

De Jure Gentium et Civili

**Festschrift in honour of
Eltjo Schrage**



*Marita Carnelley, Shannon Hoctor &
André Mukheibir (editors)*

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FOREWORD

All contributions to this book have been double-blind peer-reviewed prior to acceptance to ensure the inherent academic quality of the publication. Where necessary, the submissions were returned to the authors with comments and suggestions in order to address any issues of content that needed attention. In addition, the submissions underwent final copy-editing prior to final inclusion into the book.

DEDICATION



Eltjo Schrage is an emeritus Professor of the Faculty of Law of the University of Amsterdam. He retired in 2010, delivering his final address in the Aula of the University of Amsterdam on 29 October. He has continued to publish prolifically. He delivered his inaugural address as the first honorary professor in the Department of Private Law at the Nelson Mandela Metropolitan University on 24 August 2009. The lecture was entitled “The Role of Private Law in Promoting Social Justice.” This was also the theme of the conference held to mark the occasion. The Private Law and Social Justice is now in its eighth year and Eltjo is still involved with the conference and continues to mentor academics in the faculty during his annual visit to Port Elizabeth.

Eltjo Schrage has had an association of almost 20 years with South African universities. From an African perspective, his connection to academics, judges and legal practitioners has added great value to several young academics at previously disadvantaged institutions. This book is evidence of his impact on South African academia, which started early in the mid-1990s when he forged links with the erstwhile University of the North. Through his efforts and in collaboration with the University of Pretoria and the Vrije Universiteit in Amsterdam his programme resulted in almost 20 staff members and students obtaining their postgraduate degrees through inter-continental

study opportunities. In this time he has personally supervised a number of South African doctoral students and has mentored an even larger number of academics. He continues to give generously of his time and his expertise. His influence is aptly evidenced by the fact that the contributors to this volume come from all points of the compass in South Africa.

Upon his retirement from the University of Amsterdam colleagues from all over Europe contributed to a *Liber Amicorum* entitled *Ius romanum - Ius commune - Ius hodiernum: studies in honour of Eltjo J.H. Schrage on the occasion of his 65th birthday*. The book was presented to him after he had delivered his farewell oration. The following excerpt from the Foreword perhaps best describes him:¹

"At first sight [Eltjo] seems rather formal; he is often formally dressed and seems deeply under the spell of his orthodox Calvinistic religious beliefs. At second sight there is a completely opposite Eltjo, enjoying a good dinner, good wine, witty in his speech, an excellent host at his home in Ouderkerk, full of interesting anecdotes ... The two opposites come together nicely in the scene of Eltjo, immaculately dressed in his usual three-piece suit, telling a lecture-hall full of students that he is a great lover of animals, 'if properly cooked'." This volume would not be complete without paying tribute to Eltjo's other half, Anneke. Notwithstanding her own professional commitments, she has tirelessly supported Eltjo through the years, and has hosted countless visitors from South Africa, showing them the sights of Amsterdam.

The editors would like to thank all the authors for their contributions and last but not least, we want to thank and pay homage to Eltjo Schrage for his example as a humble and generous yet brilliant academic.

Marita Carnelley, Shannon Hoctor and André Mukheibir

December 2014

¹ Dondorp, Hallebeek, Wallinga & Winkel *Ius Romanum, Ius Commune, Ius Hodiernum* (2011).

TABLE OF CONTENTS/ INHOUDSOPGAWE

	Preface	i
	Dedication	ii
Chapters/ Hoofstukke	The Prostitute and the Rock	
	<i>Paul du Plessis</i>	1
	‘n Samevloei van Twee Regstelsels: Siviele Prosesreg in die Kaapse Howe: 1806-1828	
	<i>Willemien Du Plessis & Nic Olivier</i>	9
	Regshistoriese Gronde vir die Verbod op die Pactum Successorium: Is Geskiedkundige Redes Genoeg Vir Die Voortbestaan Van Die Verbod In Suid-Afrika?	
	<i>Christa Rautenbach</i>	45
	Does The Aedilitian Edict Constitute Good And Fair Law?	
	<i>Rena van den Bergh</i>	62
	The Transformation of South African Enrichment Law	
	<i>Sieg Eiselen</i>	82
	Social Justice and the Changing Role of the Law of Delict in South Africa	
	<i>André Mukheibir</i>	99
	Towards an Old School Theory on (New) Rights to Minerals	
	<i>Pieter Badenhorst</i>	119
	Civil Law for Common Lawyers: A Teaching Experiment at the University of Melbourne	
	<i>Danie Visser</i>	144
	Tekenbevoegdhede van ’n Senior Beampte ten bate van ’n Universiteit – Waar Bly die Billikheid?	
	<i>Jean Sonnekus</i>	168
	‘Tiger! Tiger! Burning Bright’: the Common-Law and Statutory Principles Governing the Ownership of Exotic Wild Animals in South Africa	
	<i>Warren Freedman & Shannon Hoxtor</i>	187
	Empowering The Prosecutor: Evaluating A Dutch Development	
	<i>Adriaan Anderson</i>	208

THE PROSTITUTE AND THE ROCK

PAUL J DU PLESSIS*

Senior Lecturer in Civil Law and Legal History

For much of his long and illustrious career, Professor Schrage's work has focused on contexts. In his work on both Roman and Medieval learned law, he has frequently stressed that the contexts in which Roman legal texts were first created and into which they were subsequently transposed in the works of the medieval jurists, have to be studied in order to fully appreciate the different layers of meaning contained in them.¹ With this in mind, the following short piece on contexts is presented as a tribute to this great scholar and his work.

In book 4, chapter 14 of the *Attic Nights*, a collection of tales written during the course of the second century CE, Aulus Gellius recounts an episode of Roman justice in action:

“(IV). XIV Narratur historia de Hostilio Mancino aedilium et Manilia meretrice; verbaque decreti tribunorum, ad quos a Manilia provocatum est. 1. Cum librum IX Atei Capitonis coniectaneorum legeremus, qui inscriptus est de iudiciis publicis, decretum tribunorum visum est gravitatis antiquae plenum. 2. Propterea id meminimus, idque ob hanc causam et in hanc sententiam scriptum est : Aulus Hostilius Mancinus aedilis curulis fuit. 3. Is Maniliae meretrici diem ad populum dixit, quod e tabulato eius noctu lapide ictus esset, vulnusque ex eo lapide ostendebat. 4. Manilia ad tribunos plebi provocavit. 5. Apud eos dixit comessatorem Mancinum ad aedes suas venisse; eum sibi recipere non fuisse e re sua, sed cum vi inrumperet, lapidibus depulsum. 6. Tribuni decreverunt aedilem ex eo loco iure deiectum, quo eum venire cum corollario non decuisset; propterea, ne cum populo aedilis ageret, intercesserunt.²”

“ A story told of Hostilius Mancinus, a curule aedile, and the courtesan Manilia; and the words of the decree of the tribunes to whom Manilia appealed. 1. As I was reading the ninth book of the *Miscellany* of Ateius Capito, entitled *On Public Decisions*, one decree of the tribunes seemed to me full of old-time dignity. 2. For that reason I remember it, and it was rendered for this reason and to this purport. Aulus Hostilius Mancinus was a curule aedile. 3. He brought suit before the people against a courtesan called Manilia, because he said that he had been struck with a stone thrown from her apartment by night, and he exhibited the wound made by the stone. 4. Manilia appealed to the tribunes of the commons. 5. Before them she

* B.Juris Hons B.A LL.B M.A Ph.D FRHistS.

¹ See, for example, his excellent explorations of Roman and Medieval contexts in Schrage ‘*Emptio (nondum) tollit locatum*’ 1978 *Acta Juridica* 1 – 13.

² Latin text taken from <http://www.thelatinlibrary.com/gellius/gellius4.shtml> (last accessed 23 September 2013).

declared that Mancinus had come to her house in the garb of a reveller; that it would not have been to her advantage to admit him, and that when he tried to break in by force, he had been driven off with stones. 6. The tribunes decided that the aedile had rightly been refused admission to a place to which it had not been seemly for him to go with a garland on his head; therefore they forbade the aedile to bring an action before the people.”³

This text, which has been studied by a number of scholars⁴ during the course of the last century, demonstrates the complexity of multiple contexts. While this passage contains some references to Roman law, Aulus Gellius seemingly used these merely incidentally in the construction of his own narrative in order to demonstrate the ‘old-time dignity’ of the decree of the tribunes.⁵ To the scholar of Roman law, however, these incidental comments about Republican Roman law (the episode is traditionally dated to 151 BCE) are central to the reconstruction of the events and their legal significance.⁶ In order to do so, however, one needs to be sensitive to the context of these works as Robinson remarked in her book on the ‘sources’ of Roman law in 1997.⁷ When examining such works from antiquity for information about Roman law, one needs to be aware of at least two factors which affect the context of any given text, namely the extent of the author’s knowledge of the law, especially when the events described date from a significantly earlier period, and also the extent to which the author accurately portrays said law in the broader context of his aims when constructing the narrative of his own work.⁸

In the case of Aulus Gellius, the first factor is less of a problem. It is known that Gellius had knowledge of the law and indeed practised law in Rome.⁹ It may

³ English translation from http://penelope.uchicago.edu/Thayer/E/Roman/Texts/Gellius/4*.html (based on the 1927 edition translated by Rolfe) (footnotes omitted) (last accessed 23 September 2013).

⁴ For a survey of older literature, see Peppe *Posizione giuridica e ruolo sociale della donna romana in età repubblicana* (1984) 114 – 117. For a more recent account, see McGinn *Prostitution, Sexuality and the Law in Ancient Rome* (2003) [pbk] 60. And on women in the Roman Republic generally, see Culham ‘Woman in the Roman Republic’ in Flower (ed.) *The Cambridge Companion to the Roman Republic* (2010) [pbk], 139 – 159.

⁵ For an account of the purposes for which Aulus Gellius used Roman law in the construction of the *Attic Nights*, see most recently Howley ‘Why read the Jurists? Aulus Gellius on reading across Disciplines’ in Du Plessis (ed.) *New Frontiers: Law and Society in the Roman World* (2013) 9 – 30. In personal email communication to me (dated 25 June 2013), Dr. Howley has pointed out that elsewhere in the *Attic Nights* (13.12 – 13), Aulus Gellius also deals with limits of Roman legal offices, namely whether one Republican official could summon another official.

⁶ For the dating of this fragment, see Peppe, *Posizione*, 115 as well as McGinn, *Prostitution*, 60 note 324.

⁷ Robinson *The Sources of Roman Law: Problems and Methods for Ancient Historians* (London: Routledge (1997) 67.

⁸ Issues of motive falls in the realm of narratology, see Fludernik *An Introduction to Narratology* (2009) generally as well as Bartor *Reading Law as Narrative – A Study in the Casuistic Laws of the Pentateuch* (2010) generally.

⁹ Hazel *Who’s Who in the Roman World* (2002) entry on Gellius (Aulus) (1).

therefore be reasonably assumed that his knowledge of the law was sufficient to provide an accurate portrayal of the events that occurred between Hostilius Mancinus and Manilia. Nevertheless, Gellius' knowledge of the law does not diminish the gap between the supposed occurrence of the events and the time of Gellius (mid to late second century CE). With that said, the possibility of error is somewhat mitigated by the fact that Gellius obtained his account second-hand from the writings of Gaius Ateius Capito, a jurist from the reign of Augustus and we may therefore assume that the account of the law in this passage is, as far as can be ascertained, accurate.

As for the second factor, the author's motives when constructing the narrative for his own work, these can only be addressed by looking at the transmission of the events. There are at least three points contained in this analysis, first, Aulus Gellius' recording of the events in the second century CE in a second-hand fashion from the work of Gaius Ateius Capito; secondly Gaius Ateius Capito's recording of the events from whatever source he may have obtained them (and added to that his motives for recording them in his own work in the first place); and finally the original events themselves. Let us take these three temporal episodes from latest to earliest.

The first point is Aulus Gellius' own recording of this episode and his motives for doing so. These seem fairly clear. In ll. 1 – 2 we are told that he found this episode in the work Gaius Ateius Capito and because it seemed to him to be a good example of the 'old-time dignity' of the decree of the tribunes, he recorded it as well. What this 'old-time dignity' entailed is reflected in the episode recounted. Two individuals, one a Roman official in charge of the marketplace, the other a woman of low social status were embroiled in a legal matter. The low-status woman appealed to the tribune of the plebs, the office in charge of the protection of citizens against arbitrary infringement of their liberties. She prevailed and a ruling was given against the aedile. What Aulus Gellius seems to be hinting at here is the power of the tribune of the plebs to protect citizens, no matter how lowly their social status might be, against seemingly baseless accusations from magistrates.

The second point is a century closer to the actual events. Aulus Gellius tells us that he took his account of this episode from book 9 of Gaius Ateius Capito's *Coniectanea* (Miscellany).¹⁰ Though famous for being the founder of one of the

¹⁰ For an account of the *Coniectanea* as a form of juristic literature, see Schulz *A History of Roman Legal Science* (Oxford: University Press, 1953), 227. For a more recent survey, see Peppe, *Posizione*, 115 footnote 90.

‘schools’ of Roman jurists (the Sabinians) which were prominent during the first two centuries of the Principate, Capito is a jurist about whom not much is known.¹¹ Bauman speculates that he may have been born in the early 40s BCE and Hazel gives his date of death as 22 CE.¹² He is said, according to Berger’s entry in his dictionary, to have been a jurist with Republican sympathies.¹³ Such sympathies would therefore not be incompatible with him citing decisions from the heyday of the Roman Republic in which an ordinary citizen triumphed over an official. Bauman has suggested that Capito may have had a greater interest in public than private law, since he does not seem to feature much in discussions concerning the latter.¹⁴

Berger notes in his dictionary that two jurists of the classical period are known to have written works called *Coniectanea*, namely Capito and Alfenus Varus.¹⁵ According to Schulz, this work by Capito was: ‘...nothing but an exposition of republican constitutional law, an epilogue, not a prologue, destined to interest none but historians and antiquaries.’¹⁶ But Bauman argues that Schulz’s negative attitude towards this work is based on a misunderstanding of its significance in terms of Republican Roman law.¹⁷ Since so little of this work has survived, it is virtually impossible to speculate about its structure and content.¹⁸ Schulz describes it as ‘... a collection of problems chiefly concerned with *ius publicum* in at least nine *libri*. We have, besides citations, some fragments in Gellius.’¹⁹ As the text stands, Gellius suggests that book 9 of Capito’s *Coniectanea* was entitled *De iudiciis publicis*.²⁰ This part of the work, according to Bauman, was especially significant as it was: ‘...the first work on the public criminal law of any kind.’²¹ Other than these tantalizing clues, however, the content of Capito’s *Coniectanea* cannot be reconstructed (either in full or even in part). Given these constraints, the casual reader might wonder how this additional information will contribute to enhancing the understanding of this episode. Bauman ventures the following:

¹¹ Hazel, *Who’s Who*, entry on Capito (Gaius Ateius) (2).

¹² Bauman, R.A. *Lawyers and Politics in the Early Roman Empire* (1989), 27; Hazel, *Who’s Who*, entry on Capito (Gaius Ateius) (2).

¹³ Berger, A. *Eyclopedic (sic) Dictionary of Roman Law* (1953), entry on Capito, Gaius Ateius.

¹⁴ Bauman, *Lawyers and Politics*, 28 - 31

¹⁵ Berger, *Dictionary*, entry on *Coniectanea*.

¹⁶ Schulz, *Roman Legal Science*, 138.

¹⁷ Bauman, *Lawyers and Politics*, 30.

¹⁸ Lenel, O. *Palingenesia Iuris Civilis*, vol. 1 (1889) (reprinted with 1960 addition), 106.

¹⁹ Schulz, *Roman Legal Science*, 227.

²⁰ Bauman, *Lawyers and Politics*, 29 notes that there is some debate amongst modern scholars as to whether this part of the work was a separate work or whether it formed part of the *Coniectanea*.

²¹ Bauman, *Lawyers and Politics*, 31.

‘Two of the fragments [of *De iudiciis publicis*] seem to pertain more to the obsolescent *iudicia populi* than to the *iudicia publica*, namely the case in which the tribunician veto prevented a curule aedile from charging a prostitute with a violation of sacrosanctity and the first trial for *maiestas* eo nomine, but in fact both *exempla* would have been of interest to Augustus. He was greatly interested in the scope of *intercessio*, the scope of sacrosanctity and the evils of immorality, and *maiestas* precedents were always welcome.”²²

This statement is open to criticism. One might question the attribution of such grand motives to Augustus and the comment about sacrosanctity (to which I shall return below), but the first part of Bauman’s statement rings true. It cannot be denied that Gaius Ateius Capito most likely included this episode in his work owing to its peculiar/unique nature.

This brings us to the final point, the events themselves. The precise dating of the episode is uncertain, though it is conventionally assumed to have taken place in 151 BCE.²³ The events were triggered by an attempt by the inebriated aedile curule, Hostilius Mancinus, to gain entry to the lodgings of Manilia.²⁴ She refused him entry and when he tried to gain entry through force, stones were used to repel him. From Gellius’ account of the episode, it is not clear who threw the stones, whether Manilia herself or those in her lodgings. The aedile, wounded by a stone, sought to bring a legal case *ad populum* on account of the wounding.²⁵ Manilia appealed to the tribune of the plebs who, after listening to her account of events, vetoed the aedile’s attempt to initiate a lawsuit.

The nature of the suit is somewhat unclear. Mommsen thinks that the aedile had first fined Manilia for the throwing of the rock and the resulting injury.²⁶ He then called upon the *comitia* to enforce his ruling. Manilia, dissatisfied with the ruling, appealed to the tribune of the plebs who, after hearing her arguments, interceded on her behalf against the aedile and vetoed his attempt to have the verdict confirmed by the *comitia*. Nothing more is known about the fine.

²² Bauman *Lawyers and Politics*, 31

²³ Peppe *Posizione*, 115.

²⁴ For an account of the function of the aedile in the Roman Republic, see Berger, *Dictionary*, entries on aedile. For an interesting account of the relationships between the jurists and the officials, see Schiller ‘The Jurists and the Prefects of Rome’ 1949 *RIDA* (3), 319 – 359 who argues that many of the famous jurists of the classical period may have acquired their knowledge of Roman law by acting as minor officials such as aediles during their progress through the *cursus honorum*.

²⁵ And on this procedure, see extensively Garofalo *Il processo edilizio: contributo allo studio dei iudicia populi* (1989) generally.

²⁶ Mommsen *Römisches Strafrecht* (1955), 465, footnote 1. But see Peppe, *Posizione*, 116 who is sceptical of the ‘two-stage’ set of events described by Mommsen. For an overview of the jurisdiction of the aedile in the Republic, see Greenidge *The Legal Procedure of Cicero’s Time* (1901), 340 – 342.

To the scholar of Roman law, the aedile's actions raises an important question, namely why he chose to proceed through criminal law rather than civil law to obtain redress if he was not acting in his official capacity at the time. Some scholars, such as Bauman in the quotation above, think that the answer might lie in the nature of the aedile's office. According to them, aediles like tribunes of the plebs, were sacrosanct. This meant that anyone who attacked them would be rendered *sacer* and could be lawfully killed.²⁷ That this lay behind the series of events seems implausible. There is no evidence that Manilia had been (or was on her way to being) declared *sacer* for throwing the rock and it is doubtful that such an important point of detail would have been left out of the narrative. Furthermore, it is unclear whether aediles were sacrosanct, whether originally or during this period.²⁸

It seems much more likely that the answer to this question needs to be sought in the state of Roman private law c. 151 BCE. Let us examine which remedies would have been available to the aedile at private law.²⁹ The first option is that of (physical) *iniuria*. The aedile had been thrown with a rock and had sustained an injury, which he showed in public. If the dating of this episode is correct, it occurred during a time when the Roman delict of *iniuria* was undergoing a transformation. It was during the second century BCE that the rules of the Twelve Tables on *iniuria* were remolded into the *actio de iniuriis aestimandis* through Praetorian intervention.³⁰ The novelty of this action was that it removed the fixed penalties for *iniuria* laid down in the Twelve Tables and replaced them with an assessment of the extent of the *iniuria* based on the circumstances of the case. So, would Hostilius Mancinus have been able to sue Manilia using the *actio de iniuriis aestimandis*? The answer to this question appears to be negative and for two reasons. First, there is the issue of causation. For it to be *iniuria*, it had to be shown that a definite perpetrator had committed the *iniuria* against an individual. In this case, as reported by Aulus Gellius, it does not seem to be

²⁷ Berger *Dictionary*, entry on *sacrosanctus*.

²⁸ Kondratieff 2012. Aediles. *The Encyclopedia of Ancient History*. (<http://onlinelibrary.wiley.com/doi/10.1002/9781444338386.wbeah20003/full>) (Last accessed 26 September 2013). And for a discussion on this point, see Lintott *The Constitution of the Roman Republic* (1999) 129.

²⁹ The aedile, as a minor official without *imperium*. Whether magistrates could be sued during their term of office is much debated. The legal text on which this opinion is based, D.48.2.8 (Macer) can be read in this way, but even then it only seems to suggest magistrates with *imperium*. As McGinn, *Prostitution* 58 – 60 has rightly pointed out, there were numerous exceptions to this rule, not all of them stated in the legal sources and the very fact that Manilia (as a woman of low social status seemingly without a guardian) did sue the aedile suggest that the rule should be treated with some circumspection.

³⁰ Buckland *A Textbook on Roman Law from Augustus to Justinian* (3rd ed by Peter Stein) (1963) 590.

clear who threw the rock. The Latin summarises it nicely ... *e tabulato eius noctu lapide ictus esset* ‘a rock was thrown out of her abode’. This seems to suggest that the thrower of the rock could not be identified, thus presumably making it difficult to hold Manilia liable under the delict of *iniuria*. Related to this is the issue of intent. To succeed with *iniuria*, Hostilius Mancinus would have to demonstrate that Manilia had deliberately (*dolo*) thrown a rock at him. This would be difficult, especially in light of her pleading “self-defence” as Mommsen calls it.³¹

Given the circumstances of the case, one other remedy that may possibly be applicable is that of *res effusae vel deiectae*. According to classical Roman law, the occupier of a house or apartment could be held liable if things, which were thrown or poured out of their house or apartment, caused loss to another.³² In the case of injury to a free person, the loss was assessed according to the facts of the case. The main problem with this remedy is that the extent to which the quasi-delicts existed during this period is open to question.³³ Although most scholars of Roman law agree that these must have already existed in the Republican period, there is little more that can be said about the dating of the inception of these remedies. It is worth pointing out that they are often associated with Praetorian interventions which, according to the commonly accepted view, only began to occur after the passing of the *Lex Aebutia* which was enacted c. 150 BCE. It would therefore appear that there were no remedies available in Roman private law with which the aedile could bring a lawsuit against the prostitute.

So what does all of this mean? In a recent chapter, Harries encouraged scholars of Roman law to be more sensitive to other contexts (in the case of her chapter the literary context) when approaching Roman legal sources.³⁴ Similarly, in the same volume, Thomas showed that Roman legal texts have different perspectives and that an assessment of these perspectives can produce new insights into Roman law.³⁵ Do these added layers of context contribute much to our understanding of the

³¹ Mommsen *Strafrecht* 465, footnote 1.

³² Buckland *Roman law* 598 – 599.

³³ The literature on the quasi-delicts in Roman law is vast, see most recently on this specific one, Rodriguez Ennes ‘Reflexiones en torno a diversos delitos de derecho honorario’ in Calzada Gonzales, et al (eds) *El Derecho Penal* (2005) 523 – 543.

³⁴ Harries ‘The Senatus Consultum Silanianum: Court Decisions and Judicial Severity in the Early Roman Empire’ in Du Plessis (ed.) *New Frontiers: Law and Society in the Roman World* (2013) 51 – 70, 69.

³⁵ Thomas ‘The Standpoint Determines the View: Jacques Barzun’s Theory of Aspect’ in Du Plessis, (ed.) *New Frontiers: Law and Society in the Roman World* (2013) 227 – 244, 241 – 242.

episode? The answer to this is both yes and no. While the background may not provide a radically new interpretation to this set of events, they do reinforce the point that this episode is rather peculiar and should for that reason be studied. More importantly, an exploration of the layers of transmission of this episode gives one a greater appreciation of the motives with which such episodes were included in the first place. It also gives one cause to reflect on the motives of the original actors in choosing a certain course of action in order to obtain legal redress. All this from a bit of context.

