aanspreeklik gehou. Hierdie artikel is gebaseer op die actio quanti minoris en die actio redhibitoria. In gevalle van opsetlike misleiding of waar die inligting objektief foutief is word skadevergoeding toegestaan (463 *BGB*). Hierdie aksies kan saamloop met die deliksakseis mits die wanvoorstelling skade aan 'n persoon of sy saak tot gevolg het. Artikels 45911 en 463 is egter net van toepassing op koopkontrakte.[11]

Dit wil voorkom of die Duitse reg in gevalle van nalatige wanvoorstelling van deliktuele aanspreeklikheid wegskram. Daar is 'n neiging om dit eerder op een of ander wyse met 'n kontraktuele gebondenheid in verband te bring. Die belangrikste oorweging hiervoor is die feit dat die eiser gewoonlik probleme het met die bewyslas.

3 Engeland

Salmond[12] gee die volgende definisie:

> "An action of tort, therefore, is usually a claim for pecuniary compensation in respect of damage suffered as a result of the invasion of a legally protected interest."

Onregmatigheid in die Engelse reg, is geleë in die veroorsaking van skade

[8]ibid.
[9]Fikentscher 626.
[10]Fikentscher 492–3.
[11]368 ev.
[12]Salmond on the *Law of Torts* (1973) 13.

as gevolg van die aantasting van belange wat deur die reg beskerm word.[13] Dit gaan nie soseer oor die aantasting van die belange nie maar meer oor die vraag of die aangetaste belange deur die reg beskerm word. Dit is die taak van die howe om vas te stel watter belange beskerm moet word.[14]

Daar moet in gedagte gehou word dat die Engelse reg 'n afsonderlike "tort of negligence" ken.[15] By die ander onregmatige dade word die "tort" presies omskryf, maar by die "tort of negligence" word die algemene definisie[16] toegepas en speel die "duty of care" 'n belangrike rol. Hierdie aksie het 'n hele ontwikkeling ondergaan en dit is dan ook in die lig daarvan dat sekere uitlatings gesien moet word.[17]

By aanspreeklikheid op grond van nalatigheid bepaal die "duty of care" sowel onregmatigheid as skuld. Daar is twee toetse om die bestaan van die "duty of care" vas te stel.[18] 'n "Duty of care" bestaan nie slegs as die redelike man nadeel sou voorsien het nie, maar:

> "One has to find that there had been a breach of duty which the law recognises, and to see what the law recognises one can only look at the decisions of the courts".[19]

Die vraag na die belange wat die howe bereid sal wees om te beskerm, is 'n beleidsvraag wat kan wissel en uitbrei.[20]

Millner[21] is van mening dat die howe nou in Engeland bereid is om suiwer ekonomiese belange te beskerm, onder andere, in gevalle van nalatige wanvoorstelling en dat die beperkings wat die howe stel niks anders is nie as "guides for the application of the reasonable man test to the facts of this order".[22]

Salmond[23] verwys na die bereidwilligheid van die howe om ekonomiese belange te beskerm, maar meen dat die voorsienbaarheid van die verlies op sigself nie genoegsaam is om 'n "duty of care" daar te stel nie – daar moet nog 'n "special relationship" wees.

Fleming[24] bespreek die probleme wat ontstaan by die "duty of care" in die lig van die volgende:

> "One of the basic differences between negligence and nominate torts of the traditional pattern, like assault or defamation, lies in the fact that the scope of protection afforded by the action for negligence is, on its fact, unlimited: it is not defined by reference either to a particular type of harm or a particular interest which has been invaded."

Die basiese probleem by die "tort of negligence" is volgens Fleming, die

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[13]ibid.
[14]ibid.
[15]Fleming *The Law of Torts* (4e uitg) 102.
[16]supra.
[17]Millner *Negligence in Modern Law* (1967) 1 ev.
[18]Millner 25.
[19]Millner 35.
[20]Millner 36.
[21]*Negligence* 36.
[22]Millner 39.
[23]*Torts* 206.
[24]133.

beperking van aanspreeklikheid. In gevalle van nalatige wanvoorstellings word aanspreeklikheid beperk tot,

> "... persons who take it upon themselves to supply information or advice, directly or through an intermediary, to someone who, as they know or should know, will place reliance on it to his financial detriment".[25]

Die ontwikkeling wat aanspreeklikheid op grond van nalatige wanvoorstelling in die Engelse positiewe reg ondergaan het, sal nou bespreek word tesame met enkele gedagtes van Engelsregtelike skrywers oor die onderwerp.

In *Derry v Peek*[26] is beslis dat onware inligting wat op nalatige wyse in 'n prospektus gepubliseer is, nie aanspreeklikheid tot gevolg het nie. Die hof bevind dat daar nalatigheid aan die kant van die verweerders was, maar dat dit nie genoegsaam was om aanspreeklikheid ingevolge 'n aksie vir "deceit", daar te stel nie.[27]

Hierdie uitspraak is in *Le Lievre v Gould*[28] gevolg waar lord Esher beslis het dat: "In the absence of contract, an action for negligence cannot be maintained when there is no fraud". Hierdie uitsprake het die indruk by die howe en regspraktyk geskep dat aanspreeklikheid op grond van wanvoorstelling alleen volg wanneer bedrog bewys is.

In *Nocton v Lord Ashburton*[29] het die House of Lords beslis dat *Derry v Peek* te eng geïnterpreteer word en dat daar in omstandighede wel aanspreeklikheid op grond van nalatige wanvoorstelling kan volg. Daar word besondere klem gelê op fidusiêre verhoudings as synde sodanige omstandighede en hieruit kan afgelei word dat die beginsel van moontlike aanspreeklikheid op grond van nalatige wanvoorstelling, soos in die beslissing voorgehou, eng toegepas moet word.[30]

In die lig van hierdie agtergrond word die beslissing in *Candler v Crane Christmas & Co*[31] vervolgens bespreek. Lord Denning lewer 'n afwykende uitspraak waarin hy die omstandighede uiteensit waaronder 'n aksie op grond van nalatige wanvoorstelling toegestaan behoort te word.

Die feite van die saak is soos volg: Die besturende direkteur van 'n maatskappy gee aan verweerders, 'n rekenmeestersfirma, opdrag om 'n balansstaat op te stel. 'n Werknemer van verweerders voer die opdrag op nalatige wyse uit en as gevolg hiervan ly eiser £2 000 skade.

Die hof bevind dat daar geen "duty of care" deur verweerders aan eiser verskuldig is nie en gevolglik is daar geen aanspreeklikheid nie. Lord Denning is van mening dat daar wel aanspreeklikheid onder sekere omstandighede kan wees.

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[25]ibid.
[26](1889) 14 App Cas 337.
[27]Winfield and Jolowicz *on Tort* (9e uitg) 226 gee 'n kort uiteensetting van hierdie beslissing.
[28](1893) 1 Q B 491.
[29]1914 A C 932.
[30]Winfield and Jolowicz 228.
[31]1951 1 All E R 426.

Lord Denning verwerp die argument dat daar 'n onderskeid is tussen ekonomiese verlies en skade wat voortvloei uit persoonlike besering. Albei gevalle kan onder die "tort of negligence" tuisgebring word.[32] Die tipe skade wat verhaal word speel geen rol by die vasstelling van die "duty of care" nie.[33]

Dit blyk dat lord Denning aanspreeklikheid op drie maniere beperk:

> "My conclusion is that a duty to use care in statement is recognised by English law, and that its recognition does not create any dangerous precedent when it is remembered that it is limited in respect of the persons by whom and to whom it is owed and the transactions to thich it applies."[34]

Professionele lui[35] is hierdie "duty of care" verskuldig vanweë hulle "special knowledge and skill".[36] Hierdie "duty" is aan werkgewers of kliënte verskuldig of aan derdes aan wie hulle self die rekenings toon; of wanneer hulle weet dat hulle werkgewer dit aan derdes gaan toon wat op grond daarvan gaan handel.[37] In die derde plek bestaan die "duty" net met betrekking tot daardie transaksies waarvoor die rekening vereis word en die opsteller bewus moet wees van die doel waarvoor die rekening gebruik sou word.[38]

Wilson,[39] in sy bespreking van bogenoemde beslissing, is van mening dat hierdie aanspreeklikheid tot professionele lui beperk moet word.[40] Die redes hiervoor is dat daar geen algemene aanspreeklikheid vir nalatige wanvoorstelling in die Engelse reg is nie, en sodanige algemene aanspreeklikheid ongewens sou wees.[41] Die "neighbour principle", soos neergelê in *Donoghue v Stevenson*, kan volgens Wilson nie hier toegepas word nie, omdat dit tot te wye aanspreeklikheid aanleiding sal gee.[42] Die beste toets wat in hierdie gevalle aangewend moet word is die "intended reliance" soos dit in die Amerikaanse Restatement aangetref word.[43] Laasgenoemde toets is net van toepassing waar die wanvoorstelling finansiële verlies tot gevolg het. By liggaamlike nadeel is die gewone voorsienbaarheidstoets van toepassing. Hierdie "intended reliance" kan betrekking hê op 'n spesifieke persoon[44] of op 'n groep persone.[45]

'n Verdere beperking wat Wilson stel is dat die verweerder die wanvoorstelling in die loop van sy besigheid moet gemaak het en dat die transaksie waaruit die verlies voortvloei, die een moet gewees het waarvoor die inligting bedoel was.[46]

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[32] 432H.
[33] 433A.
[34] 436A.
[35] 435C.
[36] 433E.
[37] 434.
[38] 435B.
[39] "Chattels and Certificates in the Law of Negligence" 1952 *MLR* 160.
[40] 164.
[41] 165.
[42] 168.
[43] 171.
[44] 172.
[45] 174.
[46] 176.

Wilson meen dat bydraende nalatigheid 'n beperkende faktor kan wees en as gevolg daarvan aanspreeklikheid nie tot professionele lui beperk hoef te word nie. 'n Persoon wat hom verlaat op die inligting van iemand wat nie daartoe in staat is om professionele inligting te verskaf nie, is self nalatig en daarom hoef aanspreeklikheid nie tot professionele lui beperk te word nie.[47]

In *Hedley Byrne & Co Ltd v Heller & Partners*[48] het die House of Lords die geleentheid gehad om die Engelse reg met betrekking tot nalatige wanvoorstelling opnuut uiteen te sit.

Die feite van die saak is soos volg: Die appellante (eisers) is 'n advertensiefirma wat bestellings vir die plasing van advertensies in koerante en op televisie vir hulle kliënte maak. Die advertensiefirma is volgens handelsgebruik persoonlik verantwoordelik vir betaling van hierdie besprekings. Een van die firma se kliënte was Easipower, wie se finansiële posisie kommer by appellante gewek het. Die appellante gee opdrag aan hulle eie bank om navraag te doen, waarop laasgenoemde by die handelsbank (respondente), wat Easipower se belange behartig en vir hulle finansiering verantwoordelik is, aanklop ten einde inligting oor die kredietwaardigheid van Easipower te verkry. Die respondente verskaf die inligting maar stipuleer dat die inligting vertroulik is en dat hulle geen verantwoordelikheid daarvoor aanvaar nie. Die respondente was bewus van die feit dat die inligting vir 'n kliënt aangevra was, maar was onbewus van die kliënt se identiteit. Easipower raak insolvent en as gevolg daarvan ly appellante skade wat hulle nou van respondent verhaal op grond van die inligting wat hulle nalatiglik verstrek het, "in breach of the duty to exercise reasonable care".

Regter McNair, die verhoorregter, bevind dat respondente nalatig was, maar dat hulle vanweë die afwesigheid van 'n kontraktuele of fidusiêre verhouding geen "duty of care" verskuldig was nie. Die hof van appèl handhaaf die verhoorhof se uitspraak in navolging van *Candler v Crane, Christmas & Co* (supra). Die House of Lords bekragtig die uitspraak van die appèlhof, maar op grond daarvan dat daar 'n afstanddoening van aanspreeklikheid was.

Alhoewel dit vir die hof onnodig was om op die bestaan van die "duty of care" in te gaan in die lig van hulle bevinding dat daar 'n afstanddoening was, het hulle bevind dat daar 'n "duty of care", in die afwesigheid van 'n kontraktuele of fidusiêre verhouding kan bestaan.[49] As gevolg hiervan ontstaan die vraag of die regters se uitlatings oor die "duty of care" nie obiter dicta is nie. Die meerderheid skrywers aanvaar dat dit ratio decidendi[50] is en dat die bedoeling was om die onsekerheid wat daar bestaan het na *Derry v Peek* uit die weg te ruim. Vandaar die versigtigheid waarmee die regters die beginsels formuleer en die moeite wat hulle doen om aan te toon

[47]177.
[48]1963 2 All ER 575.
[49]575F en 576C.
[50]Stevens "Hedley Byrne v Heller: Judicial Creativity and Doctrinal Possibility" 1964 *MLR* 121 op 125 ev; Goodhart "Liability for Innocent but Negligent Misrepresentations" 1964/65 *Yale LR* 286 287 ev; Honoré "Hedley Byrne & Co Ltd v Heller & Partners Ltd" 1964/65 *JSPTL* 284 286.

dat die verlening van 'n aksie op grond van nalatige wanvoorstelling nie in stryd is met die beslissing in *Derry v Peek* nie.

Vanweë die invloed wat hierdie uitspraak uitoefen, is dit nodig om kortliks na die uitsprake van die regters te verwys.

Lord Morris of Borth-Y-Gest lê veral klem op die "assumption of liability". Die bank is nie verplig om inligting te verskaf nie, maar as hy wel inligting verskaf, ontstaan daar 'n plig vir hom. Die vraag is dan of dit 'n "duty of care" of 'n "duty to be honest" is. Wanneer iemand met "special skill" onderneem om inligting te verskaf, onafhanklik van kontrak, aan 'n persoon wat op daardie bedrewenheid staatmaak, ontstaan daar 'n "duty of care". 'n Bank het 'n "duty of honesty" in gevalle waar hy "a reference in the form of a brief expression of opinion in regard to credit-worthiness" gee.[51] Hy bevind dat daar in elk geval vanweë die afstanddoening nie aanspreeklikheid is nie.

Lord Hodgson is van mening dat daar 'n "duty of care" kan wees, afgesien van 'n fidusiêre verhouding:

> "There are other circumstances in which the law imposes a duty to be careful, which is not limited to a duty to be careful to avoid personal injury to property but covers a duty to avoid inflicting pecuniary loss provided always that there is a sufficiently close relationship to give rise to a duty of care."[52]

Persone wat voorgee dat hulle 'n besondere bedrewenheid besit, het 'n "duty of care". Hy is van mening dat dit nie moontlik is om 'n geslote katalogus van gevalle wat moet bestaan vir die ontstaan van 'n "duty of care" te gee nie. Lord Hodgson baseer hierdie aanspreeklikheid op die "assumption of liability".[53]

Lord Devlin is van mening dat die tussenkoms van liggaamlike besering nie 'n noodsaaklike vereiste is vir die ontstaan van die "duty of care" nie: "I can find neither logic nor commonsense in this."[54] Die regter baseer sy uitspraak op die "undertaking of liability" en sit die posisie soos volg uiteen:

> "I shall therefore content myself with the proposition that wherever there is a relationship equivalent to contract there is a duty of care. Such a relationship may be either general or particular. Examples of a general relationship are those of solicitor and client and of banker and customer. For the former *Nocton v Lord Ashburton* (202) has long stood as the authority and for the latter there is the decision of Salmon, J in *Woods v Martins Bank Ltd* (204) which I respectfully approve. There may well be others yet to be established. Where there is a general relationship of this sort it is unnecessary to do more than prove its existence and the duty follows. Where, as in the present case, what is relied on is a particular relationship created ad hoc, it will be necessary to examine the particular facts to see whether there is an express or implied undertaking of responsibility."[55]

Hy beklemtoon die feit dat hy die gevalle waar daar moontlik 'n "duty of

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[51] 594I.
[52] 598B.
[53] 601B.
[54] 602I.
[55] 611F.

care" mag wees, nie wil beperk tot professionele lui nie. Waar 'n persoon duidelik verantwoordelikheid op hom neem het hy ook 'n "duty of care".[56]

Lord Pearce is die mening toegedaan dat *Donoghue v Stevenson*[57] net betrekking het op nalatige handelinge wat fisiese skade veroorsaak en nie op nalatige wanvoorstelling wat ekonomiese skade veroorsaak nie.[58] Oor die aanwendingsgebied van nalatigheid laat die regter hom soos volg uit:

> [It] depends ultimately on the courts' assessment of the demands of society for protection from the carelessness of others."[59]

Die regter is verder die mening toegedaan dat-

> "if persons holding themselves out in a calling or situation or profession take on a task within that calling or situation or profession they have a duty of skill and care".[60]

By al hierdie uitsprake moet steeds in gedagte gehou word dat die House of Lords rekening moes hou met die presedente oor hierdie onderwerp. In hierdie opsig is die uitspraak merkwaardig, soos deur Stevens aangetoon.

Oor die feit dat die uitspraak ook op die materiële reg 'n invloed uitoefen, is daar nie twyfel nie dog oor die omvang van hierdie invloed is daar nie sekerheid nie.

Goodhart is van mening dat die "special relationship" waarop die regters klem lê 'n ontwyking is van die eintlike vraag waarom dit gaan by aanspreeklikheid vir nalatigheid, naamlik "has the defendant shown reasonable care in the circumstances?"[61] Goodhart verkies die standpunt, soos Sir Frederich Pollock dit vyf-en-sewentig jaar gelede uiteengesit het. Dit beteken dat net soos daar 'n "duty of care" is om andere nie deur dade te benadeel nie, net so is daar 'n "duty of care" om andere nie deur onware *voorstellings te benadeel nie.*[62] Die bestaan van die "duty" sal van die omstandighede van elke geval afhang en Goodhart plaas sy vertroue in die *redelike man:*

> "There is no reason to anticipate that the reasonable man of the common law will fail here when he has proved so successful elsewhere."[63]

Honorè[64] benader die beslissing uit die oogpunt van "*business reliance*". Hy lê klem op die feit dat die hof die "assumption of responsibility" aflei uit die verweerder se professie en dat die professie alleen maar in daardie mate 'n rol speel. In die Federal District Court[65] bestaan die houding dat die "duty" ontstaan uit die professie of besigheid van die verweerder, tesame met die feit dat dit voorsienbaar is dat die eiser op die inligting oor 'n besondere aangeleentheid sal reageer.[66]

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[56]612C en D.
[57]1932 AC 562.
[58]615G.
[59]615H.
[60]616I.
[61]Goodhart 298.
[62]300.
[63]ibid.
[64]284 ev.
[65]292.
[66]293.

Honoré is minder optimisties as Goodhart oor die beskerming wat *blote ekonomiese belange* behoort te geniet:

> ". . . despite brave words in the speeches of the Lords of Appeal, no legal system will protect purely economic interests to the same extent as physical interests in the safety of person or property".[67]

Hy is van mening dat *Hedley Byrne* die aanspreeklikheid vir nalatig-veroorsaakte fisiese skade en nalatig-veroorsaakte ekonomiese skade nie op dieselfde lyn geplaas het nie, maar dat die hof 'n "subtort of economic negligence" daargestel het. Die hof het slegs een van hierdie "subtort" se indelings volledig uiteengesit. Daar mag moontlik nog ander wees.[68]

Volgens Stevens[69] is die beleid van die "common law" die volgende: "sticks and stones may break my bones, but words will never harm me". Hy is van mening dat die hof in *Hedley Byrne* nie nalatigheid in woorde op dieselfde lyn as nalatigheid in dade geplaas het nie, maar dat 'n belangrike voorwaartse stap geneem is. Deur die toepassing van die maatstaf van 'n "special relationship" is verdere ontwikkeling in die vooruitsig gestel. Die belangrikheid van die afstanddoening van aanspreeklikheid moet steeds in gedagte gehou word.[70]

Die beslissing is verder belangrik omdat die houding van die howe ten opsigte van hulle bevoegdheid om reg te skep verander het.[71] Stevens sit die posisie soos volg uiteen:

> "In other words, instead of setting out to discover what the law 'is', they consciously articulated what the law 'ought' to be, and only then resorted to more traditional legal techniques."

Die kern van al die uitsprake is

> "this idea of special relationship, coupled with the concept of assumption of responsibility".[72]

Die "special relationship" op sigself is nie so belangrik nie, maar is wel belangrik as 'n rigsnoer vir die bestaan van die "assumption of responsibility", of as 'n aanduiding van die omvang van die "duty of care".

Stevens is van mening dat daar in hierdie stadium geen nodigheid bestaan vir 'n algemene remedie op grond van nalatige wanvoorstelling nie en dat die "assumption of responsibility"-vereiste 'n natuurlike een is, in ooreenstemming met die beleid van die howe en die tradisie van die "common law".

Hy bespreek die toepassing van sodanige aksie op die "tort of negligence" en veral die inwerking van sodanige remedie op die gebied van die kontraktereg. By laasgenoemde speel die "assumption of responsibility" 'n belangrike rol. Stevens stel die interessante vraag:

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[67]298.
[68]ibid.
[69]121.
[70]122.
[71]123 ev.
[72]136.

> "But if there has to be some classification, could *Hedley Byrne* not be regarded as a warranty falling mid-way between tort and contract?"[73]

Daarna bespreek hy die verskuiwing van waarborgbreuk vanaf die reg insake onregmatige daad na die kontraktereg. Hy toon aan dat die Engelse reg 'n potensieel-waardevolle wapen verlore laat gaan het toe hulle vir waarborgbreuk slegs 'n kontraktuele remedie beskikbaar gestel het en vir alle praktiese doeleindes sy historiese antesedente vergeet het. Hy sluit sy artikel af:

> "But if the judges are to indulge in an activity, namely judicial legislation, which the orthodox regard as sinful, then it may be as well if the illegitimate fruits of that creativity are made respectable. No better way exists than by christening them with the historically hallowed name of a doctrine which might, if the courts had taken a slightly different doctrinal course, have done the work which *Hedley Byrne* could and should embrace in the future."[74]

Millner[75] betwyfel die korrektheid van die hof se standpunt dat nalatige woorde nie op dieselfde "neighbour principle" as nalatigheid in dade beslis kan word nie. Hy is van mening dat redelike voorsienbaarheid in sulke gevalle net so goed toepassing kan vind. Millner lê nie veel klem op die "assumption of responsibility" nie en meen dat die "special relationship" ten doel het om gevalle van terloopse vraag en antwoord te onderskei van daardie gevalle waar daar aanspreeklikheid behoort te wees. Sy standpunt in hierdie verband is:

> "It would be preferable therefore to treat all these attempts to hedge around the liability for careless mis-statements as no more than guides for the application of the reasonable man test to facts of this order."[76]

Die omstandighede is van so 'n aard dat die redelike man sal besef dat daar op sy woorde gereageer sal word of ten minste waarskynlik gereageer sal word.[77]

Dit is duidelik dat die hof in *Hedley Byrne* versigtig was om nie die tradisionele houding van die Engelse howe oor aanspreeklikheid vir nalatige wanvoorstelling sonder meer oorboord te gooi nie. Die hof is ook nie bereid om nalatige woorde op dieselfde lyn as nalatige handelinge te plaas nie. Die hof lê myns insiens ook te veel klem op die "assumption of responsibility". Uit die beslissing is dit duidelik dat die howe geen probleme het om 'n "special relationship" in geval van professionele lui te konstrueer nie. Honoré wil aanspreeklikheid dan ook tot sodanige persone beperk.

(*word vervolg*)

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[73] 161.
[74] 166.
[75] 38.
[76] 39.
[77] 40.

Judisiële Kennisname van Bantoereg en -gewoonte

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SUMMARY

This article gives a summary of judicial notice of Bantu law and custom in our various courts. The writer refutes the statement that Bantu law is foreign law and thus has to be proved before our courts. This statement no longer reflects the current practice of our courts especially in the light of the fact that it is based on the case *Rowe v Asst Magistrate, Pretoria* – a 1925 decision.

Referring to the jurisdiction of the various courts concerned, statutory Bantu law, the extent to which judicial notice of Bantu law and custom is taken in our various courts, the notable volume of written sources in this respect and the increasing use which is being made of assessors who have a specialised knowledge of Bantu custom in a given area, the writer contends that it is fallacious to regard Bantu law as being foreign law since it has become part and parcel of South African law.

INLEIDING

Volgens Schmidt[1] het Bantoereg en -gewoonte vir ons gewone howe die geaardheid van vreemde reg, sodat bewys daarvan gelewer moet word. As gesag vir sy stelling siteer hy die saak *Rowe v Assistant Magistrate, Pretoria*.[2] In die howe wat ingestel is om Bantoereg en -gewoonte toe te pas, is die saak anders gesteld. Dáár kan geregtelik kennis geneem word van Bantoereg en -gewoonte, behalwe as die hof nie oor die nodige kennis van 'n besondere aspek van die reg of gewoonte beskik nie. Dan moet getuienis gelei word.[3] Schmidt wys voorts daarop dat as daar twyfel is oor 'n regsreël of gewoontereël getuienis daaroor gelewer moet word. As dit nodig is, sal die hof die saak terugverwys vir getuienis.[4]

STATUTÊRE BANTOEREG

Geregtelike kennisname van Bantoereg het egter meer fasette as dié wat deur Schmidt genoem word. In die eerste plek is daar wetgewing ingevolge waarvan Bantoereg deel van ons landsreg geword het. Seymour[5] noem as voorbeeld die feit dat sommige Bantoeboedels ingevolge Wet 38 van 1927[6] volgens Bantoereg vererf. Nog 'n bekende voorbeeld van statutêre

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[1] *Die Bewysreg* (1972) 154. Sien ook Hoffmann *The South African Law of Evidence* (2e uitg 1970) 299.

[2] 1925 TPD 361.

[3] *Ex parte Minister of Native Affairs: In re Yako v Beyi* 1948 1 SA 388 (A) 394–5.

[4] *R v Dumezweni* 1961 2 SA 751 (A); *S v Ngidi* 1969 1 SA 411 (N).

[5] Seymour *Bantu Law in South Africa* (3e uitg 1970) 34.

[6] a 23 Bantoe-administrasie Wet 38 van 1927.

Bantoereg is die Natalse Wetboek van Bantoereg.[7] Dit is 'n mengsel van Zoeloe privaat-, straf- en prosesreg. Die strafbepalings, onder andere, is afdwingbaar in die gewone howe. Die Wetboek bevat baie gevalle wat slegs Bantoeregtelike misdade is en beklee dit met statutêre sanksies. Seduksie en owerspel is misdade maar kan ook aanleiding gee tot siviele eise.[8]

In strafsake is alle howe ingevolge die Strafproseswet[9] verplig om geregtelike kennis te neem van enige wet of goewermentskennisgewing of van enige ander aangeleentheid wat in die Staatskoerant of Offisiële Koerant van 'n provinsie afgekondig is. Die Wet op Bewysleer[10] bevat 'n soortgelyke bepaling ten opsigte van siviele sake.