*‘N SAMEVLOEI VAN TWEE REGSTELSELS: SIVIELE PROSESREG IN
DIE KAAPSE HOWE: 1806-1828*

WILLEMIEN DU PLESSIS*

Professor, Fakulteit Regte, Noordwes-Universiteit (Potchefstroom Kampus)

NIC OLIVIER**

*Professor, SAOG Sentrum vir Grondverwante, Streeks- en Ontwikkelingsbeleid
(Universiteit van Pretoria)*

I INLEIDING

“If we try to read history backwards, we find on either side of the Channel between the 12th and the 14th centuries totally different sets of sources of law. On the Continent the legal historian sees himself confronted with an authoritative text, laid down in the *Corpus Iuris Civilis* and in the *Corpus Iuris Canonici*, with various commentaries on these texts. The texts and the commentaries on them recognize different sets of norms, but these norms are not considered to be conflicting norms, and if there is a certain order to be found, the superiority of one set of norms does not entail the abolition of the other. Natural law does not drive out *ius gentium*, nor *ius civile*. On the other side of the Channel we find two different sets of norms, one in law and one in equity. These two sets of norms coexisted. Neither drove out the other ... As long as the two systems coexisted they were of a supplementary nature. There is not even a serious conflict between a dogmatic, purposive interpretation of the old texts of the common law and the *ius commune* on the one hand, and a historic reading of them on the other. The historical aspect of the text resolves in its "Wirkungsgeschichte" (Gadamer) and that is a harmonizing tendency. This observation leads to the conclusion that although the notion of "sources of law" has totally different meanings on either side of the Channel, there is nevertheless a measure of convergence to be seen. This convergence stretches out into later ages. The concept of "sources of law" becomes an aspect of legal development, but that is only developed from the 17th and 18th centuries onwards.”¹

Dié stelling van Schrage weerspieël die tweeslagtigheid van die reg aan die Kaap in die tydperk 1806 tot 1828. In 1806 is die Kaap vir die tweede maal deur die Britte geannekseer. Die Kapitulasievoorwaardes² het bepaal dat die Hollands-ingestelde howe bly. Die Engelse het nie nuwe prosesvoorskrifte vir dié howe uitgereik nie met die gevolg dat die Romeins-Hollandse prosesreg wat voor 1795 in die Kaap en in Holland gegeld het, bly voortbestaan het. Dit beteken egter nie dat die prosesreg aan die Kaap vir die Engelse aanvaarbaar was nie. ‘n Kommissie, die sogenaamde Colebrooke-Bigge Kommissie is aangestel om die regspleging aan die Kaap te ondersoek. Na aanleiding van die

* B Jur LLB MA LLD (PU vir CHO).

** BA (Law) LLB, BA Hons MA (UP) BA Hon B Phil (PU vir CHO) LLD (UP) LLD (Leiden).

¹ Schrage ‘Sources of Law, The Comparative Legal History of a Concept’ (2005) 11 *Fundamina* 275,284, 284.

² A 8, Kapitulasievoorwaardes van 18 Januarie 1806 in *Statute Law of the Cape of Good Hope* (1862) 39. Sien ook die a 8 van die Kaapse Kapitulasievoorwaardes van 1 Oktober 1806 op 42.

Kommissie se voorstelle is verskeie wysigings aan die Kaapse prosesreg en hofstrukture aangebring. Skrywers is van mening dat die Engelse prosesreg in 1828 aan die Kaap ingevoer is³ by wyse van ‘n Regsoktrooi⁴ wat daartoe gelei het dat die Suid-Afrikaanse reg vandag as ‘n gemengde regstelsel bekend staan of, soos Schrage dit stel, ‘n samevloei van regstelsels.⁵

In hierdie hoofstuk word daar eers ‘n uiteensetting gegee van die hofstruktuur aan die Kaap in die tydperk 1806-1828. Die kritiek van die Colebrooke-Bigge Kommissie word ook aangeraak, sowel as die wysigings wat aangebring is. Daar is gereeld in die prosesstukke van een van die howe aan die Kaap, naamlik die van die Raad van Justisie na Van der Linden⁶ as gesag vir prosesregtelike vrae verwys. Daaruit is afgelei dat Van der Linden se uiteensetting van die prosesreg as riglyn vir die prosesreg in die Kaap gebruik is – dit was ook een van die bevindinge van die Colebrooke-Biggs kommissie. Trouens, Van der Linden se uiteensetting is ‘n weergawe van die Hollandse praktyksreg aan die einde van die 18e eeu. Na ‘n uiteensetting van die verloop van ‘n proses soos deur Van der Linden bespreek, word ‘n hofsak aan die Kaap gebruik om die proses wat daar gevolg is te illustreer en om te bepaal of die prosesreg aan die Kaap van die van Van der Linden afgewyk het.⁷ Die hoofstuk sluit af met ‘n paar gevolgtrekkings oor die siviele prosesreg

³ Van Zyl *Geskiedenis van die Romeins-Hollandse reg* (1983) 451; Hosten ea *Introduction to South African Law and Legal Theory* (1977) 195; De Wet *Die ou skrywers in perspektief* (1988) 32 ev; De Vos *Regsgeskiedenis* (1992) 242 ev (sien veral 244); Van der Merwe *Regsinstellings en die reg aan die Kaap van 1806 tot 1834* (LLD-proefskrif, Universiteit van Wes-Kaapland, 1984) hfst 3 in die geheel.

⁴ Proklamasies 1834 – inwerkingtreding 1 Maart 1834 in *Statute law* 206-224. Reeds in Engeland afgekondig op 4 Mei 1832.

⁵ Die privaatreë is hoofsaaklik op Romeins-Hollandse reg gebaseer, terwyl alle prosesse deur middel van Engelse Prosesreë gevoer word. Die privaatreë is deur die Engelse reg beïnvloed, terwyl die Suid-Afrikaanse Handelsreë en Publiekreë hoofsaaklik Engelsregtelik van aard is – sien hieroor Du Plessis “The historical functions of law: The developments after 1500” in Tracy Humby *et al Introduction to Law and Legal Skills* (2012) 83-120, 104-105.

⁶ *Verhandeling over de Judiciele Practijc* (1781). Daar is ook by geleentheid na Merula *Manier van Procederen* verwys Merulae *Manier van procederen, in de provintien van Hollandt, Zeelandt en West-Vrieslandt* (Leiden 1741).

⁷ Hierdie hoofstuk is gebaseer op ‘n Raad vir Geesteswetenskaplike Navorsing gesteunde navorsingsprojek getiteld “Kaapse Argief Projek: Appèlhof en Hof van Justisie 1806-1827 ten aansien van die indeksering van hofbeslissings” (medewerkers: NJJ Olivier (tans UP); CR de Beer (tans UP); W du Plessis (NWU); CG Visagie (oorlede UWK projekteier); LF van Huyssteen (toe verbonde UWK) (1986-1992); J Th de Smidt (Leiden en Amsterdam); HC Gall (Leiden) en PJ van der Merwe (UWK tot 1988). Die indeks vir die hofsake kan hier gevind word: *Decisions of the Court of Justice Court of Appeal in the Cape Archives: 1806-1827* <http://libguides.nwu.ac.za/content.php?pid=385712&sid=3161380>. Sien die verslae oor die projek NJJ Olivier en Du Plessis *Kaapse Argiefprojek Fase I: Metodologiese Ontsluiting* RGN (1989); Visagie ea *Die siviele appèlhof en die Raad van Justisie, hofstukke en uitsprake met betrekking tot siviele sake 1806-1827: ‘n evaluering van capita selecta uit bepaalde gebiede van die reg aan die Kaap* (1993) en publikasies wat uit die projek gevloei het CR de Beer *Aspekte van die Regsposisie van die Slawe aan die Kaap* (LLM Verhandeling, Universiteit van die Wes-Kaap, 1992); Du Plessis & Olivier “Enkele sakeregtelike aspekte met betrekking tot grond aan die vroeë Kaap” (1994) *TSAR* 131-137; Du Plessis “Erfregtelike ontwikkelinge aan die Kaap 1806-1828” (1995) *THRHR* 585-602; (1996) *THRHR* 83-89.

aan die Kaap in die besonder en 'n paar algemene aanbevelings oor moontlike opvolgprojekte.

II HISTORIESE AGTERGROND: REGSPLEGING EN HOFSTRUKTUUR AAN DIE KAAP 1795-1828

(a) *Wysigings aan die hofstelsel*

Die Kaap is vir die eerste maal in 1795 deur die Britte beset. Die eerste Britse besetting het tot 1803 geduur, waarna die Kaap aan die Hollanders terug gegee is. Die Kaap is vir 'n tweede maal in 1806 beset. Tydens die eerste Britse Besetting aan die Kaap in 1795 het die Britte die Raad van Justisie aangetref. Die aanvanklike Raad van Justisie, ingestel kragtens 'n *Instruksie* van 3 Desember 1783, het uit 'n president, 'n fisikaal en 11 gewone lede bestaan. Ten tye van die eerste Britse besetting op 16 September 1795 het die Raad bestaan uit 'n president, 'n fisikaal, nege gewone lede plus drie verdere persone wat, hoewel nie lede van die Raad van Justisie nie, deelgeneem het aan sommige werksaamhede daarvan.⁸ Die hofstruktuur het verder bestaan uit die *Hof van Landdros en Heemraden*⁹ en die Hof van Kommissaris van Klein Sake in Kaapstad.¹⁰ Die Engelse Goewerneur het 'n proklamasie op 24/26 Julie 1797 uitgevaardig om die Raad van Justisie te verklein tot 'n president, fisikaal en vyf gewone lede. Die kworum vir die Raad van Justisie was op vyf gestel. As daar nie 'n kworum teenwoordig was nie, kon een of twee lede van die burgersenaat as assessore aangestel word.¹¹ Die proklamasie het ook ander wysigings aan die regstelsel aangebring. Die Hof van Kommissaris van Klein Sake se jurisdiksie is op RD 200 gestel; die Landdros en Heemrade van Stellenbosch en Drakenstein en van Swellendam se jurisdiksie op RD 150 en dié van Graaff-Reinet op 1000 gulde. Alle ander bestaande bevoegdhede van die howe het behoue gebly.¹² 'n Siviele Appèlhof (bestaande uit die goewerneur en luitenant-goewerneur is ingestel. Die hof kon appèlle waar die eis 200 pond of RD 1000 oorskry verhoor; sekuriteit moes ook deur die appellant vir nakoming van die uitspraak *a quo* (as die appèl sou misluk) gestel

⁸ Die lede is deur die Goewerneur aangewys. Geo M Theal *Records of the Cape Colony* (gepubliseer eind 19e eeu, begin 20e eeu) volume 28 3 (verwys na as Theal with the relevant volume number).

⁹ Op 1795-10-15 is die pligte van die Landdros en Heemrade by proklamasie voortgesit – Theal volume 1 op cit nota 10 op 199.

¹⁰ Theal volume 28 op cit nota 10 op 1. Ter uitvoering van die Regsoktrooi van 24 Augustus 1827 is die *Court of the judge of police and resident magistrates* met bevoegdhede ten aansien van huweliksaangeleenthede (met Engels as regstaal) ingestel – Ord 44 van 19 Maart 1828-CCP 6/5/2 434-439. Die Siviele Appèlhof is op 24 Julie 1796 ingestel, maar het eers vanaf 4 Oktober 1779 begin funksioneer en kon appèlle wat vanaf die CJ (met ingang van 16 September 1795 ingestel is) verhoor: BO 61 KPB vol 5 104-105 van 4 Oktober 1797.

¹¹ BO 61 KPB vol 5 94-95 van 24/26 Julie 1797.

¹² BO 61 KPB vol 5 95 van 24/26 Julie 1797.

word. Verdere appèl kon binne 14 dae na die uitspraak van die Siviele Appèlhof na die *Privy Council* gerig word, mits die bedrag in geskil 500 pond of RD 2500 oorskry het.¹³ Sodanige appèl moes binne 14 dae ingestel word en sekuriteit moes ook gestel word. Verder is 'n *Vise-admiraliteitshof*: met twee afdelings: *prize jurisdiction* en eerste instansie ingestel.

In 1803 het Kommissaris De Mist *Voorlopige Instructien* met betrekking tot die regspleging¹⁴ uitgereik. Die bedoeling was dat vanaf 1803 lede van die Raad van Justisie deur die Hollandse goewerneur op grond van hulle professionele kennis aangestel sou word.

Op 18 Januarie 1806 is die Kaap by wyse van die Tweede Britse Besetting geannekseer. Die vredesverdrag (*Articles of Capitulation*) wat te Papendorp (die teenswoordige Woodstock) gesluit is, het in artikel 8 bepaal dat "the burghers and inhabitants shall preserve all their rights and privileges which they have enjoyed hitherto."¹⁵ Die normale Britse gebruik by anneksasie was dat die bestaande reg en regsinstellings behoue bly totdat dit deur die nuwe staatsgesag verander word. Hahlo en Kahn¹⁶ verwys na *Campbell v Hall*¹⁷ waar die voorwaardes soos volg verwoord is:¹⁸ "(t)he laws of a conquered country continue in force, until they are altered by the conqueror."

Die Siviele Appèlhof is op 29 Mei 1807 by wyse van proklamasie deur Caledon ingestel,¹⁹ bestaande uit die Britse Goewerneur, Luitenant-Goewerneur (en na 1807, met laasgenoemde amp se afskaffing, slegs die Goewerneur), 'n sekretaris en 'n assessor.²⁰ Die hof het die funksies van die Hoë Hof van Batavia (tot 1803) en van die Asiatiese Raad in Den Haag (1803-1806) as hof van appèl vanaf die Raad van Justisie oorgeneem. Die monitiêre jurisdiksie was gestel op 200 pond of RD 500. Daar is ook voorsiening gemaak vir appèl na die *Privy Council* in gevalle waar die eisorsaak 500 pond of RD 2500 te

¹³ Ten minste 21 dae voor verhoor moes alle pleitstukke in Engels en vertaalde hofstukke van die hof *a quo* (as sodanig deur die sekretaris van die Raad van Justisie gesertifiseer) ingehandig word – BO 61 KPB vol 5 96 van 24/26 Julie 1797.

¹⁴ Theal volume 28 op cit nota op 10 17-18.

¹⁵ De Vos op cit nota 5 op 242-243; Hahlo & Kahn *The South African Legal System and its Background* (1973) 575.

¹⁶ Hahlo & Kahn op cit nota 17 op 575.

¹⁷ (1774) 1 Cowp 204 209; 98 ER 1045 1047.

¹⁸ Sien ook Thomas, Van der Merwe & Stoop *Historical Foundations of South African Private Law* 2de uitgawe (2000) 97; Visagie *Regspleging en Reg aan die Kaap van 1652 tot 1806 met 'n Bespreking van die Historiese Agtergrond* (1969) 95; De Vos op cit nota 5 op 238; Visagie *Die Kaapse Regspraak-projek: Die Raad van Justisie, Hofstukke en Uitsprake wat betrekking het op Siviele Sake, 1806 tot 1827* (1989) Bylae 4 6.

¹⁹ Theal volume 28 op cit nota 10 op 2; Visagie (1989) op cit nota 20 Bylae 4 6; De Vos op cit nota 5 op 224.

²⁰ Sekuriteit moet deur die appellant vir nakoming van die *a quo*-uitspraak en vir die appèl gestel word – Theal volume 6 op cit nota 10 op 115-116.

bowe gegaan het.²¹ Die appèl moes binne 14 dae ingestel word. Alle dokumentasie moes in Engels opgestel word. Na die tweede Britse oorname is die president van die Raad van Justisie lewenslank deur die Goewerneur aangestel; hy het ook die sewe oorblywende lede aangestel (hulle dienstermyn is deur om bepaal). Sodanige aanstellings sou in teorie op grond van hulle regs kwalifikasies of ervaring van die regspleging geskied het.²²

OG de Wet is op 6 Februarie 1807 as president van die Raad van Justisie aangestel.²³ Hy is deur WS van Ryneveld opgevolg op 4 Maart 1809.²⁴ Op 28 Augustus 1812 is JA Truter as president van die Raad van Justisie en as president van die Weeskamer aangewys.²⁵ Die bevoegdheid van RWM Ruysch, JD Alders, JG Tredoux en PJ Buissine om as prokureurs in die Raad van Justisie op te tree is amptelik in 1807 bevestig.²⁶

Die Kolleges van Landdroste en Heemrade het voortbestaan, met 'n reg van appèl na die Raad van Justisie.²⁷ Die Vise-Admiraliteitshof (oorspronklik in 1797 tydens die eerste Britse anneksasie ingestel) is in 1807 heringestel.²⁸

Op 30 Augustus 1825 het JA Truter in sy getuienis aan die Colebrook-Bigge Kommissie aangedui dat daar slegs twee professioneel gekwalifiseerde lede in die Raad van Justisie sitting gehad het.²⁹ Op 'n vraag oor die aard van die siviele regspleging, het Truter te kenne gegee dat die siviele regspleging dieselfde was as wat in Holland teen ongeveer 1799 (toe daar nuwe prosesregreëlings ingevoer is) toegepas is.³⁰

In 1823 is Majoor Colbrooke en Majoor Bigge aangestel om die regspleging aan die Kaap te ondersoek. Na 'n kritiese bespreking van die instelling, samestelling en funksionering van die verskillende Kaapse geregshoue, maak die kommissie 'n aantal aanbevelings. Vir doeleindes van hierdie artikel word 'n uiteensetting van die posisie soos wat dit aan die Kaap gegeld het, gegee. Daar word volstaan met 'n kursoriese bespreking van die vernaamste aanbevelings wat uiteindelik in twee Regsoktrooie (1827 en 1832 met

²¹ De Vos op cit nota 5 op 244.

²² Theal volume 28 op cit nota 10 op 4. Op 5 April 1806 is WS van Ryneveld as vise-president en waarnemende president aangestel; hy het ook die fisikaalamp (op daardie stadium bekend as die *procurator-generaal*) beklee – Theal volume 28 op cit nota 10 op 63;

²³ Theal volume 6 op cit nota 10 op 85.

²⁴ Theal volume 6 op cit nota 10 op 465 Met verloop van tyd is na die President as “Chief Justice” verwys.

²⁵ Theal volume 8 op cit nota 10 op 482. Dr JA Truter het aan die Universiteit van Leiden onder Bavius Voorda gestudeer. Vgl ook die aanval op Truter se integriteit – Theal volume 10 287-289; 293-296. Sy voortgesette benoeming ten opsigte van die Weeskamer na bedanking as president van die CJ was in geskil aangesien hy en sy familie RD 51 000 aan die Weeskamer geskuld het – Theal volume 27 op cit nota 10 op 334-335.

²⁶ CJ 921 (1807) 5.

²⁷ De Vos op cit nota 5 op 245.

²⁸ Visagie (1989) op cit nota 20 Bylae 4 6.

²⁹ Hyself en die sekretaris Berrange – Theal volume 28 op cit nota 10 op 261.

³⁰ Theal volume 28 op cit nota 10 op 264.

inwerkingtreding onderskeidelik op 1 Januarie 1828 en 1 Maart 1834) neerslag gevind het.³¹

Volgens die kommissie was daar verskeie nadele verbonde aan die samestelling en funksionering van die Siviele Appèlhof verbonde. Die Kommissie was van mening dat moeite gedoen moes word om die omvangryke stukke waarin daar boonop dikwels foutiewelik (na die oordeel van die kommissie) na gemeenregtelike gesag verwys is, beskikbaar te stel. Geen redes is deur die Raad van Justisie vir sy beslissings gegee nie; gevolglik moes die goewerneur met die betrokke partye of die president van die Raad van Justisie oor die regsgrondslag van die Raad van Justisie-uitspraak gesprek voer. Daarnaas was nie een van die lede van die Siviele Appèlhof juridies geskool nie. Die lede van die Appèlhof en die goewerneur was sterk Engelsregtelik georiënteerd en het dikwels Raad van Justisie-uitsprake wat nie in ooreenstemming met die Engelse reg was nie, gewysig:

“The pleadings have been loaded with multiplied and expensive copies of the same documents, and the length of the Memorials which are always signed by Advocates has been unnecessarily increased by diffuse and inaccurate quotations from the Commentators on Roman, Dutch and English Law; and the expense of the Proceedings augmented by the delays, contumacies and frivolous excuses.”³²

Hierdie standpunt van die Kommissie skyn egter ’n veralgemening te wees. In hierdie verband vir die 19 jaar, vanaf 1806 tot 1825, gee die kommissie die volgende statistiek:

“... out of 428 Sentences of the Court of Justice, against which Appeals have been entered, 131 have been affirmed, 21 amended, 83 reversed and that 76 are pending; that 72 Appeals have been made from the Governor's Court to His Majesty in Council; and that of these, 5 Sentences have been affirmed, 6 rejected, 3 reversed, and 32 were not prosecuted.”³³

Die Kommissie dui aan dat geen redes vir die Siviele Appèlhof-uitspraak gegee is nie. Die kommissie vermeld verskeie verdere nadele van die Raad van Justisie-stelsel. Die samestelling van die hof is sodanige dat dit nie eerbied en vertroue afdwing nie. Die aard van persoonlike betrokkenheid en beïnvloeding van die lede van die Raad van Justisie by

³¹ Sien vir 'n bespreking van die twee *Charters* asook vir die inwerkingtreding van die tweede *Charter* Van Zyl op cit nota 5 op 451-451.

³² Theal volume 28 op cit nota 10 op 2.

³³ Theal volume 28 op cit nota 10 op 3.

gedinge is onaanvaarbaar en verhoor vind nie in die openbaar plaas nie.³⁴ Daar word nie redes vir die finale beslissing verskaf nie. Getuieverklarings word voor notaris afgelê; dit is daarna in die teenwoordigheid van die teenparty of sy regsvertegenwoordiger onder eed bevestig; kruisondervraging deur laasgenoemde persoon was op daardie stadium moontlik. Die regbank word sodoende die geleentheid ontnem om self *viva voce* getuienis aan te hoor en om 'n oordeel oor die geloofwaardigheid van getuies te vel. Volgens die kommissie was die aard van eise wat deur die Raad van Justisie bereg moes word, ongekompliseerd. Vanweë die sogenaamde "simple modes ... of transferring property" het slegs grensgeskille en watergeskille ontstaan. In die geval van kommersiële eise het daar egter breedvoerige diskussies – met belangrike regsgevolge – ontstaan.³⁵

Die Hof van Landdros en Heemrade is vir verskillende distrikte ingestel en het kragtens die 1803-*Instructien* oor siviele jurisdiksie beskik.³⁶ Die jurisdiksie was beperk tot 'n maksimum bedrag van RD 300, grens- en besitgeskille,³⁷ serwitute, beslaglegging op vee en betreding.³⁸ Jurisdiksie met betrekking tot leenplase en die ander vorme van grondbeheer was egter uitgesluit en moes deur die Raad van Justisie beslis word. Die opskriftelling van die aanvanklike kompromie- of arbitrasiehandelinge (soos voorgeskryf deur die *Voorlopige Instructien*) was nie vereis nie. Die partye of hul agente kon hul saak stel. Die hof het ten minste een maal per maand gesit. Indien 'n skikking nie bereik kon word nie, is die getuieverklarings onder eed afgeneem en is die aangeleentheid daarna deur die hof beslis. Die kommissie bevind dat die Hof van Landdros en Heemrade aan dieselfde gebreke as die Raad van Justisie mank gaan.

Waar die eis RD 25 oorskry, kan appèl na die Raad van Justisie gerig word. 'n Kopie van alle dokumente (met inbegrip van die uitspraak) moes in so 'n geval aan die Raad van Justisie versend word.³⁹ Die Kommissie het aanbeveel dat appèlle slegs gerig mag word waar die eis RD 400 oorskry. 'n Hersieningsbevoegdheid moes ook aan die beoogde hooggeregshof verleen word.⁴⁰

³⁴ Kragtens 'n proklamasie van Cradock op 25 September 1813 CCP 6/5/1 263 moes alle verrigtinge in die Raad van Justisie in die openbaar geskied (behalwe waar die hof met voorafkennisgewing aan die Goewerneur anders sou besluit). Ook getuienis, die beëdiging daarvan en kruisondervraging moet in die ope hof geskied. Alle verrigtinge waar die aangeleentheid vir mediasie of vir ondersoek na die *gecommitteerde leden* verwys is, moes met geopende deur geskied (buiten daardie gevalle waar openbare beleid – veral huweliksgeskille – dit vereis het) – Theal volume 9 op cit nota 10 op 244.

³⁵ Theal volume 28 op cit nota 10 op 4-5.

³⁶ Theal volume 28 op cit nota 10 op 10 28-29.

³⁷ Theal volume 28 op cit nota 10 op 10.

³⁸ Theal volume 28 op cit nota 10 op 28.

³⁹ Prok van 20 Maart 1818 CCP 6/5/1 414-415; Theal volume 25 op cit nota 10 op 37-38.

⁴⁰ Theal volume 28 op cit nota 10 op 29-30.

In 1809 is die siviele en polisiefunksie in Kaapstad (wat tot toe aan die fisikaal opgedra was) na die Kaapse Landdros en Heemrade oorgedra. Dié hof het bestaan uit 'n landdros, ses heemrade uit Kaapstad en twee uit die distrik. As Hof vir Klein Sake het die hof op Saterdag gesit. Die siviele proses was dieselfde as dié van die Raad van Justisie – selfs al was die eis kleiner as RD 20; boonop moes die verweerder by aansoek vir vonnis by verstek ook vier keer aangespreek word. Regsverteenwoordiging is toegelaat. Volgens die Kommissie was hierdie hof vanweë die groot kostes (vir regsverteenwoordigers asook seëlkoste) nie algemeen toeganklik nie.⁴¹

Die Hof van Landdros en Heemrade moes ook toestemming tot die sluiting van huwelike deur koloniale inwoners en vreemdelinge verleen. Daar is op 21 September 1826 voorsiening gemaak vir die daarstelling van huwelikshoe in Tulbagh, Caledon en Cradock; die hoeve verantwoordelik vir onder andere die registrasie van huwelike. Die prosesreg was dieselfde as dié van toepassing op die Landdros en Heemrade. Die registrasie van huwelike gesluit voor die drie hoeve moes onderskeidelik na die huwelikshoe van Worcester, Swellendam en Somerset gestuur word.⁴²

Die Colebrooke-Bigge kommissie het 'n oorsigtelike beskrywing van die prosesreg gegee en daarop bepaalde bevindinge gemaak.⁴³ Die *Voorlopige Instructien* (1803) van kommissaris De Mist sou volgens die kommissie nie 'n wesenlike impak op die regspleging aan die Kaap gehad het nie.⁴⁴ Daarvolgens moes reëls ten aansien van siviele en strafregtelike aangeleenthede uitgevaardig word (dit moes boonop deur die Bataafse Regering goedgekeur word). Dit het volgens die Kommissie nie geskied nie en die siviele prosedure het soos dit tydens die eerste Britse besetting (1795-1803) toegepas is, bly voortbestaan.⁴⁵

⁴¹ Theal volume 28 op cit nota 10 op 11-12.

⁴² Ord 24 van 21 September 1826 CCP 6/5/2 344-345 (herroep deur Ord 33 van 1837).

⁴³ Theal volume 28 op cit nota 10 op 4-9.

⁴⁴ De Mist het ook in 1804 'n plakkaat vir die tussentydse hantering van appèlle vanaf die CJ deur die CJ self – by wyse van aanstelling van een van die lede as "buitengewone appellations rechter" voorsiening gemaak – BR 115 24-25 Mei 1804 KBB vol 6 136-1 43. Sien ook Naudé *Kaapse Plakkaatboek* (1951) 6 vir die name van die lede van die CJ.

⁴⁵ Sien ook Visagie (1969) op cit nota 20 vir die oorsig van die posisie van die hofstruktuur tot en met 1795; die Raad van Justisie 41-46; fisikaal 46-48; regspraktisyns 48-52; laer hoeve 52-55; die Kollege van Huwelikskommissarisse (wat later saamgesmelt het met die Kollege van die Kommissarisse van Klein Sake) 55-56 en die Weeskamer 56-62. Ten aansien van die regspleging tydens die eerste Britse besetting – sien 91-94. Die volgende regsinstellings het tydens die Bataafse tydperk bestaan: die Raad van Justisie - Visagie (1969) 100-104; prokureur-generaal ter vervanging van die fisikaal 1204-106; regspraktisyns 106-107; laer hoeve 108-110; asook die Weeskamer, Desolate Boedelkamer en Handelshof 110-111.

Dié prosedure verskil volgens die kommissie nie wesenlik van die siviele prosedure wat gemeenskaplik aan Romeinsregtelike gebaseerde regstelsels is nie. Dié stelsel gaan egter mank aan 'n aantal gebreke: Theal volume 28 op cit nota 10 op 6.

Regsverteenwoordiging by wyse van prokureurs en advokate is wel toegelaat.⁴⁶ Die Kommissie het bepaalde probleme met die proses gehad. Daar was onnodige verlenging van die “early stages of the process,” daar het onsekerheid en onakkuraatheid van die formulering van die geskilpunte bestaan, mondelinge getuienis was uitgesluit en voordat vonnis by verstek verkry kon word, moes die verweerder vier keer aangespreek word.⁴⁷ Die instelling van *gecommiteerde leden* van die Raad van Justisie om mediasie te bewerkstellig, het wel goeie vrugte in aangeleenthede rakende vennootskap, rekeninge, laster en huweliksake afgewerp, maar dit het meestal tot (onnodige) verlenging van sake en die benadeling van die partye gelei. Die kommissie het ook daarop gewys dat regsverteenwoordiging in sulke gevalle dikwels uitgesluit was en dat “the progress of the mediation depends much upon the activity and character of the commissioned Judges.”⁴⁸

Indien mediasie deur die *gecommiteerde leden* onsuksesvol was, het die saak by wyse van die gee van *requisitions* of *notices* deur die advokate van die partye op verhoor gegaan. Daarna het die inhandiging by die *Registrar* van *petitions, answers, replications, rejoinders, documentary evidence* en getuieverklarings gevolg. Geen kopieë van pleitstukke en ander dokumente is aan die teenpartyte verskaf nie; indien benodig moes kopieë daarvan op eie koste van die *Registrar* verkry word.⁴⁹

Na *litis contestatio* kon in die geval van verdedigde aksies *viva voce*-argumentering deur die regsverteenwoordigers geskied, as dit oor belangrike aangeleenthede handel het of as die President van die hof sodanig beveel het. Die stukke is daarna tussen die lede van die Raad van Justisie rondgestuur. Op die dag wat vir beraadslaging deur die lede van die Raad van Justisie bepaal was, is hulle onderskeie standpunte agter geslote deur gestel. Die standpunt van die meerderheid het die deurslag gegee. Die vorm van die uitspraak is deur die sekretaris opgestel en onderteken deur al die lede en meegedeel aan die betrokke partye. (Geen minderheidstandpunte is gevolglik in die uitspraak vermeld nie.)⁵⁰

Waar geen verweer aangeteken is nie, of wanneer dit oor likiede sake en aangeleenthede voortvloeiend uit verbande, *promesse* en dokumente handel het, is daar van ’n vinniger prosedure gebruik gemaak. Die verweerder is ontbied en indien hy sy handtekening bevestig het, is voorlopige vonnis vir die betaling van die betrokke

⁴⁶ Sien Van der Merwe op cit nota 5 vir ’n uiteensetting van die rol van regsverteenwoordigers tydens die periode 1652 tot 1795 (34-36); 1803-1806 (60-62) en Visagie (1969) op cit nota 20 tav 1652-1795 (48-52); 1803-1806 (106-107). Vgl verder Van der Merwe op cit nota 5 op 66 ten aansien van die instruksies aan Graaf Caledon in dié verband en 67-85 ten aansien van die howe tydens die Tweede Britse Besetting.

⁴⁷ Gewysigde voorskrifte in verband met siviele en kriminele sake is vervat in die proklamasie van 1 Januarie 1819 – Theal volume 25 op cit nota 10 op 74-76.

⁴⁸ Theal volume 28 op cit nota 10 op 6.

⁴⁹ Theal volume 28 op cit nota 10 op 6.

⁵⁰ Theal volume 28 op cit nota 10 op 6.

geldbedrag gegee. Sekuriteit moes egter, hangende die uitslag van die hoofsaak, gestel word. Die doel van hierdie stelsel was om enersyds sekerheid en andersyds tydige betaling in die normale verloop van handelstransaksies te bewerkstellig.⁵¹

Die kommissie beskou dit as 'n algemene nadelige kenmerk van die bestaande siviele prosesreg dat "the general character of its proceedings is calculated only for a community whose transactions are few and simple and in which the good faith of the parties has superseded the necessity of recourse to a rigorous execution of the Law."⁵² Uit 'n ontleding van die pleitstukke van die hofsake van 1806 to 1828, blyk dit dat hierdie standpunt 'n growwe veralgemening te wees. Daar was heelwat ingewikkelde regsquessies wat behandel moes word.⁵³

Op hierdie (na die mening van die kommissie) gebrekkige prosesregstelsel het die Engelse goewerneurs wysigings aangebring. Die Graaf van Caledon die rondgaande hof (*Circuit Court*) op 16 Mei 1811 ingestel⁵⁴ en daar is bepaal dat alle verhoore in die openbaar moes geskied (Lord Howden).⁵⁵

In teenstelling met die Romeins-Hollandsregtelike prosesvoorskrifte van die Raad van Justisie, het die rondgaande hof hulle eie Engelsregtelik gebaseerde prosesregulasies gebruik.⁵⁶ Ook in hierdie geval is daar nie volledig gehoor aan die betrokke *Instrukties* gegee nie. In elke distrik is 'n klerk aangestel. Sy funksies was ongeveer dieselfde as dié van die sekretaris van die Raad van Justisie. Regsverteenvoerding was in sowel siviele as kriminele sake uitgesluit. Getuieverklarings het, in teenstelling met die Raad van Justisie, voor regters plaasgevind. Moeilike sake is na die volle Raad van Justisie verwys. Waar die eisosaak RD 1000 te bowe gegaan het, kon appèl na die Raad van Justisie aangeteken word. Nadele van die stelsel was daarin geleë dat die klerke nie behoorlik opgelei was nie en dat verdragings dikwels voorgekom het. Vanaf 1811 tot 1825 is 720

⁵¹ Theal volume 28 op cit nota 10 op 6-7. Die kommissie verwys na die syns insiens foutiewe uitspraak van die Siviele Appèlhof waarvolgens die CJ verplig sou wees om in alle gevalle waar 'n appèl teen 'n voorlopige vonnis aangeteken is, die afdwinging van sodanige vonnis op te skort – Theal volume 28 op cit nota 10 op 7.

⁵² Theal volume 28 op cit nota 10 op 7.

⁵³ Olivier & Du Plessis "Samevattende oorsig oor die aanwending van bronne" in Visagie ea (1993) op cit nota 9 op K1-8.

⁵⁴ Prok van 16 Mei 1811 CCP 6/5/1 153-159; Theal volume 24 op cit nota 10 op 451 (daar word onder meer vir die verhoor met geopende deure van alle verrigtinge in die rondgaande hof voorsiening gemaak); voorskrifte met betrekking tot samestelling van die hof: Prok van 3 September 1813 CCP 6/5/1 257. Sien ook die reisverslag van die rondgaande hof – Theal volume 8 op cit nota 10 op 288-313.

⁵⁵ Theal volume 28 op cit nota 10 op 7.

⁵⁶ Theal volume 28 op cit nota 10 op 7-8. Sien ook Van Zyl op cit nota 5 op 448-452; Van der Merwe op cit nota 5 op 261 ev.

siviele sake deur die Rondgaande hof verhoor. Dit wil voorkom asof slegs 12 sake direk vir beslissing na die Raad van Justisie verwys is.⁵⁷

Die Raad van Justisie het jurisdiksie gehad ten aansien van die volgende aangeleenthede: besitsaksies, huweliksaangeleenthede, aksies deur en teen die ontvangers van inkomste en openbare liggame, jurisdiksiegeskille tussen die verskillende distrikte, aksyns, eise met betrekking tot beslaglegging op skepe tydens die oorlog, asook in alle aksies tussen inwoners van die Kaapkolonie aan die een kant en skeepskapteins, matrose en skeeppassasiers aan die ander kant.⁵⁸

Daar is ook voorsiening gemaak vir die hantering van eise wat in die buiteland ontstaan het en eise van buitelandse vyande. Persone woonagtig in Fransbeheerde kolonies het egter nie oor *locus standi* beskik nie.⁵⁹

Kragtens artikel 61 van die *Voorlopige Instrukties* is uitdruklik voorsiening gemaak vir die *locus standi* van weduwees, voogde en kurators om as eisers of verweerders op te tree. Hoewel daar nie uitdruklik voorsiening gemaak is deur die sogenaamde plaaslike wette (*local laws*) vir die hantering by wyse van oorspronklike of eksklusiewe jurisdiksie van die boedels van sodanige persone nie, meen die kommissie dat

“The distinction between the jurisdiction of Courts of Law and Equity appears to form a part of the Law of Holland, but has not lead to any corresponding separation of the Courts; causes or actions of 'extended Right', and actions of right narrowly considered being equally within the jurisdiction of the same Courts.”⁶⁰

Tussen 1810 en 1825 is daar volgens die kommissie 6985 siviele sake verhoor. Die maksimum in 'n bepaalde jaar was 616. Die kommissie bevind dat daar geen toename in regsgedinge van 1815 tot 1825 was nie en dat "the amount of the causes themselves have not been considerable".⁶¹

Die Vise-Admiraliteitshof het bestaan uit 'n afdeling vir *prize*-aangeleenthede en 'n afdeling vir sake van eerste instansie.⁶² Die kommissie beveel aan dat die Raad van Justisie vanweë die moeilikheidsgraad en die toepassing van Engelse reg alle jurisdiksie in

⁵⁷ Theal volume 28 op cit nota 10 op 8-9. Volgens die kommissie was daar waarskynlik meer sake wat op dié wyse verwys is.

⁵⁸ Theal volume 28 op cit nota 10 op 9 met 'n beroep op a 60 van die hierbovermelde *Voorlopige Instrukties*.

⁵⁹ Theal volume 28 op cit nota 10 op 9 met verwysing na die proklamasie van 27 Oktober 1813.

⁶⁰ Theal volume 28 op cit nota 10 op 10.

⁶¹ Theal volume 28 op cit nota 10 op 9.

⁶² Theal volume 28 op cit nota 10 op 9-10.

hierdie verband (met die uitsluiting van handeling in stryd met belastingregulasies en boetes wat 10 pond of RD 50 te bowe gaan) behoort te verloor.⁶³

(b) *Colebrooke-Bigge Kommissie bevindinge ten aansien van die regstoepassing aan die Kaap*

Die Colebrooke-Bigge Kommissie het verder bepaalde bevindinge ten aansien van die prosesreg en materiële reg gemaak.⁶⁴ Aldus die kommissie is die positiewe regsontwikkeling wat in die Hollandse prosesreg plaasgevind het, nie in die Kaap oorgeneem nie. Die Kommissie dui nie aan wat hierdie positiewe ontwikkelinge sou gewees het nie. Die regte van individue is volgens die kommissie oor die algemeen in die sogenaamde *Civil Codes* beskerm. In hierdie verband identifiseer die kommissie die volgende bronne van die reg soos dit in die Kaap van toepassing was, naamlik die Romeinse reg, die bespreking daarvan in die kommentare en annotasies van die Hollandse juriste waarvan die belangrikste Voet, Grotius en op daardie stadium ook Van Leeuwen en Van der Linden was, die resolusies van die Nederlandse State-Generaal (Plakkate), en die beslissings van die Nederlandse howe ('n versameling van die twee kategorieë is in 1796 onder naam van Van der Linden gepubliseer).⁶⁵ In hierdie verband is die aanpassing van sogenaamde keiserlike wette (*imperial laws*) en plaaslike gewoontes (*local customs*, veral dié van Hollandse state) geleidelik in die Kaapkolonie ingevoer.⁶⁵ Verdere bronne wat aangewend is, is proklamasies (en ordonnansies) van die Engelse goewerneurs en resolusies van die goewerneur van Batawië wat as die Bataafse statute gepromulgeer is en wat die krag van wet in die Kaapkolonie geniet het.⁶⁶

Daarteenoor het Hoofregter Truter tydens sy getuienis voor die kommissie aangedui dat die Kaapse reg uit die volgende komponente bestaan het: (a) plaaslike reg asook wetgewing deur die Kaapse regering, Nederland en Batawië uitgevaardig (in laasgenoemde twee gevalle slegs waar dit die bedoeling was dat die betrokke maatreëls in die kolonies sou geld); (b) Romeins-Hollandse reg: veral die reg van die provinsie Holland (dit is die Romeinse reg soos ingevoer in Holland – sekere uitsonderings bestaan in hierdie verband); en (c) versamelings van Plakkate waarvan die volledige stel in die *Colonial Office* aangetref kon word (twee verdere versamelings was by die sekretaris van die Raad

⁶³ Theal volume 28 op cit nota op 10. Die Raad van Justisie sou dus ook nie langer bevoeg wees om gedinge rakende die VOC-Oktrooi te verhoor nie.

⁶⁴ Theal volume 28 op cit nota 10 op 12-14.

⁶⁵ Lg bron is volgens die kommissie nie algemeen aan regspraktisyns bekend nie.

⁶⁶ Volgens die Kommissie het die hoofklem in die Kaap op die Bataafse statute se afdelings met betrekking tot slawerny en die plaaslike administrasie geval – Theal volume 28 op cit nota 10 op 13; sien ook Theal volume 9 op cit nota 10 op 170-171, volume 9 op cit nota 10 op 146-147.

van Justisie en die fiskaal beskikbaar).⁶⁷ Hoofregter Truter het verder ten aansien van die vraag of praktisyns hulle op die Engelse reg mag beroep, die standpunt ingeneem dat hulle dit in feite wel doen. Die Raad van Justisie het volgens hom egter slegs kennis daarvan geneem in kommersiële geskille, aangesien die Romeins-Hollandse handelsreg as verouderd beskou is. Die skrywers oor die handelsreg het die standpunt gehuldig dat daar wel na ander lande se handelsregreëlings verwys kon word. Hy het verder daarop gewys dat die meeste handelsregsake voor die Raad van Justisie dié met betrekking tot Engelse handelaars was. In heelwat gevalle het transaksies in elk geval in Engeland plaasgevind.⁶⁸

Ten aansien van die sake- en erfreg het die kommissie bevind dat dit hoofsaaklik deur die *civil law and customs of Holland* gereël word:

“They are very simple in their structure, and not unsuited to the condition of a people devoted to agricultural pursuits; and whose views in life have hitherto rarely exceeded the attainment of decent maintenance for their families and the establishment of their sons in situations and conditions as nearly analogous to their own.”⁶⁹

Navorsing het egter bewys dat die sake baie meer gekompliseerd is as wat die Kommissie dit beskou het.⁷⁰ Die Kommissie het verder aanbeveel dat slawerny in die Kaapkolonie moes geleidelik uitgefaseer word.⁷¹

Die volgende stap sou die geleidelike assimilasië van die Engelse reg behels.⁷² Volgens die kommissie was daar nie eenduidige standpunt onder die lede van die Raad van Justisie, regspraktisyns en agente of die Romeins-Hollandse reg deur die Engelse reg vervang moes word nie:

“We have not been insensible to those involuntarily testimonies of respect that are paid by the judges themselves, the advocates, and the agents, to the superiority of English Law and authority by the frequent quotations that they are in the habit of making from the great Expounder of our System;⁷³ and even by the most minute references to Writers of much less authority and credit.”⁷⁴

⁶⁷ Theal volume 33 op cit nota 10 op 265-266.

⁶⁸ Theal volume 33 op cit nota 10 op 265.

⁶⁹ Theal volume 28 op cit nota 10 op 13.

⁷⁰ Sien in die verband Du Plessis & Olivier (1994) op cit nota 9 op 131-137; Du Plessis op cit nota 9 op 585-602; op cit nota 9 op 83-89.

⁷¹ Ten aansien van die Raad van Justisie en sake wat oor slawerny gehandel het, sien De Beer op cit nota 9; Hilton “The influence of Roman Law on the practice of slavery at the Cape of Good Hope (1652-1834)” 2007 *Acta Classica* 1-14.

⁷² Theal volume 28 op cit nota 10 op 13-15.

⁷³ Waarskynlik verwys die kommissie hier na Blackstone.

⁷⁴ Theal volume 28 op cit nota 10 op 14.

Ten aansien van handelsregaangeleenthede was die Romeins-Hollandse reg besonder gebrekkig, maar die Raad van Justisie het die handelsreg en -praktyk van die vernaamste handeldrywende lande toegepas. Algemene plakkate en kompilasies van die Hollandse en plaaslike gewoonteregstelsels is van tyd tot tyd gemaak (die laaste in 1749). Die gesag daarvan is egter nie algemeen erken nie.⁷⁵ Die gevare voortspruitend uit die gebruikmaking van 'n nie-gesaghebbende kopie van die Bataafse statute⁷⁶ het die kommissie genoop om te bevind dat die Bataafse statute óf hervorm óf vervang moet word.

(c) *Aanbevelings van die Colebrooke-Bigge Kommissie*

Die Kommissie maak bepaalde aanbevelings teen aansien van die toepassing van die materiële reg. Weens die ongerief wat die abrupte vervanging van die huidige regsbestel met die Engelse reg sou meebring, beveel die kommissie die geleidelike invoering van die Engelse reg en statute aan.⁷⁷ Die invoering van 'n Engelsregtelik gebaseerde siviele prosesstelsel sou, volgens die Kommissie, veral advokate en prokureurs wat voor die Raad van Justisie optree, raak. Dit sou ook resulteer in die maak van logiese en duidelike onderskeidings tussen regs- en feitevrae asook in die noodwendige beperking van getuienis tot die bewys van daardie aspekte wat deur die pleitstukke na vore gebring is.⁷⁸ Die invoering van die Engelse stelsel van regspleging kon dus eers geskied nadat die infasering van Engels as regstaal afgehandel is.⁷⁹ Met die oog op die ontwikkeling van die koloniste is op 5 Julie 1822⁸⁰ by wyse van proklamasie afgekondig dat Engels die enigste amptelike regstaal vanaf 1 Januarie 1827 sou wees.⁸¹ Daar word aanbeveel dat slegs advokate wat lede was van die Engelse, Skotse of Ierse balie as regters aangestel kon word.

⁷⁵ Theal volume 28 op cit nota 10 op 14.

⁷⁶ Sien Theal volume 28 op cit nota 10 op 14-15; Stock (1915) *SALJ* 328 366; Roos (1879) *Cape Law Journal* 7-9.

⁷⁷ Theal volume op cit nota 10 op 15.

⁷⁸ Theal volume 28 op cit nota 10 op 15-16.

⁷⁹ Theal volume 28 op cit nota 10 op 16.

⁸⁰ Theal volume 14 op cit nota 10 op 452-453.

⁸¹ By wyse van Ord 27 van 13 Desember 1826 CCP 6/5/2 35 5-356 is die 1822-proklamasie herroep – Theal volume 28 op cit nota 10 op 427. Op 28 Mei 1825 is bepaal dat alle verrigtinge in die *court of magistracy* in Algoabaai (wat van daardie datum as Port Elizabeth bekend gestaan het) in Engels moes wees – Ord 1 van 28 Mei 1825 CCP 6/5/2 273-274. Sien verder par 34 van die 1827-*Charter* en par 32 van die sg *New Charter* (1832).

“Without any disparagement to the Gentlemen who now fill the ranks of the Bar of this colony, it is not to be expected that they will suddenly relinquish the professional doctrines and opinions which all of them learnt to cherish and respect, and that however fit in other respects they can(not) be expected to divest themselves on the judicial Seat of the local influence and partialities, the absence of which constitutes the brightest excellence of the English Judicial Character.”⁸²

Sodanige regters was verbied om enige belang by slawe te verkry. Insgelyks sou slegs persone wat lede van die drie bogenoemde Britse balies was, as advokate toegelaat kon word. Hierdie wysigings in die lig van onder andere die "imperfect" 1803-*Instruktionen* sou by wyse van 'n Regsoktrooi afgekondig word.

Naas die afskaffing van die bestaande regsinstellings⁸³ is die volgende voorgestel.⁸⁴ Die instelling van 'n nuwe *Appeal Court* wat bestaan uit 'n hoofregter (*Supreme Judge*) en drie regters van die laer afdeling (*lower court*). Daar sou voorsiening gemaak word vir 'n appèl na die *privy council* waar die eisorsaak 500 pond oorskry. Die *appeal court* self sou dien as hof van appèl waar die eisorsaak 200 pond oorskry in alle gevalle waar uitspraak deur die *lower courts* gegee is. Appèlle sou slegs op die pleitstukke beslis word.

Die kommissie was ten gunste van die daarstelling van 'n *equity court* met as voorsittende beampte die *supreme judge*. In gevalle waar aangeleenthede ter skikking deur hom verwys is, moes die Meester van die Hooggeregshof (*master in equity* – wat nie 'n inwoner van die Kaapkolonie mag wees nie) dié funksie vervul. *Equity courts* is egter nooit in Suid-Afrika ingevoer nie.

Die instelling van 'n sogenaamde *lower court* in die westelike provinsie (setel Kaapstad) met twee regters en 'n soortgelyke hof met een regter in die oostelike provinsie (setel Grahamstad) is deur die kommissie voorgestel.⁸⁵ Voorskrifte met betrekking tot jurisdiksie en die reg op appèl na die *Supreme Court* is gemaak.⁸⁶ Regsverteenwoordiging

⁸² Theal volume 28 op cit nota 10 op 17.