HOWE MET APPÈLJURISDIKSIE IN BANTOESAKE

In die tweede plek het gewone howe appèljurisdiksie in sake wat hulle oorsprong in spesiale howe gehad het. In strafsake van kapteinshowe is daar byvoorbeeld 'n reg van appèl na die Bantoesakekommissarishof en daarvandaan na die betrokke afdeling van die hooggeregshof. Aangesien die kaptein se jurisdiksie hoofsaaklik beperk is tot Bantoeregtelike misdade, sal die appèlhowe verplig wees om op hulle beurt Bantoereg toe te pas. In siviele sake kan daar met verlof van die Bantoe-appèlhof na die appèlafdeling van die hooggeregshof ge-appelleer word.[11] Die minister van Bantoeadministrasie en -ontwikkeling kan ook die appèlafdeling vra om uitsluitsel te gee oor 'n regsvraag waaroor hy twyfel het.[12] In gewone strafsake, byvoorbeeld in die geval van oortredings van die Natalse Wetboek van Bantoereg, word in die gewone gang van sake ge-appelleer na die provinsiale afdeling waarin die hof geleë is.

KONKURRENTE JURISDIKSIE VAN HOOGGEREGSHOF

In die derde plek het die verskillende afdelings van die hooggeregshof konkurrente jurisdiksie met Bantoesakekommissarishowe. Die Transvaalse, Kaapse en Oos-Kaapse afdelings van die hooggeregshof het beslis dat hulle jurisdiksie het in sake tussen Bantoe en Bantoe.[13] Algemeen gesproke kom hierdie beslissings daarop neer dat hierdie drie afdelings van die hooggeregshof oorspronklike, konkurrente jurisdiksie het met Bantoesakekommissarishowe. Dit ly geen twyfel dat die ander afdelings soortgelyke beslissings sou gee as hulle daartoe genoop word nie.

In Natal is die posisie dat die eertydse naturelle hoërhof (Native High Court) eers beklee was met regsmag in sg "native cases". In 1927 is die appèljurisdiksie van die naturelle hoërhof oorgedra na die Bantoe-appèlhof en die oorspronklike jurisdiksie daarvan na die Natalse provinsiale afdeling.[14]

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[7]Vervat in die bylae tot proklamasie R195 van 1967.
[8]aa 137, 138 en 162 van die Wetboek.
[9]a 251 van Wet 56 van 1955.
[10]a 5 van Wet 25 van 1965.
[11]a 18 van Wet 38 van 1927.
[12]a 14 van Wet 38 van 1927.
[13]*Seneloe v Thloloe & Ors* 1935 TPD 290; *Sigcau v Sigcau* 1941 CPD 71; *Ntisana NO v Ntisana* 1944 EDL 69.
[14]a 17(1) van Wet 38 van 1927.

In *Mabaso v Mabaso*[15] het die Natalse hof beslis dat dit in siviele gedinge tussen Bantoe en Bantoe, met inbegrip van gedinge waarby Bantoereg betrokke is, jurisdiksie het as hof van eerste instansie.

WYSE VAN GEREGTELIKE KENNISNAME

Geregtelike kennisname van Bantoereg en -gewoonte onder bogenoemde omstandighede kan soos volg geskied:

(a) In siviele howe wat ingestel is om Bantoereg en gewoontereëls toe te pas

Hierdie howe word statutêr veroorloof om Bantoereg en -gewoonte toe te pas.[16] Hulle kan Bantoereg en -gewoonte toepas sonder bewys daarvan. Hiervan het ar Schreiner in *Ex parte Minister of Native Affairs: in re Yako v Beyi*[17] gesê dat een van die voordele van die instelling van Bantoesakekommissarishowe die feit is dat sake waar Bantoegebruike betrokke is, verhoor kan word deur deskundiges wat nie vereis dat die bestaan van 'n gewoonte in elke geval bewys moet word nie. Waar die regterlike beampte nie die nodige kennis het nie moet getuienis van die gebruik gelewer word. As daar op appèl onduidelikheid is oor die regsreël met betrekking tot 'n besondere onderwerp sal die appèlhof die saak terugverwys vir getuienis.[18]

Hiermee is in beginsel nie fout te vinde nie. Daar moet egter daarop gewys word dat dit op die veronderstelling berus dat die regterlike beamptes gespesialiseerde kennis van Bantoereg en -gewoonte het. Of dit altyd wel so is, val te betwyfel, behalwe in die geval van howe van kapteins en hoofmanne. Dit kan aanvaar word dat laasgenoemde weens hulle agtergrond en ervaring eerstehandse kennis van Bantoereg en -gewoonte het. In die geval van die ander howe, of dit howe van eerste instansie of appèlhowe is, mag dit wees dat die betrokke regterlike beamptes ten spyte van 'n formele kwalifikasie en aanstelling nie vertroud is met Bantoereg en -gewoonte nie. Kennis van Bantoereg is geen statutêre vereiste vir aanstelling op die regbank nie en enigiemand kan 'n diploma of graadkwalifikasie vir aanstelling verwerf sonder formele studie van Bantoereg.[19] Hierdie opmerkings geld nie net ten opsigte van heeltydse Bantoesakekommissarisse nie maar ook ten opsigte van landdroste wat aangestel is as Bantoesakekommissarisse. 'n Persoon kan selfs vorder tot regter van die appèlafdeling van die hooggeregshof sonder enige formele studie van Bantoereg.[20]

Afrikanisering van dié regbanke sal nie die probleem oplos nie. Die intellektuele swartes wat op die regbank beland, het nie noodwendig 'n meerdere kennis van Bantoereg nie omdat baie van hulle uit stedelike ge-

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[15] 1946 NPD 183. Sien ook *Njapa v Njapa* 1932 NPD 421.
[16] a 11(1) van Wet 38 van 1927.
[17] supra 384.
[18] *Msonto v Dingindawo* 1927 AD 531.
[19] Die vereistes in a 2 van Wet 38 van 1927 vir aanstelling as Bantoesakekommissaris maak geen melding van Bantoereg of -gewoonte nie.
[20] Die leergange vir regskursusse aan Suid-Afrikaanse universiteite, behalwe die Universiteit van Port Elizabeth en die universiteite vir Swartes, dui daarop dat die grade BA LLB verwerf kan word sonder Bantoereg.

biede kom en heeltemal ontstam het, sodat hulle stamgebruike nie meer navolg nie. Inteendeel, skrywer se waarneming van swart regstudente die afgelope sewe jaar was ten effekte dat hulle kennis van hulle eie regstelsel ver tekortskiet. Weliswaar het diegene wat van landelike gebiede afkomstig is darem 'n voorsprong op die blankes deurdat hulle hulle eie mense se tradisionele gewoontes en lewenswyse beter ken.[21]

(b) Strafsake in Bantoesakekommissarishowe

Waar 'n Bantoesakekommissaris 'n strafhof hou, is dit 'n gewone hof en nie 'n spesiale hof wat geskep is vir die toepassing van Bantoereg en -gewoonte nie.[22] So 'n hof word geag 'n landdroshof te wees. In sake wat voor so 'n hof dien, sou die Bantoesakekommissaris nie geregtelik kennis kan neem van Bantoereg en -gewoonte nie.

In die geval van appèlle in strafsake van kapteinshowe is dit anders gesteld. Daar kan die Bantoesakekommissaris geregtelik kennis neem van Bantoereg.[23] In *S v Phokoane*[24] het die hof aangedui dat dit wenslik is dat die Bantoesakekommissaris wat 'n appèl verhoor in die oorkonde sal aanteken en aan die partye sal oordra wat hy beskou as die Bantoeregsreël wat op die geval van toepassing is. Die volgende opmerkings van hr Steyn op bladsy 756 van die *Dumezweni*-saak is insiggewend:[25]

> "The law to be applied by the commissioner in such cases, is part of the law by which the daily lives of the litigants before him are in fact regulated and are by statute allowed to be regulated. It is not foreign law or anything in the nature thereof, but part of the law of the area within his jurisdiction which he is called upon to apply with a frequency unassociated with foreign law."

(c) In die provinsiale en plaaslike afdelings van die hooggeregshof

Weens die feit dat hierdie howe, soos hierbo aangedui, konkurrente jurisdiksie het met Bantoesakekommissarishowe, ontstaan die vraag of dit heeltemal korrek is om te sê dat Bantoereg vir hulle vreemde reg is. Die beslissing in *Rowe v Assistant Magistrate Pretoria* is in 1925 gelewer voor artikel 17(1) van Wet 38 van 1927 op die wetboek verskyn het. Sedert 1927 het die Natalse provinsiale afdeling die oorspronklike jurisdiksie wat die naturelle hoërhof in sg "native cases" gehad het, oorgeneem. Die Natalse provinsiale afdeling sou dus as opvolger van die naturelle hoërhof geregtelik kan kennis neem van Bantoereg. Dit het dan ook gebeur in *Mfeka v R*.[26] Daar het r p Feetham gesê:

> "But we deal with this case on the assumption that there is a practice for Native medicine men to employ one or more apprentices known as *izinhlaka* who do whatever the medicine man or *inyanga* himself might have done."

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[21]Vgl Antony Allott *New Essays in African Law* (1970) 255.
[22]Ingevolge a 9(1) van Wet 38 van 1927 kan 'n Bantoesakekommissaris ten opsigte van 'n misdryf deur 'n Bantoe gepleeg 'n hof hou.
[23]*R v Dumezweni* 1961 2 SA 751 (A); *S v Phokoane* 1962 2 SA 446 (T); *S v Ngidi* 1969 1 SA 411 (N).
[24]supra.
[25]supra.
[26]1939 NPD 118.

Ten minste een ander hof het 'n uitspraak gelewer wat op Bantoereg gebaseer was sonder dat getuienis daaroor aangehoor is. In *R v Mgwali*[27] het die hof sy beslissing gelewer op grond van die feit dat verjaring onbekend is aan die Bantoereg. As die hof nie geregtelik wou kennis neem van Bantoereg nie, sou die saak terugverwys moes word vir getuienis.

Die Transkeise hoërhof word by wetgewing gemagtig om Bantoereg en -gewoonte toe te pas.[28] Daardie hof sou dus sonder voorbehoud geregtelik kon kennis neem van Bantoereg en -gewoonte, onderhewig aan die beperking dat 'n regsreël of gewoonte wat aan die hof onbekend is, bewys moet word.

(d) In die algemene praktyk

Volgens skrywer se persoonlike waarneming is dit daaglikse praktyk in alle howe dat geregtelike kennis geneem word van Bantoereg en -gewoontes sonder dat regsprekende beamptes dit as vreemde reg behandel. Daar sal in 'n hof bv verwys word na die feit dat 'n Bantoe getroud is volgens Bantoereg en -gewoonte of dat hy lobolo moet betaal. Geen hof sal die verrigtinge onderbreek om getuienis aan te hoor oor dié gebruike nie. In verkragtingsake word soms verwys na die gebruik van *ukumetsha* of *ukuhlobonga* ('n vorm van pre-maritale geslagsgemeenskap).[29] Terme soos kraal, kraalhoof, *kgotla, ibandla* en so meer word vryelik gebruik. Weliswaar is die misdade of eisoorsake nie altyd gebaseer op dié begrippe nie, maar vir 'n beoordeling van die feite in geskil is dit tog nodig dat die betrokke regterlike beamptes bewustelik moet kennis neem daarvan. Wat in sodanige gevalle gebeur, word treffend geïllustreer in die saak van *Mokwena v Laub.*[30] In daardie saak het die hof sonder meer geregtelik kennis geneem van die feit dat Bantoehuwelike poligaam is. Daarvan sê r Solomon op bl 65:

> "The marriage between plaintiff and deceased took place in Basutoland, which, of course, is outside the Union, but I think the court must take notice of the fact that the Basuto tribe is described, no less than other tribes of Southern Africa in 1910 TPD 964, as a tribe in which polygamous marriages are the custom, although no evidence of the marriage is led, and the court is entitled to take notice of the fact that this is customary, and I hold that there is no need to have evidence that such marriage is polygamous . . ."

In hierdie saak is die beslissing gebaseer op die feit dat dit 'n poligame huwelik was.

Die benadering in die *Mokwena*-saak is nie geïsoleerd nie. In *S v Bernardus*[31] op bl 306 het ar Holmes aangedui dat die howe geregtelik kan kennis neem dat Bantoes van jongsaf leer om kieries met bedrewenheid te hanteer. Die regter het gesê:

> "Sticks of various kinds are part of the traditional way of life of rural Bantu, and

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[27]1961 1 SA 51 (OK).
[28]a 38 van proklamasie R173 van 1973.
[29]Sien EJ Krige *The Social System of the Zulus* (2e uitg 1950) 105–6.
[30]1943 WPA 63.
[31]1965 3 SA 287 (A). Schmidt a w 142–3 behandel hierdie en ander gevalle as judisiële kennisname van rasse-eienskappe en wys daarop dat die howe dié gevalle met versigtigheid bejeën.

> from early youth the males learn to use them with some skill, for example in games, in hunting, and in fighting. In hunting, a stick is often thrown at the quarry, such as hares. I think that all this is of such general common knowledge that judicial cognisance may be taken of it. To hold otherwise would be to contain the judiciary in an ivory tower without windows."

Hier het die regter kennis geneem van 'n Bantoegewoonte as bekende feit en nie as regsreël nie.

BANTOEREG NIE "VREEMDE" REG NIE

Bantoereg is nie vreemde reg in dieselfde sin as wat bv Duitse of Franse reg *vis-a-vis* Suid-Afrika vreemde reg is nie. Hier het ons 'n sonderlinge situasie wat nie vergelykbaar is met die verhouding tussen soewerein onafhanklike state nie. Bantoereg is geïntegreerd in die Suid-Afrikaanse gemeenskap en regstelsel. Daar is byvoorbeeld die statutêre Bantoereg waarvan die gewone howe geregtelik kennis moet neem. Ook in gevalle waar die gewone howe appèlle van spesiale howe verhoor, kan en moet die gewone howe geregtelik kennis neem van Bantoereg. Waar die gewone howe konkurrente jurisdiksie het met Bantoesakekommissarishowe behoort hulle myns insiens ook judisieel te kan kennis neem van Bantoereg. Allott[32] wys daarop dat die situasie nie analoog is aan die Engelse reg met betrekking tot plaaslike gebruike nie en dan gaan hy voort:

> "If the analogy is not to be made with local custom in England, with what is it to be made? The answer given by some colonial courts was with foreign law: 'As native law is foreign law, it must be proved as any other fact.' This dictum of Francis Smith, J, overstated the case; customary law was not foreign law, though its rules might have been unknown to the judges who had to apply them, nor is the proof of customary law identical with that of other facts."

Die uitspraak in *Rowe v Assistant Magistrate Pretoria* supra was ook 'n "overstatement". Die uitgangspunt in hierdie uitspraak en ander wat daarop voortgeborduur het, is foutief. Die bewys van Bantoereg en -gewoonte was nie die oplossing nie. In *Ngcobo v Ngcobo*[33] het ar Wessels hierdie gevoel weergegee toe hy in 'n obiter opmerking gesê het dat die bewys van Bantoereg en -gewoonte die toepassing daarvan onuitvoerbaar sal maak, omdat sake te duur en uitgerek sal word. Daar is derhalwe spesiale howe geskep waar Bantoereg en-gewoonte nie bewys hoef te word nie, maar die era van spesiale howe word iets van die verlede, veral in die onafhanklik wordende Bantoetuislande.

Allott[34] sê van die huidige situasie in sommige Afrikalande:

> "The ascertainment of customary law as if it were a matter of fact or of foreign law to be proved by evidence has many practical disadvantages; it may work injustice between the parties, and it is juristically inelegant. In the early formative stage of customary law as applied by the courts, the proof of customary law as fact may be an inescapable necessity; but the goal must be to place customary law on an equality with the rest of the body of law that the courts are empowered to administer, ie apt to be judicially noticed as part of the law of the land."

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[32] aw 258.
[33] 1929 AD 233 236.
[34] aw 277–8.

GESKREWE BRONNE

Ons is in die gelukkige posisie dat ons oor heelwat geskrewe bronne beskik om te bepaal wat die reg is. Daar is handboeke, verslae en gerapporteerde beslissings van die Bantoe-appèlhowe en die ou naturelle hoërhof. Beslissings het oor die jare al aangegroei tot 'n bruikbare hoeveelheid. Ek kan geen rede sien waarom *alle* howe dit nie kan beskou as presedentereg nie. Weliswaar is die beslissings streeksgebonde, maar juis daarin lê ook hulle grootste waarde. Mens kan die reg van die betrokke groep daarin vind. Waar sub-groepe se reg en gebruike verskil sou daar in elk geval getuienis gelewer moet word of van assessore gebruik gemaak moet word. Bantoesakekommissaris- en Bantoe-appèlhowe kan alreeds Bantoe-assessore as raadsmanne gebruik.[35]

ASSESSORE

Na my mening behoort alle howe meer gebruik te maak van swart assessore, nie net om te help met 'n beslissing oor die feite in geskil nie, maar veral om die regterlike beampte van advies te bedien met betrekking tot Bantoereg en -gebruike. Ferreira[36] noem 'n hele rits Bantoegewoontes en -houdings wat die vertolking en evaluasie van getuienis kan beïnvloed. Hy sê dat landdroshowe nie geregtelik daarvan kennis kan neem nie. Is die aangewese uitweg dan nie dat lede van die volksgroep wat in die betrokke distrik woonagtig is self die getuienis in die lig van hulle kennis van die gewoontes evalueer nie?

Assessore kan ook 'n belangrike rol vervul om die howe te help om die reg aan te pas by veranderende sosiale omstandighede. Die seduksie van 'n maagd gee in 'n tradisionele Zoeloegemeenskap byvoorbeeld aanleiding tot 'n besondere hewige reaksie. Die meisie sal ondersoek word om vas te stel of dit waar is en volgens Krige[37] sal die moeders en dogters van die omgewing op haar spuug, haar vloek en wreed slaan. As die seun wat verantwoordelik is vir die daad nie uit hulle hande gehou word nie, kan hulle hom lelik seermaak. Veronderstel 'n saak van aanranding of 'n eis vir seduksie sou voor 'n hof dien. Dan sal dit belangrik wees om te weet of daar in die betrokke gebied nog gereageer word soos Krige dit beskrywe. Sou die Zoeloe-inwoners van Soweto ook so reageer? Assessore wat saam met die mense lewe sal seker beter as professionele regslui weet hoe daar tans onder sulke omstandighede in die betrokke gebied opgetree word.

OPTEKENING OF "RESTATEMENT"

Een of ander vorm van optekening of "restatement" van hedendaagse geldende Bantoereg sou van onskatbare waarde wees om die reg te vind. Dit moet egter gegiet wees in 'n vorm wat dit vir die Suid-Afrikaanse geskoolde juris sinvol en bruikbaar maak. Volkekundige werke het vir die juris beperkte waarde. Hy sal telkens die volkekundige se relaas weer self moet ver-

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[35]a 19 Wet 38 van 1927.
[36]JC Ferreira *Strafprosesreg in die Landdroshof* (1967) 35–37.
[37]aw 157–8.

werk om vas te stel wat die reg nou eintlik is. Al word volkekundige[38] werke soms as gesaghebbend in die howe aangehaal, is daar in die regspraktyk 'n groter behoefte aan regshandboeke uit die pen van regsgeleerdes. Regsgeleerdes is per slot van sake slagoffers van hulle opleiding. Hulle sien die reg in ou gevestigde kompartemente en hanteer dit met begrippe en woorde wat vir hulle sin maak.

ONAFHANKLIKE TUISLANDE

Wanneer 'n tuisland soos die Transkei 'n soewerein onafhanklike staat word, sal die Transkeise reg in die ware sin van die woord vreemde reg word. Aangesien die Suid-Afrikaanse en Transkeise bevolkings tot 'n groot mate geïntegreerd leef en hul ekonomieë ook geïntegreerd is, sal daar ongetwyfeld baie hofsake wees waarin burgers van die twee lande betrokke is. Vreemde reg moet bewys word deur die getuienis van 'n deskundige.[39] Dit sal 'n groot beslommernis afgee as daar telkens deskundige getuienis oor die onderskeie lande se reg in die onderhawige gedinge gelewer moet word. Dit sou miskien gerade wees om alle howe in albei lande by wetgewing te magtig om geregtelik kennis van mekaar se reg te neem. Die Transkei sal seker in elk geval sy eie howe statutêr magtig om geregtelik kennis te neem van gewoontereg. Baie Afrika-lande doen dit.[40]

'n Ander oplossing sou wees om die bestaande Bantoesakekommissarishowe onder 'n ander naam te laat voortbestaan met bevoegdheid om in sake waarin regskonflikte van verskillende lande bestaan geregtelik kennis te neem van vreemde reg. So 'n hof sou dan spesialiseer in die regstelsels van die verskillende onafhanklike state in Suider-Afrika. Dit sou moontlik beteken dat die hof se jurisdiksie nie beperk kan word tot sake waarin slegs Bantoes (of Transkeise, Ciskeise ens burgers) betrokke is nie, want konflikte kan ook ontstaan in gedinge tussen blanke Suid-Afrikaanse burgers en burgers van die ander staat. Kennis van wat tans bekend staan as Bantoereg sal onontbeerlik wees vir die oplossing van sommige geskille. Veronderstel byvoorbeeld 'n Transkeise burger sou beeste ingevolge 'n *ngoma*-ooreenkoms by 'n Suid-Afrikaanse blanke burger uitplaas. As die Transkeise burger die Suid-Afrikaanse burger in enige hof ookal dagvaar vir vee wat gevrek of weggeraak het en nie gerapporteer is nie, sal die reg met betrekking tot *ngoma*-kontrakte toegepas moet word.[41] □

[38]Bv Schapera *A Handbook of Tswana Law and Customs* (1970).
[39]*Schneider v Jaffe* 1916 CPD 696.
[40]Allott a w 290 e v.
[41]Die *ngoma*-kontrak word behandel in Seymour a w 314 e v.

Supervening Impossibility of Performance and Changed Circumstances in German Law

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OPSOMMING

Dit wil voorkom asof die middeleeuse clausula rebus sic stantibus-leerstuk gedurende die agtiende eeu heeltemal in Wes-Europa verdwyn het om weer later in Frankryk en Duitsland te herleef, grootliks as gevolg van die omwentelinge wat die eerste wêreld-oorlog in dié lande teweeggebring het. Die skrywer toon aan die hand van die *BGB* en Duitse hofbeslissings, aan dat die leerstuk van onmoontlikwording van prestasie in Duitsland uitgebrei is om ook gevalle te dek waar prestasie, hoewel fisies nog moontlik, volgens verkeersmaatstawwe onmoontlik geword het, maar dat hierdie leerstuk nie kon tred hou met al die gevalle van ontbering wat voortgevloei het uit die snel ekonomiese veranderinge gedurende die twintigerjare nie. Dit het gelei tot die leerstuk van "veranderde omstandighede" wat eintlik 'n herlewing was van die middeleeuse clausula in moderne vorm. Dit het verder ontwikkel in 'n eis om aanpassing (*Ausgleichanspruch*) en die idee van *Aequivalenz* wat aan die Duitse howe die werktuie verleen het vir die judisiële herwaardering van geldelike skulde. Dit het geblyk 'n nuttige toevoeging tot die leerstuk van onmoontlikwording te wees en daar word aan die hand gedoen dat dit in die huidige onsekere tye van inflasie en wisseling van geldwaardes, ons aandag verdien.

The clausula rebus sic stantibus doctrine of medieval law had a "long and interesting history" in Europe.[1] Thomas Aquinas[2] conceived the idea of this clause which he maintained was to be implied in every contract to the effect that the obligations assumed thereunder were only to hold good as long as the circumstances relevant to performance which existed at the time of contracting remained unchanged, thus reconciling notions of justice with the canonists' ideas of the sanctity of a promise. The clausula was "carried along on the main stream of civil law doctrine until at least the time of Grotius",[3] as we have seen[4], particularly as a result of the work of the glossators and commentators. It does not, however, appear to have been favourably received by the Roman–Dutch institutional writers and during the eighteenth century it seems to have disappeared entirely,[5] only to be

[1]John P Dawson "Effects of Inflation on Private Contracts: Germany 1914–1924" 1934 *Michigan Law Review* 176 n 21.

[2]*Summa Theologica* 2 2 qn 110 art 3.

[3]Dawson op cit.

[4][Refer to earlier article].

[5]Knut Rodhe "Adjustment of Contracts on Account of Changed Conditions" 1959 *Scandinavian Studies in Law* (Sweden) 165; Dawson op cit; E J Cohn "Frustration of Contract in German Law" 1946 *Journal of Comparative Legislation and International Law* Third Series Part IV 20 (Refer to earlier article also).

revived again in both France and Germany by legal doctrine and court decisions, chiefly as a result of the post-world war I upheavals in those countries.

The clausula, although it found its way into some of the earlier codifications,[6] was generally rejected[7] on the ground that usually the facts do not justify the implication of such a tacit condition and that for the most part, therefore, it is a pure legal fiction, not based on any rule of law.[8] It was also very vague.[9] It was accordingly reformulated in the middle of the nineteenth century[10] by Professor Windscheid in his theory of *Voraussetzung* (underlying contractual assumption)[11] which, as the name of his work implies, was based largely on Roman law texts.[12] Windscheid's theory was in effect that whenever a party to a contract was in a position to conclude from the circumstances of the transaction that an underlying assumption was considered by the other party to be fundamental to the contract, that other party could refuse performance (or, if he had already performed, recover it) if his basic assumption ceased to be valid.[13]

The clausula and the notion of *Voraussetzung* were rejected by both of the drafting commissions which prepared the *Bürgerliches Gesetzbuch* (*BGB*)[14]

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[6] *Code Maximilianeus Bavaricus Civilis* (1756) part 4 ch 15 s 12 and the Prussian *Allemeines Landrecht* I 5 377–379; Cohn op cit 20.