⁸³ Sien die voorstelle van die kommissie met betrekking tot die beëindiging van dienste van die president en lede van die CJ, die fiskaal en ander amptenare – Theal volume 27 op cit nota 10 op 333-341. Hulle het ook voorgestel dat die bestaande vise-admiraliteitsregter (Kekewich) in die nuwe hofstruktuur as regter in die westelike provinsie *lower court* aangestel word – Theal volume 27 op cit nota 10 op 335-336. Ter uitvoering van die aanbevelings met betrekking tot die afskaffing van die Landdros en Heemrade is Ord 33 op 19 Desember 1827 CCP 6/5/2 389-393 afgekondig: daarvolgens word *resident magistrates* en *clerks of the peace* aangestel om in beginsel dieselfde siviele, straf, huweliks- en jurisdiksie-aangeleenthede as die daardeur herroepte Landdros en Heemrade uit te oefen – met inwerkingtreding van 1 Januarie 1828.

⁸⁴ Sien Theal volume 28 op cit nota 10 op 18-111.

⁸⁵ Ibid op 19-20.

⁸⁶ Ibid op 19-20.

moes toegelaat word.⁸⁷ Voorskrifte met betrekking tot die diensvoorwaardes en pensioen, asook die relatiewe status van die verskillende regters, is deur die kommissie neergelê.⁸⁸

Die instelling van die juriestelsel in die *lower court* (bestaande uit nege lede wat ten minste met 'n twee-derde meerderheid moes beslis) is voorgestel. Die inwerkingstelling hiervan in die oostelike provinsie moes met vyf jaar uitgestel word. Die kommissie was van oordeel dat alle inwoners wat jaarliks ten minste een pond tien as belasting betaal, as jurielide behoort te dien. In dié verband is gemeen dat daar geen weerstand teen enige persoon as jurielid sou wees nie. Jurielide moes egter Engels kon verstaan.⁸⁹ Die juriestelsel sou nie in die *Appeal Court* ter sprake kom nie.⁹⁰ Ook in die geval van rondgaande howe (*circuit courts*) sou daar nie van die juriestelsel gebruik gemaak word nie.⁹¹

Die instelling van 'n vise-admiraliteitshof en die bestaan van konkurrente jurisdiksie van die hooggeregshof ten aansien van sekere omskrewe aangeleenthede is oorweeg. In die oostelike provinsie moes die vise-admiraliteitsfunksies deur die regter van die *lower court* uitgeoefen word.

Die aanstelling van 'n prokureur-generaal moes oorweeg word,⁹² sowel as die oordrag van die funksies van Landdros en Heemrade na *judges of the county courts* en *resident magistrates*. Vir elke distrik moes 'n *county court* ingestel word. 'n Regter moes as voorsittende beampte en 'n sogenaamde *clerk of the peace* as aanklaer in strafsake en sekretaris (en registrateur) in siviele sake optree. Die siviele jurisdiksie is op 30 pond (RO 400) gestel.⁹³ Die *supreme court* en die *lower court* se appèl- en hersieningsbevoegdheid (ten aansien van beslissings van die *county courts* en die *resident magistrates*) kom ook in die verslag voor.⁹⁴

Ten aansien van huweliksake word die praktyk dat huwelike deur die onderskeie landdroste bevestig word, voortgesit; dié bevoegdheid is soos reeds in 1806⁹⁵ bepaal, ook deur gemagtigde predikante uitgeoefen. Die hof vir huweliksake moes afgeskaf word en die funksies moes voortaan deur die *local courts* en deur gemagtigde predikante

⁸⁷ Ibid op 22-25.

⁸⁸ Ibid op 21.

⁸⁹ Ibid op 24-25.

⁹⁰ Ibid op 18-19.

⁹¹ Ibid op 25.

⁹² Ibid op 22.

⁹³ Ibid 25-26 28-30.

⁹⁴ Ibid op 29-30.

⁹⁵ Prok van 26 April 1806 (Sir David Baird).

oorgeneem word. Huweliksregisters sou ook deur die registrateur in die westelike en oostelike provinsie van alle huwelike (ook kerkhuwelike) gehou word.⁹⁶

Die hof van Klein Eise in Kaapstad (wat deur die Kaapse Landdros en Heemrade hanteer is) moes vervang word deur 'n *petty debt court* bestaande uit twee kommissarisse, naamlik die *master in equity* en die huidige magistraat te Kaapstad. Regsverteenwoordiging deur prokureurs en notaris moes ook hier toegelaat word.⁹⁷

Toekomstige advokate moes in die Engelse reg opgelei wees en lede van die Engelse, Skotse of Ierse balie wees. Slegs prokureurs wat ook reeds deur dié Britse howe toegelaat is, mag met toestemming van die voorgestelde howe alhier praktiseer. Advokate mag ook die funksie van prokureur vervul. Die kommissie was dus nie ten gunste van die onmiddellike skeiding tussen die beroep van advokaat en prokureur nie. Die skeiding van die twee beroepstakke is egter in die vooruitsig gestel.⁹⁸ Notaris sou voortaan ook in die *lower courts* en die *court of small debts* kon optree.

Regters moes die bevoegdheid tot insae in die notariële protokolle verkry. Die *civil law*-praktyk van die notariële verlyding en argivering van kontrakte, ooreenkomste, regshandeling en testamentêre beskikkings is nie beëindig nie; daar is egter voorsiening gemaak dat partye van die Engelsregtelike metode (dit wil sê sonder notariële verlyding en opname in notariële protokolle) gebruik kon maak.⁹⁹

Die bestelling van regskenninggewings op partye en die afneem van die verklarings van die betrokke partye (asook getuieverklarings) sou egter met die inwerkingstelling van 'n nuwe siviele prosedure beëindig word.¹⁰⁰

Die kommissie het ten slotte 'n aantal aanbevelings met betrekking tot burgerlike regte (onder andere die reg op verblyf),¹⁰¹ siviele gyseling,¹⁰² voorlopige vonnisse (*mesne process*),¹⁰³ fooie en hofkoste,¹⁰⁴ bankrotskap en insolvente boedels,¹⁰⁵ sake- en erfreg,¹⁰⁶ aktesregistrasie,¹⁰⁷ en die Weeskamer gemaak.¹⁰⁸ Volgens die kommissie het bogenoemde voorstelle ter bereiking van die volgende doelstellings gedien:

⁹⁶ Theal volume 28 op cit nota 10 op 30-33.

⁹⁷ Ibid op 26.

⁹⁸ Ironies word die samevoeging van die prokureurs en advokateberoep tans weer in Suid-Afrika heroorweeg – sien *Legal Practice Bill* [B20 - 2012].

⁹⁹ Ibid op 24.

¹⁰⁰ Ibid op 26-28.

¹⁰¹ Ibid op 33-40.

¹⁰² Ibid op 44-45.

¹⁰³ Ibid op 44-51.

¹⁰⁴ Ibid op 51-56.

¹⁰⁵ Ibid op 56-64.

¹⁰⁶ Ibid op 64-69.

¹⁰⁷ Ibid op 69-74.

¹⁰⁸ Ibid op 74-111.

“The entire Separation of the Executive from the Judicial power, the establishment of an appellate jurisdiction within the colony of correcting the errors and controlling the action of the Inferior Courts, and lastly an improvement in the Structure of the latter of a view to secure them as much as possible of the influence of local prejudice and interests.”^{109,,}

Vanaf 1807 tot 1827 het die siviele hofstruktuur aan die Kaap dus soos volg uitgesien:¹¹⁰

- Hof van Landdros en Heemraden.
- Raad van Justisie in Kaapstad as hof van eerste instansie wat sake op appèl en in die eerste instansie kan verhoor.
- Siviele Appèlhof (*Court of Appeal in Civil Cases*) met die goewerneur en ander senior amptenare as regters.
- *Privy Council* in Engeland.

Ten einde te bepaal of die Colebrooke-Bigge Kommissie se aannames ten aansien van die proses aan die Kaap aanvaarbaar was, is dit nodig om te bepaal wat die Romeins-Hollandse prosedurereëls volgens Van der Linden was en dan te bepaal wat die proses was wat aan die Kaap gevolg was aan die hand van ‘n hofsak.

III DIE PROSES VOLGENS VAN DER LINDEN

Volgens Van der Linden moes daar aan drie vereistes voldoen word, voordat die uitreiking van die dagvaarding kon geskied.. Daar moes ’n skriftelike of mondelinge versoek aan die teenparty gerig word voordat die geding aanhangig gemaak word bekend as ‘n *insinuatie*¹¹¹ of *minnelijke aanmaning*.¹¹² Die partye moes oor *locus standi* beskik of *venia agendi* verkry.¹¹³ Daar moes van regsverteenwoordiging by wyse van prokureurs en advokate gebruik gemaak word.¹¹⁴

Voordat die dagvaarding (*mandament*) uitgereik kon word, moes daar eers ’n *requeste* by die hof ingedien word.¹¹⁵ Die *requeste* moes die volgende vermeld het: (a) Naam en woonplek van die partye; (b) bepaling van die dag, uur en plek vir verskyning

¹⁰⁹ Ibid op 33.

¹¹⁰ Sien veral ook vir 1806-1835 Van der Merwe op cit nota 5 in die geheel.

¹¹¹ *Judiciele Practijcq* 1 8 8.

¹¹² *Koopmanshandboek* 3 1 2 1.

¹¹³ *Judiciele Practijcq* 3 1 2 2-3.

¹¹⁴ *Judiciele Practijcq* 1 8 4 7; *Koopmanshandboek* 3 1 2 4. Daar kan by die hof om *pro deo* regshulp aansoek gedoen word – *Judiciele Practijcq* 1 8 10; *Koopmanshandboek* 3 1 2 5.

¹¹⁵ *Judiciele Practijcq* 2 1 1-4; *Koopmanshandboek* 3 1 2 4-7.

van die partye (*Dag van Beraad; Regtdag*); (c) 'n uiteensetting van die feite, eis en regsgronde artikelgewys; (d) 'n versoek tot nakoming van die eis (*clause van simpel bevel*) of tot beregtiging van die saak (*clause justificatoir*); en (e) ondertekening deur die prokureur en advokaat van die eiser.

Die dagvaarding moes by *Commissarissen* (2 *gecommitteerde leden* van die Raad van Justisie) ingedien word. Dié stukke vorm nie deel van die Raad van Justisie-reeks wat ondersoek is nie. Die kommissaris moes vasstel of aan formele vereistes voldoen is.¹¹⁶ Daarna was die partye ontbied om met die oog op 'n skikking (*accord*) voor die twee kommissarisse te verskyn (*compareeren*).¹¹⁷ Indien die skikkingspoging onsuksesvol was, was 'n dagvaarding uitgereik.¹¹⁸

Daar is verskillende soorte dagvaardings (*mandamente*) in die Romeins-Hollandse reg onderskei,¹¹⁹ byvoorbeeld die *mandament van debitis* (meerdere skuldeisers),¹²⁰ *mandament van condemnatie* (in likiede sake) en *obligatoire acte* (waarskynlik van *praetensie* –by koopkontrakte),¹²¹ *mandament om executie te zien decerneeren* (eksekusie te verkry),¹²² *mandament om actie te institueeren* (om 'n persoon te dwing om 'n aksie in te stel),¹²³ *mandament in cas van guarand* (in geval van waarborge bv verborge gebreke),¹²⁴ en die *mandament van indemniteit* (in geval van ander vorderingsregte).¹²⁵ Die dagvaarding is deur die *deurwaarder* bedien en 'n relaas moes deur hom opgestel word.¹²⁶ In die dagvaarding het die twee klousules met betrekking tot voldoening of die liassering van 'n verweer voorgekom.¹²⁷

Die prokureur van die eiser (*impetrant*) moes daarna die saak op die hofrol plaas (*praesentatie*).¹²⁸ 'n Bepaalde geldbedrag moes ook gedeponeer word (*betaling van*

¹¹⁶ *Judicieele Practijcq* 2 1 5.

¹¹⁷ *Ibid* 2 1 6.

¹¹⁸ *Judicieele Practijcq* 2 1 7; *Koopmanshandboek* 3 1 2 8.

¹¹⁹ *Judicieele Practijcq* 2 1 9 – 2 1 16; 2 7 – 2 33; *Koopmanshandboek* 3 1 2.

¹²⁰ *Judicieele Practijcq* 2 7 1-5; *Koopmanshandboek* 3 1 2 20.

¹²¹ *Judicieele Practijcq* 2 9 1 4. Hierdie dagvaarding het die verkorting van die proses ten doel; in so 'n geval kan voorlopige vonnis (*namptissement*) verkry word: *Judicieele Practijcq* 2.5.3. In gepaste gevalle, terwyl die hoofeis nog nie afgehandel is nie, kan *provisie* aangevra word – die verweerder moet daarvolgens die bedrag in geskil by *provisie* aan die eiser betaal, onderhewig aan verskaffing van borgtog: *Judicieele Practijcq* 2 5 3; *Koopmanshandboek* 3.1.2 12, 19.

¹²² *Judicieele Practijcq* 2 10 1-4; *Koopmanshandboek* 3 1 2 4.

¹²³ *Judicieele Practijcq* 2 11 4, 14; *Koopmanshandboek* 3 1 2 5.

¹²⁴ *Judicieele Practijcq* 2 12 1-3; *Koopmanshandboek* 3 1 2 6.

¹²⁵ *Judicieele Practijcq* 2 13 1-3.

¹²⁶ *Judicieele Practijcq* 2 1-10; *Koopmanshandboek* 3 1 2 9.

¹²⁷ *Judicieele Practijcq* 2 1 7.

¹²⁸ *Judicieele Practijcq* 2.3.1; *Koopmanshandboek* 3 1 2 10. Die klerk moet alle *praesentaties* op 'n afsonderlike rol plaas en die naam van die betrokke prokureur en tyd van ontvangs van die betrokke stukke daar aanteken; *Judicieele Practijcq* 2 3 4; *Koopmanshandboek* 3 1 2 10.

impart).¹²⁹ *Rolle* dra twee betekenis naamlk die boek of register waar alle *praesentatien* deur die prokureurs *ter griffier* ingehandig is; of die boek of register waar die prokureurs die notule (verloop van gedinge) gedikteer het.¹³⁰ Die voorgeskrewe terminologie met betrekking tot die aantekening in die notule moes gevolg word.¹³¹ Dié betrokke rolle is daarna in die openbaar voorgelees.¹³² Die begrip *saak ter rolle gepraesenteerd* beteken dat die *regtdag* aangebreek het en dat die eis vervolgens ingedien moes word.¹³³

Die *eisch en conclusie* het die uiteensetting van die eis bevat.¹³⁴ Dit is deur die advokaat opgestel en deur 'n prokureur *gearresteerd* en ingedien.¹³⁵ By die opstel daarvan moes die betrokke aksie en die regsgronde waarop dit berus in ag geneem word; daarnaas moes die *conclusie* by die betrokke omstandighede pas. Die bestaande *formulieren van conclusie* moes in ag geneem word. Voorgeskrewe *conclusies* het onder andere ten aansien van wissels,¹³⁶ die sakereg,¹³⁷ vorderingsregte (*iura ad rem*),¹³⁸ die huweliksreg,¹³⁹ die erfreg,¹⁴⁰ en die deliktereg bestaan.¹⁴¹

Waar die eisorsaak oor die vasstelling van 'n spesifieke rekening (byvoorbeeld by skadevergoeding) handel, het die *eisch en conclusie* as *debath* bekend gestaan.¹⁴²

Alvorens die verweerder antwoord, kon 'n aantal tussenhandelinge plaasvind. Waar die eiser nie verskyn nie (*non-comparitie*) is absolusie van die instansie verleen.¹⁴³ In die geval van 'n eerste instansie-eis (*rau actie*¹⁴⁴), waar die verweerder nie verskyn nie, kon finale vonnis by verstek verkry word.¹⁴⁵ Klein sake is voor die twee *gecommitteerde leden* afgehandel.¹⁴⁶ Summiere sake het sonder die wisseling van pleitstukke plaas gevind.¹⁴⁷

¹²⁹ *Judicieele Practijcq* 2 3 5.

¹³⁰ *Ibid* 2 3 6.

¹³¹ *Ibid* 2 6 10.

¹³² *Ibid* 2 3 6.

¹³³ *Ibid* 2 3 7.

¹³⁴ *Judicieele Practijcq* 2 3 7; *Koopmanshandboek* 3 1 2 11.

¹³⁵ *Judicieele Practijcq* 3 3 8; *Koopmanshandboek* 3 1 2 11.

¹³⁶ *Judicieele Practijcq* 2 6 4.

¹³⁷ *Ibid* 2 6 5.

¹³⁸ *Ibid* 2 6 6.

¹³⁹ *Ibid* 2 6 7.

¹⁴⁰ *Ibid* 2 6 8.

¹⁴¹ *Ibid* 2 6 9.

¹⁴² *Koopmanshandboek* 1 9 3.

¹⁴³ *Judicieele Practijcq* 2 3 9-10; *Koopmanshandboek* 3 1 2 13.

¹⁴⁴ Vgl *Judicieele Practijcq* 2 6 2-2 6 4.

¹⁴⁵ *Judicieele Practijcq* 2 3 11-12; *Koopmanshandboek* 3 1 2 13. Afhangende van die soort eis moet tot vier aansoeke om verstek deur die eiser ingehandig word. Dit lei tot onderskeidelik twee uitreikings van 'n *mandament* (of *citatie*), *intendit* (dokument waarin die verloop van die proses uiteengesit is) en *acte* wat tot die *intendit* toegevoeg moet word. Daarna kan vonnis by verstek verkry word.

¹⁴⁶ *Koopmanshandboek* 3 1 2 1.

¹⁴⁷ *Ibid* 3 1 2 2.

Die verweerder (*gedaagde*) kon op drie wyses optree. Die verweerder kon voor die betrokke regsdag 'n aantal preliminêre versoeke opper.¹⁴⁸ Op die dag van beraad kon daar naas 'n negetal eksepsies ook 'n konklusie tot *absolutie van instantie contrarie conclusie* (eksepsie van nie-ontvanklik) geopper word.¹⁴⁹ Die verweerder moes hom aan die voorgeskrewe termyn vir die indiening van antwoord hou of aansoek om uitstel doen.¹⁵⁰ As geen antwoord ontvang is nie, kon die eiser verstek van antwoord aanvra.¹⁵¹ Waar die dokumente van die eiser ontbreek het, kon die verweerder in sy antwoord by wyse van 'n *reconventie* dit ook in sy *conclusie van antwoord* opgevra het.¹⁵² 'n Teeneis (*eis in reconventie*) kon ook in bepaalde gevalle in die *conclusie van antwoord* opgeneem word.¹⁵³ Waar die eisorsaak 'n vasstelling van 'n rekening was, het die antwoord as *contra-debath* bekend gestaan.¹⁵⁴

Die eiser kan repliek lewer of sy eis (na aanleiding van verweerder se antwoord) inkort by wyse van 'n *contra-praesentatie* of 'n *contra-declaratoir*.¹⁵⁵ Waar die eisorsaak die vasstelling van 'n rekening is, het die repliek as *solutie* bekend gestaan.¹⁵⁶

Die laaste pleitstuk (*termijn*) wat ingehandig kon word, was die *duplicq* van die verweerder.¹⁵⁷ Waar die eisorsaak die vasstelling van 'n rekening was, het die dupliek as *supersolutie* bekend gestaan.¹⁵⁸ Partye kon gedwing word tot die inhandiging van repliek en dupliek by wyse van versoek tot verstek van repliek en dupliek.¹⁵⁹

Alhoewel Van der Linden nie spesifiek vir 'n *triplicq* en *quadruplicq* voorsiening maak nie, word hierdie pleitstukke wel in die Kaapse argiefstukke aangetref.¹⁶⁰ In dié opsig het 'n vernuwing ingetree of is dit 'n proses wat nog uit die oud-Romeins-Hollandse reg voortgesit is. Geen verdere dokumente kon daarna ter rolle geplaas word nie – die *zaak is voldongen*.¹⁶¹

¹⁴⁸ *Judiciele Practijc* 2 4 3-5; *Koopmanshandboek* 3 1 2 14 – bv insae in die prokurasie van die eiser se prokureur en dat daar waarborg (*cautie*) vir koste van die proses gestel word.

¹⁴⁹ *Judiciele Practijc* 2 4 6-9.

¹⁵⁰ *Ibid* 2 4 10.

¹⁵¹ *Judiciele Practijc* 2 4 11; *Koopmanshandboek* 3 1 2 17.

¹⁵² *Judiciele Practijc* 2 4 12-13.

¹⁵³ *Judiciele Practijc* 2 4 13; *Koopmanshandboek* 3 1 2 18.

¹⁵⁴ *Koopmanshandboek* 1 9 3.

¹⁵⁵ *Judiciele Practijc* 2 5 1; *Koopmanshandboek* 3 1 2 19.

¹⁵⁶ *Koopmanshandboek* 1 9 3.

¹⁵⁷ *Judiciele Practijc* 2 5 2; *Koopmanshandboek* 3 1 2 19.

¹⁵⁸ *Koopmanshandboek* 1 9 3.

¹⁵⁹ *Judiciele Practijc* 2 5 2.

¹⁶⁰ *Sien Cruywagen v Sandenbergh* 1806 CJ 1416 211-228 234-242 254-266 274-301

¹⁶¹ *Judiciele Practijc* 2 5 2; *Koopmanshandboek* 3 1 2 19.

In gevalle van *provitie* (voorlopige vonnis),¹⁶² eksepsies, *insidenten* en summiere sake is die saak by wyse van mondelinge pleidooi voor die twee *commissarissen ten rolle* besleg.¹⁶³ Dit is beslis (*gedecideerd*) by wyse van vonnis (*sententie*) van die twee *commissarissen*. Hulle kon die saak in advies hou; waar hulle verskil of dit oor 'n belangrike aangeleentheid handel het, kon die saak na die Raad van Justisie vir afhandeling verwys word. In laasgenoemde twee gevalle het die Raad 'n beslissing na oorweging van die *rapport* van die twee *commissarissen* gemaak. Waar dit gaan om preliminêre versoeke en eksepsies, is geen betoog ten aansien van kostes gelewer nie; dit staan oor tot afhandeling van die hoofsake.¹⁶⁴ Na *voldingen* (voldoening) moes die onderskeie prokureurs onmiddellik in die hofnotule bepaal of die betrokke saak as *beschreven* of *bepreite* gehanteer moet word – die sogenaamde *appointment dispositief*.¹⁶⁵ Die volgende reëls het voorgekom: (a) Alle sake waar geen feitegeskil is nie en die bedrag onder 1000 gulde is, is mondelings voor die Raad afgehandel. (b) Alle sake waar daar feitegeskille is en die bedrag 1000 gulde of daar bo is, was *beschreven* voor die Raad van Justisie. (c) Alle sake onder 1000 gulde is mondeling voor die twee *gecommitteerde leden* afgehandel.¹⁶⁶

Daar bestaan sekere voorskrifte met betrekking tot die uitruiling (wisseling) van die inventaris en alle stukke tussen die lede van die regbank.¹⁶⁷ In die mondelinge pleidooi moes die gronde en redes van wat in die proses beweer word, aan die regter voorgedra word en *teenwerpingen* van die ander party beantwoord word. Soos in die geval van die prosesstukke is ook hier voorsiening gemaak vir vier soorte pleidooie (*termijnen*): eis, antwoord, repliek en dupliek. Daar het ook 'n aantal vereistes met betrekking tot die inhoud van en wyse van formulering van mondelinge pleidooie bestaan.¹⁶⁸

Die aanhoor van getuienis het slegs by *beschreven zaken* plaas gevind. Geen kruisondervraging is toegelaat nie; vrae is namens die betrokke teenparty deur die regter gestel en het bekend as *contra-interrogatorien* bekend gestaan. 'n *Ampliasie-inventaris* is daarvan opgestel. Die proses is hierna as geslote beskou (*renuncieren van verdere productie*).¹⁶⁹ Daarna is 'n versoek tot bepaling van die *dag van pleidooije* gerig.¹⁷⁰

¹⁶² *Koopmanshandboek* 3 1 2 19.

¹⁶³ *Judiciele Practijc* 2 5 4 3-4; *Koopmanshandboek* 3 1 8 1.

¹⁶⁴ *Judiciele Practijc* 2 5 3.

¹⁶⁵ *Koopmanshandboek* 3 1 8 2.

¹⁶⁶ *Ibid* 3 1 8 2.

¹⁶⁷ *Ibid* 3 1 8 3.

¹⁶⁸ *Judiciele Practijc* 3 2 1 3-18; *Koopmanshandboek* 3 1 8 5.

¹⁶⁹ *Koopmanshandboek* 3 1 8 4.

¹⁷⁰ *Ibid* 3 1 8 4.

'n Finale inventaris is opgestel en na verloop van vier weke is die stukke en inventaris uitgereik. Deel van die stukke is die skriftelike pleidooi (*advertissement van rechten*) en 'n dokument wat nie openbaar gemaak is nie (*secretee schriftuur*). Die betoë moes artikelsgewys opgestel wees en moes aan dieselfde reëls as by 'n mondelinge pleit voldoen het. Ook in hierdie geval is daar voorsiening vir skriftelike pleite by wyse van eis, antwoord, repliek en dupliek gemaak.¹⁷¹

Die Raad van Justisie het een van sy lede as *rapporteur* aangestel wat 'n skriftelike advies (*voordracht*) aan die Raad voorgelê het.¹⁷² Na stemming oor die voordrag¹⁷³ is die vonnis bepaal (*definitive vonnis*)¹⁷⁴ en is die vonnis in die openbaar uitgespreek (*pronuntiatie van vonnis*).¹⁷⁵

Daar is voorsiening gemaak vir eksekusie,¹⁷⁶ *summation* (kennisgewing) dat binne 24 uur aan die vonnis voldoen moet word deur die *deurwaarder*,¹⁷⁷ siviele gyseling,¹⁷⁸ likwidasie,¹⁷⁹ taksasie van koste¹⁸⁰ en *debath van reekening*.¹⁸¹

In die volgende gedeelte word daar 'n kort uiteensetting van die proses in die Raad van Justisie (*Court of Justice*) en die Siviele Appèlhof (*Court of Appeal*) aan die Kaap weergegee.¹⁸²

IV VERLOOP IN DIE RAAD VAN JUSTISIE

Die Romeins-Hollandse prosesreg¹⁸³ het die grondslag van die Kaapse prosesreg gevorm. 'n Aantal leidende sake is ontleed ten einde die verloop van die proses in die Raad van Justisie gedurende 1806-1828 te bepaal.¹⁸⁴

¹⁷¹ *Judicieele Practijcq* 3 3-4; *Koopmanshandboek* 3 1 8 6.

¹⁷² *Koopmanshandboek* 3 1 9 1.

¹⁷³ *Ibid* 3 1 9 2.

¹⁷⁴ *Ibid* 3 1 9 3.

¹⁷⁵ *Ibid* 3 1 9 4.

¹⁷⁶ *Ibid* 3 1 9 5, 7-15.

¹⁷⁷ *Ibid* 3 1 9 6.

¹⁷⁸ *Ibid* 3 1 9 16.

¹⁷⁹ *Ibid* 3 1 9 17.

¹⁸⁰ *Ibid* 3 1 9 17.

¹⁸¹ *Ibid* 3 1 9 17.

¹⁸² Nie alle sake van die Raad van Justisie en die Siviele Appèlhof het die volle proses deurloop nie. Ter wille van duidelikheid word die hele proses hier uiteengesit. Tydens die Navorsingsprojek is die volgende Raad van Justisie-reekse (hierna "CJ-reekse" – die benaming wat deur die Kaapse Argiefbewaarplek gebruik word) is gebruik: (a) Verslag van Verrigtinge, (b) Siviele Prosesstukke, en (c) Registers en Indekse op Siviele Vonnisse. Na oorweging van die relevansie van bogenoemde reekse, het dit geblyk dat die volgende kategorieë bundels onontbeerlik was vir ontsluitings- en evaluasiedoeleindes: Registerbundels (met inligting oor die name van die litigante, die eisoorzaak en die finale (al dan nie) status van die saak) (slegs vir die tydperk 1823 tot 1827); Vonnisbundels (met inligting oor tussentydse en finale uitsprake; sonder vermelding van redes vir uitsprake en van enige gesag); en Prosesbundels (met inligting oor prosesstukke, byvoorbeeld dagvaardings, betoogshoofde (waarin daar dikwels na gesag verwys is), stawende dokumentasie en soms ook uitsprake van die hof *a quo* (die Hof van Landdros en Heemrade)). 32 van die ongeveer 300 argiefregisters in die Kaapse Argiefbewaarplek bevat inligting relevant tot die Kaapse Regspraakprojek. Die Raad van Justisie Register beslaan 3666 bande (Visagie GG ea (1993) op cit nota 9 op Li).

Dit blyk uit al die hofstukke wat ontleed is dat daar eerstens 'n *extract uit de civiele rechtsrolle* voorkom waarin die *procuratie*, partye en die eisoorzaak kortliks uiteengesit is. Buiten sekere uitsonderingsgevalle (byvoorbeeld ten aansien van borg, eksepsies en *cas van rekening*) word daar feitlik in elke saak 'n *eisch en conclusie*, antwoord, *replicq* en *duplicq* aangetref. In die *eisch en conclusie* van die eiser word hoofsaaklik die feite van die saak, 'n kort beredenering van die regsposisie met betrekking tot die eis en die aard van die verwagte regshulp weergegee. Op hierdie stadium word daar oor die algemeen geen gemeenregtelike gesag aangehaal nie. Die *antwoord* van die verweerder sit die feitlike posisie soos deur hom gesien, asook sy regsargument uiteen. In die *replicq* van die eiser word gepoog om die argumente van die verweerder te weerlê en word daar indien nodig na gemeenregtelike gesag verwys ten einde die regsposisie duideliker te maak. In die *duplicq* verkry die verweerder die geleentheid om argumente te opper en indien hy dit nodig ag gesag aan te haal. In uitsonderingsgevalle word ook 'n *triplicq* en *quadruplicq* aangetref¹⁸⁵ ten einde onsekerhede (*confusie*), wat in die vorige pleitstukke kon bestaan het, op te klaar of die eis breedvoeriger uiteen te sit.

'n *Pleydooy van eisch, antwoord, replicq* en *duplicq* word in sommige gevalle aangetref. Dié beredenerings is mondelings in die hof gestel¹⁸⁶ ten einde die regsposisie of feite uiteen te sit.

Wanneer daar 'n geskil oor koste (*rekening*) ontstaan het, staan die pleitstukke as *deboth, contra debth, solutie* en *supersolutie* bekend.¹⁸⁷ In sommige gevalle word 'n *acte van summatie, renovatie, insinuatie* en 'n *denuntiatio* aangetref.¹⁸⁸

'n *Replicq in conventie* en 'n *antwoord in reconventie* kom verder voor.¹⁸⁹ Partykeer word die notules van die *Heeren Gecommitteerden* in die stukke ingesluit.¹⁹⁰ Op 'n versoek

¹⁸³ Sien supra.

¹⁸⁴ *Cruywagen v Sandenberg* 1806 CJ 1416 184-303; *Hoets v Korsten* 1806 CJ 1416 21-182; *Myburgh v Mostert* 1807 CJ 1441 508-817; *De Wet v Fryman* 1808 CJ 1472 564-641; *Grundling v Oertel* 1809 CJ 1495 48-259; *Wagener v Kock* 1810 CJ 1499 261-401; *Weesmeester v Kock* 1811 CJ 1533 1-940; *Geyser v Hoffmann* 1812 CJ 1546 482-611; *Brand v Swan & Stone* 1813 CJ 1565 655-670; *Vermaak v Bosman & Bosman* 1816 CJ 1610 592-684; *Smit v Geyer* 1820 CJ 1717 2-242; *Esterhuizen v Esterhuizen* 1821 CJ 1737 1-242; *Anossi ea v Smuts* 1817 CJ 1645 253-382; *Briers v Cloete & Van der Byl* 1819 CJ 1703 3-36; *Blomerus v Weduwee Cloete* 1817 CJ 1646 2-662; *Kruger v Van der Bijl* 1810 CJ 1507 526-67; *Albertyn v Cloete* 1818 CJ 1585 35-541.

¹⁸⁵ Sien bv *Cruywagen v Sandenberg* 1806 CJ 1416 211-228; 234-242. Dit is opmerklik dat hierdie pleitstukke met verloop van jare al hoe minder voorgekom het.

¹⁸⁶ Sien bv *Vermaak v Bosman & Bosman* 1816 CJ 1610 635-682 (verwys bv buiten die feite ook na *Merula Manier van Procederen* 4.37.3.10 (646-647; 650-651); *Albertyn v Cloete* 1818 CJ 440-539; *Blomerus v Weduwee Cloete* 1817 CJ 1646 176-287.

¹⁸⁷ Sien bv *Blomerus v Weduwee Cloete* 1817 CJ 1646 2-662; *Weesmeester v Van Reenen* 1811 CJ 1533 1-940.

¹⁸⁸ *Weesmeester v Van Reenen* 1811 CJ 1533 1-940 waar dit oor blootlegging van rekeninge gehandel het.

¹⁸⁹ Sien *Geyer v Hoffmann* 1812 CJ 482-611.

¹⁹⁰ Sien *Hoets v Korsten* 1808 CJ 1416 21-182.

van 'n party (byvoorbeeld *request van gedaagden*) kan 'n *memorie van belangen en contrabelangen* ingedien word.¹⁹¹ In *Myburgh v Mostert*¹⁹² word 'n *acte van substitutie van eisch* sowel as 'n *acte van cautie* aangetref.

Dit blyk uit die hofstukke dat die prokureur 'n *procuratie* moet verkry om stukke te liasseer. Die stukke self word deur sowel die prokureur as 'n advokaat onderteken. Wanneer 'n advokaat self die stukke indien, moet hy 'n *speciale procuratie* van die hof verkry.¹⁹³

Fisiese bewysstukke soos byvoorbeeld stukke materiaal¹⁹⁴ en oorspronklike aktes¹⁹⁵ word aangetref. Ander bewysstukke is onder meer rekenings, wissels, briewe, getuieverklarings, kaarte/planne en ondervragings (*interrogatie*). Die prosesstukke is almal genommer. 'n Register van al die stukke is telkens aan die einde daarvan ingebind.

Die saak, *Albertyn v Cloete*,¹⁹⁶ wat oor 'n grensgeskil handel, word as voorbeeld gebruik ten einde 'n proses in die *Raad van Justisie* te illustreer. Die saak het oor etlike jare voor die Hof van Landdros en Heemrade gedien. RWM Ruysch het as prokureur vir Albertyn opgetree en prokureur *PJ Blommaert* vir die gedaagde. Die saak het op appèl voor die Raad van Justisie (met JA Truter as voorsitter) gedien. Die verloop was soos volg:

- *Extract de Siviele Rolle* 11 September 1817¹⁹⁷

Daar word vermeld dat appèl aangeteken word teen die uitspraak van die Hof van Landdros en Heemrade van 14 April 1817. Prokureur Ruysch se prokurasie word aan die linkerkant van die prosesstuk aangeteken.

- *Eisch met 3 Bijlagen* 3 Maart 1817¹⁹⁸

In hierdie prosesstuk word eerstens die feite uiteengesit,¹⁹⁹ daarna word drie gronde van appèl weergegee²⁰⁰ en laastens 'n *conclusie*.²⁰¹ Advokaat Verret het die stuk mede-onderteken. Die tydperk waarbinne die teenparty moes antwoord, is ook by die hof aangevra. Hierdie tydperke wissel na gelang van die geval. Die bylae bevat 'n kopie van 'n

¹⁹¹ Sien bv *Cruywagen v Sandenberg* 1806 CJ 1416 245-301.

¹⁹² 1807 CJ 1441 508-517.

¹⁹³ Sien bv *Grundling v Oertel* 1809 CJ 1495 48-259; *Cruywagen v Sandenberg* 1806 CJ 1416 186-187; *Vermaak v Bosman & Bosman* 1816 CJ 1610 596-619; *Anossi ea v Smuts* 1817 CJ 1645 253-382.

¹⁹⁴ Sien bv *Hoets v Korsten* 1808 CJ 1416 21-182. In 'n saak oor troubreuk is 'n ring as bewysstuk ingedien en maak deel van die hofstukke uit.

¹⁹⁵ Sien bv *Albertyn v Cloete* 1818 CJ 1685 35-541.

¹⁹⁶ B 1818 CJ 1685 35-541. VB CJ 2236 478-479.

¹⁹⁷ CJ 1685 35-36.

¹⁹⁸ CJ 1685 37-52.

¹⁹⁹ 38-41.

²⁰⁰ 41-50.

²⁰¹ 50-52.

verslag van die *Heemraden Commissarissen* aan die Hof van Landdros en Heemrade,²⁰² 'n kopie van 'n ooreenkoms gedateer 6 Februarie 1762²⁰³ en 'n kopie van die vrae aan 'n landmeter gestel en wat deur PC Blommaert (sekretaris van die Hof van Landdros en Heemrade) afgeneem en gesertifiseer is, is ook ingesluit.²⁰⁴

- *Extract Civiele Rolle* 20 November 1817²⁰⁵

Prokureur Blommaert legitimeer homself met 'n spesiale prokurasie²⁰⁶ en vra die hof om die gedaagde vier weke geleentheid te gee om sy antwoord op die eis in te dien. Die ingeslote versoek van die appellant aan die notaris²⁰⁷ op 17 November 1817 is om 'n prokurasie uit te reik "ten dien einde so in als Civielregten te doen en te verrigten al het geen overeenkomstig styl, practijk en manier van procederen alhier ..." ²⁰⁸

- *Schriftuur van antwoord met 6 Bijlage* 20 Desember 1817

In die antwoord word eerstens kortliks die naam van die voorsitter van die Raad van Justisie vermeld, die naam van die regsverteenvoordiger, die eisorsaak en 'n verwysing na die hof *a quo* gegee,²⁰⁹ asook in genommerde artikels 'n uiteensetting van die feite en verweer.²¹⁰ Die betoog of *conclusie* volg laaste.²¹¹ Die stuk is mede-onderteken deur prokureur Ruysch en advokaat JH Cloete. Die bylae bestaan uit drie beëdigde verklarings voor 'n prokureur en twee getuies afgelê.²¹² 'n Gewaarmerkte en ware afskrif (*geaccodeert*) van die grondbrief van Simon van der Stel gedateer 13 Augustus 1692²¹³ is aangeheg asook 'n kopie van die verslag van die Kommissaris Heemrade aan die Landdros en Heemrade te Stellenbosch van 1 Desember 1806.²¹⁴ Aan die einde is 'n register van die stukke wat by die skriftuur van antwoord gevoeg is, ingesluit.²¹⁵

- *Extract Civiele Rechtsrolle* 18 Desember 1817²¹⁶

Prokureur Ruysch versoek die hof om 'n repliek in te handig met verwysing na die *retro acta* van 20 November 1817.

- *Schriftuur van replicq in appèl en antwoord a minima*²¹⁷ van 15 Januarie 1818²¹⁸

²⁰² 53-71.

²⁰³ 72-76.

²⁰⁴ 77-81.

²⁰⁵ 80-83.

²⁰⁶ 82.

²⁰⁷ Advokate kon ook as notaris optree.

²⁰⁸ 84.

²⁰⁹ 86-87.

²¹⁰ 87-96.

²¹¹ 96-99.

²¹² 100-105; 106-109; 110-113.

²¹³ 114-116.

²¹⁴ Die voorsitter van die Landdros en Heemrade was Ryna Johannes van der Riet. Vgl 117-140.

²¹⁵ 141.

²¹⁶ 142-143.

Die repliek bestaan uit 155 artikels. Eerstens is die feite uiteengesit,²¹⁹ die gronde vir die betoog en kommentaar op die antwoord van die respondent²²⁰ en daarna die *conclusie*.²²¹ Dié stuk is onderteken deur prokureur Ruysch en advokaat JA Joubert.

- *Extract Civiele Rechtsrolle* 15 Januarie 1818²²²

Die stuk verwys na die indiening van die repliek deur prokureur Ruysch. Prokureur Blommaert versoek *copie en termijn* van 14 dae om die *duplicq* en *replicq a minima* in te dien.

- *Duplicq en replicq a minima* 26 Januarie 1818²²³

Daar is 72 artikels in die stuk. Daar word nie 'n betoog aan die einde aangetref nie. Die stukke is opgestel deur advokaat Joubert en mede-onderteken deur prokureur Ruysch.

- *Extract Civiele Rechtsrolle* 29 Januarie 1818²²⁴

Die hof staan 'n versoek van prokureur Blommaert om *atterminatie* (verlenging van termyn) vir die inhandiging van die dupliek en twee bylaes toe.

- *Extract Civiele Rechtsrolle* 12 Februarie 1818²²⁵

Prokureur Blommaert dien die dupliek en twee bylaes in. Prokureur Ruysch versoek die hof om *copie en termijn* van 14 dae te *declareer*.

- (j) *Duplicq in appèl en replicq a minima* 12 Februarie 1818²²⁶

Prokureur Blommaert dien die stukke wat deur advokaat JH Cloete opgestel is namens Cloete (respondent in appèl en eiser *in minima*) in. Die stuk bestaan uit 111 artikels waarin onder andere drie gronde²²⁷ vir die eis *in minima* uiteengesit word. Verder word 'n *conclusie* aangetref.²²⁸ Die bylae bestaan uit 'n *extract resolutie College Landdros en Heemrade*, gedateer 4 April 1816²²⁹ en 'n kopie van 'n tussentydse bevel van eksepsie verleen deur die Raad van Justisie van 12 September 1816.²³⁰

- *Extract Civiele Rechtsrolle* 26 Februarie 1818²³¹

²¹⁷ Dié beskrywing kom voor op die dekblad van die betrokke prosesstuk.

²¹⁸ 144-165.

²¹⁹ 145-147.

²²⁰ 147-163.

²²¹ 163-164.

²²² 165.

²²³ 166-175.

²²⁴ 176.

²²⁵ 177-178.

²²⁶ 179-187.

²²⁷ 180-187.

²²⁸ 187.

²²⁹ 188-193.

²³⁰ 197-198.

²³¹ 198.

Prokureur Ruysch dien die *schriftuur van duplicq a minima* sonder enige bylae in. Prokureur Blommaert vra produksie van die stukke van 12 Februarie 1818.²³²

- *Extract Civiele Rechtsrolle* 17 Julie 1817²³³

Die hof staan 'n versoek van prokureur Ruysch vir Albertyn vir die aanstelling van 'n *justisiële commissie* toe.

- *Stukke in die register van College van Landdros en Heemrade* 5 Oktober 1801 tot 5 Mei 1817²³⁴

'n Verdere register van die stukke word aan die einde aangetref.²³⁵

- *Raad van Justisie: aanstelling van Justisiële Commissie* 20 April 1818²³⁶

Die Raad van Justisie stel 'n *Justisiële commissie* aan om opmetings te doen, die plaaslike omstandighede waar te neem, alle verkrygbare inligting te versamel, alle noodsaaklike werk in die verband te onderneem en 'n *rapport* op te stel en dit by die stukke te voeg sodat die Raad van Justisie dit kan beoordeel. Die hofstukke sluit daarna 'n brief van Albertyn aan die kommissie gedateer 9 November 1818²³⁷ en die Verslag van die landmeter gedateer 4 November 1818 in.²³⁸

- *Pleidooy van eisch* 20 April 1818²³⁹

Advokaat Joubert stel die pleidooi op.²⁴⁰ 'n Uiteensetting van die feite word gegee²⁴¹ en die twee gronde vir die appèl²⁴² en verweer *in minima*²⁴³ word uiteengesit.

- *Pleidooy van antwoord in appèl en eisch in minima* ongedateer²⁴⁴

Die pleidooi is deur advokaat Cloete opgestel. 'n Feite-uiteensetting word gegee en die drie gronde van die appèl en eis *in minima* word uiteengesit. Die stuk is nie artikelgewys uiteengesit nie.²⁴⁵ 'n Groot verskeidenheid gemeenregtelike gesag word in hierdie pleidooi uiteengesit²⁴⁶ soos onder andere verwysings na die *Instructie van den Hogen Raad* artikel

²³² 199-204 (soos in 11).

²³³ 199-204.

²³⁴ 205-425.

²³⁵ 426-431.

²³⁶ 432-433.

²³⁷ 432-435.

²³⁸ 436-438.

²³⁹ 440-454.

²⁴⁰ Geen verwysing na 'n prokureur word aangetref nie.

²⁴¹ 440-447.

²⁴² 447-450.

²⁴³ 450-454.

²⁴⁴ 455-515.

²⁴⁵ 476-480; 480-488; 488-515.

²⁴⁶ 492-503.

257 van 31 Mei 1582 soos dit gepubliseer is in die *Kleijn Placaatboek* van De Blecourt en Jacobsen²⁴⁷ en die *Wetboeke van Holland*.²⁴⁸

- *Pleidooy van replicq* ongedateer²⁴⁹

Advokaat Joubert sit onder andere, met verwysing na gesag,²⁵⁰ die onderskeid tussen *usucapio* en *praescriptio* uiteen. Die pleidooi is nie artikelsgewys uiteengesit nie. Advokaat Joubert merk op dat daar weinig deur die advokaat van die verweerder op die eis *in minima* vermeld word. Die stuk word gevolg deur 'n *Inventaris van stukke* in die Raad van Justisie.²⁵¹

V APPÈLPROSEDURE

Die spesifieke saak van *Albertyn* is nie op appèl geneem nie. Die beskrywing van die appèlprosedure in die *Court of Appeal* word aan die hand van verskillende hofsake in die periode 1806 tot 1828 bespreek. Die prosesstukke in die appèlhofsake²⁵² bestaan uit die *appellant's case*; *respondent's case*; *respondent's reply* en *appellant's rejoinder*.

Op die oog af het dit gelyk asof die stukke in die *Court of Appeal* bloot 'n vertaling was van die pleitstukke in die Raad van Justisie-reeks. By nadere ondersoek het dit geblyk dat hierdie stukke eers die feite van die saak soos in die Raad van Justisie-stukke vervat, uiteengesit het. Daarna volg die redes waarom geappelleer word of waarom die appèl nie behoort te slaag nie. Meestal stem hierdie stukke min of meer ooreen met dié beredenering en gesag aangehaal in die Raad van Justisie-stukke. In sommige sake word egter na nuwe gesag verwys wat nie in die vroeëre Raad van Justisie-stukke vervat is nie. Anders as die prosesstukke in die Raad van Justisie-reeks word die *Court of Appeal* stukke nie artikelgewys uiteengesit nie.

Buiten die bovermelde stukke word daar in sekere sake spesiale versoeke gerig. Dié versoeke word vervat in die *appellant's memorial*, *respondent's reply to appellant's*

²⁴⁷ 502-503.

²⁴⁸ 496-497.

²⁴⁹ 516-536.

²⁵⁰ 518-519; 527.

²⁵¹ 540-541.

²⁵² Sien bv. *Esterhuizen v Esterhuizen* 1821 GH 48/2/49 306-600; *Anossi v Smuts* 1818 GH 84.2.35 310-597; *Watermeyer v Morrisson* 1815 GH 48/2/24 174-395; *Cloete v Briers* 1820 GH 48/2/41 363-693; *Blomerus v Weduwee Cloete* 1818 GH 48.2.37 1-463; *Proctor v Cloete* 1819 GH 48/2/41 363-693; *Freisslich v Burger Senaat* 1821-22 GH 48/2/50 455-857; *Cloete v Van Reenen* 1813 GH 48.2/16 554-778; *Rabe v Jordaan* 1819 GH 48/2/39 146-412; *Roos v Rosseau* 1815 GH 48/2/24 1-173; *Cruywagen v Ruysch* 1815 GH 48/2/24 396-558; *Roos v Roux* 1812 GH 48/2/8 476-767.

memorial; appellant's rejoinder of as die versoek deur die respondent gerig word *respondent's memorial, appellant's reply*, ensomeer.²⁵³

VI ALGEMENE BEVINDINGS TEN AANSIEN VAN DIE MATERIËLE REG

Die aantal sake wat per jaar in die Kaapse Argiefdatabasis aangeteken is, kan soos volg opgesom word:²⁵⁴

1806	1807	1808	1809	1810	1811	1812	1813	1814	1815	1816
127	88	76	55	65	65	59	79	88	63	69
1817	1818	1819	1820	1821	1822	1823	1824	1825	1826	1827
81	101	114	108	93	67	77	73	71	34	73

Uit die tabel kan afgelei word dat daar in sekere jare meer litigasie as in ander plaasgevind het. Gebaseer op die ontsluiting en evaluasie van die tersaaklike bronne in die Kaapse Argiefbewaarplek, kan 'n aantal algemene bevindinge gemaak word.²⁵⁵ Ten aansien van die reg van toepassing aan die Kaap²⁵⁶ blyk dit dat skrywers oor die gemenereg van die Provinsie Holland dikwels aangehaal is. Daarnaas is ook gesaghebbende skrywers van ander Nederlandse provinsies en aangrensende lande aangehaal. Dit wil dus voorkom asof die *ius commune* soos in die Provinsie Holland toegepas in hoofsaak die gemenereg is wat aan die Kaap gegeld het. Bepaalde regsnorme soos redelikheid en *bona fides* aan die Kaap het veral ten aansien van die kontraktereg 'n belangrike rol gespeel en daar is dikwels van die *exceptio doli generalis* gebruik gemaak.