[7] See eg the Swiss cases of *Rogenmoser v Liliengund A–G, Bundesgericht* (I *Zivilabteilung*) 10 Oct 1933 59 (II) SBG 372; *Segessemann & Cie v Dreyfus Fréres & Cie Bundesgericht* (*1re Section civile*) 4 May 1922 48 (II) SBG 242; *Michael Weniger-Weiher-Legat v Wuth Bundesgericht* (II *Zivilabteilung*) 10 Sept 1919 45 (II) SBG 386, and the German case of *B v F Reichsgericht* Third Civil Senate 8 July 1920 99 ERG (Z) 258; cf *SP Co v F Co Reichsgericht* (III *Zivilsenat*) 21 Sept 1920 100 ERG (Z) 129 and *Marseiwerke v H Reichsgericht* (II *Zivilsenat*) 29 Nov 1921, 103 ERG (Z) 177 both of which recognise it. See also *RGZ* vol 121 133, where the clausula rebus sic stantibus doctrine is treated as having the same meaning as the doctrine of *Geschäftsgrundlage* (see Cohn *op cit* 22 n 43) and *AGR v Gewerkschaft C Reichsgericht* (VII *Zivilsenat*) 4 May 1923 107 ERG (Z) 140, which also mentions it without recognising it. (The cases mentioned are reported in Schlesinger *Comparative Law* and Arthur L von Mehren *The Civil Law System*).

[8] Hans Smit "Frustration of Contract: A Comparative Attempt at Consolidation" 1958 *Columbia Law Review* 289. This does not mean that the present writer necessarily agrees with the criticism for legal fictions do become rules of law and in fact I believe this to be the case in relation to "frustration" in English law.

[9] As Cohn points out (op cit 20) in its original form the clausula "lacked both a proper legal justification and a precise definition of its requirements and its results".

[10] Windscheid's *Die Lehre des römischen Recht von der Voraussetzung* (1850) published in 1852; see Cohn op cit 20 and Robert A Riekert "The West German Civil Code, its Origin and its Contract Provisions" 1970 *Tulane Law Review* 86, but Rohde (op cit 165) says it was published in 1850.

[11] Sometimes called "contractual requirement" (Cohn op cit 20) or "pre-supposition" (Dawson op cit 186 n 48). According to Windscheid this was an undeveloped condition (*unentwickelte Bedingung*), differing from a condition because it was not an express term of the contract, although requiring compliance with it as a basis for performance, showing its great similarities to the implied condition of the clausula (see Smit op cit 297.)

[12] Dawson op cit 186 n 48.

[13] Cohn op cit 20 who, however, expresses it somewhat differently.

[14] *B v F Reichsgericht* (III *Zivilsenat*) 8 July 1920 99 ERG (Z) 258; Dawson op cit; Cohn op cit; von Mehren op cit 725. Although a relaxation of contractual terms, where conditions had subsequently changed, was allowed in certain exceptional cases (see especially sections 321 and 610 of the *BGB*) the drafting commissions had made it clear that these

which came into force on 1 January 1900.[15] (The re-introduction of the clausula was however urged by Cohen in 1916, under the pressure of war conditions[16] and was later revived in a modified form, principally as the result of the writings of Krückmann and Oertmann, as we shall see later).

At the beginning of the twentieth century, then, German law stressed the principle of pacta sunt servanda subject only to the relieving effects of absolute supervening impossibility of performance (*Unmöglichkeit*) provided for in the *BGB*.

Of the various sections of the *BGB* which deal with impossibility,[17] section 275 is the most important for our purposes, being the general provision relating to supervening impossibility. It reads:

> "The debtor is released from his duty to perform if his performance becomes impossible as a result of a circumstance occurring without his fault[18] after the obligation was incurred."

Because the section equates inability with impossibility[19] it is clear that "supervening impossibility automatically discharges the debtor, provided he is not responsible[18] for it, no matter whether performance is impossible for him alone or for everybody".[20]

The *BGB*, however, does not define impossibility,[21] that being left to the courts and the commentators. The *BGB* merely envisages physical impossibility[22] and doubtless legal impossibility.[23] The commentators,

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exceptions were not to be taken as the acceptance of a general principle (Dawson op cit 177). See, however, n 30 below. Windscheid's theory was rejected by most of his contemporaries (Dawson op cit 186 n 48) and was replaced in Germany by the *Geschäftsgrundlage* concept (see below) although it still finds acceptance in Scandinavia (Rohde op cit 166).

[15] Riegert op cit 49. Wieacker is of opinion that the basic concepts of the *BGB*, including impossibility of performance, were the product of the jurisprudence of reason developed during the 17th, 18th and 19th centuries and were not the product of Roman Law ("*Privatrechtsgeschichte der Neuzeit unter besonderer Berücksichitigung der deutschen Entwicklung*" (2nd ed 1967) 249 n 1, 374 5 n 1).

[16] Dawson op cit.

[17] ss 275, 279–283, 287, 306–08, 319–25 (Comments, "Commercial Frustration: A Comparative Study" 1967 *Texas International Law Forum* 292; von Mehren op cit 725).

[18] Defined as "bad intention or negligence" on the part of the debtor or anyone for whom he is responsible (Cohn op cit 15; Michael D Aubrey, "Frustration Reconsidered – Some Comparative Aspects" 1963 *International and Comparative Law Quarterly* 1177.)

[19] See Riegert op cit 58 n 62.

[20] Cohn op cit 15; Dawson op cit 181; but see Comments op cit 294 n 86 where the term "objective inability to perform" may be employed in a sense different to that generally understood in German Law, see Rohde op cit 160 n 2. In *C v M Reichsgericht* (II *Zivilsenat*) 21 March 1916 88 ERG (Z) 172 the judge pointed out, however, that: "A subjective inability does not free the debtor from an obligation involving a type (*Gattungsschuld*) so long as performance from this type is possible". (*BGB* section 279; Cohn op cit 15). "Absolute" or "objective" impossibility is here used to refer to a performance which is impossible for anyone and "subjective" or "relative" impossibility as a performance of which the debtor alone is incapable.

[21] Comments op cit 284, described by Cohn op cit 16 as a "most conspicuous deficiency".

[22] Aubrey op cit 1177.

[23] In the sense of performance being legally prohibited (Aubrey op cit 1177; Cohn op cit 16).

following a number of nineteenth century writers, argued that a performance which is so highly impractical as to be impossible in the ordinary business sense must also be regarded as impossible for the purposes of the section. Later the *Reichsgericht* endorsed this view[24] and also added that a temporary impossibility of performance could also amount to an impossibility within the section.[25]

In connection with impracticability the case of *C v M*[26] should be contrasted with *B v Bremer Rolandmuehle*[27].

In *C v M* the plaintiff in July 1914 bought from the defendant 5 000 kilograms of two special kinds of English tin to be delivered to plaintiff in five instalments between August and December 1914 at prices ranging from 301 to 309 marks for 100 kilograms. Notwithstanding the outbreak of war, the defendant delivered two of the 1 000 kilogram instalments to the plaintiff in August and September but refused to make further deliveries on the ground that it was no longer possible to import the tin through Holland and consequently the price had risen to about 650 marks for 100 kilograms. The plaintiff purchased tin from other sources in November and December and sued for damages being the difference between the contract price and the price paid by him. He obtained judgment which was confirmed on appeal.

The court said the supply of tin was not technically impossible since English tin was available though at more than double the contract price. (It distinguished the case of *B v Bremer Rolandmuehle* on the grounds that in that case the commodity sold had entirely disappeared from the market). It held that a mere increase in prices did not amount to impossibility as that would merely shift the loss from the seller's shoulders on to those of the purchaser. Nor could the notion of "good faith" in performance (contained in section 242 of the *BGB*)[28] be replied upon as, if the defendant had already purchased the tin at the time of his contract with the plaintiff, he could suffer no loss whereas if he was selling a commodity he had not yet bought, he was in effect gambling on a "subsequent fall in the market" and so could not complain if it rose against him.

In *B v Bremer Rolandmuehle*, on the other hand, plaintiff had purchased a considerable amount of the *Eichenlaub* brand of cotton seed product from the defendant in December 1901 for delivery to the plaintiff in instalments from that December until the following May. This brand was only produced by the B & H Company at its special mill in Hamburg and in January 1902, this mill burned down together with all stocks of this brand stored there. On the night of the fire a considerable amount of this brand of cotton seed had been loaded on ships going up the Elbe to supply other customers of the mill at Magdeburg. It was held that "performance from a class of goods is impossible not only when the whole class disappears, but also when it has

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[24]See n 30 below.
[25]See n 31 below.
[26]*Reichsgericht* (II *Zivilsenat*) 21 March 1916 88 ERG (Z) 172.
[27]*Reichsgericht* (II *Zivilsenat*) 23 Feb 1904 57 ERG (Z) 116.
[28]See below.

become so difficult to obtain objects of the class in question that this cannot fairly be required of anyone". The court indicated that "the seller must do more than merely seek the goods in his regular market. He must inquire extensively in other markets and indicate that he is willing to pay a higher price". The court held "there was in fact no market on which this brand could be obtained in the required quantity" and excused the defendant from performance.

Impossibility therefore embraces –

(i) physical impossibility;

(ii) legal impossibility (even though still physically possible);[29]

(iii) performance which has become highly impractical; as where a thing promised which is of little value has accidentally fallen into the sea; the fact that "an army of divers might rescue it is irrelevant".[30]

(iv) a temporary impossibility of performance of such length that when it ceases to operate the performance which then becomes possible is essentially different from that promised.[31]

Although the courts gradually extended the idea of impossibility to include cases of economic futility[32], mere "economic hardship" (in the sense that performance was extremely onerous for the debtor[33] was never recognised. As was said in *B v Bremer Rolandmuehle*:[34]

> "The difficulty in obtaining the promised object because of the accidental occurrence must be more than an additional difficulty, such as greater difficulty in locating goods for sale or the considerably higher cost of obtaining the goods. There must be such exceptional difficulties that these difficulties are considered by commerce as equivalent to impossibility."[35]

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[29]Cohn op cit 16.

[30]ibid. Called by Rohde "supervening hardship of performance" op cit 154). In *C v M* supra the judge stated: "This is shown by the school example, that it cannot be said that a seller of copper bars, which are not to be had, should buy up copper utensils and melt them down." See also *B v Bremer Rolandmuehle* supra and below where the test is discussed in more detail. See also Riegert op cit 86. I have included in this category what is sometimes loosely termed "economic impossibility" as in my view it is merely an example of extreme impracticability.

[31]Cohn op cit 16–17; Dawson op cit 184; & 94 ERG (Z) referred to in *B v F Reichsgericht* (III *Zivilsenat*) 8 July 1920 99 ERG (Z) 258. See also cases of *Reichsgericht* (II *Zivilsenat*) 4 Feb 1916 88 ERG (Z) 71 which held that performance when possible would "in essence and significance" be different from that contracted by the parties and *Reichsgericht* (II *Zivilsenat*) 17 Mar 1917 90 ERG (Z) 102 which held that when performance was possible it would be "quite different" from that originally assumed under the contract.

[32]*B v Bremer Rolandmuehle* op cit; Riegert op cit 85.

[33]Cohn op cit 17; von Mehren op cit 725; Comments op cit 295 n 85 seems to misunderstand Cohn on this. See, however, *SP Co v F Co Reichsgericht* (III *Zivilsenat*) 21 Sept 1920 100 ERG (Z) 129 where it was said: "And if, in Article 325 of the Civil Code, under impossibility not only factual but also economic impossibility is to be understood, the *clausula rebus sic stantibus* is, to this extent, clearly contained in the Code." "Economic impossibility" in this sense, however, seems to fall under (iii) above – a performance which is highly impractical, see *B v Bremer Rolandmuehle op cit* and Smit op cit 297.

[34]op cit.

[35]See also *S v B Reichsgericht* (III *Zivilsenat*) 4 May 1915 86 ERG (Z) 397; *H v Norddeutsche Immobilien-Akt-Ges Reichsgericht* (III *Zivilsenat*) 3 July 1917 ERG (Z) 374; *B v T Reichsgericht* (III *Zivilsenat*) 30 Nov 1915 87 ERG (Z) 349; *C v M Reichsgericht* (II *Zivilsenat*) 21 Mar 1916 88 ERG (Z) 172.

And in *B v Berliner Maschinenbau-Aktiengesellschaft*:[36]

> "A mere rise in price cannot release the seller, even if it results in considerable loss to him, from his contractual obligation. There would be no standard for determining what degree of loss was required before this liberation would be permitted. This would lead to an intolerable degree of legal uncertainty."

However, the pressure of economic events in Germany soon brought about a retreat from this position and as we shall see other sections of the Code were restored to in order to justify the new remedies evolved.

The sections of the *BGB* relating to supervening impossibility of performance, then provide that where performance has become impossible through no fault of the debtor, he is excused performance,[37] except where generic goods have been promised, when, as already indicated, he would not be excused if the goods are reasonably available anywhere in the world, even if he was not at fault.[38] If the creditor has already performed at the time the supervening event occurs, he may recover its value to the extent that the recipient is still enriched thereby.[39]

If the debtor is at fault, however, his failure to perform is regarded as a breach of contract[40] and he is liable for damages as a surrogate for performance.[41]

In the case of synallagmatic contracts (*gegenseitige Verträge*) the failure of one party to perform without the fault of either party would not only result in the discharge of his own obligation but in that of the other party also.[42]

In the case of partial impossibility, the creditor may reject the part performance which is still possible and claim damages for the non-performance of the entire obligation "if he has no interest" in the part performance,[43] or if he has such an interest he may claim the part performance,[44]

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[36] *Reichsgericht* (II *Zivilsenat*) 25 Feb 1919 95 ERG (Z) 41 44. And see *C v M* supra where it was held that it was not technically impossible for the defendant to supply tin as promised as it was freely available on the open market, although at more than double the contract price.

[37] *BGB* s 275 above; Comments op cit 293.

[38] *BGB* s 279; Comments op cit 293; *C v M* supra; see also n 27 above.

[39] Cohn op cit 16.

[40] Cohn op cit 15.

[41] *BGB* section 280 which reads: "Insofar as the performance becomes impossible as a result of a circumstance for which the debtor is responsible, he shall compensate the creditor for the damages due to the non-performance".

[42] *BGB* section 323; Comments op cit 294. The essential interdependence of reciprocal obligations is shown by a number of factors in German Law, eg the exceptio non adimpleti contractus (von Mehren op cit 688 n 7).

[43] *BGB* section 280 which continues: "In the case of partial impossibility the creditor may, by rejecting the part of the performance which is still possible, claim compensation for non-performance of the entire obligation, if he has no interest in the part performance"; and see Charles Szladitz "The Concept of Specific Performance in Civil Law" *American Journal of Comparative Law*. It is not clear whether the requirement of interest in performance is to be judged objectively or not but it is submitted that this need not be so for the courts will presumably be loathe to compel a creditor to accept anything substantially less than the promised performance if he does not wish to accept it, and performance which is substantially in accordance with the contract will, of course, constitute performance (See Szladitz op cit).

[44] *BGB* s 265.

and, it would seem, a corresponding reduction in his own performance.[45]

Consequently there was no room under the head of impossibility for the court to adjust the contract to the changed circumstances,[46] although of course the parties themselves could do so if they wished and could agree upon the changes to be made.[47] For that reason, it was agreed that impossibility was an unsuitable solution to the economic problems which then beset Germany, for often the parties desired to continue the contract despite enormous difficulties.[48]

The obligations of the parties were temporarily suspended where performance had merely become temporarily impossible[49] but that also did not assist in the majority of cases then arising where, generally speaking, one of the parties sought relief from the vastly changed economic conditions under which prices could, and did, multiply a hundredfold within a single year,[50] and the value of money could diminish to a very small fraction of its former value within the space of a few months.[51] As we have seen, often the change was so great that the court ruled that to hold the parties to performance after the supervening events had ceased to operate would be to hold them to a performance essentially different from that originally contracted for.[52]

There was another legal notion, that of usury, in the *BGB* to which the same criticism applied. The draftsmen of the *BGB*, besides rejecting the clausula rebus sic stantibus, had also rejected the Roman law doctrine of laesio enormis, used for measuring the adequacy of the consideration in sales of land,[53] and substituted for it a broad category of "usury" in section 138 of the *BGB*[54]. Section 138 reads:

> "A juristic act is also void, whereby a person through exploitation of the necessities, indiscretion, or inexperience of another, causes pecuniary advantages to be promised to himself or a third party; where these pecuniary advantages exceed the value of the counterperformance to such an extent as to be, under the circumstances, clearly disproportionate."

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[45]Cohen op cit 16; *P v G Reichsgericht* 9 Nov 1915 87 ERG (Z) 227 where the rent of a dance hall was reduced following a prohibition of public dancing; cf *H v Norddeutsche Immobilien-Akt-Ges Reichsgericht* 3 July 1917 90 ERG (Z) 374 where the rent of a beer hall was not reduced when the total production of beer was reduced by a third.

[46]Cohn op cit 17; Riegert op cit.

[47]Germany espouses a policy of freedom of contract (see Dawson op cit 187).

[48]Cohn op cit 17. An example of this was *SP Co v F Co* supra, where neither party wished the contract to be terminated, but could not agree upon an increase in rent, see below. It was further criticised on the grounds that the area of operation of "economic impossibility" (really where performance has become highly impractical – see supra) was very vague. (Cohn ibid.) Further on this latter point, see below.

[49]Dawson op cit 181–2.

[50]Von Mehren op cit 747–8; Dawson op cit 183.

[51]Von Mehren ibid, Dawson op cit 174.

[52]See n 28 above. It must also be noted that the rules relating to impossibility do not apply in a number of cases provided for by special provisions in the *BGB* relating to the accidental destruction of a corporeal thing forming the subject-matter of the obligation, especially those relating to the passing of risk in a merx. (Cohn op cit 16).

[53]This doctrine, as we shall see in a later article, proved valuable in post-war France as a means of overcoming some of the undesirable consequences of inflation.

[54]Dawson *op cit* 175.

Attempts were made to make use of this section to alleviate the effects of war on contracts entered into under quite different economic conditions than those prevailing at the time for performance,[55] but the section suffered from two major disadvantages which seriously restricted its use for this purpose, viz–

(a) For the section to be applicable the exploitation had to take place at the time the contract was entered into; but in almost all the cases with which we are here concerned the contract had been fairly concluded, the "exploitation" merely consisting of one party desiring to take advantage of a favourable situation which had been brought about by the change of circumstances.[56]

(b) The legal consequences of the application of the section, like that of impossibility, was absolute nullity.[57]

These attempts were frustrated by the *Reichsgericht* in the case of *SP Co v F Co*[58] though they were for a while still accepted in some decisions of the lower court.[59]

Before we turn to the important case of *SP Co v F Co* which brought about a revolution in German law in relation to changed circumstances, we shall consider the principle of *Dauer-Schuldverhältnisse* (which was said to be embodied in sections 626 and 723 *BGB*.[60] Section 723 only applied to contracts of employment and partnership and provided that a party to any such contract may freely terminate the contract contrary to its express terms at any time "for an important reason".[61] Through a liberal method of interpretation the courts extended this principle to all long-term contracts[62] and even held in some circumstances that the loss of economic utility under a contract may be considered "an important reason",[63] thereby eliminating a part of the problem of "frustration" in German law.[64] Section 649 *BGB* gives a contracting party the right to "countermand" a contract, that is, he has the right to terminate the contract without assigning any reason therefor (for example, if changed conditions have rendered performance unduly onerous) provided that he compensates the other party for the entire loss suffered by him as a result of the countermand.[65]

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[55]*ibid.*

[56]Dawson op cit 176 n 19.

[57]Dawson op cit 176.

[58]*Reichsgericht* (III *Zivilsenat*) 21 Sept 1920 100 ERG (Z) 129.

[59]eg Decisions of the Darmstadt court of appeal of 29 March 1923 and 18 May 1923 *Juristische Wochenschrift* 1923 459 and 522.

[60]Cohn op cit 17–8 and 78 ERG (Z) 421.

[61]Cohn ibid; Riegert op cit 85–6. See also 38 ERG (Z) 116 where an employer terminated his employee's contract before its five year term had expired because he was living in concubinage with a loose woman in a way which gave offence to the public.

[62]Riegert op cit 86.

[63]*B v Bremer Rolandmuehle Reichsgericht* (II *Zivilsenat*) 23 Feb 1904, 57 ERG (Z) 116; Riegert op cit 86.

[64]Cohn op cit 18 who says: "It required economic vibrations of more than ordinary strength to show that it had not succeeded in eliminating it."

[65]Rohde op cit 185.

The principle of *Dauer-Schuldverhältnisse* and of "countermand" suffered from the disadvantage which was common to impossibility and to section 138. They were "all or nothing" remedies which gave the courts no opportunity to keep the contract alive by modifying it to meet the changed conditions.[66]

As indicated earlier, the clausula rebus sic stantibus, although deliberately omitted from the *BGB*, was not by any means dead and was finally revived by the efforts of Krückmann, and more especially Oertmann.

Krückmann published a paper in 1918 in which he demonstrated that the notion that a legal transaction was closely connected with, if not actually dependent upon, the purpose of that transaction[67] underlay much of the *BGB*.

In 1920 and 1921[68] Professor Oertmann of Göttingen University and a "celebrated exponent" of the *BGB*[69] revived the notions relating to changed contractual circumstances in a greatly improved form which first received recognition in a German court barely six months after he first mooted his idea[70] and has been referred to in a great many cases in Germany[71] and elsewhere,[72] since.

He defines his concept of "*Geschäftsgrundlage*" (foundations of the contract) as–

> "an assumption made by one party that has become obvious to the other during the process of the formation of the contract and has received his acquiescence, provided that the assumption refers to the existence, or the coming into existence of circumstances forming the basis of the contractual intention. Alternatively, [it] is the common assumption on the part of the respective parties of such circumstances".[73]

It was not sufficient if one of the parties was motivated by a mistaken impression of the legal or factual position not shared by the other.[74]

If the foundation of the contract disappeared (*Fortfall*[75] or *Wegfall*[76] *der Geschäftsgrundlage*) an intervention in the contractual relationship was justified[77] on the grounds that the express conditions of the contract were

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[66]Other notions were also considered and rejected as being unsuitable, such as unjust enrichment and mistake (Dawson 206–7 ns 114–5), but it is unnecessary to examine them here.

[67]Lochner later described it as "*die Zweckgebundenheit des Rechtsgeschäftes*" (the affiliation of the legal transaction with its purpose), Dawson 186 n 48 op cit.

[68]Oertmann *Der Einfluss von Herstellungsverteuerungen auf die Lieferpflicht* (1920) and *Die Geschäftsgrundlage ein neuer Rechtsbegriff* (1921).

[69]Cohn op cit 20.

[70]In *SP Co v F Co Reichsgericht* (III *Zivilsenat*) 21 Sept 1920 100 ERG (Z) 129.

[71]Cohn op cit 20 n 31, who points out (n 30) that "Oertmann does not seem to have noticed that the term *Vertragsgrundlage* is actually used by the Swiss Code of Obligations, Art 24(4)."

[72]For example, in the Swiss courts and in the Scandinavian courts (Rodhe op cit 165–7).

[73]See Rohde op cit 167 and Cohn op cit 20–1.

[74]157 ERG (Z) 171. See also 1925 *Juristische Wochenshrift* 1633 and Cohn op cit 22.

[75]Cohn op cit 21.

[76]Comments op cit 294–5.

[77]Rodhe op cit 167.

no longer effective[78] and the courts were free to fill the gap.[79] As was said in *SP Co v F Co*[80], "when a contractual performance has become economically impossible due to changes in the conditions, a gap in the contract arises that the judge must, as with other contractual gaps, fill", and, in an earlier case: "Clearly, if the subsequent events were not foreseeable, a manifestation of intent cannot reasonably be interpreted to express a willingness to be found also in the unexpected situation".[81]

The doctrine applies to many types of cases and for this reason it does not provide a uniform solution.[82]

Where the contractual foundation has wholly fallen away each party is entitled to rescind the contract in accordance with the provisions of the *BGB* relating to rescission. Such rescission has retroactive effect either to the date of the contract or to the time when the assumptions of the parties which constituted the foundation of the contract fell away. The latter course occurs if the contract has been in operation for some time (during which both parties fulfilled their obligations under it) before the change in circumstances occasioning the rescission occurs.[83] Because rescission is to be in accordance with the provisions of the *BGB*, on rescission each party must return to the other everything received in pursuance of the contract or, where this is impossible, pay the other compensation for it.[84]

If the foundation of the contract has only partly fallen away, that is, where both parties wish to continue with it, but cannot agree upon a modification, the courts have gone beyond Oertmann's proposals and taken upon themselves the power to adapt the contract to the changed circumstances.[85] The court based this power upon *BGB* section 242 which we shall consider later. As Cohn says (at 21): this is "certainly a very thin argument" but he goes on to claim that experience has "shown the necessity for this development of the basis of contract theory" of judicial adjustment of the contract (*Vertragsbestand mit Ausgleichsanspruch*).

The development of this relief occurred in three stages: First, to grant revision rather than termination where the defendant, who would suffer

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[78]Smit op cit 290.

[79]B *v L & Co Reichsgericht* (*Vereinigte Zivilsenat*) 31 Mar 1925 110 ERG (Z) 371; *St v R Reichsgericht* (*V Zivilsenat*) 28 Nov 1923 107 ERG (Z) 78; Smit op cit 297–9.

[80]Op cit.

[81]*H- Draht und Kabelwerke v Elektrizitäts-AG vorm Sch & Co Reichsgericht* (III *Zivilsenat*) 15 Oct 1918 94 ERG (Z) 102; see also *Fr & Co GmbH v G & Co Reichsgericht* (II *Zivilsenat*) 27 Mar 1917 90 ERG (Z) 102 and Smit op cit 298. This latter statement assumes that the debtor has not, expressly or impliedly, assumed the risk of changed conditions (see below).

[82]Cohn op cit 21 referring to Oertmann.

[83]Cohn op cit 21.

[84]Ibid *Marseiwerke v H Reichsgericht* (II *Zivilsenat*) 29 Nov 1921 103 ERG (Z) 177; *St v Deutsches Reich Reichsgericht* (V *Zivilsenat*) 6 Jan 1923, 106 ERG (Z) 7 – a sort of *Vertrauensinteresse* (reliance interest), ie the payment of damages in an amount necessary to place the other party in the same position as he would have been in had he not relied upon the existence of the contract (Rodhe op cit 186).