Daar was ook moontlik reeds in hierdie tyd Engelsregtelike beïnvloeding.²⁵⁷ Ten opsigte van die materiële kontraktereg, wisselreg, erfreg en die reg met betrekking tot grondbesit in die Kaap, het die Romeins-Hollandse reg gegeld. In hoofsaak is die prosesreg soos dit voor 1806 bestaan het, ook daarna voortgesit. Tog het daar aan die Kaap 'n informele presedentestelsel ontwikkel, wat moontlik deur die Engelse reg beïnvloed is. Die Britse koloniale beleid van geleidelike assimilasie in die rigting van Britse instellings, die opleiding van advokate, die beskikbaarheid van Engelse hofuitsprake en

²⁵³ Sien bv *Watermeyer v Morrisson* 1815 GH 48/2/24 174-395; *Proctor v Cloete* 1819 GH 48/2/41 363-693; *Roos v Roux* 1812 GH 48/2/8 476-767.

²⁵⁴ Die getalle is tans die sake wat in die Kaapse Argiefdatabasis vervat is. Die getalle berus op die werk van die projekspan en sluit sake van die Raad van Justisie en *Court of Appeal* in. Aangesien daar meerdere medewerkers aan die projek gewerk het, kan die akkuraatheid van die getalle nie bevestig word nie. Dit mag ook wees dat daar deur die jare bundels in die argief verlore gegaan het. Die getalle gee egter 'n perspektief van hoeveel sake wel ter sprake gekom het.

²⁵⁵ Visagie ea (1993) op cit nota 9 op L1-L6.

²⁵⁶ Thomas, Van der Merwe & Stoop op cit nota 20 op 94; Visagie (1989) op cit nota 20 Bylae 4 6-10, 12-14 en 18-21; Visagie ea (1993) op cit nota 9 op 35-38; De Vos op cit nota 5 op 244; Hahlo & Kahn op cit nota 17 op 575. Sien ook Visagie (1969) op cit nota 20 op 73-76 ten aansien van die gemeenregtelike bronne wat beskikbaar was vir die Raad van Justisie.

²⁵⁷ De Vos op cit nota 5 op 245; Hahlo & Kahn op cit nota 17 op 576.

regshandboeke, bekendheid met die Engelse regstruktuur en die invloed van die *Privy Council* as finale hof van appèl, het toenemend druk op die Romeins-Hollandse Reg aan die Kaap geplaas. Dit is die duidelikste waarneembaar op die gebied van die lasterreg aan die Kaap, waar daar deur die Kaapse regspraktyk gepoog is om gelykstelling te bewerkstellig tussen die Romeins-Hollandse en Engelse lasterreg met betrekking tot (a) die begrippe *malice* en *animus iniuriandi*, die verwere teen die *actio iniuriarum* asook die verdere uitbouing van *amende honorable* en *amende profitable*. Kaapse lasterreg was gevolglik gebaseer op die Romeins-Hollandse reg, maar het toenemend onder die invloed gestaan van die Engelse reg binne die breër konteks van die Wes-Europese *ius commune*.²⁵⁸

Nieteenstaande die breë bevinding dat die Romeins-Hollandse reg aan die Kaap tydens die periode 1807 tot 1827 bly voortbestaan het en dat daar wel sprake van Engelsregtelike druk (en selfs beïnvloeding veral ten opsigte van lasterreg) was, het daar tog ook bepaalde Kaapse praktykreëlings ontstaan, in die besonder met betrekking tot die prosesreg en bepaalde erfregtelike en sakeregtelike kwessies.²⁵⁹ Dié tydperk het ook die begin van Suid-Afrika se gemengde regstelsel ingelui.

VII GEVOLGTREKKING

Vanaf 1807 tot 1827 het die siviele hofstruktuur aan die Kaap bestaan uit die Hof vir Landdros en Heemraden, die Raad van Justisie en die Siviele Appèlhof waarvandaan na die *Privy Council* in Engeland geappelleer kan word. Kragtens die Kapitulasiovoorwaardes tydens die Britse anneksasie in 1806 sou die Hollandse howe bly voortbestaan. Daar is nie nuwe prosesregreëlings uitgevaardig nie en die bestaande prosesreg soos deur Van der Linden beskryf, is toegepas. Eers na die aanbevelings van die Colebrooke-Bigge-kommissie (1826) is die Engelse hofinstellings en prosesreg aan die Kaap ingevoer.

Uit 'n vergelyking tussen Van der Linden se *Judiciele Practijc* (en *Koopmanshandboek*) en die prosedures wat aan die Kaap gevolg is, blyk dit dat die Kaapse prosesreg in 'n geringe mate vir plaaslike omstandighede aangepas is. In sommige gevalle is daar van meerdere pleitstukke (*triplicq*, *duplicq*, *memories van belangen* en *contra-belangen*) wat nie deur Van der Linden beskryf is nie, gebruik gemaak. Of daar werklik van 'n Kaapse prosesreg in die sin van 'n totaal nuwe prosesreg gepraat kon word,

²⁵⁸ Olivier in Visagie ea op cit nota 9.

²⁵⁹ Visagie ea (1993) Liii-Liv.

is te betwyfel; met betrekking tot bepaalde aangeleenthede is daar wel wysigings aangebring en praktyksreëls ontwikkel.

Tydens die verloop van die proses voor die Raad van Justisie moes sekere handeling vooraf plaasvind (aanmaning, bepaling van *locus standi* en die verkryging van regsverteenvoerders). Daarna is 'n *requeste* by die *Commissarissen* ingedien wat bepaal of daar aan die formele vereistes voldoen is. Die *Commissarissen* het gepoog om 'n skikking tussen die partye te bewerkstellig. Indien nie, is die dagvaarding uitgereik en die saak ter rolle geplaas. 'n *Eisch en conclusie* is ingedien wat 'n uiteensetting van die eis en 'n voorgeskrewe *conclusie* bevat. Sekere tussenhandelinge kon nou plaasvind (absolusie van die instansie by nie-verskyning of vonnis by verstek). Indien die verweerder wel verskyning wou aanteken, kon hy (a) op die verhoordag sekere preliminêre versoeke rig (b) 'n eksepsie opper of (c) 'n antwoord indien. Daarna kon die eiser repliek lewer en die verweerder weer 'n *duplicq*. 'n *Triplicq* en *quaduplicq*, *memories van belangen en contra-belangen* kon ook ingedien word. Na *plena litis contestatio* kon geen verdere dokumente ter rolle geplaas word nie. Waar geen feitegeskil betrokke was nie en die bedrag onder RD 1000 was, is die saak mondelings aan die Raad van Justisie voorgedra. Alle ander sake onder RD 1000 is voor die *Commissarissen* afgehandel. Alle ander sake moes *beschreven* wees. Die Raad van Justisie het geen redes vir sy vonnis gegee nie.

In die reg soos aan die Kaap toegepas, is daar voorsiening vir bemiddeling gemaak waar vennootskappe, rekeninge, laster en huweliksake ter sprake kom. Dit blyk uit sowel die Raad van Justisie-stukke as die Colebrooke-Bigge-kommissie se verslag dat hierdie wyse van geskilbeslegting heelwat sukses gehad het. Indien die saak wel later voor die Raad van Justisie beslis is, is heelwat van die feitegeskille reeds uitgeskakel. Die enigste kritiek wat die kommissie geopper het, is dat in sommige gevalle dit meegebring het dat die proses verleng en die partye benadeel word.

Ander kritiekpunte van die Colebrooke-Bigge-kommissie teen die Raad van Justisie was dat die samestelling van dié hof nie eerbied en vertrouwe afdwing nie, die lede van die Raad van Justisie persoonlik betrokke en beïnvloed was, verhore nie in die openbaar plaasgevind het nie, geen redes vir beslissings gegee is nie en die regbank nooit self mondelingse getuienis aangehoor het nie.

Volgens die kommissie sou die sake wat die Raad van Justisie oor die algemeen bereg het, ongekompliseerd en eenvoudig wees. Die enigste gekompliseerde sake sou die van kommersiële aard wees – 'n stelling wat deur die hofsake self weerlê word. Die houding van die kommissie kan afgelei word uit hulle standpuntinname dat die Romeins-

Hollandse reg eenvoudig is en bloot voorsiening vir 'n landelike gemeenskap maak. Die Engelse reg is volgens die kommissie by verreweg meer gekompliseerd. Daar is hoofsaaklik van die Engelse handelsreg gebruik gemaak en daarom sou hierdie sake dan meer gekompliseerd gewees het.

Daar is ook heelwat kritiek teen die onnodige verlenging van die voorafproses geopper – om vonnis by verstek te verkry moes 'n verweerder eers vier keer aangespreek word. In 1811 is 'n rondgaande hof ingestel en het verhore ook in die openbaar geskied. Die proses wat in hierdie howe gevolg was, was Engelsregtelik van aard.

Die kommissie het verder bevind dat daar geen toename in die sake voor die Raad van Justisie vanaf 1815-1825 was nie. Dit wil voorkom asof daar in sommige jare 'n sterk styging was en in ander jare weer 'n afname.

Volgens die kommissie het die Raad van Justisie slegs van die Romeinse reg, besprekings daarvan in die kommentare en annotasies van die Hollandse juriste (waarvan die belangrikste na die mening van die kommissie Voet, de Groot, Van Leeuwen en Van der Linden was), resolusies van die State-Generaal soos aangepas vir plaaslike omstandighede, proklamasies van Engelse goewerneurs en die Bataafse statute gebruik gemaak. Hoofregter Truter het tydens sy getuienis voor die Kommissie egter aangedui dat plaaslike regsreëls, die Romeins-Hollandse reg soos in Holland en elders, versamelings van Plakkate soos onder meer te vinde in die *Colonial Office* en die Engelse reg (veral die Engelse handelsreg) die bronne van die reg aan die Kaap was. Uit die onderskeie *capita selecta* blyk dit egter dat die gesag wat aangehaal is veral die van die *ius commune*²⁶⁰ in Europa was.²⁶¹ Dit is duidelik dat die kommissie nie behoorlik ingelig is, of wou wees nie, oor die omvang en die gekompliseerdheid van die Romeins-Hollandse reg, in die breë sin soos wat dit aan die Kaap toegepas is.

Vanaf die Raad van Justisie kon na die Siviele Appèlhof geappelleer word. Alle stukke van die Raad van Justisie moes in Engels vertaal word. Hierdie vertalings was nie altyd korrek nie.²⁶² Die appèlhofstukke bestaan meestal uit die volgende: *appellant's case*, *respondent's case*, *respondent's reply* en *appellant's rejoinder*. Buiten die vertaalde stukke word daar in die stukke ook die redes vir die appèl nie moet slaag nie, uiteengesit. In sommige sake word nuwe verwysings na gesag wat nie voorheen in die betrokke Raad van

²⁶⁰ Vgl hieroor Du Plessis & Olivier "Du Plessis v Strauss" (1988) *De Jure* 171-181.

²⁶¹ Vir 'n bespreking van die hofsake wat aangehaal is, Visagie ea (1993) op cit nota 9.

²⁶² "Zij heeft een kind gehaad" is in een stuk byvoorbeeld vertaal met "She hated her child." – *Van Reenen v Bailey* 1817B GH 38/2/30; sien ook Olivier in Visagie (1993) op cit nota 9 op H1-H35.

Justisie-stukke aangetref is nie, uiteengesit. Geen redes is vir Siviele Appèlhof-uitsprake gegee nie.

Die hoofkritiekpunte van die Colebrooke-Bigge-kommissie teen die Siviele Appèlhof was dat daar te veel probleme was om die stukke wat bowendien nog foutiewe verwysings na gemeenregtelike gesag gehad het, te vertaal. Aangesien geen redes vir 'n Raad van Justisie-uitsprake gegee is nie, moes die Siviele Appèlhof met die Raad van Justisie oorleg pleeg vir die redes vir laasgenoemde se beslissing. Die lede van die Siviele Appèlhof was voorts nie juridies geskool nie. Die Colebrooke-Bigge-kommissie het bowendien die mening gehuldig dat die lede van die Siviele Appèlhof in alle gevalle Engelsregtelik georiënteer was en gevolglik uitsprake wat nie in ooreenstemming met die Engelse reg was nie, gewysig het. Verder is kritiek geopper omdat daar geen redes vir Siviele Appèlhof-uitsprake gegee is nie. Daar kan met die Colebrooke-Bigge-kommissie saamgestem word dat die feit dat geen redes vir die uitsprake gegee is nie, die interpretasie van die verskillende hofstukke bemoeilik en veral dat die grondslag vir uitsprake nie altyd gemaklik vasstelbaar is nie. Alhoewel die kommissie van mening is dat die aanhalings van gemeenregtelike gesag (Romeinse, Hollandse en Engelse) meestal foutief is, is dit 'n growwe veralgemening.

Die vernaamste aanbevelings van die kommissie was dat die Engelse materiële reg en wetgewing geleidelik en die Engelse siviele prosesreg onmiddellik ingevoer moet word. Engels moes Nederlands as regstaal vervang en slegs Engelsregtelik opgeleide advokate sou as regters en advokate kan optree. Daar is voorgestel dat die appèlhof bestaande uit 'n hoofregter en drie ander regters wat self van 'n laerafdeling (*supreme court*) sou wees, ingestel moet word. 'n *Equity court* is voorgestel. Daar moes voorts *lower courts* (hooggeregshowe of "provinsiale afdelings") in die westelike en oostelike provinsie ingestel word. Rondgaande howe is ook voorgestel waar regsverteenvoordinging toegelaat moet word. 'n Juriestelsel (buiten vir die *appeal court* en rondgaande howe) is bepleit. Die bevoegdhede van die landdros en heemrade moes na die *judges of county courts* (vir elke distrik ingestel) en *resident magistrates* oorgedra word. Suid-Afrika het wel later die stelsel gehad van laer howe (landdroshowe), hooggeregshowe en 'n Appèlhof. Die idee van *Equity* howe is nooit in die Suid-Afrikaanse stelsel opgeneem nie. Daar is steeds rondgaande howe (beide op laerhof (streekhof) en hooggeregshof vlak). Die juriestelsel is in 1831 ingestel maar was nooit gewild nie en is finaal in 1969 afgeskaf.²⁶³

²⁶³ Du Plessis op cit nota 7 op 107.

Daar is verder aanbeveel dat die hof vir huweliksake afgeskaf moet word en sy funksies deur die *lower courts* gemagtigde predikante oorgeneem moet word. Die Hof vir Klein Eise wat in Kaapstad gesetel het, moes vervang word deur 'n *petty debt court* bestaande uit twee kommissarisse. Regsverteenwoordiging sou in alle howe toegelaat wees. Volgens die kommissie sou die volgende doelstellings bereik word:

“The entire Separation of the Executive from the Judicial power, the establishment of an appellate jurisdiction within the colony of correcting the errors and controlling the action of the inferior Courts, and lastly an improvement in the Structure of the latter of a view to secure them as much as possible of the influence of local prejudice and interests.”²⁶⁴

Die prosesreg en die hofstruktuur aan die Kaap was 'n voortsetting van die stelsel wat voor 1806 aan die Kaap gegeld het. Geleidelik is die prosesreg en hofstruktuur weens plaaslike gebruike (die voorkoms van 'n *triplicq* en 'n *quadruplicq*) en die optrede van Engelse goewerneurs (die instelling van 'n Siviele Appèlhof en 'n rondgaande hof asook die voorskrif dat alle verhore openbaar moes geskied) gewysig.

Alhoewel daar dus nie onmiddellik 'n volledige oorname van Engelse prosesreg aan die Kaap was nie, dien die tydperk 1806 tot 1828 as 'n oorgangstydperk tussen twee regstelsels – die van Engeland en die van die Holland. In die tydperk word Engelse prosesregreëls geleidelik ingevoer en begin die howe reeds om Engelse reg toe te pas in bepaalde geskille. Advokate begin reeds in die tydperk na Engelse reg verwys. Wat ook duidelik uit die Colebrooke-Bigge Kommissie se verslag blyk, is dat die Britte neergesien het op die Romeins-Hollandse regstelsel en dat die gekompliseerdheid van die stelsel nie verstaan is nie. Die invoer van die Engelse prosesreg in 1827 het wel 'n einde gebring aan die Romeins-Hollandse prosesreg maar die Britse bewind kon nooit daarin slaag om die Romeins-Hollandse reg te laat uitsterf nie. Al wat gebeur het, was dat die twee regstelsels saamgevloei het (soos Schrage daarna verwys) en aanleiding gegee het tot die ontwikkeling van 'n unieke Suid-Afrikaanse regstelsel met sy eie kenmerke en eie identiteit.

Gesien die belang van die bevindinge met betrekking tot die siviele prosesreg tydens die periode van die tweede Britse anneksasie (1806) tot 1827, en die algemene bevindinge hierbo bespreek, is dit noodsaaklik dat 'n verdere gedetailleerde ontsluiting van die regspraak tydens hierdie periode gedoen moet word. In hierdie verband sou die publikasie van die twee elektroniese databasisse wat tans gesetel is in die biblioteek van

²⁶⁴ Theal volume 28 op cit nota 10 op 33.

die Potchefstroom-kampus van Noordwes-Universiteit in 'n gebruikersvriendelike formaat van onskatbare waarde wees. Op die kort termyn sou ontsluiting en gebruikmaking van hierdie elektroniese indeks op die *Court of Appeal in Civil Cases* en die Raad van Justisie vergemaklik kan word deur die skryf en implementering van 'n rekenaarprogram wat 'n direkte skakel tussen die twee stelsels bewerkstellig. Dit sou dit groot nut hê om 'n opsomming van die bestaande projek en die gebruikmaking van die elektroniese toegangsindeks wat by Noordwes-Universiteit gevestig is, beskikbaar te stel aan regs- en historiese navorsers. Ten aansien van die periode onder bespreking sou verdere ontsluiting ten opsigte van die strafregstelsel aan die Kaap tydens die periode 1807 tot 1828 van groot waarde wees. Ook wat betref die tydperk 1652 tot 1807 sou die ontsluiting en evaluasie van straf- en siviele sake 'n behoorlike beeld kon verskaf van die verhouding tussen koloniste, slawe, vrygemaakte slawe en lede van die Khoi-gemeenskappe, in die gevestigde gedeeltes van die Kaap, sowel as die sogenaamde buiteposte in die Noordweste en Noordooste.

REGSHISTORIESE GRONDE VIR DIE VERBOD OP DIE PACTUM SUCCESSORIUM: IS GESKIEDKUNDIGE REDES GENOEG VIR DIE VOORTBESTAAN VAN DIE VERBOD IN SUID-AFRIKA?

Christa Rautenbach*

Professor Noordwes-Universiteit (Potchefstroomkampus) Suid-Afrika

I INLEIDING

In die Suid-Afrikaanse erfreg geskied erfopvolging normaalweg óf volgens die bepalings van 'n testament (*ex testamento*) óf volgens die norme van die intestate erfreg (*ab intestato*). In die reël word 'n erflater verbied om deur middel van 'n tweesydigse regshandeling *inter vivos* erfregtelike gevolge te probeer bewerkstellig. Die gevaar bestaan dat sodanige ooreenkoms die testeervryheid van 'n erflater kan beperk. Sodanige ooreenkoms word as 'n *pactum successorium* beskou wat sedert die vroegste reg nie geduld is nie. *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk*¹ verklaar soos volg:

“'n *Pactum successorium* (of *pactum de succedendo*) is, kort gestel, 'n ooreenkoms waarin die partye die vererwing (*successio*) van die nalatenskap (of van 'n deel daarvan, of van 'n bepaalde saak wat deel daarvan uitmaak) van een of meer van die partye ná die dood (*mortis causa*) van die betrokke party of partye reël. 'n Voorbeeld van so 'n ooreenkoms is waar A en B met mekaar ooreenkom om mekaar oor en weer as erfgenaam in te stel; of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of 'n deel daarvan) aan B sal bemaak; of waar A en B met mekaar ooreenkom dat A sy nalatenskap (of 'n deel daarvan, of 'n bepaalde saak wat aan hom behoort) aan C sal bemaak. 'n Ooreenkoms van hierdie aard druis in teen die algemene reël van ons reg dat nalatenskappe *ex testamento* of *ab intestato* vererf, en word as ongeldig beskou, behalwe in die geval waar dit in 'n huweliksvoorwaardekontrak beliggaam is.”

Die verbod teen die *pactum successorium* het uit die gemenereg (die Romeins-Hollandse reg) ontwikkel. Dit is gemene saak dat die moderne Suid-Afrikaanse regstelsel die resultaat is van jarelange kolonialisasie deur hoofsaaklik twee Westerse moondhede; eers Nederland vanaf 1652 tot vroeg in die 1800's en

* B Iuris LLB LLM LLD

¹ 1997 1 SA 736 (A) 501A-D. Bronneverwysings in teks is weggelaat.

daarna Engeland tot in die 1960's. Die gevolg is dat Suid-Afrika 'n gemengde Westerse regstelsel het wat grootliks gebaseer is op oud-Nederlandse reg (Romeins-Hollandse reg) en Engelse reg. Alhoewel Nederland intussen 'n ander rigting ingeslaan het met die kodifikasie van die Nederlandse reg in die *Burgerlijk Wetboek*, het die gemenereg in Suid-Afrika grootliks ongekodifiseer gebly. Verdere ontwikkeling van die Suid-Afrikaanse gemenereg vind voortdurend plaas deur middel van wetgewing en die regspraak.

Die verbod op die *pactum successorium* in die Suid-Afrikaanse reg is egter een van die gebiede van waar weinig moderne ontwikkeling plaasgevind het. Sedert 1919 het die hofe reëlmatig in navolging van die gemeenregtelike posisie bevestig dat die *pactum successorium* ongewens en ongeldig is.² In 1976 het die Appèlhof in *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk*³ bevestig dat die *pactum successorium* ongeldig is en 21 jaar later weer in *McAlpine v McAlpine*.⁴ In die lig van beginsels soos kontrakteervryheid, privaatbesit en privaatoutonomie, wat belangrike beginsels in die moderne Suid-Afrikaanse bestel is, is die voortbestaan van die verbod byna onverklaarbaar. Daarom is 'n ondersoek na die historiese redes vir die ontstaan van die verbod beide sinvol en openbarend. In 'n reeks meesterlike artikels in

² Die relevante regspraak word bespreek in Rautenbach *Die Pactum Successorium in die Suid-Afrikaanse Reg* (1994 Ongepubliseerde LLM Verhandeling PU vir CHO) hoofstuk 3. Redelik onlangs in *Van Aardt v Van Aardt* 2007 1 SA 53 (E) het die hof weereens vroeëre uitsprake bevestig wat bevind het dat 'n *pactum successorium* ongeldig is.

³ 1976 3 SA 488 (A). In hierdie saak het die erflater sy krediet (ledebelang) in die Ledebelangefondsrekening van die Potgietersrusse Tabakkoöperasie Bpk aan sy seun bemaak. Die statute (artikel 101) van die koöperasie het bepaal dat die ledebelang aan die "weduwee of die bevoordeelde uit die boedel" betaal moes word en op grond van hierdie "ooreenkoms" tussen die oorledene en die koöperasie, het die oorledene se weduwee daarop aangedring dat die waarde van die ledebelang aan haar oorgedra moes word. Die seun van die oorledene het egter aangevoer dat die ooreenkoms (dit wil sê die statute) 'n ongeldige *pactum successorium* is en dat hy testamentêr geregtig was op die uitbetaling. Die hof het bevind dat artikel 101 inderdaad 'n ooreenkoms beliggaam wat die oorledene sy testeervryheid ontnem of ingeperk het en dat die ooreenkoms gevolglik as 'n ongeldige *pactum successorium* beskou moes word. Vir 'n bespreking van die feite, sien Van Warmelo "*Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk* 1976 3 SA 488 A 1977" *THRHR* 184 – 195.