[85]See cases referred to in n 84 and in Cohn op cit 21 and Dawson op cit 237 n 217. See also *VC v H Reichsgericht* (III *Zivilsenat*) No 10 1923 107 ERG (Z) 151.

great hardship from termination, wished to continue the contract and was agreeable to an equitable revision.[86] Getting bolder, in the second stage, the court allowed revision where it was practical to allow the contract to continue, and the defendant was agreeable to an equitable revision.[87] In the third and final stage the court held that if either party wished the contract to continue and justice required a revision of its terms to meet the changed circumstances, the court would so revise it.[88]

It was argued that if the court had the power to dissolve the contract, it was reasonable to assume that it should be able to change its terms. The court in accepting this argument indicated that it would only modify the terms where–

(a) both parties, or later, at least one party, wished the contract to be modified;[89]
(b) "very exceptional changes in circumstances" had taken place, mere unforeseeability being insufficient; and
(c) such modifications amounted to a full and equitable adjustment of the loss between both parties.[90]

The court said that when applying the provisions of sections 157 and 242 *BGB* it ought to modify the contract in the way in which the parties themselves would have agreed at the time of contracting if they had foreseen the possibility of the changed circumstances occurring.[91]

Before the conception of "changed conditions" had expanded very far beyond its primary source in the codified law of impossibility, the *Reichsgericht* held that a change of economic conditions would be no defence if it occurred after the debtor was in mora with performance.[92] However, in a decision given some seven months later[93] it was indicated that such mora would not necessarily preclude reliance on the clausula rebus sic stantibus[94],

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[86] *B v Adlerwerke Reichsgericht* (VII *Zivilsenat*) 10 Dec 1920 101 ERG (Z) 79; von Mehren op cit 758–9; Dawson op cit 225. As late as 1922 the court (*Reichsgericht* 24 Mar 1922 106 ERG (Z) 218) revised the rental of a lease on the ground that the parties desired the lease to continue although, as Dawson points out (at 207 n 116) it did not follow that because the lessee desired to continue the lease at the old rental, he had thereby "agreed" to its continuation at the increased rental.

[87] *W v K Reichsgericht* (II *Zivilsenat*) 3 Feb 1922 103, ERG (Z) 328; *St v Deutsches Reich* op cit. In the latter case the court simply ordered that the contract for the sale of land be rescinded if the purchaser would not agree to a "reasonable" increase in the purchase price.

[88] In *Reichsgericht* 10 Nov 1923 107 ERG (Z) 151 the court held that if the parties could not agree on a fair rental, it would fix the rental and refuse rescission even though the lessor demanded rescission and rejected modification. (See also 1923 *Juristische Wochenschrift* 984, a case of sale where the vendor demanded rescission, and Dawson op cit 207 n 116).

[89] More accurately, both parties wished the contract to continue but could not agree on the changes which would enable this to occur, but see n 88) below.

[90] Aubrey op cit 1179.

[91] *S v H Reichsgericht* (III *Zivilsenat*) 12 March 1918 92 ERG (Z) 318; Smit op cit 299.

[92] *Reichsgericht* (II *Zivilsenat*) 30 Sept 1921 103 ERG (Z) 3; Dawson op cit 199 n 86.

[93] *Reichsgericht* (V *Zivilsenat*) 1 Apr 1922, reported in 1922 *Juristische Wochenschrift*, 1513.

[94] The clausula was "never fully defined" and was "often quoted in support of the decision in addition to and sometimes even in the place of the *Geschäftsgrundlage* doctrine" (Cohn op cit 22). See eg 121 ERG (Z) 133 where they are treated as having the same meaning. Many academic writers saw no real difference between the two doctrines (such as Lehmann and Fleck, see Cohn op cit 22).

and this was finally so held by the *Reichsgericht* just over a year later[95] as to refuse to do so would be to inflict a disproportionately heavy penalty on a vendor in mora because of galloping inflation.[96]

The doctrine of changed circumstances arose out of the inflation cases[97] and in this regard gave rise to the doctrine of the *Ausgleichsanspruch*[98], but it was by no means confined to the inflation cases and continued to prove its worth when it was no longer required to relieve the effects of inflation.[99]

The merits of the doctrine "are that it correctly, or at least nearly correctly, described a situation that is not properly met by other juridical concepts"[97] and provided a remedy for it.

> "In the Coronation cases[100], referred to by Oertmann himself, it was not a condition that was not fulfilled. Nor could one speak of an impossibility of performance otherwise than in a very strained sense of the word. Nor was there anything wrong with the intention of the parties; the parties had never thought of what really did happen. The characteristic feature of the situation was that an assumption made by both parties and relating to circumstances forming the very basis of their contractual intention was wrong."
>
> "The main objections advanced against it have been that it fails to explain why, in the absence of any supporting rule of law or pertinent agreement, such contemplated facts may be held to constitute a requirement for the continued existence of the contract and, further, that it cannot explain why, as is generally conceded, not every minor disturbance of that foundation results in the ineffectiveness of express contractual provisions."[101]

Perhaps equally important is the lack of certainty which results from the very vagueness of the doctrine itself as it possesses hardly any greater precision than the clausula or the doctrine of *Voraussetzung*. The result was that it was often used in conjunction with other, sometimes more specific rules[102], such as mistake, impossibility, unjust enrichment, usury, good faith, and so on.[103]

Probably the most important of these is the concept of good faith (*Treu und Glauben*), embodied in sections 157 and 242 *BGB* which, as we have seen, was used as a means to extend the remedies available under the *Geschäftsgrundlage* doctrine to permit modification of the contract.

(*to be concluded*)

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[95] *Reichsgericht* (V *Zivilsenat*) 6 Aug 1923 106 ERG (Z) 422.

[96] Dawson op cit 199 n 86 who points out that: "The result was much more easily achieved after it was clearly realised (as in 107 RGZ 19) that the alteration of the price term did not increase the real weight of the purchaser's obligation but merely offset the continued depreciation of money". Often a debtor would delay payment as long as possible so as to pay in even more depreciated marks (Dawson op cit 302).

[97] Cohn op cit 21.

[98] See 28 below.

[99] Cohn op cit 21. Indeed since the 1920's it has been the basis of German views on the problem – Rohde op cit 167.

[100] The English cases which resulted from the postponement of the coronation of Edward VII, which I shall consider in a subsequent article.

[101] Smit op cit 290.

[102] See e g *St v R Reichsgericht* (V *Zivilsenat*) 28 Nov 1923 107 ERG (Z) 78, 87–88; *SW v K Reichsgericht* (II *Zivilsenat*) 3 Feb 1922 103 ERG (Z) 39; Smit op cit 296–7 read with 289–90 and Rohde op cit 167.

[103] See above.

Aantekeninge

NULLI RES SUA SERVIT EN TUINSERWITUTE

Die sakeregtelike nulli res sua servit-beginsel vind blykbaar geen toepassing by die registrasie van tuinserwitute ingevolge die Wet op Deeltitels 66 van 1971 nie. Die registrateur van aktes het sonder motivering duidelik verklaar dat hy bereid is om tuinserwitute wat aan die houer daarvan die uitsluitlike gebruik en genot van die saak waaroor dit strek, te registreer.[1]

In 'n poging om hierdie optrede van die registrateur in ooreenstemming met gemeenregtelike beginsels en die bepalings van die wet te bring, beland die ondersoeker in talle doodloopstrate.

By ontleding van die vereistes wat die registrateur stel, blyk dit dat die oppervlakte waaroor die serwituut strek, beskryf moet word. Verder moet die serwituut geregistreer word by die oordrag van die eerste deel ten einde komplikasies uit te skakel, soos bv latere eienaars wat onwillig is om die nodige dokumente te teken.[2] 'n Aspek wat hier opval, is dat die registrateur praat van die oordrag van 'n deel (nie 'n eenheid nie). Die deel en onverdeelde aandeel is immers onafskeidbaar aan mekaar verbonde.[3]

Soos deur verskeie skrywers aangetoon, was dit duidelik die bedoeling van die wetgewer om eiendomsreg van 'n nuwe entiteit (saamgestelde saak), deur die wet 'n eenheid genoem, moontlik te maak.[4] Uit die voorbeeld van die registrateur blyk dit dan ook duidelik dat hy hiervan bewus is, want volgens sy voorbeeld word die koper van die deeltitelwoonstel die eienaar van die eenheid.[5] 'n Eenheid bestaan uit 'n deel[6] tesame met sy onverdeelde aandeel in die gemeenskaplike eiendom,[7] toegedeel ooreenkomstig die deelnemingskwota.[8]

Aangesien dit vasstaan dat 'n deeleienaar se eiendomsreg oor een saak

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[1]Chief Registrar's Circular 9/1973 – Sectional Titles: "Garden Servitudes" *De Rebus Procuratoriis* August 1973 345.

[2]Art 13 vereis bv 'n eenparige besluit en art 20 'n spesiale besluit.

[3]art 12(3).

[4]DV Cowen "The South African Sectional Titles Act in historical perspective: an analysis and evaluation" 1973 *CILSA* 18; CG Van der Merwe "The Sectional Titles Act and the Wohnungseigentumsgesetz" 1974 *CILSA* 165 op 169 170 en 178; CG van der Merwe "Die Wet op Deeltitels in die lig van ons gemeenregtelike saak- en eiendomsbegrip" 1974 *THRHR* 113 op 115 118 119 en 130–132; D Shrand *Shrand on the Sectional Titles Act* (Cape Town 1972) 42; RF Rorke *A Commentary on the Sectional Titles Act 1971* (Durban 1972) 52.

[5]"By virtue of Certificate of Registered Sectional Title No 3/1973(1) dated 6 June, 1973 SMITH is the registered owner of a *unit* consisting of –" (my kursivering).

[6]arts 1 en 6(2)(d).

[7]art 1.

[8]art 1.

(eenheid) strek, ontstaan die vraag hoe dit enigsins moontlik is dat 'n persoon 'n serwituut oor sy eie saak kan hê. As die wet die registrasie van tuinserwitute moontlik gemaak het, soos in art 19 vir sekere stilswyende serwitute ten gunste en ten laste van elke deel gedoen is, was daar natuurlik geen probleme nie. Die serwitute in art 19, aan die ander kant, is serwitute wat verband hou met die verskillende dele en kom wel neer op 'n beperkte saaklike reg op iemand anders se saak en wyk dus nie van die nulli res sua servit-beginsel af nie.[9]

Die registrasie van sogenaamde tuinserwitute vind waarskynlik in artikels 2 en 20 aanknopingspunte. Art 2 maak voorsiening vir eiendomsreg en saaklike regte in of oor gedeeltes van geboue en registrasie van titel tot eiendomsreg of ander saaklike regte in of oor sodanige gedeeltes. Art 20 maak uitdruklik voorsiening vir die vestiging van serwitute ten gunste of ten laste van die *grond.* Art 2 (d) maak voorsiening vir die registrasie van 'n saaklike reg oor die gemeenskaplike eiendom. Alhoewel 'n serwituut as so 'n saaklike reg beskou kan word, behoort dit nie so geïnterpreteer te word nie, aangesien die wetgewer hier besig is om die verdeling van die grond en geboue en die samehang daarvan te bepaal ten einde 'n persoon in staat te stel om eienaar van 'n gedeelte van 'n gebou te word. In art 20 is die bedoeling van die wetgewer duidelik gerig op die vestiging van serwitute oor of teen die *grond*, as 'n geheel, met betrekking tot ander eiendom.[10] In art 20(1)(a) en (b) word die woord *grond* uitdruklik gebruik. *Grond* word in art 1 omskryf met verwysing na die deelplan. Art 5 (3) (d) (i) bepaal dat die aansoek om opening van 'n deeltitelregister van 'n deelplan, "met die serwitute, ander saaklike regte en voorwaardes, as daar is, daarop aangeteken wat volgens 'n sertifikaat van 'n transportbesorger die grond *of*[11] die dele *en*[11] gemeenskaplike eiendom beswaar of bevoordeel . . .", vergesel moet wees. In hierdie artikel word grond aan die een kant genoem en aan die ander kant die deel *tesame* met die gemeenskaplike eiendom. Volgens hierdie interpretasie is dit ook nie moontlik om die tuinserwituut slegs oor die gemeenskaplike eiendom te registreer nie, en is die wet dus nie in stryd met ons gemeenregtelike beginsels wat op serwitute van toepassing is nie.

As egter wel aanvaar word dat tuinserwitute ingevolge art 20 geregistreer kan word,[12] is die uitleg in stryd met die nulli res sua servit-beginsel[13]

[9] Rorke *Sectional Titles Act* 102. Hierdie serwitute geld ten gunste of ten laste van een deel teenoor 'n ander deel. Daar is maw twee entiteite met twee verskillende eienaars.

[10] Rorke *Sectional Titles Act* 103. Uit sy bespreking van art 20 is dit duidelik dat hy ook hierdie artikel so interpreteer.

[11] My kursivering.

[12] PR Greyling en SJ Naudé *Die Wet op Deeltitels Nr 66/71* (Handleiding uitgereik deur die Pretoriase Prokureursvereniging) 115; L Benjamin, RF Rorke and DN Walwyn *The Sectional Titles Act, 1971* (The Association of Law Societies of the Republic of South Africa) 1974 11; DV Cowen "The Scope of the Sectional Titles Act with special reference to Group and Cluster Housing and Phased Developments" *Supplement to Planning and Building Developments* 14 16.

[13] *D* 7 6 5 pr; *D* 8 2 26; *D* 8 3 31; *D* 8 3 33 1; *D* 8 4 10; *D* 39 3 17 3; M Kaser *Das Römische Privatrecht* (Erster Abschnitt München 1971) 443; G Grosso *Le servitu' prediali nel diritto romano* (Torino 1969) 89; G Franciosi *Studi sulle servitù prediali* (Napoli 1967) 89; Grotius 2 33 4, 5; 2 37 1; Van Leeuwen *RHR* 2 19 6; Voet 8 4 14; *Dreyer v Letterstedt's Exors* 5 SC (1865) 89 99; CG Hall *Servitudes* (1973) 3 22.

wat by alle serwitute van toepassing is. Die effek van die negering van hierdie reël is dat 'n persoon wat eiendomsreg (die mees volledige saaklike reg) oor 'n saak het, nou ook 'n beperkte saaklike reg (serwituut) oor dieselfde saak verkry. Hierdie konstruksie ontken die hele geaardheid van 'n serwituut, nl 'n reg op iemand anders se saak (ius in re aliena). Selfs al sou 'n mens jou oë sluit vir hierdie verkragting van beginsels en die tuinserwituut as 'n serwituut aanvaar, word nogtans probleme ondervind om dié serwituut te identifiseer. As algemene reël kan gestel word dat by die skepping van 'n serwituut dit duidelik gestel behoort te word of die betrokke serwituut persoonlik is en of dit 'n erfdiensbaarheid is. As dit nie duidelik is nie, sal 'n hof die bedoeling van die partye probeer vasstel. Daar bestaan 'n vermoede ten gunste van persoonlike serwitute: waar daar 'n serwituut geskep is waarvan die aard moeilik te bepaal is, moet die bepalings beperkend uitgelê word, met die gevolg dat-

> "where it is doubtful whether a servitutal burden placed on land was intended to be for the benefit of another property and, therefore, praedial and perpetual or for the benefit of a particular person and, therefore, personal and limited in its duration, the latter interpretation must be adopted as being the one which places the lesser burden upon the subject-matter of the servitude".[14]

In die genoemde voorbeeld van die registrateur word dit duidelik gestel dat die serwituut ewigdurend sal wees en dat dit aan die verskillende eenhede toekom.[15] Die feit dat die serwituut ewigdurend verskaf word, is nie noodwendig 'n struikelblok in die weg van die gedagte dat dit 'n persoonlike serwituut sou kon wees nie,[16] maar die feit dat dit aan die eenhede toegeken word skakel wel dié moontlikheid uit vanweë die reël *res non servit rei, sed res servit personae.*[17]

'n Ander moontlike serwituut wat hier ter sprake kan wees, is 'n erfdiensbaarheid. Hier word twee erwe vereis, 'n heersende en 'n dienende erf.[18] Die serwituut kom toe aan die eienaar van die heersende erf in sy hoedanigheid as eienaar daarvan.[19]

Alhoewel ons duidelik hier met net een[20] erf te doene het, sou argumentshalwe geredeneer kon word dat dit as twee erwe gesien kan word, dit wil sê dat elke deel 'n heersende erf is en die gemeenskaplike eiendom die dienende erf van die dele. As hierdie geforseerde en verkeerde konstruksie moontlik is, ontstaan die vraag of die eienaar van 'n heersende erf 'n serwituut kan verkry oor die erf waarvan hy self mede-eienaar is.

Van der Merwe betoog dat die gemeenskaplike eiendom van die wet nie as mede-eiendomsreg beskou kan word nie, omdat die wet sekere beperkings op hierdie gemeenskaplike eiendom plaas wat nie op mede-eiendom van toepassing is nie.[21] Die aspek wat myns insiens beklemtoning verdien,

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[14]H Silberberg *The Law of Property* (1975) 301.
[15]*De Rebus* 346.
[16]Hall *Servitudes* 163.
[17]Hall *Servitudes* 161; Silberberg *Property* 284.
[18]Silberberg *Property* 284 291; Hall *Servitudes* 3.
[19]JJL Sisson *The South African Judicial Dictionary* (1960) s v *praedial servitude;* Silberberg *Property* 284.
[20]supra noot 4.
[21]Van der Merwe 1974 *THRHR* 124. Sien ook Cowen 1973 *CILSA* 12.

is die feit dat die eienaar 'n onverdeelde aandeel in die gemeenskaplike eiendom het: in hierdie opsig is die gemeenskaplike eiendom van die wet volkome in ooreenstemming met mede-eiendom[22]. Van der Merwe fouteer as hy sê dat die onverdeelde aandeel in die gemeenskaplike eiendom nie bloot ideeël of abstrak verdeel word nie, maar gerealiseer of gelokaliseer word.[23] Al wat gerealiseer word ooreenkomstig die deelnemingskwota is die omvang van die onverdeelde aandeel ten einde die eenheid as 'n afsonderlike entiteit te identifiseer. Die gemeenskaplike eiendom word altyd in onverdeelde aandele gehou.[24] Net soos Van der Merwe redeneer dat sekere afwykings van die bestaande saak- en eiendomsbegrip nie by deeltiteleiendom aan die wese daarvan verander nie, so kan geredeneer word dat sekere afwykings van die bestaande mede-eiendomsreg nie aan die wese daarvan afbreuk doen nie.[25]

In die afwesigheid van andersluidende bepalings kan die reëls van mede-eiendomsreg dus hier toegepas word.[26] Die vraag of 'n mede-eienaar 'n serwituut kan verkry oor 'n saak waarvan hyself mede-eienaar is, is alreeds vanweë die nulli res sua servit-reël en die ondeelbaarheid van serwitute 'n omstrede een in ons reg.[27] Hiermee word die moontlikheid dat die tuinserwituut 'n erfdiensbaarheid kan wees ook uitgeskakel.

'n Tuinserwituut is duidelik ook nie 'n publieke serwituut nie. Miskien sou 'n mens kon sê dat hierdie 'n serwituut sui generis is.[28] Sy sui generis-eienskappe is van sodanige geaardheid dat hy die basiese beginsel, naamlik, dat 'n serwituut 'n ius in re aliena is, negeer.

Die gevolgtrekking waartoe geraak word, is dat enige interpretasie van die wet wat neerkom op 'n miskenning van die reël nulli res sua servit, verwerp moet word. In elk geval is dit myns insiens duidelik, soos aangetoon,[29] dat die wetgewer geensins die bedoeling gehad het om hierdie reël van die gemene reg by serwitute ingevolge die wet af te skaf nie en gevolglik behoort die registrasie van tuinserwitute ontoelaatbaar te wees, aangesien daar eenvoudig nie sprake van 'n serwituut kan wees nie.

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[22] Silberberg *Property* 256; Van der Merwe 1974 *THRHR* 124; Cowen 1973 *CILSA* 12.

[23] 1974 *THRHR* 127.

[24] art 12. Shrand *Sectional Titles* 42; Rorke *Sectional Titles* 51. Van der Merwe 1974 *THRHR* 124.

[25] PJ Conradie *Woonsteleiendom in Suid-Afrika* (Verslag oor 'n Simposium van die Instituut vir Buitelandse Reg en Regsvergelyking UNISA) 50: "Al die mense wat onverdeelde aandele in daardie gebou het, is in die posisie van gemeenskaplike eienaars van ten minste die gemeenskaplike eiendom."

[26] Conradie *Simposium* 50: "Mnr die Voorsitter, toe ek gesê het dat 'the common law has been left as it is', het ek eintlik in gedagte gehad dat ons hier te doen het met gemeenskaplike eiendom."

[27] Voet 8 6 2; *Appuhamy et al v Appuhamy et al* 24 N L R (Ceylon) 1922 414; *Mocke v Beaufort West Municipality* 1939 CPD 135 141. Lg beslissing handel nie spesifiek oor hierdie aspek nie, maar verwys obiter na eg beslissing. In eg beslissing word aanvaar dat 'n persoon 'n serwituut kan vestig deur verjaring in 'n geval waar hy mede-eienaar is van beide heersende en dienende erf, maar die ander mede-eienaars van die erwe nie dieselfde persone is nie. Hierdie uitspraak word gegee sonder verwysing na enige gesag. Die aspek waarop klem gelê word, is die strydige gebruik (*adverse user*) van die mede-eienaar wat nie ook mede-eienaar van die dienende erf is nie. (416 in fine).

[28] Soos met die meeste sui generis-verskynsels is hierdie een ook een wat voorgee om dit te wees wat hy nie is nie, en gevolglik is hy dit – maar "op sy manier".

[29] My interpretasie van art 20 supra.

Daar kan egter geen twyfel bestaan oor die feit dat daar 'n behoefte bestaan om aan die eienaar van 'n deel die uitsluitlike gebruik en genot van 'n gedeelte van die gemeenskaplike eiendom toe te ken nie. Hierdie leemte kan myns insiens doeltreffend op een van die volgende wyses aangevul word:

(1) Die tuingedeelte kan by die deel ingesluit word. Hierdie moontlikheid word tans deur die wet uitgesluit, aangesien die omskrywing van 'n deel van so 'n aard is dat die tuingedeelte nie daarby ingesluit kan word nie.[30] Die artikel sou moontlik gewysig kan word.

(2) Die uitsluitlike gebruiks- en genotsbevoegdheid kan by die reëls geïnkorporeer word.[31]

(3) Die woonstelbewoners kan 'n verdelingsooreenkoms aangaan wat inter partes en ook teenoor derdes wat kennis van die ooreenkoms dra, bindend is.[32]

(4) Art 5 (3) (d) (i) maak voorsiening vir die registrasie van voorwaardes wat in die deelplan opgeneem is. Die ontwikkelaar kan die uitsluitlike gebruik en genot van 'n tuingedeelte as voorwaarde in die deelplan stipuleer. Die landmeter-generaal mag egter weier om sodanige diagram goed te keur.[33]

(5) Ingevolge art 13 (1) kan die eienaars deur 'n eenparige besluit die regspersoon gelas om die gemeenskaplike eiendom of 'n gedeelte daarvan namens hulle te vervreem, of kragtens 'n huurkontrak te verhuur. Sommige skrywers[34] betoog dat tuingedeeltes so gehuur kan word vir 'n minimale bedrag en dat die huurder dan die uitsluitlike gebruik en genot daarvan het. Hierdie interpretasie van die artikel is onaanvaarbaar aangesien dit ook daarop neerkom dat 'n persoon 'n saak waarop hy onbeperkte mede-eiendomsreg het, huur – dws tegelykertyd huurder en verhuurder van dieselfde saak is. In die tweede plek word 'n eenparige besluit, wat miskien moeilik te verkry is, hiervoor vereis.[35]

Maatreëls twee en drie is myns insiens die mees aanvaarbare, aangesien dit die probleem doeltreffend oplos sonder om enigsins op bestaande regsbeginsels inbreuk te maak en ook omdat dit geen wetswysiging verg nie.

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[30]art 6(2)(d); Cowen *Supplement to Planning and Building Developments* 16.
[31]Cowen *Supplement* 16.
[32]Rorke *Sectional Titles Act* 50. So 'n verdeling word uitdruklik by mede-eiendomsreg toegelaat: *Sieberhagen v Roos* 1912 AD 50.
[33]Cowen *Supplement* 16.
[34]Benjamin, Rorke en Walwyn *Sectional Titles Act* 10.
[35]Shrand *Sectional Titles Act* 45.

HOËR BEROEP BY BORGTOG

1 Probleemstelling

In hierdie aantekening sal ek my sover moontlik beperk tot gevalle waar borgtog deur 'n landdros geweier is ingevolge a 95 van die huidige Strafproseswet en waar die beskuldigde in hoër beroep wil gaan.

Ingevolge a 108 van die ou Strafproseswet 31 van 1917, kon 'n beskuldigde wie se aansoek om borgtog deur 'n landdros afgewys is, die hooggeregshof by wyse van aansoek nader om regshulp. Hierdie artikel is net so oorgeneem in a 98 van die huidige Strafproseswet. 'n Nuwe artikel, a 97, is egter in die huidige Strafproseswet opgeneem. In a 97 kry 'n persoon wat hom veronreg voel deur 'n landdros se weiering van borgtog spesifiek die reg om teen die landdros se bevinding te „appelleer".

Die invoering van die nuwe a 97 het die vraag laat ontstaan of 'n beskuldigde aan wie borg deur 'n landdros geweier is, steeds ingevolge a 98 'n direkte aansoek tot die hooggeregshof kan rig (soos onder die ou Strafproseswet) en of die invoering van a 97 juis die effek het dat so 'n beskuldigde nou *slegs* onder a 97 kan „appelleer". Die beslissing oor hierdie vraag is in die praktyk van groot belang vir die beskuldigde, aangesien 'n dringende aansoek normaalweg veel spoediger aangehoor kan word as 'n appèl.

Daar is twee benaderings oor hierdie aangeleentheid in ons regspraak te onderskei:

1 1 In die Transvaalse, Vrystaatse, Kaapse en Suidwes-Afrikaanse afdelings is die algemene houding dat nadat 'n landdros borg geweier het ingevolge a 95 van die huidige Strafproseswet, die beskuldigde sy regte ingevolge a 97 moet uitput, in elk geval waar hy reeds appèl aangeteken het ingevolge daardie artikel.[1]

1 2 In die Natalse, Oos-Kaapse en Noord-Kaapse afdelings is die benadering weer dat waar 'n landdros borg geweier het, die hooggeregshof direk genader kan word met 'n substantiewe aansoek ingevolge a 98.[2] In *R v Qhaka* 1961 4 SA 170 (OK) 173A is beslis dat dit die posisie is of die beskuldigde nou appèl aangeteken het ingevolge a 97 of nie, en in *S v Smith* 1969 4 SA 175 (N) 176D is 'n appèl ingevolge a 97 en 'n aansoek ingevolge a 98 ten opsigte van dieselfde geval deur toestemming gekonsolideer en saam aangehoor.

Die appèlhof het nog nie oor hierdie vraag uitsluitsel gegee nie.
Artikel 95(1) lui:

> "Wanneer 'n strafverhoor voor 'n laerhof verdaag of uitgestel word en die beskuldigde in hegtenis gehou word, kan die hof na goeddunke die beskuldigde op die hieronder bepaalde wyse op borgtog vrylaat."

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[1]Sien *S v Kathrada* 1961 3 SA 593 (T); *S v Baker* 1965 1 821 (W); *S v Berg* 1962 4 111 (O); *S v Narker* 1973 3 SA 30 (K); *S v Nangatuuala & Anor* 1973 4 SA 640 (SWA).

[2]Sien *R v Deetlefs* 1960 1 SA 388 (GW); *R v Kodi* 1960 4 SA 23 (N); *R v Qhaka* 1961 4 SA 170 (OK); *S v Ngakane* 1964 4 SA 28 (N); *S v Smith & Anor* 1969 4 SA 175 (N).

Artikel 97(1) lui:

> "Wanneer 'n beskuldigde veronreg voel ten gevolge van die weiering van 'n magistraat of van 'n laerhof om hom op borgtog vry te laat of deurdat so 'n magistraat of hof buitensporige borggeld vasgestel het of onredelike voorwaardes gestel het, kan hy teen die weiering of buitensporige borggeld na die hoërhof wat regsbevoegdheid besit . . . appelleer."

Artikel 98 lui:

> "Behoudens die bepalings van artikel 108 bis en enige ander wet, kan 'n hoërhof wat regsbevoegdheid ten opsigte van 'n misdryf besit op enige stadium van enige verrigtinge in enige hof ten opsigte van so 'n misdryf, die beskuldigde op borgtog vrylaat."

2 Regverdiging vir die benadering onder 1 1 bo

In *S v Kathrada* 1961 3 SA 593 (T) 594E–G is deur twee regters beslis dat die hof

> "do not think that the provisions of sec 97 can be discarded as surplusage, but are intended to apply whenever an inferior court has refused bail. An indication which supports this view is found in sec 88, which makes provision for bail to be granted after a person has been committed for trial, and provides that the magistrate may refuse bail under certain circumstances. In both sub-sec (a) and (b) such refusal is stated to be without prejudice to the accused's rights under sec 97. This provision, in my opinion, indicates that the only rights preserved when bail is refused after committal for trial are the rights to be found in sec 97. I can see no reason why the accused's rights should be different if the application is made before committal. In coming to this conclusion I must respectfully disagree with the opinions expressed in *R v Kodi* 1969 4 SA 23 (N), and *R v Deetlefs* 1960 1 SA 388 (GW)".[3]

In *S v Baker* 1965 1 SA 821 (W) is *Kathrada* se saak sonder bespreking nagevolg. In *S v Narker* 1973 3 SA 30 (K) 32C word gemeld dat a 97 'n nuwe artikel is en dat die aanname daarvan dui op 'n bedoeling dat die vroeëre wye magte van die hof onder a 98 ingekort is. In *Narker* se saak word verdere steun aan hierdie interpretasie gegee met die redenasie dat 'n saak alleen deur een hof verhoor kan word; dat as 'n beskuldigde in die eerste instansie sy remedie in die landdroshof gaan soek en onsuksesvol is, hy sy saak konsekwent moet deurvoer en appelleer as hy ontevrede is; en dat 'n ander uitleg a 97 oorbodig sou maak. Waar die beskuldigde egter in die eerste instansie direk na die hooggeregshof toe gaan, is daar ander remedies.[4]

In *S v L* 1966 4 SA 409 (T) 411 is in navolging van obiter dicta in *Riddock v Attorney-General, Transvaal* 1965 1 SA 817 (W) beslis dat 'n beskuldigde wat *nie* 'n borgaansoek in die landdroshof gerig het nie, wel die hooggeregshof direk kan nader kragtens a 98 mits daar „spesiale omstandighede" is wat die aansoek regverdig. Sodanige „spesiale omstandighede" moet aantoon waarom die beskuldigde nie eers sy regte ingevolge a 95 uitgeput het nie. Hierdie beslissing is sterk gekritiseer in *S v Goldberg* 1969 4 SA 253 (K) 524 waarin bevind is dat daar geen beperking op die hooggeregshof se magte ingevolge a 98 in te lees is nie en dat „spesiale omstandighede" nie

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[3]In *Kathrada* se saak is uitspraak gegee op 12 Junie 1961 en redes is verstrek op 15 Junie. In die teenoorgestelde uitspraak, *S v Qhaka* (supra), is uitspraak gegee op 22 Junie 1961.
[4]Sien 32G–H van die verslag.

vereis word waar die hooggeregshof direk genader word in gevalle waarin geen borgaansoek eers tot die landdros gerig is nie. In *S v Nangatuuala* 1973 4 SA 640 (SWA) is *S v L* (supra) nagevolg sonder verwysing na *Goldberg* se saak (supra).

3 Regverdiging vir die benadering onder 1 2 bo

In *R v Deetlefs* 1960 1 SA 388 (GW) 388G is 'n aansoek ingevolge a 98 aangehoor nadat 'n landdros 'n aansoek kragtens a 87(1) van die hand gewys het, hoewel die hof die mening uitgespreek het dat 'n appèl ingevolge a 97 meer van pas sou wees.[5]

In *R v Kodi* 1960 4 SA 23 (D & K) is slegs verwys na die situasie waarin nie geappelleer is teen die landdros se weiering nie, maar waarin die hooggeregshof direk genader is. Daarin is beslis dat 'n petisie ingevolge a 98 aangehoor kan word waar 'n landdros borgtog geweier het. Regter-president Broome beslis dat indien die wetgewer a 98 se wye omvang wou beperk het, sou die ou a 108 nie identies oorgeneem gewees het in die nuwe Strafproseswet nie.

In *S v Qhaka* 1961 4 SA 170 (OK) het twee regters beslis dat die invoeging van a 97 nie die hof se wye magte ingevolge a 98 beperk het nie. As daar geen ander feite voor die hooggeregshof geplaas word as dié wat aan die landdros voorgelê is nie, sal die hof daarop let of die landdros sy diskresie behoorlik uitgeoefen het, ongeag of die hof nou versoek word om op te tree ingevolge a 97 of a 98.

In *S v Ngakane* 1964 4 SA 28 (N) is *Kodi* se saak (supra) gevolg. Weer word die wye strekking van a 98 beklemtoon. As die bedoeling van die wetgewer was om a 98 slegs beskikbaar te stel waar 'n beskuldigde nog geen aansoek in die landdroshof gerig het nie, sou dit so gestel gewees het in die wet. Daar moet regsmagtiging wees vir die aanhouding van 'n persoon:

> "*Prima facie* a person is entitled to be at liberty. The Legislature might well have enacted secs 97 and 98 on the basis that an accused person who is kept in custody should have every procedural remedy available to him to approach the proper tribunal for his release on bail. It might well be that, where a magistrate has, for example, refused to grant bail, an appeal against that decision would involve considerably more delay than a fresh application to the Supreme Court in terms of sec 98."[6]

In *S v Smith* 1969 4 SA 175 (N) het twee regters beslis dat dit in elk geval in Natal vasstaan dat 'n persoon wat in hegtenis is die hooggeregshof ingevolge a 98 kan nader of hy nou ingevolge a 97 appèl aangeteken het of nie. Hierbo is reeds gemeld dat 'n aansoek ingevolge a 98 en 'n appèl ingevolge a 97 in hierdie saak gekonsolideer en saam aangehoor is.[7]

4 Enkele interpretasiereëls

Die vermoede dat die wetgewer die bestaande reg nie meer as nodig wil

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[5] A 87 het betrekking op 'n borgaansoek in die landdroshof voor beëindiging van 'n voorlopige ondersoek.
[6] 30C van die verslag.
[7] Sien 1 2 bo.

wysig nie, is ook van toepassing op vorige wette.[8] Ooreenkomstig a 108 van die ou wet is aangeleenthede van die onderhawige aard altyd by wyse van 'n aansoek voor die hooggeregshof gebring. Die invoeging van a 97 dui eerder op aanvulling as op vervanging.

'n Verdere vermoede wat nuttig kan wees is dat die wetgewer nie 'n onbillike, onregverdige of onredelike resultaat beoog nie.[9] In die onderhawige geval is die vryheid van die beskuldigde wat moontlik ten onregte in hegtenis gehou word, op die spel. In die lig van hierdie vermoede sou dit minstens eienaardig gewees het as die wetgewer beoog het om deur middel van a 97 'n struikelblok in die pad van die beskuldigde te plaas.

Dit mag wel waar wees dat die vermoede dat die wetgewer geen kragtelose of doellose bepaling wil maak nie die benadering onder 1 1 bo steun. Maar hierteenoor kan weer aangevoer word dat die omstandighede van 'n gegewe geval sodanig kan wees dat die prosedure kragtens a 97 net so 'n spoedige remedie kan verskaf as dié kragtens a 98, sodat dit dan nie nodig sal wees om van a 98 gebruik te maak nie. Waar 'n hof by 'n aansoek kragtens a 98 bevind dat regshulp net so spoedig kragtens a 97 verkry kon geword het in 'n besondere geval, sou daardie hof met respek voldoende gronde hê om 'n dringende aansoek te weier. Juis hierom kan ek met alle eerbied nie saamstem met wat Hiemstra *SA Strafproses* op 116 verklaar nie:

> "Daar word aan die hand gegee dat die Transvaalse en Vrystaatse sienswyse die juiste is, omdat anders artikel 97 heeltemal oorbodig word."

5 Die praktyk

Die prosesreg is daargestel vir die praktyk en nie andersom nie. Wanneer daar dan gekies moet word tussen twee alternatiewe interpretasies in die prosesreg wat albei redelik kan wees, is dit my submissie dat daar voorkeur gegee behoort te word aan daardie interpretasie wat die mees effektiewe afloop in die praktyk sal hê. Wanneer 'n landdros gefouteer het deur 'n beskuldigde se borgaansoek van die hand te wys, is dit in belang van die regspleging dat die beskuldigde so gou as enigsins moontlik sy vryheid moet verkry. In die beslissings wat daarop neerkom dat a 97 'n struikelblok is in die beskuldigde se weg na hoër beroep word hierdie belang benadeel.

Dit skyn asof die praktykbehoeftes sterk die deurslag gee ten gunste van die beslissings wat aan 'n beskuldigde wat aangehou word die reg verleen om, na weiering van 'n aansoek om borgtog deur 'n landdros, die hooggeregshof direk deur middel van 'n dringende aansoek ingevolge a 98 te nader – ongeag of reeds appèl aangeteken is teen die landdros se bevinding al dan nie.

D THEO DE JAGER
Lid van die Port Elizabethse Balie

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[8]Sien Steyn *Die Uitleg van Wette* (4e uitgawe) 102 e v en gesag daar aangehaal.
[9]Sien *Steyn* a w 106 e v.

DIE PLEIT VAN SKULDIG EN ARTIKEL 258(1)(b) VAN WET 56 VAN 1955

Reeds vir 'n aantal dekades al kruip die regsgogga waaraan artikel 258(1)(b) van Wet 56 van 1955 – en sy voorgangers – geboorte gegee het, deur die Suid-Afrikaanse strafregpleging en die swart sleepmerke wat deur dié ongewone kruiptog afgegee word, is duidelik waarneembaar in onder andere 'n tweetal beslissings wat hieronder aandag sal geniet. Artikel 258(1)(b) van Wet 56 van 1955 lees tans soos volg:

> "Indien 'n beskuldigde wat weens 'n misdryf voor enige hof aangekla word, aan bedoelde misdryf of 'n misdryf waaraan hy op die aanklag skuldig bevind kan word, skuldig pleit en die vervolger die pleit aanvaar, kan die hof –
>
> (b) indien dit 'n laerhof is, hom weens die misdryf waaraan hy skuldig pleit, vonnis by bewys, afgesien van die onbekragtigde getuienis van die beskuldigde, dat die misdryf werklik gepleeg is: Met dien verstande dat indien die misdryf waaraan hy skuldig pleit sodanig is dat die hof van oordeel is dat dit nie gevangenisstraf sonder die keuse van 'n boete of lyfstraf of 'n boete van meer as honderd rand verdien nie, die hof, indien die vervolger geen getuienis met betrekking tot die pleging van die misdryf aanbied nie, die beskuldigde weens bedoelde misdryf op sy pleit van skuldig, skuldig kan bevind, en daarop enige bevoegde vonnis kan oplê behalwe gevangenisstraf of 'n ander vorm van aanhouding sonder die keuse van 'n boete of lyfstraf of 'n boete van meer as honderd rand, of andersins volgens wet met hom kan handel."

A Die betekenis van artikel 258(1)(b) van Wet 56 van 1955

Artikel 258(1)(b) impliseer eerstens dat 'n beskuldigde in die laerhof skuldig bevind kan word aan enige misdryf op sy pleit van skuldig en getuienis deur die staat wat die pleging van die misdryf bewys, oftewel getuienis aliunde. Dit beteken dat die beskuldigde deur sy pleit van skuldig slegs sy persoonlike betrokkenheid by die misdryf buite geskil plaas maar dat die staat, sy pleit van skuldig ten spyt, al die elemente van die ten laste gelegde misdryf deur middel van getuienis anders as die onbekragtigde getuienis van die beskuldigde moet bewys. Indien die beskuldigde getuienis aflê wat die pleging van die misdryf aantoon, moet die staat steeds getuienis aanbied om die werklike pleging van die misdryf te bewys. Sien in hierdie verband *R v Fouche* 1958 3 SA 767 (T) en *R v Nathanson* 1959 3 SA 124 (A). By sodanige bewyslewering deur die staat speel die pleit van skuldig deur die beskuldigde geen rol nie. Sien *S v Lombard* 1967 4 SA 538 (A) en *S v Skele* 1974 4 SA 386 (O).

Tweedens hou die voorbehoudsbepaling tot artikel 258(1)(b) in dat die laerhof in bepaalde gevalle sonder enige getuienis hoegenaamd op die pleit van die beskuldigde skuldig kan bevind. Die wetgewer betrek hierdeur baie duidelik slegs misdrywe van geringe aard wat normaalweg gevangenisstraf met die keuse van 'n boete of 'n blote maksimum boete van honderd rand tot gevolg sal hê. Indien die moontlike straf weens 'n misdryf gevangenisstraf sonder die keuse van 'n boete of lyfstraf of 'n boete van meer as honderd rand is, sal die voorbehoudsbepaling nie in werking tree nie. Sien in hierdie verband *S v Silva* 1975 4 SA 104 (N).

Die belangrikste implikasie van artikel 258(1)(b) is vervat in die feit dat die laerhof by meer ernstige misdrywe nie by magte is om 'n beskuldigde slegs op sy pleit van skuldig aan die ten laste gelegde misdryf skuldig te be-

vind nie. Selfs in die geval van 'n pleit van skuldig en onbekragtigde getuienis van die beskuldigde wat die pleging van die misdryf aantoon, sou die laerhof nie bevoeg wees om 'n skuldigbevinding uit te bring nie. Die pleit en getuienis van die beskuldigde moet vergesel gaan van getuienis anders as dié van die beskuldigde wat die pleging van die misdryf bewys alvorens 'n daaropvolgende skuldigbevinding in ooreenstemming met artikel 258(1)(b) sou wees. Gevolglik bring die pleit van skuldig van die beskuldigde nie mee dat al die feite – en dus ook al die elemente van die misdryf – buite geskil geplaas word nie. Die feit dat die beskuldigde getuienis onder eed aflê wat die pleging van die misdryf aantoon, plaas die feite en die elemente van die misdryf ook nie buite geskil nie. Die las is steeds op die staat om die werklike pleging van die misdryf te bewys.

B Die argumente ten gunste van artikel 258 (1)(b) van Wet 56 van 1955

Daar is veral twee redes vir die implementering van artikel 258(1)(b) – en sy voorgangers – wat normaalweg ook aangevoer word as argumente wat die gemelde implikasie van dié artikel regverdig. Die eerste en vernaamste is dat 'n onskuldige persoon om die een of ander rede skuldig kan pleit tot sy eie ooglopende nadeel en dat getuienis aliunde derhalwe die pleit van skuldig moet vergesel alvorens 'n skuldigbevinding regtens uitgebring kan word. Sodoende sal verhoed word dat die onskuldige wat valslik skuldig pleit, ten onregte skuldig bevind word. Tweedens word aangevoer dat 'n hoërhof op appèl of by hersiening sonder enige getuienis op rekord in 'n onmoontlike posisie sou wees om die meriete van die skuldigbevinding en/of vonnis na te gaan. Die vereiste dat getuienis aliunde aangebied moet word, sal minstens inhou dat die hof van appèl of die hersieningshof in die posisie sal wees om op 'n breedvoerige notule van die verrigtinge voor die verhoorhof hom uit te spreek oor die meriete van die skuldigbevinding en vonnis.

1 *Die onskuldige kan moontlik skuldig pleit*

Dat hierdie rede 'n baie belangrike oorweging was by die ontstaan van artikel 258(1)(b), blyk duidelik uit die opmerking van ar Van den Heever in *R v Sikosana* 1960 4 SA 723 (A) op 729C–D – 'n uitspraak wat reeds in 1950 gelewer is:

> "The danger of innocent persons freely and voluntarily confessing their guilt in connection with crimes which either they did not commit or which were in fact not committed by anyone, is no doubt slight. As a result of accumulated experience, however, different safeguards have been devised in different countries to provide for what must be exceptional occurences, namely confessions by unbalanced individuals to being guilty of crimes which they never committed."

Hoewel dié opmerking gemaak is ten aansien van die destydse voorganger van artikel 258(2) van Wet 56 van 1955, het ek geen twyfel dat dieselfde oorwegings minstens deurslaggewend was by die totstandkoming van artikel 258(1)(b) en sy voorgangers nie. ('n Bekentenis deur 'n beskuldigde verskil in elk geval van 'n pleit van skuldig basies slegs in dié opsig dat laasgenoemde 'n ondubbelsinnige erkenning van skuld binne die hof is.)

Dat 'n onskuldige persoon valslik skuldig kan pleit en dienooreenkomstig ten onregte skuldig bevind kan word, is egter 'n moontlikheid wat

nie deur artikel 258(1)(b) uitgesluit word nie. Die pleit van skuldig het, soos ons hierbo opgemerk het, juis tot gevolg dat die persoonlike betrokkenheid van die beskuldigde by die ten laste gelegde misdryf buite geskil geplaas word. Weens die feit dat die persoonlike betrokkenheid van die beskuldigde by die misdryf deur sy pleit van skuldig buite geskil geplaas word, is die kanse dat die valsheid van sy pleit aan die lig sal kom, uitgeskakel. Die staat hoef slegs die werklike pleging van die misdryf te bewys en geen getuienis aan te bied wat die beskuldigde as pleger van die misdryf impliseer nie.

Dan bestaan daar ook die anomalie wat die voorbehoudsbepaling tot artikel 258(1)(b) skep, naamlik dat daar wel in bepaalde gevalle slegs op die pleit van skuldig van die beskuldigde skuldig bevind kan word. Indien die werklike effek van dié artikel moes wees om die onskuldige teen sy eie valse pleit van skuldig te beskerm, is die skepping van uitsonderings daarop onverklaarbaar.

Voorts is die moontlikheid dat 'n engel hom in die moderne samelewing waarin ons leef as 'n satan sal voordoen, só skraal dat ek van mening is dat enige maatreël om sodanige moontlikheid uit te skakel die spreekwoordelike bobbejaan agter die bult sal gaan haal.

Laastens bestaan daar die onomwonde feit dat 'n hoërhof op die blote pleit van skuldig die beskuldigde skuldig kan bevind – sien artikel 258(1)(a) van Wet 56 van 1955. Ek meen nie dat die moontlikheid dat 'n onskuldige valslik skuldig sal pleit, uit die weg geruim word bloot omdat daardie pleit in 'n hoërhof aangebied is nie. Gevolglik is die ontheffing van die hoërhof aan die bepalings van artikel 258(1)(b) eweneens onverklaarbaar indien dié artikel die onskuldige persoon teen sy valse pleit van skuldig moet beskerm, soos voorgegee word.

2 *Geen notule vir die hof van appèl of hersieningshof nie*

Dit is inderdaad so dat die hof van appèl of die hersieningshof die meriete van die skuldigbevinding en/of vonnis hoofsaaklik aan die hand van die notule van die verrigtinge in die laerhof beoordeel. Indien alle sake op die pleit van skuldig van die beskuldigde in laerhowe afgehandel kan word sonder die aanbieding van enige getuienis, kan dit beteken dat die hoërhof op appèl of by hersiening tot 'n groot hoogte lamgelê word deur die afwesigheid van 'n breedvoerige notule van die verrigtinge in die verhoorhof.

Ek is egter van mening dat dié verskynsel minstens nie nuut sal wees nie. Elke hoërhof kan soos reeds opgemerk op die blote pleit van skuldig deur die beskuldigde skuldig bevind. Dit hou uiteraard in dat die appèlafdeling, wat dan die funksie van 'n hof van appèl sal vervul, sonder sodanige breedvoerige notule sal wees indien die beskuldigde wat aldus skuldig bevind is, sou appelleer. Die posisie is egter dat 'n persoon wat in 'n hoërhof op sy pleit van skuldig skuldig bevind is, nie 'n ongekwalifiseerde reg van appèl na die appèlafdeling het nie. Hy mag naamlik slegs teen sy vonnis en/of 'n bevel wat op die vonnis volg, appelleer en nie teen sy skuldigbevinding nie – sien artikel 363(1) van Wet 56 van 1955. Die afwesigheid van 'n breedvoerige notule kan die hof van appèl dus nie steur in sy beoordeling van die meriete van die skuldigbevinding nie, omdat 'n appèl op die meriete van die skuldigbevinding nie moontlik is nie.

Ek voorsien nie dat daar 'n gebrek aan breedvoerigheid in die notule ten opsigte van vonnis sal wees nie. Dit is die plig van die beskuldigde om by straftoemeting omstandighede ter versagting voor die verhoorhof te lê. Dit is ook die taak van die staatsaanklaer of staatsadvokaat om die verhoorhof by vonnisoplegging by te staan. Boonop bring die voorsittende beampte tydens die verrigtinge al die feite met betrekking tot straftoemeting op die notule aan en verskaf hy ook breedvoerige redes aan die hof van appèl vir die vonnis waarop besluit is.

Wat hersiening betref, is ek van mening dat daar geen noodsaaklikheid vir hersiening bestaan in gevalle waarin die beskuldigde deur sy pleit van skuldig al die tersaaklike feite wat op die meriete van sy skuldigbevinding betrekking kan hê, buite geskil geplaas het nie. Watter nadeel kan die skuldigbevinding vir die beskuldigde inhou as dit gegrond is op sy pleit van skuldig waardeur alle tersaaklike feite – en ook die bewerings in die klagstaat – buite geskil geplaas is? Daar bestaan weliswaar die moontlikheid dat die pleit van skuldig op 'n misverstand gegrond kon gewees het, of dat daar sedert die skuldigbevinding feite tot sy aandag gekom het wat 'n pleit van onskuldig by die verhoor sou bewerk het, maar in hierdie uitsonderlike gevalle het die beskuldigde of sy verteenwoordiger steeds die reg om 'n regter vir regstelling te nader.

Uitgaande van bovermelde standpunt, is die afwesigheid van 'n breedvoerige notule van die verrigtinge voor die verhoorhof tydens appèl- of hersieningsprosedure geen onaanvegbare grond vir die bestaan van artikel 258(1)(b) van Wet 56 van 1955 nie.

C Die argumente teen artikel 258 (1)(b) van Wet 56 van 1955

1 *Die gemene reg*

Die gemene reg het as uitgangspunt dat 'n persoon op sy blote pleit van skuldig skuldig bevind kan word. Daar word nie as vereiste gestel getuienis aliunde afgesien van die onbekragtigde getuienis van die beskuldigde nie.

Die posisie in hierdie verband is reeds deur rp Claassen in *R v Leuner* 1958 2 SA 582 (SWA) nagevors. Hy verwys na die volgende gesag: "Scott's translation of D 42 2 1 states: 'He who confessess in Court is held to have had judgment rendered against him, for he himself is, as it were, condemned by his own sentence'" (op 583H) en "Voet 'Commentary', discusses the question of admissions in Book 42, title 2 and says in sec 6 (Gane's translation): 'The effect of a judicial admission . . . is that the person who made it is considered as having been judged, *so that there is no need for further evidence or inquiry*. Thus the Judge has no other rôle than to pass adverse judgment" (my eie kursivering). Hoewel die navorsing gedoen is met betrekking tot die vraag of die pleit van skuldig op "getuienis" neerkom, blyk dit duidelik uit die aangehaalde werke van die ou skrywers dat 'n persoon op sy blote bekentenis in die hof, dit wil sê 'n pleit van skuldig, skuldig bevind kon word. Die verdere vereiste van getuienis aliunde, afgesien van die onbekragtigde getuienis van die beskuldigde, is na my mening aan die gemene reg onbekend.

Slegs ten opsigte van die prosedure in die hoërhof is die huidige posisie in ons reg dus in ooreenstemming met die gemeenregtelike stand van sake.

2 *Die praktiese implikasie van die artikel*

Die praktiese implikasie van artikel 258(1)(b) is so verreikend dat die posisie bykans bereik is dat die pleit van skuldig in die laerhof geen gewig meer het nie, afgesien van die feit dat dit die persoonlike betrokkenheid van die beskuldigde by die misdryf buite geskil plaas en dat dit lei tot gedwonge growwe beslissings wat nooit deur die fyn sif van die reg moes gekom het nie.

(i) *Die pleit van skuldig het in die laerhof geen gewig nie*

Die pleit van skuldig word allerweë beskou as 'n formele en afdoende erkenning van die pleging van die misdryf deur die erkenner. As noodwendige gevolg, het uit die pleit van skuldig voortgevloei dat alle tersaaklike feite buite geskil geplaas word en dat dit gevolglik vir die staat nie nodig is om enige van die bewerings in die klagstaat of die akte van beskuldiging te bewys nie. Sien byvoorbeeld *R v Kumalo* 1930 AD 193 op 202 en 206. Dit is ook nog die posisie in die Suid-Afrikaanse hoërhowe – vergelyk artikels 258(2) en 363(1) van Wet 56 van 1955, wat reeds hierbo aandag geniet het.