⁴ 1997 1 SA 736 (A). In hierdie saak het twee broers 'n skriftelike ooreenkoms aangegaan ingevolge waarvan die een broer (Ian) 50% van die aandeelkapitaal in 'n maatskappy aan die ander broer (Gilroy) verkoop het. Die ooreenkoms het verder bepaal dat "[i]n the event of either party's death, the other party will get 100% of the shares of the company ... in other words, the deceased's shareholding will go to the one remaining alive" (267H). By die afsterwe van Ian eis Gilroy oordrag van Ian se aandeel, maar laasgenoemde se weduwee opponeer die eis en voer aan dat die ooreenkoms op 'n ongeldige *pactum successorium* neerkom. Die hof gee haar gelyk en bevind dat die ooreenkoms inderdaad 'n ongeldige *pactum successorium* is wat die testeervryheid van die twee broers beperk het. Vir 'n bespreking van die feite van die saak, sien Rautenbach "Die Bedoeling van die Kontrakspartye as Maatstaf vir die *Pactum Successorium*" 1998 *THRHR* 652-653.

die 1960's verwys Joubert⁵ na die ontwikkeling van die *pactum successorium* in die Romeinse reg, Romeins-Hollandse reg en Germaanse reg. Hy verwys ook na standpunte van verskeie kommentators en juriste van die 16de en begin 17de eeu. In hierdie bespreking word egter alleenlik gekonsentreer op die ontwikkeling van die *pactum successorium* in die Romeinse en Romeins-Hollandse reg. Ten slotte word die vraag kortliks gestel of die historiese redes vir die behoud van die verbod steeds houdbaar in die lig van moderne regsontwikkelinge in die Suid-Afrikaanse reg is.

II POSISIE IN DIE ROMEINSE REG

Die vroegste Romeinse regsbronne maak slegs melding van twee wyses van erfopvolging, naamlik:⁶ deur middel van 'n geldige testament (*ex testamento*); en deur middel van die werking van die intestate erfreg (*ab intestato*). 'n Derde wyse van erfopvolging, naamlik deur middel van 'n kontrak (*pactum successorium*), is, benewens enkele uitsonderings, nie geken of toegelaat nie.⁷ Die *pactum successorium* is hoofsaaklik om twee redes verbied. In die eerste plek omdat gevrees is dat so 'n ooreenkoms die begeerte kon laat ontstaan om die dood van die erflater, wat as kontraktant opgetree het, te bewerkstellig en in die tweede plek omdat gemeen is dat so 'n ooreenkoms die betrokke kontraktant sy testeervryheid sal ontnem of beperk.⁸

⁵Die historiese ontwikkeling van die *pactum successorium* is grondig uitgepluis deur Joubert "Pactum Successorium" 1961 *THRHR* 18 - 40; 106 - 111; 177 - 188; 250 - 260; "Pactum Successorium" 1962 *THRHR* 46 - 66; 93 - 111. Sien ook die bespreking van Williams "Pacta Successoria" 1969 *Responsa Meridiana* 45 - 58.

⁶G 2 99: "And, first, let us discuss inheritances, the condition of which is twofold; for an inheritance either comes to us by will, or on account of intestacy." (Vertaling deur Scott *The Civil Law* (Cincinnati 1932)); D 50 16 130: "One will not wrongly have said that an inheritance has fallen to someone also in the case of one which is given by will, since testamentary inheritances are confirmed in the *Law of the Twelve Tables*." (Mommensen en Krueger (reds) *The Digest of Justinian*. Engelse vertaling deur Watson (1985)); Inst 2 9 6: "First let us treat of inheritances, which may be divided into two kinds, according as they come to you by testament or *ab intestato*." (Sandars TC *The Institutes of Justinian* (Voorwoord, vertaling en notas) 14e uitg (1917)).

⁷Sien Joubert 1961 *THRHR* 23 ev; Williams *Responsa Meridiana* 46 ev; Van Warmelo "Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk 1976 3 SA 488 A" 1977 *THRHR* 184 - 195 by 188 ev.

⁸In D 45 1 61 word verklaar: "Do you promise to pay me so much if you do not make me your heir?" It is void because such a stipulation is contrary to sound morals." (Mommensen en Krueger *The Digest of Justinian*). Sien ook Voet J *The Selective Voet: Being the Commentary on the Pandects* (1647 - 1713) en die bylae deur Johannes van der Linden (1756 - 1835) vertaling en notas deur Gane (1955 - 1958) 2 4 16; Joubert 1961 *THRHR* 24; Williams 1969 *Responsa Meridiana* 47; Van Warmelo 1977 *THRHR* 189.

Volgens Joubert⁹ moet die oorsprong van die *pactum successorium* nie in die Romeinse reg gesoek word nie. So verklaar hy dan ook:¹⁰

“Die Romeinse Reg het in die algemeen geen vorm van *pactum successorium* geken of geduld nie. Dit word dan ook algemeen aanvaar dat die oorsprong van die *pactum successorium* beslis nie in die Romeinse Reg gesoek moet word nie.”

Williams¹¹ meen dat Joubert die posisie vooruitloop met sy stelling dat alle *pacta successoria* in die Romeinse reg ongeldig was. Hy is van mening dat die stelling van Joubert gekwalifiseer moet word omdat Joubert tot sy gevolgtrekking gekom het op grond van "a very limited number of certain facts".¹² Hy dui twee uitsonderings op die algemene reël aan, naamlik:¹³ 'n *pactum successorium* tussen twee broers is geldig omdat dit hoogs onwaarskynlik is dat twee broers die dood van mekaar sal wens;¹⁴ en *pacta successoria mutua* aangegaan tussen twee soldate is geldig.¹⁵ Volgens hom dui hierdie uitsonderings aan dat die verbod op die *pactum successorium* nie 'n onbuigsame reël was nie en ook dat die beswaar dat die *pactum successorium* die testeervryheid van 'n erflater hom sal ontnem of beperk, ondergeskik is aan die morele besware teen die *pactum successorium*. Die eerste uitsondering beperk naamlik steeds die testeervryheid van die betrokke broers, maar word steeds toegelaat.¹⁶ Ook is dit duidelik dat die Romeine nie onbeperkte

⁹ 1961 *THRHR* 23-27.

¹⁰ Joubert 1961 *THRHR* 23.

¹¹ 1969 *Responsa Meridiana* 46 -48.

¹² Williams 1969 *Responsa Meridiana* 48.

¹³ Williams 1969 *Responsa Meridiana* 47.

¹⁴ C 2 4 11: "The compromise made between your brother and yourself with reference to a trust created by your father providing that if either of you should die without issue, is valid; as it is maintained by the harmony existing between the brothers, rendering it improbable that one of them should desire the death of the other; and it cannot be rescinded on the ground that advantage has been taken of you, as, under this agreement, you have given your promise not to avail yourself of the age when it is customary for a person to be released from his obligations; and, if you institute proceedings, you should not, for the same reason, obtain the benefit of complete restitution." (Scott *The Civil Law*).

¹⁵ C 2 3 19: "Although a document drawn up between private persons, which provides that the survivor shall obtain the property of the other, does not present the appearance of a donation *mortis causa*, still, as the testament of a soldier, disposing of his estate, and reduced to writing during his last moments, in anticipation of death, has all the force of a last will; and you state that your brother and yourself, being about to go into battle, made a reciprocal agreement in view of the common fortune of death, in such manner that the property of him who died first should belong to the survivor; and the condition having been complied with, it is understood that, by the will of your brother (which rule is confirmed by the Imperial Constitutions), his entire property is transferred to you". (Scott *The Civil Law*).

¹⁶ Williams 1969 *Responsa Meridiana* 47.

testeervryheid geken het nie. Dit blyk uit die bepalings van die *Lex Falcidia*¹⁷ en uit die instelling van die *Querella inofficiosi testamenti*.¹⁸

Ook Van Warmelo¹⁹ is die mening toegedaan dat die hele leerstuk aangaande die *pactum successorium* sy aanvang neem by die Romeinse reg. Hy is van mening dat die *fideicommissum*²⁰ 'n tipe *pactum successorium* is wat reeds in die Romeinse reg erken en toegelaat is.²¹ In die lig van die uitwerking van die *pactum successorium* kan 'n mens die oorsprong van sy standpunt verstaan, maar dit moet in gedagte gehou word dat die *fideicommissum* testamentêr geskep word en dus 'n eensydige regshandeling is, terwyl die *pactum successorium* deur 'n meersydige regshandeling geskep word en dus 'n kontrak is.

Die *pactum successorium* is hoofsaaklik om twee redes tydens die Romeinse tydperk verbied. In die eerste plek is daar gevrees dat so 'n ooreenkoms die begeerte kon laat ontstaan om die dood van die erflater, wat as kontraktant opgetree het, te bewerkstellig en in die tweede plek is daar gemeen dat so 'n ooreenkoms die betrokke erflater hom sy testeervryheid sal ontnem of beperk.²²

Die ooreenkomste wat in die Romeinse reg as verbode *pacta successoria* beskou is, kan hoofsaaklik in twee groepe verdeel word.²³ Die eerste groep sluit ooreenkomste in waar A en B ooreen kom om mekaar as erfgename in te stel of nie in te stel nie. In hierdie gevalle is daar nie sprake van 'n derde persoon, C, nie. Voorbeelde van sulke ooreenkomste is waar A en B ooreenkom dat A aan B 'n bedrag geld sal betaal indien A nie vir B as sy erfgenaam instel nie;²⁴ waar 'n vader met sy toekomstige skoonseun ooreen kom dat sy dogter 'n bruidskat sal ontvang en sy dan

¹⁷ Letterlik vertaal "die wet van *Falcidius*". Die *Publius Falcidius* was 'n Romeinse reël wat bepaal het dat 'n erflater slegs 'n driekwart van sy boedel aan legate kon uitkeer. Die res moes op erfgename vererf. Borkowski and Du Plessis *Textbook on Roman Law* (2005) 233-234.

¹⁸ Letterlik vertaal "die klagte van die onwaardige testament". In die Romeinse reg kon 'n begunstigde hierdie aksie instel indien hy kwaadwillig onterf is. Borkowski and Du Plessis *Textbook on Roman Law* 237-240.

¹⁹ 1977 *THRHR* 187 - 191.

²⁰ 'n *Fideicommissum* is 'n testamentêre regsfiguur waardeur die erflater (die oprigter of die *fideicommittens*) bates in eiendom bemaak aan 'n eerste erfopvolger (die *fiduciarius*) onderhewig aan die las (*onus fideicommissi*) om dit in volle eiendom aan 'n verdere opvolger (die *fideicommissarius*) uit te keer by die vervulling van 'n voorwaarde of by die verstryking van 'n termyn.

²¹ Van Warmelo 1977 *THRHR* 188.

²² Voet (1647-1713) *Commentarius ad Pandectas* 2 4 16; Joubert 1961 *THRHR* 24; Williams 1969 *Responsa Meridiana* 47; Van Warmelo 1977 *THRHR* 189.

²³ Van Warmelo 1977 *THRHR* 188 - 189.

²⁴ D 45 1 61.

geen erfregtelike eise teen die vader sal hê nie;²⁵ waar aangedui word dat 'n persoon nie sy reg om intestaat te erf kan prysgee by wyse van ooreenkoms nie;²⁶ waar 'n vader 'n som geld aan sy seun gee op voorwaarde dat hy nie sy testament met die *querella inofficiosi testamenti* sal aanval nie;²⁷ en waar 'n man en 'n vrou 'n ooreenkoms aangaan te dien effekte dat hy haar bruidskat sal erf en daar ook 'n testament is.²⁸ Dit is duidelik dat hierdie tipes ooreenkomste 'n erflater van sy testeervryheid sal ontnem of dit sal beperk, en dit is verstaanbaar waarom dit verbied is.²⁹

Die tweede groep sluit ooreenkomste in waar A en B ooreen kom ten aansien van die erfenis van C wat hulle hoop en vertrou hulle in die toekoms gaan erf. In hierdie geval is daar wel sprake van 'n derde party wat by die ooreenkoms betrek word. Voorbeelde van sulke ooreenkomste is waar A en B 'n ooreenkoms sluit met betrekking tot 'n verwagte erfenis van C;³⁰ waar 'n ooreenkoms gesluit word te dien effekte dat die vrou die vaderlike erfenis gelykop met haar broer sal deel;³¹ waar 'n

²⁵ D 38 16 16: "A father included in the instrument relating to the dowry a clause to the effect that his daughter had received a dowry without any other expectations from her father's estate; it is certain that this clause has not ousted the rights of succession; for the provisions of individuals do not derogate from the authority of the law." (Mommensen en Krueger *The Digest of Justinian*).

²⁶ D2 14 34: "It is the opinion of Julian that the legal position constituted by agnation cannot be repudiated by pact, any more than a person may say that he refuses to be a *suus heres*." (Mommensen en Krueger *The Digest of Justinian*).

²⁷ C 3 28 35 1: "We also decree that, if anyone should receive a certain sum of money, or a certain amount of property from his father, and agrees that he will, under no circumstances, bring suit to declare his will inofficious, and, after the death of his father, the son, having examined his will, should be unwilling to accept it, and should think that it ought to be contested, an opinion was given by Papinianus in which he stated that a son ought, by no means, to be oppressed by an agreement of this kind, but that children should rather be induced to show respect to their parents than be restrained by contracts. We adopt this opinion, unless the son should have made a compromise with the heirs of his father in which he clearly accepted the will of the latter." (Scott *The Civil Law*).

²⁸ C 5 14 5: "An estate passes by will to strangers. Therefore, when you assert that by a dotal instrument, an agreement instead of a will was interposed, by the terms of which, after the death of the wife, her property, to which you are not entitled as dowry, will belong to you, you are advised that you cannot, by any proceedings, sue her heirs or successors, in order that what is in no way due may be delivered to you." (Scott *The Civil Law*).

²⁹ Ook hier moet C 2 3 19 as uitsondering in gedagte gehou word. Joubert 1961 *THRHR* 25 dui aan dat hierdie ooreenkoms, waar die kontraktante soldate is en mekaar oor en weer as hul erfgename ingestel het, wel as uitsondering in die Romeinse reg toegelaat is.

³⁰ C 8 39 4: "It is clear that you have no right of action under the instrument in which a stipulation contrary to good morals was made with reference to a succession as all provisions against good morals, whether set forth in a contract or in a stipulation, are of no force or effect." (Scott *The Civil Law*).

³¹ C 2 3 15: "The agreement included in the dotal instrument, namely, that if the father should die, the daughter who was to be married, should, with her brother, be heirs to equal portions of the estate, gives rise to no obligation, and does not deprive the father of the woman of the power to make a will." (Scott *The Civil Law*).

ooreenkoms gesluit word te dien effekte dat 'n vrou tevrede sal wees met haar bruidskat en nie van haar vader sal erf nie;³² waar 'n toekomstige erfenis komende van 'n derde gekoop of verkoop word;³³ waar 'n derde gedwing word om 'n erfenis te aanvaar vir die behoud van die *fideicommissum* daarin gestel;³⁴ waar 'n broer sy suster as erfgenaam instel en dit so bewerk dat 'n derde stipuleer dat sy nie gebruik sal maak van haar reg kragtens die *lex Falcidia* nie;³⁵ en waar 'n persoon by wyse van 'n *fideicommissum* versoek word om 'n derde as sy erfgenaam te benoem.³⁶ Volgens Voet³⁷ kom dit voor asof 'n ooreenkoms tussen twee persone met betrekking tot die nalatenskap van 'n derde geldig sal wees indien die derde tot die ooreenkoms toegestem het. As gesag vir hierdie stelling haal hy 'n taamlike lang *constitutio* aan wat soos volg bepaal het:³⁸

“We have been asked the following question by the Bar of Caesarea: Two or more persons expected to receive an estate, either on account of their relationship, or because of informal agreements entered into between them with reference to the said estate, in which agreements it was expressly stated that if the owner of it should die, and the estate should go to them, certain

³² C 6 20 3: "A clause included in a dotal instrument providing that the woman shall be contented with the dowry given at marriage, and shall have no right to the estate of her father, is disapproved by the law, and the daughter cannot for this reason be prevented from succeeding to the estate of her father if he dies intestate. She must, however, account to her brothers, who remained under the control of their father, for the dowry which she received." (Scott *The Civil Law*).

³³ D 18 4 1: "The sale of the inheritance of a living person is a nullity because the thing sold is not in existence." (Mommsen en Krueger *The Digest of Justinian*); D 18 4 7: "When someone sells an inheritance, there must in fact be an inheritance for a sale to exist; for this is not the purchase of a chance as in hunting and the like; it is the sale of an existing thing, and if the thing does not exist, there is no sale, and the price, if paid, can be recovered by *condictio*." (Mommsen en Krueger *The Digest of Justinian*).

³⁴ D 28 6 2 2: "Sometimes the instituted heir must be compelled to accept the inheritance for the sake of the will of the *impubes* also, so that a *fideicommissum* under the *secundae tabulae* is validated, as, say, where the *pupillus* has already died; but if he is still alive, Julian thinks that someone who is concerned about the inheritance of a living man is wicked." (Mommsen en Krueger *The Digest of Justinian*).

³⁵ D 35 2 15 1: "A brother, appointing as heiress his sister, provided that a third person should stipulate from his intended beneficiary that she would not invoke the *lex Falcidia* [against him] and that should she do so, she should pay a specified sum. It is established that statutes of general application cannot be flouted by private arrangements; the sister will thus have her right of retention under the general law, and no action under the stipulation will be granted." (Mommsen en Krueger *The Digest of Justinian*).

³⁶ D 36 1 18 (17) pr: "In one case the question arose whether a man may be asked by *fideicommissum* to institute someone his heir. The senate resolved that no one may be asked to make someone his heir, but that by this form of words the testator is to be taken to have asked his heir to restore his own inheritance to him, that is, that he should restore him whatever he had acquired from the inheritance." (Mommsen en Krueger *The Digest of Justinian*).

³⁷ (1647-1713) *Commentarius ad Pandectas* 2 4 16.

³⁸ C 2 3 30. (Scott *The Civil Law*).

arrangements should be made concerning the same; or if any of said persons should receive any particular benefit from the estate, certain provisions were to be carried out; and a doubt arose whether agreements of this kind should be observed.

The difficulty arises from the fact that the agreements had been entered into while the owner of the estate was still alive, because agreements of this kind are not based upon the fact that the parties are, under all circumstances, certain to receive the estate, but are dependent upon two conditions; namely, that the owner of the same should die, and that those who made such an agreement should be called to the succession.

All contracts of this kind, however, seem to Us to be abominable, and capable of producing the saddest and most dangerous effects; for why should any persons make an agreement concerning the property of a person who is still living and not be aware of what they have done? Therefore in accordance with the rules of the ancients, We order that agreements of this kind, which are entered into against good morals, shall be absolutely void, and that nothing in them shall be observed, unless the person with reference to whose estate the agreement was made gives his consent, and from that time to the end of his life remains of the same kind. For, under these circumstances, all untimely expectations having been removed, it will be lawful for the agreements to be carried out, as the owner of the property is aware of, and consents to them.

This rule was not unknown to former laws and constitutions, but it has been presented by Us in a clearer manner. For We order that neither donations of such property nor hypothecations of the same shall be permitted under any circumstances whatsoever, that no one shall make a contract for this purpose; and also that after Our reign, it shall not be permissible for anything to be done or contracted for with reference to the estate of another, without his consent."

Dit is duidelik dat 'n ooreenkoms tussen twee persone betreffende die beskikking oor 'n erfenis wat in die toekoms aan hulle sal toekom, afgekeur word omdat dit as strydig met die goeie sedes beskou is. Goedkeuring word wel verleen in die geval waar die persoon oor wie se erfenis die ooreenkoms aangegaan word, sy goedkeuring tot die aangaan van die ooreenkoms verleen. Gevolglik is dit duidelik dat die Romeine, benewens reeds genoemde uitsonderings, 'n verbod op die *pactum successorium* geplaas het.

3. Die regsposisie in die Romeins-Hollandse reg

Die algemene verbod op die *pactum successorium* is stelselmatig uit die Romeinse reg in Wes-Europa oorgeneem.³⁹ Joubert⁴⁰ toon aan dat daar 'n belangrike

³⁹ Van Warmelo 1977 *THRHR* 191.

⁴⁰ 1961 *THRHR* 27 ev.

ontwikkeling onder die invloed van die Germaanse reg op die gebied van die *pactum successorium* plaasgevind het. 'n Egpaar is toegelaat om deur middel van hulle huweliksvoorwaardeskontrak bindende erfooreenkomste ten opsigte van hulle onderskeie vermoëns te maak. Met verwysing na die Romeinse reg kom Voet⁴¹ tot die gevolgtrekking dat alle *pacta successoria*, uitgesonder dié in huweliksvoorwaardeskontrakte, ongeldig is.⁴² Hy verklaar dat dit ongeldig is omdat dit in die eerste plek 'n begeerte na die dood van die erflater kan laat ontstaan en in die tweede plek die erflater hom sy testeervryheid kan ontnem of beperk.

De Groot⁴³ verwys in die algemeen na die *pactum successorium* en verklaar kripties dat:

“Men mag oock gheen verbintenissen maecken om een deel te hebben in een gedinge, nochte over de erfenisse eens levende mensch, uitghenomen de verkiezing van land-recht by huwelicksche voorwaerden.”

Van der Keessel⁴⁴ bespreek ook net kortliks die *pactum successorium* en verklaar dat 'n *pactum successorium* in 'n huweliksvoorwaardekontrak geldig, maar

⁴¹ (1647-1713) *Commentarius ad Pandectas* 2 4 16: "...The same applies to agreements framed in regard to the future succession to a definite third party who is still alive, on the ground that they involve a longing for the contrivance of his death and are fraught with most gloomy and hazardous possibilities; and that they destroy the power of testation, or at least involve a base hastening and anxiety over the inheritance from another. ... nevertheless if, when an agreement has been made between two parties as to the succession to a third, the third party is proved to have consented to it, and has not later on changed his desire, then probably the covenant between the parties agreeing will hold good. ... It may be that nowadays there so far appears to have been a departure everywhere from the well-known provision of Roman law to the extent that in dotal agreements terms are rightfully made as to the future succession of the spouses to each other, as also of the spouses to the property of a third party or of a third party to that of the spouses, as I shall say more fully in the title cited below. ...".

⁴² Hierdie uitsondering kom steeds in die Suid-Afrikaanse reg voor, alhoewel die houe soms die beginsels verkeerd toepas, soos uitgewys deur Rautenbach en Van der Linde "Requirements for a Valid *Pactum Successorium* in an Antenuptial Contract: The Curious Case of *Radebe v Sosibo* [2011] ZAGPJHC 17"

⁴³ De Groot *Inleidinge tot de Hollandsche Rechts-Geleerdheid* (met aantekeninge van Fockema Andreae) deel 1 (1895) 3 1 41.

⁴⁴ Van der Keessel *Select Theses on the Laws of Holland and Zeeland, being a commentary on Hugo Grotius' Introduction to Dutch Jurisprudence* vertaling deur Lorenz (Leyden 1800) 235: "The succession to the property of both or either of the parties may also be defined by antenuptial contract, (as established by the testimony of two occasions of a great number of witnesses, and admitted in the Political Ordinance); in which case the succession will be conventional, and cannot be revoked at the will of one party, and is to be preferred not only to the legitimate but also to testamentary succession; though at the same time a testamentary disposition, revocable at the will of the disposing party, may also be made in an antenuptial contract."

andersins ongeldig is ingevolge die Romeinse reg.⁴⁵ Vinnius⁴⁶ baseer sy standpunt met betrekking tot die *pactum successorium* ook op die Romeinse reg. Hy dui aan dat die *pactum successorium* nie ingevolge die *jus gentium* en die *jus naturale* as skandelik beskou is nie, maar dat die verbod op die *pactum successorium* ontstaan het uit die Romeinse reg op grond van Romeinse idees en gewoontes. Hy wys dan ook daarop dat *pacta successoria* in huweliksvoorwaardekontrakte, anders as in die Romeinse reg, wel in die Romeins-Hollandse reg toelaatbaar is.

Dit is duidelik volgens Joubert,⁴⁷ verwysende na die standpunte van die Romeins-Hollandse regsgeleerdes, dat die verbod op die *pactum successorium* uit die Romeinse reg in die Romeins-Hollandse reg oorgeneem is. Die grondslag van die verbod is steeds dat dit *contra bonos mores* is en dat dit die erflater sy testeervryheid ontnem of beperk. 'n Belangrike uitsondering het egter op die verbod teen die *pactum successorium* ontwikkel, naamlik dat dit as geldig beskou word waar dit vervat is in 'n huweliksvoorwaardeskontrak.