Uitgaande van die standpunt dat die rasionale menslike wese slegs deur die prikkel van waarheid en gewete tot 'n pleit van skuldig kom, is ek van mening dat die negering van die waarde daarvan deur artikel 258(1) (b) van Wet 56 van 1955 onverdedigbaar is. Indien hierdie negering boonop slegs in die Suid-Afrikaanse laerhowe bestaan, is dit myns insiens ook onverklaarbaar. Dit is noodsaaklik dat eenvormigheid verkry word.

(ii) *Dit lei tot moreel onregverdigbare beslissings*

Dit gebeur heel dikwels dat hoërhowe skuldigbevindings ter syde stel omdat getuienis aliunde, die beskuldigde se pleit van skuldig ten spyt, nie deur die staat voor die verhoorhof aangevoer is nie. Hieronder volg twee onlangse voorbeelde. Ek wil dit duidelik stel dat die beslissings as sodanig nie aangeval word nie – dit volg noodwendig op die implikasie van artikel 285(1)(b).

S v De Vos 1975 1 SA 451 (O): Beskuldigde is aangekla van oortreding van die regulasies wat algemeen bekendstaan as die spoedregulasies. In die laerhof het hy skuldig gepleit soos aangekla en het self geen getuienis op die meriete van die saak voor die hof geplaas nie. Die staat het die getuienis van 'n verkeersbeampte gelei, maar versuim om getuienis aan te bied dat brandstof deur die voertuig van die beskuldigde verbruik is toe dit in die lokval betrap is. Na skuldigbevinding het die beskuldigde ter strafversagting getuig dat sy kind, wat saam met hom in die motor was, lastig geword het en dat dit hom verplig het om vinniger te ry. By appèl word beslis dat die staat nie getuienis aliunde aangebied het nie, weens die versuim om aan te toon dat die betrokke voertuig brandstof verbruik het en die skuldigbevinding en vonnis word ter syde gestel.

S v De Waal 1976 2 SA 289 (O): Beskuldigde is aangekla van oortreding van artikel 140 van Ordonnansie 21 van 1966 (O) en is skuldig bevind aan oortreding van artikel 140(2) van die gemelde ordonnansie. Beskuldigde het skuldig gepleit aan oortreding van artikel 140(2) en daar was onbetwiste

getuienis op rekord dat hy op 'n vraag geantwoord het: "Ag, aan die eenkant het 'n ou moeg gevoel en gevoel hy het iets gedrink en ek het gedink ek sal daarmee wegkom." Aangesien die staat nie bewys het dat alkohol eweredig deur die beskuldigde se bloed versprei was nie, word die skuldigbevinding en vonnis ter syde gestel weens 'n gebrek aan getuienis aliunde soos vereis deur artikel 258(1)(b) van Wet 56 van 1955.

Dit kan eenvoudig nie in belang van reg en geregtigheid wees dat hoërhowe verplig word om by appèl of by hersiening skuldigbevindings en vonnisse ter syde te stel weens die feit dat die staat versuim het om getuienis aliunde aan te bied nie, en dit nadat die beskuldigde skuldig gepleit het aan die ten laste gelegde misdryf en selfs ter versagting verduidelik het waarom of onder welke omstandighede hy die misdryf gepleeg het. Dikwels is die versuim van hoogs tegniese aard en boonop te wyte aan die gees waarin die verhoor voor die verhoorhof afgespeel het – een van erkenning en berou deur die beskuldigde.

D Slotsom

Dit is noodsaaklik dat artikel 258(1)(b) van Wet 56 van 1955 dringend onder die loep geneem word deur die wetgewer. Die Suid-Afrikaanse hoërhowe word daardeur in die posisie geplaas dat hulle verplig is om 'n erkennende en berouvolle beskuldigde voor die verhoorhof om te tower in 'n onskuldige en verontregde appellant. Artikel 258(1)(b) veroorsaak kortsluitings in die Suid-Afrikaanse strafregpleging wat nie alleen tot onreg lei nie, maar ook die aansien van geloofwaardigheid en pligsgetrouheid van ons hoërhowe in die oë van die gewone burger ernstig in gevaar stel.

E DU TOIT
Kantoor van die Prokureur-Generaal, Bloemfontein

NEGLIGENT MISREPRESENTATION INDUCING A CONTRACT: RECENT DECISIONS IN THE SOUTH AFRICAN AND ENGLISH COURTS

The actionability in South African law of negligent misrepresentation inducing a contract was enunciated by Wessels JA in *Hamman v Moolman*[1] in 1968:

> "The existing law grants what appears to be adequate protection in the field of contract to a party to whom a misrepresentation is made. Thus a contracting party may safeguard himself against loss by simply taking the elementary precaution of requiring the representor to guarantee the truth of his representations. Adequate remedies are available where misrepresentations are tainted with *dolus*, and in appropriate circumstances an aggrieved party is granted relief in the case of an innocent misrepresentation. Although pure logic and the never-ending development and expansion of legal ideas do not appear to be opposed in principle to a conclusion that in appropriate circumstances an action might be maintained to recover pecuniary loss caused by honest but carelessly made verbal (or written) misrepresentations, there is as yet in our law no authoritative determination or generally accepted definition of the principles to be applied in deciding in what circumstances such an action will lie in the field of contract . . . I am by no means satisfied that the

[1] 1968 4 SA 340 (A).

> practical necessity of a remedy of the kind contended for has been demonstrated, nor that its recognition might not result in more ills than the one that it is intended to remedy, namely, the failure of the unwary representee to have proper regard to his own interests in the field of contract."[2]

Before this negative attitude to damages for misrepresentations inducing a contract, it was already propagated by PMA Hunt[3] that this type of misrepresentation should be treated on the same footing as delictual liability for negligent statements unconnected with a contract.[4] In *Hamman v Moolman* the appellate division declined to extend this to misrepresentation inducing a contract; it was outspoken about difficulties in respect of negligent misrepresentation in general and the problems created by liability. The judgment by Wessels JA seems to favour the representor and casts a burden on the representee to be very careful – a flash of English law akin to caveat emptor?

The appellate division appreciated that the refusal of damages for negligent misrepresentation could produce unjust results. In *Phame (Pty) Ltd v Paizes*[5] the plaintiff was induced by a so-called "innocent" misrepresentation to enter into a contract of sale of an amount of shares in a company which was the owner of a rent producing property. On the facts, however, the representation seems to have been negligent rather than without fault.[6] In the course of negotiations a material misrepresentation was made to the buyers in respect of the amount of yearly expenses, which turned out to be only one third of the true expenses. The plaintiff claimed reduction of the purchase price, being the difference between the purchase price and the true value of the shares. The court examined the Roman and Roman-Dutch authorities on cases where a dictum promissumve was made in a contract of sale and the subject matter turned out to be different than described by the vendor. Holmes JA decided that the actio quanti minoris was available

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[2] 348.

[3] 1964 *SALJ* 241.

[4] *Herschel v Mrupe* 1954 3 SA 464 (A), notably 480 per Schreiner JA. Support for the general proposition that an action lies for negligently spoken or written words in some circumstances but not in others can be found in a few South African cases like *Perlman v Zoutendyk* 1934 CPD 151 328, *Alliance Building Society v Deretich,* 1941 TPD 203 and *Western Alarm Systems (Pty) Ltd v Coini & Co* 1944 CPD 271, but none of them furnishes much help in deciding when a person who is asked a question, is obliged in law to answer it carefully. On the assumption that I have made, that in some cases of this kind an action is maintainable, I know of no more reasonable propositions than those enunciated by Andrews, J, in delivering the judgment of the New York court of appeals in *International Products Company v Erie Railway Company,* 56 ACR 1377. At 1381 the learned judge says in relation to liability for answers to questions: "There must be knowledge, or its equivalent, that the information is desired for a serious purpose, that he to whom it is given intends to rely and act upon it; that, if false or erroneous, he will because of it be injured in person or property. Finally, the relationship of the parties, arising out of contract or otherwise, must be such that in morals and good conscience the one has the right to rely upon the other for information, and the other giving the information owes a duty to give it with care".

[5] 1973 3 SA 397 (A).

[6] 407. Holmes JA does not make a distinction between "innocent" and "negligent" misrepresentations – indeed "negligent" does not appear in the judgment. The impression is created by Holmes JA that he is dealing with all misrepresentations save those made intentionally. Cf the case note by Van der Merwe and Reinecke in 1973 *THRHR* 175 180.

to the plaintiff because of the misrepresentations as to the quality of the res vendita.[7]

The result of this decision is that misrepresentations bearing on the quality of the res vendita in a contract of purchase and sale are actionable in damages. The damages consists in the reduction of the purchase price. It is therefore not delictual damages, but a special case where damages is given. Nothing was said about the actionability in general of negligent misrepresentations inducing a contract; in fact, it was carefully avoided because the issue was framed as innocent misrepresentation in the context of purchase and sale. The effect of this judgment is just, but one wonders what will happen when a misrepresentation is made which has bearing on something else than the quality of the res vendita, though still connected with it.[8]

This was the background against which *Du Plessis v Semmelink*[9] was decided. The facts of the case were: Plaintiff bought a piece of land from defendant. In the negotiations preceding the contract, defendant negligently stated that a servitude of right of way existed over an adjoining property in favour of the land which was the subject matter of the sale. When the contract was concluded, the buyer became aware that no servitude existed at all. This rendered the property less valuable and the plaintiff claimed damages, eventually basing his claim on negligent misrepresentation. Very late in the proceedings it was sought to change the pleadings so as to include "innocent misrepresentation" and thus to bring the case in line with *Phame v Paizes*, namely that a dictum promissumve which is proved to be untrue, entitles the buyer to price reduction.[10] The court refused this application on practical grounds: it would lead to an undesirable protraction of the legislation.

In respect of liability for negligent misrepresentation counsel for the defendant, relying on *Hamman v Moolman*, argued[11] that that was no ground of action. To this it was replied on behalf of the plaintiff[12] that *Hamman v Moolman* did not decide explicitly that no liability resulted from negligent misrepresentation inducing a contract; furthermore, that in *Herschel v Mrupe* it was decided by the appellate division that damages can be claimed in cases where a negligent misrepresentation was made and the representor was aware of the fact that the other party would act in reliance on his conduct.

Nestadt AJ rejected these arguments and held that the decision in *Hamman v Moolman* was unambiguous[13] and that the appellate division had declined to extend the principle laid down in *Herschel's* case to negligent misrepresentations inducing a contract. He accentuated the idea that negligent misrepresentation inducing a contract should be treated differently

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[7]For criticism of the historical approach see Van der Merwe and Reinecke 176 ff.
[8]Cf Van der Merwe and Reinecke 183.
[9]1976 2 SA 500 (T).
[10]501F.
[11]502H.
[12]Ibid.
[13]503A–H.

from negligent misrepresentation in cases where no contract was involved – as happened in *Herschel*'s case. The claim was therefore dismissed.

This decision is in contrast to the one in *Esso Petroleum Co v Mardon*[14] delivered by the English court of appeal. Before discussing the case, it might be worthwhile to refer to the position of damages for negligent misrepresentation inducing a contract in English law.

Prior to the Misrepresentation Act (1967) negligent misrepresentation inducing a contract was no cause of action.[15] This led to inequitable results, so that the courts tried to evade this result by means of the construction of collateral warranties, ie that the misrepresentations are actually contractual terms.[16] If such warranties are breached a contractual party may sue for damages for breach of warranty, which places the plaintiff in the same position he would have been in if the contract had been properly executed.[17] This, of course, differs from damages in negligence which places the plaintiff in the same position he would have been in if the delict had not been committed. The courts have tended to favour the warranty-construction and readily decided that a misrepresentation became a warranty.[18]

A further development in English law prior to 1967 was the decision of the house of lords in the well-known case of *Hedley Byrne & Co Ltd v Heller and Partners*[19], from which the rule can be deducted that a claim in negligence for misrepresentation lies when there is a contractual, fiduciary or other 'special relationship'[20] between parties which gives rise to a duty of care. This case was decided for instance where liability for damages lay in negligence and not in contract, although nothing was said in the speeches of the law lords against extending it to misrepresentations inducing contracts.

In 1967 the position in respect of misrepresentation was changed. Sec 2(1) of the Misrepresentation Act, applicable to misrepresentations made on or after 22nd March 1967, provides:

> "Where a person has entered into a contract after a misrepresentation has been made to him by another party thereto and as a result thereof he has suffered loss, then, if the person making the misrepresentation would be liable in damages in respect thereof had the misrepresentation been made fraudulently, that person shall be so liable notwithstanding that the misrepresentation has not been made fraudulently, unless he proves that he had reasonable ground to believe and did believe up to the time the contract was made that the facts represented were true."

This negligent misrepresentation is treated in the same way as fraudulent misrepresentation where damages are concerned. Furthermore the burden

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[14](1976) 2 All ER 5 (CA).

[15]*Derry v Peek* (1889) 14 App Cas 337. The ratio of this case, that only deceit would lead to an action for damages in cases where misrepresentation is alleged, was confirmed in *Heilbut Symons & Co v Buckleton* (1913) AC 30.

[16]Cheshire and Fifoot *The Law of Contract* (1969) 56. Treitel *An Outline of the Law of Contract* (1975) 136 ff.

[17]Treitel loc cit.

[18]Per Lord Denning MR in *Esso v Mardon* 13. This happened in spite of Lord Moulton's declaration in *Heilbut Symons & Co v Buckleton* (47) that the intention of the parties to the contract should be the deciding factor.

[19](1964) AC 465.

[20]Millner *Negligence in Modern Law* (1967) 38.

of proof is put upon the defendant to prove that he was not negligent, which greatly facilitates the task of the plaintiff.

Because the cause of action in *Esso v Mardon* arose before 1967, it was decided on the grounds available before that time. The relevant facts were: After a considerable amount of market research E built a petrol station in an area, which, on the strength of their research, promised to render good profits. The local authorities forced them to build the station back to front, so that the entrance to the petrol pumps was not on the main street but only accessible by side streets – only the shop window was allowed to face the main street. The market research, needless to say, was based on the proposition that the entrance would be on the main street. On the strength of their market research experienced employees of E induced M to become tenant of the station. M had a bad time and could not make the station profitable; he was not able to make the amount of profit that was represented to him as possible on the strength of the market research; in fact, he was losing heavily. Finally E claimed possession of the petrol station and payment for petrol supplied to M. In a counterclaim M claimed damages on the grounds that the representation by E before their entering into the contract was a collateral warranty and that it amounted to negligent misrepresentation. In the high court it was held that no collateral warranty existed, but that a claim for negligent misrepresentation could be allowed. E appealed, but the appeal was dismissed.

Lord Denning MR decided that a collateral warranty could be constructed in the present case. He went further and examined the claim on the ground of negligent misrepresentation. The master of the rolls decided that the doctrine enunciated in *Hedley Byrne* was also applicable in the present case. He rejected the argument on behalf of E that when negotiations between two parties resulted in a contract between them, their rights and duties were governed by the law of contract and not by the law of tort:

> It seems to me that *Hedley Byrne*, properly understood, covers this particular proposition: if a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another – be it advice, information or opinion – with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading information or expresses an erroneous opinion, and thereby induces the other side into a contract with him, he is liable in damages.[21]

The quantum of damages was calculated on the basis of the loss caused by M's having been induced to enter into a disastrous contract.[22] It is thus not the same as for a contractual action.

Concurring judgments were handed down by Ormrod and Shaw LJJ. Both these lords justice held that liability could be founded on either breach of warranty or negligence in the sense of *Hedley Byrne*.

In this way English law has bridged the problem of negligent mis-

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[21]16a–b.
[22]16e–f.

representation inducing a contract for cases prior to the Misrepresentation Act. By treating the problem as a case in which the rules for negligence as expounded in *Hedley Byrne* are applicable, a wider remedy was created than that offered by the use of collateral warranties and their breach. The true root of the problem has now been touched.

This decision should have persuasive power for future South African cases. In the first place: the idea that negligent misrepresentation inducing a contract is not a cause of action in South African law has crept into our law from English law. This should never have happened. Had our courts looked at the problem of misrepresentation within or outside the field of contract in its perspective, the logical deduction would be that misrepresentation is a fact entirely different from the resulting contract. In both contractual and extra-contractual claims the misrepresentation has the effect to induce a person to do something to his detriment, either to enter into an unfortunate contract or to act elsewise, as happened in *Perlman v Zoutendyk.*[23] As was pointed out by Lord Denning, a duty to take care is present in both cases. The distinction contract/tort is thus meaningless in cases of misrepresentation where damages are claimed.

Secondly, liability in negligence for misrepresentations in cases where a duty to take care exists, is accentuated. A clear case can thus be made out for liability in negligence for mere pecuniary or financial loss. Henceforth the problem should not be whether a claim should be allowed, but whether a duty to be careful exists in the circumstances. This point will be decided by the facts of the case. The policy, however, will be clear.

Thirdly, the argument by Wessels JA, in *Hamman v Moolman* that there is no need for liability for negligent misrepresentation in contract is effectively refuted. That was already recognised in England in 1967 when the Misrepresentation Act was introduced. But even before that a remedy was given by means of the use of collateral warranties. It should not be difficult for South African law, which is more flexible than English law, to adopt a new course in respect of liability for negligent misrepresentations inducing contracts.

PIETER PAUW
Johannesburg

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[23]1934 CPD 151 328.

Vonnisse

ST AUGUSTINE'S HOSPITAL PTY LTD v LE BRETON 1975 2 SA 530 (N)

Hospitaal – middellike aanspreeklikheid vir nalatigheid van verplegingspersoneel – toets vir bestaan van heer-dienaar verhouding

Die feite in hierdie saak was kortliks die volgende: Die eiser het 'n hospitaal bedryf. 'n Ou dame van 92 jaar met 'n gebreekte arm is deur die eiser in die hospitaal opgeneem. Die ou dame is deur haar seun, die verweerder, na die eiser se hospitaal gebring. Weens die nalatigheid van die verplegingspersoneel is nagelaat om die kantrelings van die ou dame se bed gedurende die nag op te sit; sy val gedurende die nag uit die bed en doen 'n beenfraktuur op. As gevolg hiervan moes sy aansienlik langer in die hospitaal vertoef en is addisionele koste sodoende opgeloop.

Die eiser eis van die verweerder op grond van kontrak betaling van die hospitaalrekening vir die volle tydperk van die ou dame se hospitalisasie. Die verweerder ontken kontraktuele aanspreeklikheid vir die addisionele verblyf van die ou dame in die hospitaal. Hy stel 'n teeneis in vir die verhaal van die gemelde addisionele uitgawes in verband met die beenfraktuur wat die ou dame opgedoen het.

Vir die doeleindes van hierdie bespreking laat ek die beslissing oor die eiser se eis buite rekening en beperk my tot die teeneis van die verweerder.

Die hof bevind dat die verantwoordelike verplegingspersoneel nalatig opgetree het deur nie die kantrelings van die bed gedurende die nag in posisie te plaas nie (536A).

Die vraag waarvoor die hof te staan gekom het, is of die hospitaal as regspersoon aanspreeklik is vir die nalatige optrede van sy verplegingspersoneel. Die hof is gekonfronteer met 'n volbankuitspraak van die Natalse afdeling in *Lower Umfolosi District War Memorial Hospital v Lowe* 1937 NPD 31 waarin beslis is dat 'n hospitaalowerheid nie aanspreeklik is vir die nalatige optrede van 'n verpleegster wat plaasvind in die uitvoering van haar professionele aktiwiteite nie. Die regter ag hom gebonde aan hierdie uitspraak. Hy meen dat die nalatige optrede in casu ook voortvloei uit die lewering van professionele dienste en dat die verweerder se teeneis dus moet misluk. Die regter stel dit duidelik dat, as hy nie aan die gemelde presedent gebonde was nie, hy geneë sou gewees het om die eis toe te staan (538D–E).

In die *Lower Umfolosi*-saak was die feite die volgende: Terwyl die respondent besig was om te herstel van narkose toegedien met die oog op 'n operasie, is hy ernstig gebrand deur 'n warmwatersak wat 'n verpleegster in sy bed geplaas het. Die respondent eis skadevergoeding van die appellant. In die landdroshof word die appellant aanspreeklik gestel.

By appèl beslis die Natalse hof dat die appellant nie aanspreeklik is nie. In navolging van die appèlhofuitspraak in *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 en twee uitsprake in die Engelse howe (*Hillyer v The Governors of St Bartholomew's Hospital* (1909) 2 KB 820; *Strangways-Lesmere v Clayton* (1936) 2 KB 11) word beslis dat 'n hospitaalowerheid nie middellik aanspreeklik is vir nalatige optrede van personeel in die uitvoering van hul professionele pligte nie, maar slegs vir hul nalatige aktiwiteite in die uitoefening van hulle eenvoudige diens- of administratiewe pligte ("pure ministerial or administrative duties" – *Hillyer*-saak hierbo 829). Die onderskeiding tussen professionele en ander aktiwiteite berus op twee gedagtes: (1) 'n hospitaalowerheid onderneem teenoor 'n pasiënt slegs om hom te laat behandel deur personeel van wie se professionele bekwaamheid die owerheid homself deur redelike sorg vergewis het en staan nie in vir sulke personeel se nalatigheid by die uitoefening van hul professionele pligte nie (vgl *Hillyer*-saak hierbo 826 829; *Byrne v East London Hospitaal Board* 1926 EDL 128); en (2) by die uitoefening van professionele aktiwiteite het die owerheid geen kontrole oor die wyse van uitoefening nie en vir die doeleindes van die uitoefening van sulke aktiwiteite is die betrokke personeel dus nie dienaars of werknemers van die owerheid nie (*Hillyer*-saak hierbo 825 829).

Die beginsel wat hierdie benadering ten opsigte van die aanspreeklikheid van 'n hospitaalowerheid ten grondslag lê, is opgeslote in die tradisionele kontrole-maatstaf om vas te stel of 'n dienslewerende persoon 'n dienaar of onafhanklike kontrakteur is. Die dokter en verpleegster op die personeel van 'n hospitaal is, wat die lewering van professionele dienste betref, klaarblyklik nie onder die beheer van die owerheid nie (ten minste nie wat die *wyse* van dienslewering betref nie) en kan dus streng gesproke nie as dienaars beskou word nie (vgl die aanwending van die kontrole-toets in *Hartl v Pretoria Hospital Committee* 1915 TPD 336). McKerron se standpunt dat 'n hospitaalowerheid op indirekte wyse, byvoorbeeld deur die aanstelling van 'n toesighoudende geneesheer, wel beheer kan uitoefen oor die professionele aktiwiteite van sy personeel en dus wel 'n reg op beheer het (*The Law of Delict* (1971) 92 n 13), is onaanvaarbaar. Die hospitaalowerheid sal normaalweg die insidentele aspekte van dienslewering, byvoorbeeld die bepaling van plek en tyd van dienslewering, kan beheer, maar dit is te betwyfel of dit realisties en moontlik is om deur 'n toesighoudende party in te gryp of beheer uit te oefen oor die daadwerklike wyse van uitoefening van professionele pligte deur die professionele personeel. Streng volgens die kontrole-toets is die professionele personeel vir die doeleindes van die uitoefening van hul professionele pligte dus nie dienaars van die hospitaalowerheid nie.

Sedert die *Hillyer*-uitspraak in 1909 het die kontrole-maatstaf in die Engelse reg belangrike ontwikkelinge ondergaan (vergelyk oor die algemeen Atiyah *Vicarious Liability in the Law of Torts* (1967) 35–49; Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1976) (ongepubliseerde proefskrif PU vir CHO) 368–379; Kahn-Freund "Servants and Independent Contractors" 1951 *Modern Law Review* 504). Aanvanklik (sedert 1858) is kontrole oor die wyse waarop 'n persoon diens lewer as deurslaggewende faktor aanvaar (Atiyah 40 ev). Kontrole is opgevat as daadwerklike beheer

(Scott 368 e v). Dit het mettertyd geblyk 'n onrealistiese opvatting te wees. In 'n betreklik ongekompliseerde samelewing waarin tegniese en professionele vaardighede grootliks ontbreek, kan die heer daadwerklike beheer uitoefen in die sin dat hy kan voorskryf hoe die betrokke diens gelewer moet word. Met die toenemende industrialisasie het daadwerklike beheer moeilik en selfs onmoontlik begin word. Die dienaar is dikwels juis 'n persoon wat weens sy besondere bekwaamhede in diens geneem word; die heer kan in so 'n geval uiteraard nie die wyse van dienslewering bepaal nie (vergelyk Kahn-Freund 505). Dit het gelei tot 'n afwatering van die kontrolemaatstaf.

Dit is geherinterpreteer as 'n "reg op beheer"-maatstaf. Die "reg op beheer"-maatstaf hou oor die algemeen in dat die werkgewer die bevoegdheid moet hê om beheer uit te oefen oor die sogenaamde insidentele aspekte van die dienslewering; dit behels die bevoegdheid om voor te skryf *wat* gedoen moet word, *waar* dit gedoen moet word en *wanneer* dit gedoen moet word (vgl *Cassidy v Minister of Health* (1951) 2 KB 343 (CA); *Mersey Docks and Harbour Board v Coggins & Griffith* (*Liverpool*) *Ltd* 1947 AC 1 (HL)). Hierdeur is beheer oor die *wyse* van dienslewering as essensiële element van kontrole verwerp.

'n Meer moderne opvatting is dat 'n persoon as dienaar diens lewer aan 'n ander as sy werk 'n integrale deel vorm van die ander se besigheid of organisasie – die sogenaamde "organisation"-toets. Hierdie maatstaf is deur lord Denning ontwikkel (sien *Stevenson, Jordan and Harrison, Ltd v Macdonald and Evans* (1952) 1 TLR 101 (CA); *Bank Voor Handel En Scheepvaart N V v Slatford* (1953) 1 QB 248 (CA); vgl lord Wright se uitspraak in *Montreal Locomotive Works Ltd v Montreal and A–G.* (1947) 1 DLR 161 op 169). Die toets behels basies die vraag of die betrokke werker ten opsigte van die diens wat hy moet lewer integraal ingeskakel is by die besigheid of organisasie van die ander (Scott 375).

Benewens bostaande maatstawwe is daar ook die siening dat 'n veelheid van faktore, indicia, waarvan nie een noodwendig deurslaggewend is nie, relevant is ter bepaling van die status van die werknemer. Die hof moet op grond van veral die volgende faktore beslis: ten bate van wie die werk verrig word, wie die risiko van verliese dra; wie die reg het om beheer uit te oefen oor die wyse van dienslewering, wie die werker aanstel, wie hom vergoed en op welke wyse, wie die werker kan ontslaan, wie die plek aanwys waar die werk gedoen moet word en die tyd wanneer dit gedoen moet word (vgl Scott 377–379; sien veral *Short v J & W Henderson Ltd* (1946) 62 TLR 427 (HL) op 429; *MacDonald v Glasgow Western Hospitals* 1954 SC 453 op 465; *Montreal Locomotive Works Ltd v Montreal and A–G* hierbo 169; Atiyah 40–69).

Die gestadige herinterpretasie en verval van die oorspronklike strenge kontrole-toets in die Engelse reg moes noodwendig mettertyd die gesag van die *Hillyer*-uitspraak van 1909 in gedrang bring.

In *Gold v Essex County Council* (1942) 2 KB 293 is die *Hillyer*-uitspraak verwerp. Die hof beslis dat 'n hospitaalowerheid in beginsel aanspreeklik is vir nalatige optrede van personeel in die uitvoering van hul professionele

pligte (299). Verder is aanvaar dat die hospitaalowerheid nie slegs 'n plig het om redelike sorg by die aanstelling van sy personeel aan die dag te lê nie, maar ook om redelike sorg met en by die verpleging van pasiënte aan die dag te lê (302).

Die ratio van die uitspraak (in elk geval dié van lord Greene) is skynbaar die nie-nakoming van 'n "persoonlike" sorgvuldigheidsplig aan die kant van hospitaalowerheid, welke plig uiteraard deur werknemers vir die owerheid as regspersoon nagekom word (vgl 301–302). Nalatige optrede aan die kant van 'n werknemer is dus sonder meer pligskending aan die kant van die hospitaalowerheid. Sò gesien, het 'n mens dus nie met oorgedraagde aanspreeklikheid te doen nie. In laasgenoemde geval sou die hospitaalowerheid se aanspreeklikheid nie op pligskending berus nie, maar wel op 'n middellike aanspreeklikheid vir die pligskending van 'n werknemer in die uitoefening van sy diensverpligtinge. In die geheel gesien hinke-pink die uitsprake in die *Gold*-saak op hierdie twee moontlike gronde.

Die benadering van lord Greene is bevestig deur lord Denning in *Cassidy v Ministry of Health* (1951) 2 KB 343. Lord Denning stel dit onomwonde dat 'n hospitaalowerheid die plig het om redelike sorg aan die dag te lê by die verpleging van 'n pasiënt. Dit is irrelevant of die pasiënt vir die dienste betaal of dit gratis ontvang (359–360). Die hospitaalowerheid kom nie sonder meer sy plig na deur van sy diensfunksies aan byvoorbeeld dokters, wat nie dienare is nie maar onafhanklike kontrakteurs, oor te dra nie. Nalatige optrede van so 'n dokter kom nog steeds ipso facto neer op 'n verbreking van die hospitaal se plig. Hierdie plig is dus nie delegeerbaar nie (363). Die onderskeiding tussen 'n dienaar en 'n onafhanklike kontrakteur is van geen belang nie. Solank die hospitaalowerheid mense gebruik, hetsy as dienare hetsy as onafhanklike kontrakteurs om sy plig te vervul, is dit aanspreeklik in geval van nalatige optrede aan die kant van sulke persone (362–365).

In *Roe v Minister of Health* (1954) 2 QB 66 het lord Denning sy standpunt in die *Cassidy*-saak bevestig. Die verswaring en uitbreiding van 'n hospitaalowerheid se plig sedert die *Hillyer*-saak blyk uit die volgende dictum (82):

> "I think that the hospital authorities are responsible for the whole of their staff, not only for the nurses and doctors, but also for the anaesthetists and the surgeons. It does not matter whether they are permanent or temporary, resident or visiting. whole-time or part-time. The hospital authorities are responsible for all of them, The reason is, because, even if they are not servants, they are the agents of the hospital to give the treatment."

Die begrip "agent" word hier nie in 'n regstegniese sin gebruik nie, maar in die sin van 'n persoon deur wie gehandel word.

Ten spyte van lord Denning se benadering wat toenemend veld wen (Fleming *The Law of Torts* (1971) 319), is die rationes decidendi in die *Cassidy* en *Roe*-sake geleë in die beginsel van middellike aanspreeklikheid: die hospitaalowerheid is aanspreeklik op grond van die pligsversuim van sy dienare en nie op grond van "eie" pligsversuim nie (vgl Street *The Law of Torts* (1972) 425).

Daar kan geen twyfel wees nie dat ontwikkelinge in die Engelse reg sedert die *Hillyer*-saak in 1909 die ratio van uitsprake soos dié in die *Lower Umfolosi* verouderd en ontoepaslik laat voorkom.

Hierbenewens het die Transvaalse afdeling van die hooggeregshof vry gebly van die invloed van die *Hillyer*-uitspraak (*Esterhuizen v Administrator, Transvaal* 1957 3 SA 710 (T); *Dube v Administrator, Transvaal* 1963 4 SA 260 (W); *Buls and Another v Tsatsarolakis* 1976 2 SA 891 (T)). In hierdie uitsprake is sonder meer aanvaar dat die professionele personeel van 'n hospitaal dienare van die owerheid is en dat die hospitaal ook aanspreeklik is vir hul nalatige optrede in die uitvoering van hul professionele pligte.

Die feit dat die gesag van die *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 waarin die kontrole-toets gestel is ter bepaling van die aanwesigheid van 'n heer-dienaar verhouding, nog nie deur enige ontwikkelinge in ons regspraak verminder is nie, het dit uiteraard ook vir die regter Fannin moeilik gemaak om in die onderhawige saak die verhouding tussen die hospitaalowerheid en die verplegingspersoneel, vir so ver dit die uitoefening van hul professionele pligte aangaan, opnuut te evalueer. In die *Hillyer* en *Lower Umfolosi*-sake is juis aanvaar dat vir die doeleindes van die uitoefening van professionele pligte daar, weens gebrek aan kontrole, geen heer-dienaar verhouding bestaan nie. Oor die algemeen hou ons regspraak nog vas aan die kontrole-toets (vgl Scott 567 ev). Daar is wel enkele aanduidings van 'n moontlike soepele toepassing van die toets in die toekoms (vgl *R v Feun* 1954 1 SA 58 (T) 60G–61B; *R v AMCA Services Ltd and Another* 1959 4 SA 207 (A) 211D–212A).

Die uitspraak in die onderhawige saak was teleurstellend. Die regter kan, met respek gesê, nie hiervoor blameer word nie; hy het hom tereg gebonde geag aan die *Umfolosi*-uitspraak. Die fout lê by ons te rigoristiese presedente-sisteem. Ek vind dit onaanneemlik dat die regter in casu in die lig van die klaarblyklike verval van die ratio van die *Umfolosi*-uitspraak, die latere ontwikkelinge in hierdie verband en veral die bestaan van 'n konsekwent volgehoue ander standpunt in 'n ander afdeling van die hooggeregshof, nog steeds gebonde was om dit te volg. Só 'n rigoristiese sisteem verseker 'n doodse sekerheid maar geen lewende aanpasbaarheid en soepelheid nie.

Die benadering van lords Greene en Denning waarna hierbo verwys is, is besonder interessant. Die gedagte dat 'n hospitaalowerheid se aanspreeklikheid op eie pligsversuim berus en nie op 'n oorgedraagde aanspreeklikheid van 'n dienaar nie, dui myns insiens op die moontlikheid dat die heer-dienaar verhouding, vir die doeleindes van die aanspreeklikstelling van die heer, in die moderne wêreld met sy grootondernemings relevansie kan verloor. Die grootonderneming, hoe kompleks sy interne struktuur ookal mag wees, vertoon na buite 'n eenheidsfront. Dit funksioneer as 'n eenheid, as die onderneming. Dit funksioneer deur middel van sy personeel. As 'n personeellid in die uitoefening van sy funksies skade aan iemand berokken, is die skade deur die onderneming veroorsaak. Die personeellid wat as integrale deel van 'n grootonderneming se aktiwiteite op bepaalde wyse handel, handel dus as die instrument, middel of orgaan van die onderneming. Dit is eintlik die onderneming self wat handel.

Dit blyk uit die *Gold, Cassidy* en *Roe*-sake. Solank die betrokke personeellid as dienaar of as "agent" die funksie het om die hospitaal se pligte prakties te vervul en dit op 'n nalatige wyse doen, is die hospitaalowerheid op grond van eie pligsversuim aanspreeklik. Die heer-dienaar verhouding is hier nie relevant nie.

Die sogenaamde "organisasie"-toets van lord Denning is myns insiens nie soseer daarop gerig om 'n heer-dienaar verhouding te identifiseer nie, maar om die persone wat as die organe van die onderneming optree te bepaal. As dit korrek is, het die heer-dienaar verhouding, in elk geval by grootondernemings, irrelevant geword en is verwysings daarna maar anomaliese oorblyfsels van eens bekende en geykte terminologie.

'n Ontwikkeling in 'n rigting soos hierbo in enkele sinne geskets, lê myns insiens nie buite die waarskynlike nie. Lord Denning het reeds die eerste tree in so 'n rigting gegee.

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PAN-AMERICAN WORLD AIRWAYS INC v THE AETNA CASUALTY AND SURETY CO ET AL 505 F 2d 939

Aircraft hijacking – liability of insurer for destruction of aircraft – all risk or war risk policies – war or warlike operations – insurrection – civil commotion – proximate cause

On 6 September 1970 a Pan-American Boeing 747 airliner on a scheduled flight from Brussels to New York was hijacked to Cairo and there destroyed. The persons responsible for this act were allegedly acting on behalf of the Popular Front for the Liberation of Palestine (PFLP)

PANAM thereupon brought an action against The Aetna Casualty and Surety Company, and two other groups of aviation *all risk* insurance underwriters as well as certain *war risk* insurers to recover $24 300 000.

There was no dispute as to the facts of the hijacking, the amount of the loss, or as to the provisions of what the district court characterised as the "seamless mosaic" of insurance policies held by the carrier of the aircraft.

The *all risk* insurers argued that the loss was covered by the *war risk exclusion clauses in the all risk policies,* ie that the loss was *proximately caused* by "capture, seizure . . . or any taking by any military . . . or usurped power", by "war . . . civil war, revolution, rebellion, insurrection, or warlike operations" or by "riots or civil commotion". The *war risk* insurers argued that the loss was covered by the all risk policies. The United States government which covered the war risk insurance in excess of that written by private underwriters took the position that the loss was due to barratry on the part of the carrier.

The carrier stood to recover all or substantially all of the loss no matter which of the several insurers had to assume the liability. The district court

held that the *all risk* insurers were liable for plaintiff's entire loss (368F Supp 1698 (SDNY 1973)). On appeal this decision was affirmed by the United States court of appeals (second circuit).

Treating certain preliminary issues, circuit judge Hays said:

> "The loss in this case is covered by the all risk policies if Pan American or the war risk insurers can formulate a reasonable interpretation of the terms of exclusion to permit coverage. On the other hand, it is not sufficient for the all risk insurers' case for them to offer a reasonable interpretation under which the loss is excluded; they must demonstrate that an interpretation favouring them is the only reasonable reading of at least one of the relevant terms of exclusion" (999).

He went on to say that

> "*contra proferentem* has special relevance as a rule of construction when an insurer fails to use apt words to exclude a known risk. The evidence indicates that the risk of a hijacking was well known to the all risk insurers. Between 1960 and 1970 over 200 commercial aircraft were hijacked, eight of which belonged to Pan American. International hijacking is the subject of the Tokyo Convention of 1963 and the Hague Convention of 1970. The specific risk which caused the present loss was known to the all risk insurers at least three months before the inception of the Pan American policies. In August, 1969, the PFLP hijacked a Trans World Airlines 707 to Damascus and seriously damaged it through the use of explosives. TWA's war risk insurers, who had written policies with coverage clauses similar to the present all risk exclusions, denied liability. The present all risk insurers took no steps to clarify their exclusions even after the Damascus loss made it clear that the London market did not consider the PFLP hijackings to be within the terms of USAIG (United States Aviation Insurance Group) all risk exclusions" (1000).

The court pointed out that in 1969 aviation insurance underwriters were devising an exclusionary clause specifically covering hijacking and that USAIG, which included Aetna, was aware of and could have used this clause in writing the coverage for the Boeing 747. In not doing so "they acted at their own peril". The court also indicated that the district court should have given the maxim *contra proferentem* more weight, not less as had been contended by the all risk insurers (993–1005). In examining the *all risk* position the court said:

> "The *all risk* insurers rely on all of the following words of exclusion in the all risk policies:
>
> 'This policy does not cover anything herein to the contrary notwithstanding loss or damage due to or resulting from:
>
> 1 capture, seizure . . . or any taking of the property insured or damage to or destruction thereof . . . by any military . . . or usurped power, whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful . . .;
>
> 2 war, . . . civil war, revolution, rebellion, insurrection or warlike operations, whether there be a declaration of war or not;
>
> 3 . . . riots, civil commotion'."

The all risk insurer's position is that the terms employed define uninterrupted overlapping areas of exclusion on a continuum of violence. They claim that in terms of approximately increasing scale and organization of violence, "riot", "civil commotion", "insurrection", "military or usurped power", "rebellion", "revolution", "civil war", "warlike operations", and "war" exhaust the possibilities, and that the cause of the loss *must* be described by *at least one* of the terms.

However, each of the exclusionary terms has dimensions besides the level of violence. For example, for there to be a "*riot*" three or more actors must gather in the same place; for there to be an "*insurrection*" there must be an intent to overthrow a lawfully constituted regime; for there to be a "*war*" a sovereign or quasi-sovereign must engage in hostilities. The doctrine of *contra proferentem* shrinks the all risk "overlapping areas" to mere points on a line of violence. The lacunae between these points include the vast number of nameless causes that are not precisely described by the terms actually employed (1005).

The fact that the all risk insurers had chosen to rely on nearly all of the terms of these three exclusions affected their cause adversely. The district court correctly observed that one could infer from their reliance on so large a number of exclusions that the all risk insurers recognized that each of the exclusions were ambiguous or had only uncertain application to the facts. The all risk insurer's shotgun approach belied its claim that these terms had certain fixed meanings.

Regarding *proximate cause* the court said:

> "The all risk policies exclude 'loss or damage due to or resulting from' the various enumerated perils, a phrase that clearly refers to the proximate cause of the loss. Remote causes of causes are not relevant to the characterization of an insurance loss. In the context of this commercial litigation, the causation inquiry stops at the efficient physical cause of the loss; it does not trace events back to their metaphysical beginnings. The words 'due to or resulting from' limit the inquiry to the facts immediately surrounding the loss" (1006).

After examining various cases the court came to the conclusion that the cases established a mechanical test of proximate causation for insurance cases, a test that looked only to the "causes nearest to the loss". This rule was adumbrated by the maxim *contra proferentem*: if the insurer desires to have more remote causes determine the scope of exclusion, he may draft language to effectuate that desire. In the present case, events drawn from the general history of unrest in the Middle East did not proximately cause the destruction of the 747. Of course, in some attenuated "cause of causes" sense, the loss may have resulted from the Fedayeen or PFLP pattern of military operations against Israel, from the domestic unrest in Jordan, or from the most recent of the three wars which prior to 1970 had convulsed the Middle East. But for *insurance purposes*, the mechanical cause of the present loss was two men, who by force of arms, diverted Flight 093 from its intended destination.

In the light of the extensive references in the record to the activities of the Fedayeen and the Palestine Liberation Organization (PLO), it is important to bear in mind that the loss of the 747 was not proximately caused by the PLO, the Fedayeen, or Al Fatah. Evidence elicited by the all risk insurers concerning the activities of the PLO and other less homogeneous groups had no bearing on the causes of the present loss. The PFLP was a small political force that most often acted independently from other Palestinian entities. The district court found, with ample support in the record, that

> "hijackings and other 'external operations' . . . were unique tactics of PFLP terrorism, almost uniformly opposed by . . . the other, far more numerous fedayeen group" (368 F Supp at 1110).

The PFLP boycotted the PLO during 1969, and sent only one representative, an observer, to the 30 May 1970 Seventh National Council Session of the PLO. The PFLP refused to join the Palestine Armed Struggle Command or the United Command, successive military branches of the PLO. The all risk insurers conceded that there were vast philosophical differences between the PFLP, which fought "world imperialism", and the other more moderate Fedayeen groups, which sought only to destroy Israel. A PFLP propaganda statement of September 13, 1970, stated that the PFLP did not act on behalf of the PLO when it hijacked the 747 and the various other aircraft to Dawson's Field. Other major Fedayeen groups uniformly condemned hijacking as a tactic. As a result of the 6 September hijackings, the central committee of the PLO suspended the PFLP from membership.

The all risk insurers' only argument linking the Fedayeen as a group to the present loss was their assertion that when it committed the 6 September hijacking, the PFLP hoped to force the other Fedayeen to follow them.

Aside from the above considerations, all of the parties recognized that when a peril results in the owner's losing control over insured property, any subsequent damage to or loss of the property is attributable to the peril *causing* the loss of control. In other words, the *proximate cause* of a loss resulting from a *taking* followed by destruction is determined by the *nature of the taking*. While the events immediately preceding the taking may proximately cause a loss, the events following a taking may not.

The principle that the *taking* characterizes the loss has been applied by at least one court to an aircraft hijacking. In *Sunny South Aircraft Service Inc v American Fire & Casualty Co* 140 So 2d 276 (Fla 1973), the insured aircraft was covered for theft excluding losses "due to war . . . rebellion or revolution". The airplane was hijacked in the United States and taken to Cuba where it was damaged by a Cuban military plane. The court found that the loss was proximately *caused by theft* rather than by warlike activity, and accordingly held that the loss was not excluded. If events following a hijacking were permitted to control the insurance nature of the loss, the outcome in any case would vary according to the whim of the hijacker. In the present case the 747 might well have been destroyed in the air over London by two hijackers, rather than in Cairo by a larger group. The parties cannot have intended that the caprice of the hijackers would control the insurance consequences of the loss. It was not relevant in this case that after the aircraft was hijacked by two actors, a third came aboard, or that extensive civil disorders broke out in Jordan nine days after the hijacking.

The all risk insurers claimed that the destruction of the 747 was "due to or resulting from" unrest in Jordan of a type which was fairly described by the first exclusion which read:

> "1 capture, seizure, arrest, restraint or detention or the consequences thereof or any attempt thereat, or *any taking of the property insured or damage to or destruction thereof* by any government or governmental authority or agent (whether secret or otherwise) or *by any military*, naval *or usurped power* whether any of the foregoing be done by way of requisition or otherwise and whether in time of peace or war and whether lawful or unlawful (*this subdivision 1 shall not apply, however, to any such action by a foreign government* or foreign governmental authority *following the forceful diversion* to a

foreign country *by any person* not in lawful possession or custody of such insured aircraft and *who is not an agent or representative*, secret or otherwise, *of any foreign government* or governmental authority)" (Emphasis added).

At the outset there was some controversy as to the implication of the second parenthetical of clause 1, the parenthetical beginning "this subdivision . . ." The all risk insurers claimed that the deletion from the exclusion of acts following a "forceful diversion" implied that "forceful diversion" was a risk excluded by clause 1, except as to the particular case described by the parenthetical. The war risk insurers argued that because "forceful diversion" appeared in an exception to an exclusion, one must infer that the all risk policies cover "forceful diversion".

The all risk insurers' principal argument under clause 1 was that the loss of the Pan American 747 resulted from its destruction by a "military . . . or usurped power" in Jordan. They claimed that as a matter of law military or usurped power embraces "an organized force defying the general enforcement of the laws by force of arms", and that this definition applied to PFLP and, more certainly, to Fedayeen activity in Jordan. Pan American argued that to be a military or usurped power, a force must control a substantial territory with trappings of state sufficient to constitute it a "*de facto* government". The opposing formulations were considered by the district court, but it did not choose between them. It found that the PFLP "occupied" ground in Jordan at the sufferance of the Jordanian government, and held only that such occupation "is surely insufficient" to constitute a military or usurped power. Accordingly it held that the loss was not excluded by clause 1 (368 F Supp 1129). The court of appeal, ie the circuit court, held that in order to constitute a military or usurped power the power must be at least that of a *de facto* government. On the facts of this case, the PFLP was not a *de facto* government in the sky over London when the 747 was taken. Thus the loss was not "due to or resulting from" a "military . . . or usurped power".

Considering the clause 2 exclusions which covered *war*, *warlike operations* and *insurrection*, the court found itself in agreement with the district court's pronouncement:

"that the term *war* 'has been defined almost always as the employment of force between governments or entities essentially like governments, at least *de facto*'. (368F Supp at 1130). The PFLP was not a *de facto* government in the context of 'war' for substantially the same reasons that it was not a government in the context of 'military . . . or usurped power'.

The cases establish that war is a course of hostility engaged in by entities that have at least significant attributes of sovereignty. Under international law war is waged by states or state-like entities. Lauterpacht defines war as a "contention between two or more States through their armed forces . . ." (2 L Oppenheim, *International Law* 202; H Lauterpacht, 7th ed 1952)" (1012).

English and American cases dealing with the insurance meaning of "war" have defined it in accordance with the ancient international law definition: war refers to and includes only hostilities carried on by entities that constitute governments at least *de facto* in character. For example, in *British SS Co v The King* (1921) 1 AC 99 (1920), an action on dovetailing marine and war risk policies, Lord Atkinson stated that "hostilities", a term cer-

tainly of no narrower scope than "war", "connotes the idea of belligerents, properly so called, enemy nations at war with one another" (114). In *Vanderbilt v Travelers' Insurance Co* 112 Misc 248, 184 NYS 54 (Sup CT NY Cty 1920) 202 App Div 738, 194 NYS 986 (1st Dep't 1922) 235 NY 514m 139 NE 715 (1923), the deceased lost his life when the Lusitania was sunk by a German submarine. His life was insured by a policy that excluded death due to "war". Notwithstanding the beneficiaries' protestations that the deceased was not a combatant, the New York courts held that the death was due to war, finding that the Lusitania was sunk in accordance with the instructions of a sovereign government, Germany, by naval forces of that government, during a period when a war was in progress between Great Britain and Germany.

In the present case, the loss of the Pan American 747 was in no sense proximately caused by any "war" being waged by or between recognized states. The PFLP has never claimed to be a state. The PFLP could not have been acting on behalf of any of the states in which it existed when it hijacked the 747, since those states uniformly opposed hijacking.

The record of the case disclosed that there was no "war" in the Middle East on September 6. A cease fire had been negotiated early in August, and was being observed at the time of the loss.

The all risk insurers' claim that the loss was due to a "war" thus stood or fell on the proposition that it was caused by a PFLP "guerilla war" waged against either or both Israel and the United States. War can exist between quasi-sovereign entities. And of course an undeclared *de facto* war may exist between sovereign states. But the all risk insurers proposed to push the meaning of war much further. Central to their argument was the proposition that war as it is used in property insurance policies includes conflicts waged by guerilla groups regardless of such groups' lack of sovereignty.

The evidence showed that Middle Eastern states did not accord the PFLP the rights of a government. Jordan and Lebanon "negotiated" with the PFLP only in the sense that any government "negotiates" with a terrorist who holds hostages. Jordan "negotiated" the release of Morris Draper, an American diplomat kidnapped by the PFLP, by insisting on his release and by planning to utilize the army against the Fedayeen unless he was released. The government of Lebanon did not meet with the Fedayeen as equals. It forced them to attend meetings with the Lebanese minister of interior so it could keep tabs on them. No Arab state recognized the PFLP. The fact that the PFLP received financial support from several states did not give it the status of a "quasi-sovereign".

The record disclosed that the PFLP may or may not have conducted guerilla warfare against Israel. However it stretched the notion of *proximate cause* too far to suppose that a guerilla war against Israel, if there was such a war, caused the hijacking over London of an American aircraft owned by a carrier that serves no routes to Israel.

The all risk insurer's alternate theory, that the loss resulted from a guerilla war between the PFLP and the United States the court found wholly untenable. The only evidence that the PFLP and the United States were at

war consisted of the PFLP's self-serving propaganda, propaganda claiming that PFLP was effectively at war with the entire western world. Such radical rhetoric the court found could not affect the outcome of this insurance case (1015).

The loss of the Pan American 747 was thus not caused by any act that is recognized as a warlike act. The hijackers did not wear insignia. They did not openly carry arms. Their acts had criminal rather than military overtones. They were the agents of a radical political group, rather than a sovereign government.

The court further found that there was no basis whatsoever for any claim that the insured Pan American was involved in a *warlike* operation. It carried no cargo of military stores. It carried no cargo destined for a theatre of war. Its owner was not the national of any middle eastern belligerent. Pan American served no routes to any middle eastern belligerent. When the loss occurred, the aircraft was not near or over the territory of any belligerent or any theatre of war (1017).

In the district court the all risk insurers relied on every term in clause 2 except "invasion". Thus, aside from "war" and "warlike operations", they claimed that the loss was excluded from coverage by each of "civil war", "revolution", "rebellion", and "*insurrection*". Their efforts soon focused on the last of these terms, because all parties agreed that if the loss was not caused by an "*insurrection*", then it could not have been caused by any of the other clause 2 terms relating to civil disorders. "Insurrection" presented the key issue because "rebellion", "revolution", and "civil war" are progressive stages in the development of civil unrest, the most rudimentary form of which is "insurrection". The district court accordingly confined its inquiry to insurrection, the circuit court decided to do the same, and after sifting much evidence found that any insurrection in Jordan *did not proximately* cause the loss of the 747.

The evidence that the Fedayeen, the PLO and the PFLP did not intend to overthrow King Hussein supports the district and circuit courts' findings in this regard.

From the welter of conflicting evidence, reasonable men might draw any of a number of conflicting conclusions about the PFLP's motives on September 6. One of those reasonable conclusions is that the PFLP did not intend to overthrow King Hussein when it hijacked the Pan American 747. The hijacking was designed to attract world attention to the Palestinian cause and to accumulate "victories" as an example to other groups. It was a "symbolic blow" in the PFLPs fight against the United States. The all risk insurers failed to carry the burden of proving the crucial element of PFLP intent.

The all risk insurers finally relied on clause 3 of the exclusions to avoid liability as to about 14 million dollars of the agreed upon value of the 747. Clause 3 excluded from coverage loss or damage "due to or resulting from . . . strikes, riots, *civil commotion*". These terms, the circuit court found, have a *domestic flavour* that contrasts sharply with the sense of the terms employed

in the other causes – terms such as "capture, seizure, arrest, restraint or detention", or "war, invasion" or "warlike operations".

For the proposition thus that the loss of the 747 was due to civil commotion the all risk insurers offered no argument or authority which was not duly considered and rejected by the district court. The district court clearly applied the correct rule of law: civil commotion does not comprehend a loss occurring in the skies over two continents. The circuit court found that the all risk argument that the 747 hijacking, taken together with the other September 6 hijackings to Dawson's Field constituted a single civil commotion was fanciful. For there to be a civil commotion, the agents causing the disorder must gather together and cause a disturbance and tumult. It held that the loss was not caused by civil commotion for essentially the reasons set out in the district court's opinion (1020).

The all risk insurers also contended that the bare facts of the hijacking without reference to the middle eastern situation, established that the loss was caused by a *riot*. They claimed that there is a body of authority establishing that riot as an insurance exclusion takes a meaning which derives from the ancient common law criminal definition of the term:

> "[t]he insurance term 'riot' includes any gathering of three or more persons with a common purpose to do an unlawful act and with an apparent intention to use force or violence against anyone who may oppose this purpose" (1020).

They claimed that when riot is used in an insurance context, it need not be accompanied by any uproar or tumult. They argued that the acts of PFLP members hijacking the Pan American 747 satisfied this technical definition.

The circuit court however held that:

> "The all risk definition of riot requires that there be an assembly of at least three actors. Thus, there was no riot, in any sense of the word, on board the flight when it was hijacked. Events subsequent to the hijacking, as when additional PFLP members came on board the aircraft in Beirut, may have constituted a common law riot, but these events do not colour the initial taking. The district court was entirely correct when it wrote:
>
> "The definitions (proferred by the all risk insurers) give serious trouble at the outset, and probably would not serve even if there were sound reason to use them. Plaintiff's airplane was hijacked by two people, not three. There was, to be sure, a stop at Beirut as the improvised operation unfolded, and as many as nine others came aboard temporarily. Then, still meeting the minimum, a third man stayed aboard to Cairo. But the notion of a flying riot in geographic instalments cannot be squeezed into the ancient formula. Among its other attributes, as the cases reflect, a riot is a local disturbance, normally by a mob, not a complex, traveling conspiracy of the kind in this case" (1020).

The circuit court observed that the meaning of "riot" for insurance purposes was unclear. The all risk insurers, however, had the burden of showing that their preferred definition should be accepted, and this they did not do (1021).

Summing up the case, judge Hays said:

> "We hold that the district court did not clearly err when it found that none of the all risk exclusions, considered in a light most favourable to the insured, fairly describes the cause of the present loss. Terms like 'military . . . or usurped power', 'war', 'insurrection' and the other terms found in clause 1 and clause 2 simply do

> not describe a hijacking committed by two men far from the site of any larger scale violence. The all risk insurers sought to show that the hijacking was a part of PFLP schemes for waging war or insurrection, thus linking the acts of the hijackers to the larger Middle Eastern situation. The crucial element in this effort was the intent of the PFLP . . .
>
> . . . as to the PFLP intent there is little evidence of any probative weight on the record. That record consists of hearsay, propaganda, unbridled speculation, and a great mass of evidence relating to entities other than the PFLP at times other than September 6, 1970, We agree with the district court's conclusion that the all risk insurers failed to discharge their burden of proof" (1022).

It is opportune here to compare the United States courts' description of the terms "civil commotion" and "insurrection" with those of our own courts. In *Lindsay and Pirie v General Accident, Fire and Life Assurance Corporation, Limited* 1914 AD 574, 591, the appeal court held the view that the phrase "*civil commotion*" denotes something more than a riot but less than an *insurrection.* Solomon said a civil commotion implies not only that there is a disturbance on a somewhat extensive scale amongst the citizens of a state, but also that it is directed to a common purpose. A brawl, or riot of a few persons, although it might occasion tumult, is not a civil commotion (591).

The elements of civil commotion were also considered in *Orenstein Arthur Koppel, Limited v Salamander Fire Insurance Corporation, Limited* 1915 TPD 497, 499–501, and described as being a disturbance or tumult. The disturbance must be on a fairly considerable scale; there must be actual violence or an intention to commit violence; and there must be some common purpose of mischief.

In the *Lindsay* case "*insurrection*" was seen as being the rising of the people in open resistance against established authority with the object of supplanting that authority (594). In the *Orenstein* case it was stated that a civil commotion is not necessarily levelled at the government, an *insurrection* is (499). This appears to be in conflict with the circuit court's view of "*insurrection*" (supra) which was seen as being the "most rudimentary form" of civil unrest. *Orenstein's* case, would appear to see "*insurrection*" as quite a progressive stage in the development of civil unrest.

Be that as it may the point which emerges quite clearly is that terms such as "war", "civil war", "insurrection", "riot", "civil commotion" etc, as they appear in insurance policies, will most decidedly have to be re-examined in the light of new situations pertaining to the facts of life today. Not only new facts pertaining to international civil aviation, but also new facts pertaining to domestic situations and situations existing on our borders.

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AA MUTUAL INSURANCE ASSOCIATION LTD v NOMEKA 1976 3 SA 45(A)

Bydraende nalatigheid – bepaling van

In hierdie beslissing het onder andere die vraag ter sprake gekom of, in die geval waar sowel die eiser as die verweerder se nalatigheid in gedrang

gebring word sonder dat die partye spesifiek die toepassing van die beginsels van die Wet op Verdeling van Skadevergoeding 34 van 1956 pleit, die hof uit eie oorweging daardie beginsels kan toepas. Waarnemende appèlregter Viljoen beslis dat dit wel die geval is (sien 52–55 van die verslag) en vervolg (op 55–6):

> "In order to decide whether the issues have been properly raised in the present matter it is necessary to have regard to the substantive law. In *South British Insurance Co Ltd v Smit*, 1962 3 SA 826 (AD) at p 835, Ogilvie Thompson, JA, interpreted the word "fault" in sec 1 as meaning negligence causally linked with the damage. The following dictum appears on the same and the following page:
>
> In all cases falling within para 1(a) the damages recoverable by the claimant 'shall be reduced by the court to such extent as the court may deem just and equitable having regard to the degree in which the claimant was at fault in relation to the damage'. Although the paragraph thus refers only to the claimant, it is, I think, plain from a consideration of the section as a whole that what the court has to measure is the conduct of all parties whose fault caused the damage. Postulating a single defendant, the determination of the 'degree in which the claimant was at fault in relation to the damage' will also automatically determine the degree in which the defendant was at fault in relation to the damage.
>
> It follows from all the foregoing that, when the court reaches the stage of apportionment, it is ex hypothesi dealing with 'fault' – that is to say, a negligent act or omission – which is causally linked with the damage in issue. In so far, therefore, as any view has hitherto been expressed that the question of causation has nothing whatever to do with the apportionment of damages, I find myself unable to agree with it.'
>
> Provided, therefore, it is clearly put in issue that the plaintiff was at fault, either completely or to a certain degree, the court has to apply the provisions of the Act. *If the determination of the degree in which the plaintiff was at fault in relation to the damage will also automatically determine the degree in which the defendant was at fault in relation to the damage*, I fail to see why it should be necessary specifically to plead and claim an apportionment" (my kursivering).

Alhoewel met die resultaat van die vonnis saamgestem word, is hierdie dictum tog vatbaar vir kritiek. In die lig van die beslissing in *Jones NO v SANTAM Bpk* 1965 2 SA 542 (A) skep dit naamlik met betrekking tot die toets vir bydraende nalatigheid nie alleen verwarring en bygevolg regsonsekerheid nie, maar kan dit ook nie geregverdig word nie.

Tot die uitspraak in die *Jones*-saak (supra) het die appèlhof by die bepaling van bydraende nalatigheid aanvaar dat indien daar eenmaal vasgestel is welke graad van skuld die eiser gehad het, dit onnodig was om te vra in welke mate die verweerder se gedrag nie aan die norm van die redelike man voldoen het nie. As die hof byvoorbeeld bepaal het dat die eiser 30% nalatig was, is sonder meer aanvaar dat die verweerder noodwendig 70% nalatig was. Hierdie benadering blyk duidelik uit *South British Insurance Co Ltd v Smit* 1962 3 SA 826(A) 835–6. In die *Jones*-saak word egter 'n geheel en al nuwe benadering tot die vasstelling van die mate van skuld by die eiser en verweerder gevind. Regter Williamson verduidelik dit so (op 555):

> "I concurred in this judgment of Ogilvie Thompson, JA, in *Smith's* case, but on further consideration I have come to the conclusion that the last sentence of this quotation [supra aangehaal] does not make clear my view as to how the respective degrees of fault of the different parties must be assessed. A determination of the degree of fault on the part of the claimant does not by itself 'automatically determine the degree in which the defendant was at fault in relation to the damage'; the court must first also determine in how far the defendant's 'acts or omissions, causally

linked with the damage in issue, deviated from the norm of the *bonus paterfamilias*'. It is on the basis of comparison between the respective degrees of negligence of the two parties . . . that the court can determine in how far the fault or negligence of each combined with the other to bring about the damage in issue."

Ten spyte hiervan blyk dit duidelik uit die dictum hierbo aangehaal dat appèlregter Viljoen die benadering in die *Smit*-saak goedkeur. Moet hierdie uitspraak nou beskou word as 'n terugkeer na die posisie voor die *Jones*-saak, of kan dit dalk wees dat die beslissing in die *Jones*-saak per incuriam misgekyk is? Hoe dit ook al sy, regsonsekerheid is geskep – 'n aangeleentheid wat hopelik in die nabye toekoms reggestel sal word.

Myns insiens is die benadering in die *Jones*-saak in ieder geval te verkies (sien ook Van der Merwe en Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* (1970) 143–4). Die blote feit dat die eiser 30% nalatig was, kan tog nie sonder meer beteken dat die verweerder 70% nalatig was nie. Getoets aan die norm van die redelike man kan hy 90% of selfs maar 10% daarvan afgewyk het. In so 'n geval is die verhouding van die eiser se graad van skuld tot dié van die verweerder nie 30 : 70 nie, maar wel 30 : 90 (25% : 75%) of 30 : 10 (75% : 25%). (Vgl die *Jones*-saak op 555.) Prakties maak die benadering in die *Jones*-saak dus 'n geweldige verskil en is dit ooglopend nader aan die ware toedrag van sake.

Dat hierdie benadering die enigste sinvolle is, blyk nog duideliker in gevalle waar die toets vir nalatigheid anders is as die norm van die redelike man soos by deskundiges die geval is. Hierdie persone se gedrag word naamlik gemeet aan dié van die redelike deskundige (Van der Merwe en Olivier a w 125–6). As byvoorbeeld 'n eiser-pasiënt sowel as sy geneesheer nalatig was met betrekking tot benadeling wat die pasiënt ly, is dit tog ondenkbaar dat die feit dat die pasiënt 30% afgewyk het van die norm van die redelike man, die gevolgtrekking regverdig dat die geneesheer dan noodwendig 70% afgewyk het van die norm van die redelike geneesheer. Ten einde die geneesheer se graad van nalatigheid te bepaal, moet sy gedrag tog eers afsonderlik gemeet word aan dié van die redelike geneesheer. Eers daarna kan die verhouding van die pasiënt en geneesheer se mate van skuld sinvol bepaal word.

In die lig hiervan kan die vertroue uitgespreek word dat die appèlhof weer eens die benadering in die *Jones*-saak sal bevestig.

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Boeke

AN INTRODUCTION TO THE PRINCIPLES OF ROMAN CIVIL LAW

deur P VAN WARMELO

Juta 1976; 60 XXI 296 bl; prys R25 (hardeband), R16 (sagteband)

Hierdie boek is die derde oor die Romeinse reg uit die pen van die doyen van Suid-Afrikaanse skrywers oor die Romeinse reg. Die eerste twee werke is in Afrikaans (*'n Inleiding tot die Studie van die Romeinse reg* en *Die Oorsprong en Betekenis van die Romeinse reg*). Die huidige is in Engels, wat dit van 'n wye leserskring, ook in die buiteland, kan verseker.

Die oogmerk van die skrywer is om die belangstelling van die moderne student en regsgeleerde te prikkel. Daarom word slegs daardie gebiede van die Romeinse reg wat van groot betekenis vir die hedendaagse reg is in besonderhede behandel. Sy bespreking van die Romeinse sakereg en verbintenisreg is dus baie meer volledig as dié van die Romeinse personereg, familiereg, erfreg en prosesreg. By die behandeling van die afsonderlike gebiede probeer die skrywer ook meer klem lê op daardie instellings en stelreëls wat in verband gebring kan word met die moderne reg. Hy slaag veral myns insiens uitmuntend om hierdie instellings uit te lig in die korter afdelings oor die personereg en die prosesreg. By die uiteensetting van die afsonderlike *contractus* in sy bespreking van die *contractus consensu* (paragrawe 441 tot 513) ook byvoorbeeld baie meer volledig as dié van die *contractus verbis* (paragrawe 420 tot 433). Die skrywer dui ook die verband tussen Romeinse regsfigure en hul moderne ekwivalente plek-plek helder aan (kyk byvoorbeeld paragrawe 88, 103 en 107). Die vergelyking met die moderne reg kon egter na my mening met vrug vollediger uitgewerk gewees het.

Die skrywer stel hom ten doel om die Romeinse reg nie soos die meeste vastelandse Romaniste vanuit historiese oogpunt nie, maar as 'n geldende regstelsel te behandel. Hy wil die Romeinse reg laat herleef as 'n stel regsreëls wat die sosiale, maatskaplike en ekonomiese behoeftes van die Romeinse volk gereguleer het. Hy toon aan hoe hierdie reëls telkens by veranderende omstandighede aangepas is en poog om die student insig te gee in die wyse waarop Romeinse regsbeoefenaars regsprobleme benader, beredeneer en opgelos het. 'n Studie van die werkmetodes en logika van die Romeinse juriste, dit wil sê die wyse waarop hulle regsbeginsels toegepas het om praktiese probleme op te los, is ongetwyfeld vir die jong juris van ons tyd van onskatbare waarde.

Dit was nooit die oogmerk van die skrywer om elke onderwerp in besonderhede te behandel nie. Dit val buite die bestek van 'n inleidende werk van hierdie aard. Nietemin poog die skrywer om soveel moontlik van die

Romeinse regsinstellings en stelreëls kortliks te bespreek (veral op die gebied van die sakereg en die verbintenisreg). Hierdie kenmerk maak die werk 'n goeie beginpunt vir sowel die jong student as die ryper juris. Vir diegene wat die geheime van die Romeinse reg dieper wil navors, bied die werk ook aanknopingspunte: benewens die verwysings na tersaaklike tekste in die *Institute* van Gaius, die *Digesta* en die *Codex* is daar 'n insiggewende paar bladsye oor moderne Romeinse regsliteratuur in die begin van die boek (xix–xxi).

Die manuskrip is besonder goed geproeflees. Slegs drie drukfoute is opgemerk: "customray" in plaas van "customary" (par 25), *Constitutitio* in plaas van *Constitutio* (par 109) en "*iudicium bonae fide*" in plaas van "*iudicium bonae fidei*". In die afdeling oor die erfreg kom die volgende, vir my onverstaanbare, sin voor: "Furthermore, it was definitely not only ownership, but all the assets of the deceased that the heir acquired". Wat die behandeling van die koopkontrak betref, dui die skrywer na my mening nie duidelik genoeg aan dat die oomblik van kontraksluiting en die oomblik waarop die koopkontrak *perfecta* word nie altyd noodwendig saamval nie. (par 453). Hierdie momente verskil byvoorbeeld in die geval van die beperkte *genus*-koop (10 vate wyn uit my kelder) en in gevalle waar die koopsom eers later vasgestel word. Ten slotte is die uiteensetting van die stof na my mening ietwat fragmentaries vanweë die groot aantal hoofstukke en onderafdelings.

Ten spyte van bogenoemde puntjies van kritiek beantwoord die boek uitstekend aan sy doel as 'n inleidende werk oor die Romeinse reg. Dit is prikkelend, interessant en skets 'n ensiklopediese beeld van die Romeinse privaatreg. Die werk kan met die grootste vrymoedigheid by regstudente en regspraktisyns wat hul kennis van die basiese beginsels en instellings van die Romeinse reg wil opknap, aanbeveel word.

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CONSILIUM NR 225 VAN NICOLAAS EVERAERTS

deur CHRISTIAAN MG VAN RAA
Mededelingen van het Juridisch Instituut van de Erasmus Universiteit, Rotterdam, Roneo, geen datum; prys onvermeld

Hierdie werk is 'n waardevolle bydrae tot die kennis van die Romeins-Hollandse regswetenskap. In die algemeen is 'n mens geneig om as uitgangspunt vir die Romeins-Hollandse reg die geskrifte van die ou skrywers te neem. Daar moet egter daarmee rekening gehou word dat die kenbronne van die Romeins-Hollandse reg nie tot die geskrifte van geleerdes beperk was nie aangesien dit ook 'n baie aktiewe bestaan in die geregshowe geken het. Dit blyk natuurlik uit die menigte konsultasies en adviese (bv van Coren, Schrassert, Van den Berg, De Haas, ens) en hofverslae (bv die *Observationes* van Van Bijnkershoek en Pauw) wat bekend is. Hierdie werk gee nie slegs die (gepubliseerde) *Consilium* 225 van Everaerts weer nie, maar gaan uitvoerig in op die hele proses waarmee die *Consilium* in verband gestaan het.

In kort gestel, die *Consilium* hou verband met 'n proses (of beter, prosesse) afkomstig uit die begin van die 16e eeu betreffende die besit en eiendomsreg van 'n huis in Den Haag. Die huis is deur 'n weduwee gekoop wat dit op die naam van twee seuns geplaas het. Volgens kontrak, het die moeder die besit en gebruik behou met die verdere bepaling dat die moeder die huis kon belas en beswaar, asof dit haar eiendom was, en ook dat sy kon eis dat dit op háár naam of dié van 'n derde geplaas word. Sy het dit later op haar naam laat plaas en toe bemaak sy dit dmv 'n testament aan sekere neefs en 'n niggie en ander. Na haar dood ontstaan 'n twis tussen hierdie legatarisse en die wettige (abintestaat)-erfgename, 'n kleindogter. Haar saak kom in hoofsaak daarop neer dat die huis gekoop is met geld van die gemeenskaplike boedel van die weduwee en haar oorlede man. Hulle het mekaar oor en weer as erfgename ingestel met die verdere beding dat as een van hulle hulle nasate oorleef, die oorlewende die huweliksgoedere kan vervreem. Dus, a contrario, word geredeneer dat as daar 'n oorblywende nasaat is (in casu, die kleindogter) die goed nie vervreem kan word nie en dan erf daardie nasaat). In 'n mate is die moeilikheid dus 'n vraag aangaande die uitleg van die testament. Dit is interessant om te merk dat die huis, alhoewel dit leengoed is, tog juridies gelyk staan aan allodiale goedere en dat die vraag oor besit en oor eiendomsreg gestel is. Die leenreg as sodanig is feitlik slegs dieselfde as 'n reg om sekere heffinge te eis, enigsins soos hereregte of grondbelasting in moderne tye.

Hierdie proses het voor die Hof van Holland begin. Eers was daar 'n geskil oor besit en is die legatarisse in besit gehandhaaf. Daarna kom die stryd oor die eiendomsreg. In hierdie geval, soos wanneer die spreekwoordelike twee honde oor 'n been baklei, het 'n derde party tot die geding toegetree, nl die vrou van een van die seuns op wie se naam die huis eertyds geplaas was. Sy ontdek bewysstukke waaruit blyk dat die huis tot die dood van haar man op sy naam geplaas was (nie op die weduwee, sy moeder, se naam nie) en sy word gehandhaaf as eienares van die huis. Daar moet onthou word dat sulke onroerende goed met skriftelike oorkondes van die een persoon na die ander oorgedra moes word en dat sulke dokumente geregistreer is. Daar was egter nie iets soos ons Wet op Registrasie van Aktes nie en dus kon dit voorkom (soos in hierdie geval) dat volgens sulke dokumente dieselfde onroerende saak op die naam van meer as een party aangeteken staan. Dit is 'n punt wat gerus in ag geneem kan word by die huidige neiging in Suid-Afrika om meer toeskietlik te word by die registrasie van aktes en die neem van transport.

Die advies van Everaerts is gegee aan die legatarisse (in die proses teen die kleindogter wat aangevoer het dat sy die abintestaat erfgename was en dus geregtig op die huis) kennelik om die moontlikhede vir die legatarisse te verduidelik, indien hulle sou appelleer teen die uitspraak van die Hof van Holland. Hierdie prosesse het inderdaad nie voor die Hof van Holland geeindig nie, maar is voortgesit voor die Grote Raad van Mechelen wat destyds, voordat die Hooge Raad van Holland, Seeland en Friesland ingestel is, ook appèlle uit die Noord-Nederlande aangehoor het. Na verhouding is sake afkomstig uit gebiede waar die Romeins-Hollandse en Friese reg gegeld het heelwat minder as ander sake wat voor hierdie Grote Raad beslis is.

Daar kan moontlik gedink word dat hierdie betrokke prosesse, vanuit 'n juridiese gesigspunt gesien, nie van soveel belang is nie. Te meer aangesien die saak, deur die tussenkoms van die eggenote van die een seun soos 'n *dea ex machina*, eintlik 'n anti-klimaks beleef. Wat van baie groot belang is, is die feit dat die skrywer, deur 'n diepgaande analise van die prosesse, stap vir stap, 'n waardevolle uiteensetting gee, in die eerste plek van die prosedure. Hierdie prosedure, in besonder voor die Grote Raad van Mechelen, is in hoofsaak dieselfde as dié van die *Parlement de Paris* en was later weer in hoofsaak gehandhaaf voor die Hooge Raad van Holland. Die praktisyns kan gerus oordeel of daar nie enkele aspekte van hierdie prosedure is wat nie sonder verdienste in ons moderne prosedure aanwending kan vind nie.

Ten tweede is van belang die figuur van Everaerts as juris. Dit is bekend dat hy in 'n mate 'n oorgangspersoon is tussen die Kommentatore aan die een kant en die Humaniste aan die ander kant. Hierdie punt blyk duidelik uit sy *Consilium*. Aan die een kant, die dialektiese metode van die Kommentatore: die aanvoer van argumente pro en contra, 'n uitvoerige en gemotiveerde oplossing van die probleem en die weerlegging van argumente contra. Aan die ander kant, soos die Humaniste, sy bespreking van die glos *Generaliter* op *D* 20 6 8 11. Hy verwerp die lesing van die glos en herstel die teks van die betrokke lex. Vir hom is die glos nie die belangrikste nie, maar die lex en hy behandel die saak met 'n deeglike studie van sy bronne.

Om te herhaal wat reeds uit die voorgaande bespreking blyk, hier word 'n waardevolle bydrae tot ons regswetenskap gelewer.

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DG VAN DER KEESSELII PRAELECTIONES IURIS HODIERNI AD HUGONIS GROTII INTRODUCTIONEM AD IURISPRUDENTIAM HOLLANDICAM. Sesde Band.

Opgestel deur P van Warmelo

Balkema, Rotterdam, Kaapstad 1975; vii en 417 bl; Prys R20

'n Resensie van die eerste band van bogenoemde werk is deur skrywer hiervan in 1963 *THRHR* gepubliseer en die daaropvolgende vier bande is ook deur hom in 1968 *THRHR* geresenseer. Die vyf bande het eintlik die werk voltooi, maar 'n sesde band het nou onder leiding van professor Van Warmelo met die hulp van 'n aantal dosente en navorsingsassistente by die Universiteit van Pretoria verskyn. Hierdie band is nie 'n voortsetting van Van der Keessel se lesings nie. Dit is 'n register van die hedendaagse Suid-Afrikaanse regsliteratuur en hofbeslissings waarin dieselfde vraagstukke as die van Van der Keessel se *Praelectiones* behandel word.

In die algemeen volg die aantekeninge die bladsye van Van der Keessel se handskrif in die Utrechtse biblioteek wat in vetgedrukte letters in vierkantige hakies aangewys word (in die gepubliseerde vyf bande van die

Praelectiones is hierdie bladsye ook so aangeteken). Uit elk so 'n bladsy word al die vernaamste regsbegrippe gekies (bv *huurkontrak* (*erfopvolging*) op bl 1376) en dan volg daar 'n kort aantekening oor die stand van die bepaalde begrip in die hedendaagse SA reg met verwysings na die boeke en artikels sowel as hofbeslissings wat daaroor handel. Al verwys die aangehaalde regsliteratuur of vonnis nie uitdruklik na Van der Keessel se *Theses Selectae* of *Praelectiones* nie, word dit tog genoem, solank as dit dieselfde punt as die van Van der Keessel bespreek. Geskrifte en vonnisse wat lank voor die uitgawe van die *Praelectiones* in 1967 verskyn het, word dus aangehaal; bv op bl 83 (no 10) word *R v Strydom* (1880) 1 SA 60 genoem. In 'n sekere mate lees hierdie sesde band dus soos die *De Legibus abrogatis* van Groenewegen en van dergelike skrywers.

Verder bevat hierdie band 'n register van woorde en begrippe met verwysings na die Latynse teks van Van der Keessel en ook 'n register van Afrikaanse woorde en begrippe wat verwys na die Afrikaanse vertaling van die Latynse teks. Aan die einde van die band verskyn daar ook 'n register van al die hofsake wat aangehaal is in die band met verwysings na die plekke waar dit in die band gesiteer is.

Daar kan geen twyfel bestaan dat hierdie sesde band van groot nut sal wees vir die praktisyn en veral vir navorsers in die studie van die reg nie. Die werk is met groot sorgvuldigheid en, vir sover skrywer hiervan dit kon kontroleer, op akkurate wyse gedoen. Menige assistent moet seker dae en nagte bestee het om al die literatuur en vonnisse deur te lees en om relevante punte of begrippe na te gaan. Vir die gebruiker of "*consumer*" sal die werk van onskatbare waarde wees, vir die samestellers kan ek alleen bewondering uitspreek oor so 'n grootse werk wat veel tyd en arbeid van hulle moes geëis het en wat miskien aan meer skeppende werk kon bestee gewees het. Lof moet betuig word waar dit so hoort. 'n Mens hoop egter dat soortgelyke ondernemings nie van elke huidige uitgewer van die ou skrywers se boeke of handskrifte nou verwag sal word nie.

B BEINART

BOEKAANKONDIGING

Index to the South African Law Journal, 1954-1972

By LYNETTE GREENSTEIN BA MA H Dipl Libr, CILLA JASPAN BA H Dipl Libr, HILDRED C HADASSIN BA H Dipl Libr

Cape Town, Juta's, 1975

The index to volumes 71–89, 1954–1972, of *The South African Law Journal* contains comprehensive subject and author indexes, the former making allowances for articles dealing with more than one subject.

Previous cumulative indexes contain only a subject index and with the inclusion of the author index as well as the very useful table of cases, tables of statutes and index to book reviews, this publication is most welcome.

JEANNIE BURDZIK
Law Library, University of South Africa

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