III MODERNE SUID-AFRIKAANSE REG

Aangesien die Suid-Afrikaanse reg sy bestaan aan die Romeinse en Romeins-Hollandse reg te danke het, is dit te verstane dat daar dieselfde mate van afkeer in ons reg teenoor die *pactum successorium* bestaan. Daarbenewens het bykomende redes vir die behoud van die verbod in die moderne Suid-Afrikaanse reg ontwikkel.⁴⁸ Een van die vernaamste redes wat aangevoer word, is dat dit die testamentêre erfopvolgingsreg kan ondermyn deurdat 'n formele testament nie meer nodig sal wees indien persone erfooreenkomste kan beding nie. Daarbenewens kan 'n *pactum successorium* die bepalinge van die Boedelbelastingwet⁴⁹ en Boedelwet⁵⁰ omseil en kan houe probleme ondervind met die vasstelling van die inhoud van 'n mondelinge

⁴⁵ Van der Keessel *Select Theses on the Laws of Holland and Zeeland* 479: "Although a stipulation or agreement concerning succession to the property of a living person, may be validly entered into in an antenuptial contract, as we have already laid down; yet Grotius, following the reason of our law, which is in favour of free disposition by will, has not admitted the other successory pacts which are illegal under the Roman Law."

⁴⁶ Vinnius *A Tractatus de Pactis* vertaling deur du Plessis (1985) hoofstuk 19.

⁴⁷ 1962 *THRHR* 46 ev.

⁴⁸ Hutchison "Isolating the *Pactum Successorium*" 1983 *SALJ* 221 – 239 by 222.

⁴⁹ 45 van 1960.

⁵⁰ 66 van 1965.

ooreenkoms omdat die erflater nie meer beskikbaar is om oor die inhoud van die ooreenkoms te getuig nie.

'n Teenoorgestelde siening is dat daar geen behoefte meer aan die verbod in die moderne Suid-Afrikaanse reg is nie en dat die uitgangspunt eerder die *bona fides* van die partye moet wees.⁵¹ Die vraag wat ons ons ten slotte moet afvra, is of die historiese gronde vir die verbod teen die *pactum successorium* inderdaad voldoende is om die voortbestaan van die verbod te regverdig.

IV GEVOLGTREKKING EN AANBEVELINGS

Soos reeds aangedui, is die *pactum successorium* in wese 'n ooreenkoms waar 'n erflater hom *inter vivos* daartoe verbind om 'n voordeel aan 'n ander *mortis causa* te laat toekom. Dit bevat die volgende eienskappe: die begunstigde verkry eers *mortis causa*-regte op bates van die erflater; en die erflater kan nie die ooreenkoms gedurende sy lewe eensydig herroep nie. Hierdie eienskappe van die *pactum successorium* het tot gevolg dat die testeervryheid van die erflater beperk word. Aangesien die beginsel van testeervryheid een van die hoekstene van die Suid-Afrikaanse erfreg is, word in die algemeen aanvaar dat die vernaamste rede vir die verbod teen die *pactum successorium* juis is omdat dit die testeervryheid van die erflater beperk.

Hierdie beswaar teen die *pactum successorium* het histories uit die Romeinse reg, wat slegs twee vorme van erfopvolging geken het, ontwikkel, naamlik *successio ab intestato* en *successio ex testamento*. Die *pactum successorium* is met agterdog bejeën omdat dit die potensiaal gehad het om die lewe van die erflater in gevaar te stel en omdat dit die testeervryheid van die erflater in gevaar gestel het. Die verbod op erfopvolging kragtens ooreenkoms is feitlik net so in die Romeins-Hollandse reg oorgeneem, maar gades kon by wyse van uitsondering met hulle huweliksvoorwaardeskontrak bindend oor die vererwing van hulle bates beskik.

⁵¹ Wessels *The Law of Contract in South Africa* (1937) 403.

Dit is interessant om daarop te let dat die *pactum successorium*, alhoewel dit sy Latynse baadjie uitgetrek het, steeds in die Nederlandse *Burgerlijk Wetboek* verbied word. Wetboek 4 artikel 4 bepaal soos volg:

- “1 Een voor het openvallen van een nalatenschap verrichte rechtshandeling is nietig, voor zover zij de strekking heeft een persoon te belemmeren in zijn vrijheid om bevoegdheden uit te oefenen, welke hem krachtens dit Boek met betrekking tot die nalatenschap toekomen.
- 2 Overeenkomsten strekkende tot beschikking over nog niet opengevallen nalatenschappen in hun geheel of over een evenredig deel daarvan, zijn nietig.”

Sonder om indringend daarop in te gaan, wil dit voorkom of die verbod op die *pactum successorium* effe verslap is. Artikel 4 verbied ooreenkomste wat handel oor 'n eweredige deel of 'n algehele bemaking waar die toekomstige erfgenaam een van die partye tot die ooreenkoms is. Indien 'n party tot die ooreenkoms nie 'n erfgenaam is nie, blyk die ooreenkoms toelaatbaar te wees. Die beginsel bly egter in wese dieselfde; indien 'n ooreenkoms erfgevolge tussen 'n erflater en 'n erfgenaam reël, is sodanige ooreenkoms nietig.

Die wenslikheid van die behoud van die verbod op alle *pacta successoria* in die moderne Suid-Afrikaanse reg is reeds verskeie kere bevraagteken,⁵² maar die heroorweging van die verbod op die *pactum successorium* is nie hoog op die agenda van die regshervormers in Suid-Afrika nie. Tog duik daar sporadies gevalle in die regspraak op wat daarop dui dat so 'n behoefte wel bestaan.

Heelwat besware kan teen die huidige posisie met betrekking tot die *pactum successorium* in die Suid-Afrikaanse reg geopper word. In die gemenerereg is die *pactum successorium* verbied omdat daar geglo is dat dit onder andere die lewe van die erflater in gevaar kan stel. Volgens Wessels⁵³ gaan hierdie argument nie werklik op nie: dieselfde argument kan immers geopper word in die geval van lewensversekering waar 'n derde as begunstigde aangedui is en by die testate erfreg in die algemeen waar erfgename benoem word. Daar word redelik algemeen aanvaar dat

⁵² Sien byvoorbeeld Rautenbach "Die *Pactum Successorium*: Stiefkind van die Suid-Afrikaanse Reg" 1999 *Koers* 357 – 377.

⁵³ *The Law of Contract* 133.

hierdie rede vir die verbod op *pacta successoria* verval het.⁵⁴ In die tweede plek is die *pactum successorium* in die gemenereg verbied omdat dit die testeervryheid van die erflater beperk het. Hierdie beswaar is die hoofrede waarom die *pactum successorium* in die moderne Suid-Afrikaanse reg verbied word. Deur 'n verbod te plaas op die *pactum successorium* word daar ook op 'n ander vryheid inbreuk gemaak, naamlik kontrakteervryheid. Testeervryheid en kontrakteervryheid is albei gebaseer op private besit en privaat outonomie en albei vryhede is belangrike beginsels in 'n kapitalistiese bestel. Die vraag ontstaan gevolglik of dit houdbaar is om een vryheid, naamlik testeervryheid, te beskerm ten koste van 'n ander vryheid, naamlik kontrakteervryheid. Behoort 'n persoon nie 'n vrye keuse te hê om self te besluit watter een van die twee vryhede vir hom die swaarste weeg nie? Deur 'n testateur deur middel van die beletsel teen die *pactum successorium* te verhinder om sy kontrakteervryheid te beoefen, lyk na 'n anachronisme, en onnodige spanning word geskep tussen die twee vryhede, waaroor die testateur self 'n keuse behoort te kan uitoefen. Volgens Hutchison⁵⁵ het die tyd aangebreek om die beginsel van testeervryheid in heroorweging te neem. Hy verklaar soos volg:

“Our law takes that principle further than any other Western legal system - further, by far, than Roman law took it. The hardship which is thereby caused to the unjustly disinherited or 'forgotten' widow is well known. In regard to *pacta successoria*, our devotion to the principle is all the more strange in view of the obvious conflict with the principle of freedom of contract.”

Hutchison⁵⁶ voer verder aan dat die reg onnodig tegnies en gekompliseerd geword het in 'n poging om testeervryheid sy belangrike plek in die Suid-Afrikaanse erfreg te laat inneem. Alhoewel die aspek nie in hierdie bydrae aangeraak is nie, het die houe byvoorbeeld verskeie maatstawwe ontwikkel wat hulle gebruik om die *pactum successorium* van ander soortgelyke, maar geldige ooreenkomste, te onderskei.⁵⁷ Aanwending van hierdie maatstawwe het nie sonder probleme geskied nie en heelwat regsonsekerheid bestaan in dié verband. Sommige regters het van

⁵⁴ *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk* 1976 3 SA 488 (A) 501H.

⁵⁵ 1983 SALJ 239.

⁵⁶ 1983 SALJ 238.

⁵⁷ Sien Rautenbach 1999 *Koers* 368-373.

hierdie verwarring benut om 'n "twyfelagtige" ooreenkoms geldig te verklaar in 'n poging om die "verontregte" kontraksparty te help.⁵⁸

Die tegniese aard van die reg skep soms kunsmatige situasies.⁵⁹ Daar is byvoorbeeld gevalle waar die inhoud van die ooreenkoms regstegnies geldig is, maar wat nogtans erfopvolging by die dood van die erflater reguleer. 'n Voorbeeld van só 'n geval word deur Hutchison⁶⁰ genoem, naamlik waar 'n trust-oprigter by 'n *inter vivos*-trust 'n trustee aanstel wat reghebbende word van sekere vermoënsbestanddele. Selfs al vestig die regte in die eiendom eers na die oprigter se dood in die bevoordeeldes, is dit tegnies nie 'n *pactum successorium* nie, want die oprigter vervreem reeds *inter vivos* die vermoënsbestanddele aan die trustee. Dit kan egter nie ontken word nie dat dié trustooreenkoms gebruik word om erfopvolging te bewerkstellig.

Die wete dat alle *pacta successoria* verbode is, is stremmend in op die handelsverkeer. Daar bestaan duidelik behoefte daaraan in die moderne Suid-Afrikaanse reg om erfopvolging in sommige gevalle kontraktueel te reël. Voorbeelde waar daar so 'n behoefte bestaan, is in die geval van kommersiële ooreenkomste soos pensioenskemas, lewensversekeringspolisse,⁶¹ vennootskapsooreenkomste,⁶² trusts, asook staatseffekte en effeketrusts.⁶³ Dit is hoofsaaklik ooreenkomste en regsfigure wat nie verband hou met die inhoud van 'n testament nie, maar nogtans 'n party tot die bemaking van sy eiendom *mortis causa* verbind. Die gevaar bestaan dat sulke ooreenkomste as verbode *pacta successoria* verklaar kan word indien die beginsels met betrekking tot die *pactum successorium* konsekwent toegepas word.

Daar is geen dwingende rede waarom die regshistoriese verbod op die *pactum successorium* slaafs nagevolg moet word nie. Die beginsel van testeervryheid in

⁵⁸ Sien bv *Costain and Partners v Godden* 1960 4 SA 456 (SR); *D' Angelo v Bona* 1976 1 SA 463 (A); *Erasmus v Havenga* 1979 3 SA 1253 (T) en 4.4.2. Sien ook *Jubelius v Griesel* 1988 2 SA 610 (K) waar die hof op 'n kunsmatige wyse te werk gegaan het om die ooreenkoms vry te maak van die stigma van 'n *pactum successorium* in 'n poging om die kontrakspartye daaraan gebonde te hou.

⁵⁹ Hutchison 1983 SALJ 238.

⁶⁰ Hutchison 1983 SALJ 238.

⁶¹ In *Borman en De Vos v Potgietersrusse Tabakkorporasie Bpk* 1997 1 SA 736 (A) het die hof wel bevind dat lewensversekeringspolisse nie ongeldige *pacta successoria* is nie, deur te bevind dat die premies wat betaal word nie in die boedel van die oorledene val nie.

⁶² Alhoewel die regspraak tot op hede bevind het dat sodanige ooreenkomste nie ongeldige *pacta successoria* is nie, bestaan die gevaar tog dat toekomstige howe tot 'n ander gevolgtrekking kan kom. Sien die bespreking van Rautenbach "Die Praktiese Implikasies van die Verbod op die Pactum Successorium met betrekking tot Vennootskapsooreenkomste" 1995 *De Jure* 98-112.

⁶³ Hierdie probleem is ook uitgelig deur Keetse "Is Our Law on Beneficiary Nominations and *Pacta Successoria* outdated?" Sept 2004 *Insurance and Tax* 3-8 en Sonnekus "Staatseffekte, *Pactum Successorium* en Onverwagte Implikasies" 2012 *TSAR* 130-148.

hierdie konteks behoort in herooring geneem te word. Soos reeds aangedui, behoort 'n erflater self 'n keuse te kan maak tussen testeervryheid en kontrakteervryheid. Benewens die enkele bestaande beperkings op die testeervryheid van die erflater behoort die reg dus ook voorsiening te maak vir 'n beperking soos die *pactum successorium*. In die Engelse⁶⁴ en Duitse reg⁶⁵ word 'n hoë premie geplaas op die testeervryheid van die erflater, maar by wyse van uitsondering kan die erflater se testeervryheid beperk word deur middel van 'n onherroeplike ooreenkoms wat dieselfde kenmerke vertoon as die *pactum successorium* in die Suid-Afrikaanse reg. Indien aanvaar word dat daar wel op die testeervryheid van die erflater inbreuk gemaak kan word deur middel van die *pactum successorium*, is die volgende vraag wat aandag moet geniet wat die inhoud of trefwydte van so 'n ooreenkoms moet wees. In die Engelse reg is daar byvoorbeeld geen formele vereistes vir die sluit van 'n "successory agreement" nie, en die vereistes is dieselfde as vir 'n gewone ooreenkoms. In die Suid-Afrikaanse beslissing, *Berman v Winrow*,⁶⁶ het die applikant beweer dat haar aanneemouers met haar 'n mondelinge ooreenkoms in Engeland gesluit het waarvolgens hulle die applikant as hulle enigste erfgenaam sou benoem. Na die dood van haar vader het die applikant se moeder die ooreenkoms mondeling bevestig en ook 'n testament opgestel waarin sy applikant as enigste erfgenaam benoem het. Intussen het die applikant en haar moeder na Suid-Afrika verhuis en hulle hier kom vestig. Haar moeder tree met die respondent in die huwelik en sy stel 'n nuwe testament op waarin sy die respondent as enigste erfgenaam benoem. Na haar moeder se dood doen applikant aansoek om 'n interdik om te verhinder dat die respondent die nagelate bates opeis voor afhandeling van die geding waarin sy spesifieke nakoming en alternatiewelik skadevergoeding eis. Die hof beslis dat die "proper law" die Engelse reg is. Hy bevestig verder die posisie in die Engelse reg, naamlik dat 'n erflater hom deur middel van 'n ooreenkoms kan verbind tot die inhoud van sy testament en beslis dat so 'n "successory agreement" nie volgens die Suid-Afrikaanse reg ongeldig of *contra bonos mores* is nie en dat dit dus in die Suid-Afrikaanse reg afdwingbaar is, en staan gevolglik die applikant se eis toe. Dit blyk

⁶⁴ Vir 'n oorsigtelike bespreking van die posisie in die Engelse reg, sien Rautenbach *Die Pactum Successorium in die Suid-Afrikaanse Reg* hoofstuk 5.

⁶⁵ Vir 'n oorsigtelike bespreking van die posisie van die "Erbvertrag" in die Duitse reg, sien Rautenbach "Die *Pactum Successorium* in die Duitse Reg" 1997 *THRHR* 131-136.

⁶⁶ 1943 TPD 213.

dus dat die howe bereid is om *pacta successoria* wat in vreemde regstelsels gesluit is, te erken, maar nie indien dit in Suid-Afrika gesluit word nie.

In die Duitse reg veroorloof die *Bürgerliches Gesetzbuch* (BGB) inderdaad ook die sluit van 'n erfooreenkoms wat vergelykbaar is met die *pactum successorium*. Artikel 1941 van die BGB bepaal soos volg:

- “(1) Der Erblasser kann durch Vertrag einen Erben einsetzen sowie Vermächtnisse und Auflagen anordnen (Erbvertrag).
- (2) Als Erbe (Vertragserbe) oder als Vermächtnisnehmer kann sowohl der andere Vertragsschließende als ein Dritter bedacht werden.”

Die erfooreenkoms in die Duitse reg is 'n onherroeplike ooreenkoms wat die testeervryheid van die erflater kan beperk. Anders as in die Engelse reg word wel formele vereistes gestel vir die sluit van 'n erfooreenkoms. Die belangrikste vereiste is dat die erfooreenkoms op skrif gestel en notarieel voor 'n notaris verly moet word. Hierdie vereiste hou sekere voordele vir die kontraksparty in, naamlik: regsekerheid ten opsigte van die bestaan en inhoud van só 'n ooreenkoms; die uitsluiting of vermindering van vervalsing of bedrog; skep van sekerheid van die handelingsbevoegdheid van die kontraksparty; en uitskakeling van bewysregtelike probleme. Omdat die ooreenkoms formeel skriftelik gesluit word, is die beswaar dat die testamentêre erfreg ondermyn sal word deur die sluiting van informele ooreenkomste, nie meer geldig nie.

Daar word gevolglik aan die hand gedoen dat die verbod teen die *pactum successorium* in heroorweging geneem behoort te word. Weimar⁶⁷ verklaar soos volg:

“Are the ... South African prohibitions on succession pacts still necessary? We seem never to have considered it in this way. Where inheritance contracts are valid, especially in Germany and Switzerland, dispositions in contemplation of death lost its mystique; it is favoured and has proven very helpful.”

Benewens die historiese redes soos kortliks hierin aangetoon, is daar geen ander dwingende rede (wat nie deur goed deurdagte maatreëls ondervang kan word nie) vir

⁶⁷"Inheritance Contracts and Public Policy" 1994 *TSAR* 797.

die voortbestaan van die verbod op die *pactum successorium* nie, en het die tyd aangebreek dat ons die gebruik daarvan heroorweeg.

*DOES THE AEDILICIAN EDICT CONSTITUTE GOOD AND FAIR LAW?** **

RENA VAN DEN BERGH†

Professor in Law, School of Law, University of South Africa

I INTRODUCTION

In this article attention I shall focus on the contract of sale, and more specifically on the sale of slaves, in order to determine whether the curule aediles' edict may be regarded as 'good and fair' law. First, various Latin words and concepts closely linked to Celsus' definition of the law will be discussed briefly so as to shed more light on the meaning of this definition. Secondly, the evolution of the contract of sale, a consensual contract, will be examined. Then the development of the seller's warranty against hidden or latent defects will be examined, with special emphasis on the edict of the curule aediles.

II THE LAW IS THAT WHICH IS GOOD AND FAIR

A few Latin words and concepts are closely linked to Celsus' definition of the law as quoted by Ulpian in the first book of the *Digest*, namely that 'the law is the art of goodness and fairness'.¹ The first of these is 'aequitas', which is related to justice (iustitia, iustum)² and is a basic principle that should guide the development of the law in order to create ius aequum (fair or equitable law). Aequitas implies the element of equality, and in law this suggests equal treatment of all. It stems from all human societies and is based on their customs as well as their social and

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** This article is dedicated to my good friend and colleague, Professor Eltjo Schrage.

† BA BA (Hons) MA LLB LLD (University of South Africa).

¹ *Digest* 1 1 1pr: *Ulpianus libro primo institutionum*: 'ius est ars boni et aequi.' All quotations and translations from the *Digest* are from *The Digest of Justinian* by Theodor Mommsen, Paul Krueger & Alan Watson (eds). See also Adolf Berger *Transactions of the American Philosophical Society: Encyclopedic Dictionary of Roman Law* (repr 1991) sv 'Ius est ars boni et aequi' at 528.

² Berger op cit note 1 sv 'Aequitas (aequum)' at 354.

ethical concepts that may develop into law by custom or be embodied in legislation. Aequitas played an important role in the development of Roman law: as outdated legal norms proved unable to deal with changed social and economic circumstances, the jurists started to apply this principle, which influenced many legal decisions after the end of the Republic.

Legal maxims closely linked to it are, for example, ‘aequitas factum habet, quod fieri oportuit’ (equity considers that which must be done as done); ‘aequitas sequitur legem’ (equity follows the law); ‘aequitas praefertur rigori’ (equity is preferred to inflexibility); and ‘jus respicit aequitatem’ (the law considers equity). Other expressions relevant to this theme are ‘bonum et aequum’ (good and fair), which also appears in Celsus’ definition of the law mentioned above; ‘aequum et bonum est lex legum’ (that which is fair and good is the highest law); and ‘ex aequo et bono’ (in accordance with fairness and goodness).³

‘Ius’ in Roman legal language has various meanings. The term, in its widest sense, includes the whole of the law deriving from different sources. It is this ‘ius’ which is defined by Celsus.⁴ His definition does not differ much from that of Paul who describes it as something that is ‘always fair and good’ (semper aequum ac bonum).⁵

According to Lee these definitions of justice may be regarded as definitions of moral virtue. Moral standards, however, do not form part of legal systems. When a legal standard is applied, ‘justice’ indicates right or wrong as determined by the law of the country. Ulpian’s assertion that the basic principles of the ius are ‘to live honorably, not to harm any other person, to render to each his own’⁶ is, therefore, too wide because it includes other issues (morality and religion) in the definition of law.⁷

In the Roman world ‘fides’ was defined as keeping one’s word (fit quod dicitur).⁸ Fidelity was a guiding principle of life to the Romans. That they occasionally failed to keep

³ Ibid at 377.

⁴ See above.

⁵ *Digest* 1 1 1: *Paulus libro quarto decimo ad Sabinum*.

⁶ *Digest* 1 1 10 1: *Ulpianus libro primo regularum*: ‘Iuris praecepta sunt haec: honeste uiuere, alterum non laedere, suum cuique tribuere.’

⁷ RW Lee *The Elements of Roman Law with a Translation of the Institutes of Justinian* 4 ed (1956) at 34.

⁸ See Cicero *De officiis* 1 23: ‘Fundamentum autem est iustitiae fides, id est dictorum conventorumque constantia et veritas’; Cicero *De re publica* 4 7: ‘Fides enim nomen ipsum mihi videtur habere, cum fit, quod dicitur’ ([C]redit seems to me to get its very name from the fact that what is promised is performed’); Valerius Maximus *Memorabilium* 6 6: ‘Cuius imagine ante oculos posita uenerabile fidei numen dexteram suam, certissimum salutis humanae pignus, ostendit. quam semper in nostra ciuitate uiguisse et omnes gentes senserunt et nos paucis exemplis recognoscimus.’ See, further, sv ‘Fides – Recht’ in Hubert Cancik & Helmuth Schneider (eds) *Der neue Pauly. Enzyklopädie der Antike* vol 4 (1998) 507–9; sv ‘fides’ E Fraenkel in *Thesaurus Linguae Latinae* vol 6-1 at 661ff.

agreements did not detract from the validity of the maxim.⁹ Fidelity and honesty are so closely linked that the expression *bona fides* came to encompass honesty.¹⁰ Eventually a person who guaranteed *bona fides* no longer only undertook to keep his word, but also to act in an honest way, to keep faith and to act in a way conforming to custom.

As far as legal sources were concerned, the Roman principle of fidelity gave rise to two important rules: (1) the issuing magistrate was bound by his edicts, and (2) no legal rule could have retroactive force. Initially the magistrate was not bound by his own edict, but eventually *fides* came to require that he be bound by what he had promised, and on which others relied. The denial of the retroactivity of any legal rule is therefore a fundamental principle of *fides*. There must be certainty about legal rules and the creator of a rule must keep his word: people must be able to rely on the rule as it is and the consequences of legal actions must be foreseeable.¹¹

Even before the time of Cicero non-legal writers generally distinguished between law (*leges* or *ius*) and equity (*bonum atque aequum*). What is incongruous about the assertion by Celsus that law (*ius*) is the art of the good and the fair (*ars boni et aequi*) is that the concept of *bonum et aequum* is regularly shown to be different from the concept of law.¹²

What is equity in Roman law? It is obvious that in doing justice to one person, the law may occasionally fail to do justice to another. The legal system might then attempt to ensure fairness and impartiality (equity) by amending the law and modifying its impact in certain situations that might be regarded as unfair and unjust.¹³ It should be noted that equity is never mentioned in any discussion of the sources of the law and was not recognised as a formal source of law.

The concept of ‘*aequitas*’ is found throughout the development of Roman law. According to Humbert it was used as a means of criticism, and was often championed ‘against the *lex*, the *ius civile* and the *ius scriptum*’.¹⁴ It is through this very conflict between *aequitas* and the *ius civile* that Roman law evolved into a ‘perfect’ legal system.¹⁵ The praetor and the jurists were

⁹ Fritz Schulz *Principles of Roman Law* (tr Marguerite Wolff) (1936) at 223–4.

¹⁰ *Ibid* at 228.

¹¹ *Ibid* at 230. See Cicero *In Verrem* 2 1 42 108: ‘De iure civile si quis novi quid instituerit, is non omnia quae ante acta sunt rata esse patietur?’

¹² See Alan Watson ‘Equity in the time of Cicero’ in Alfredo Mordechai Rabello (ed) *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997) 23 at 26.

¹³ *Ibid* at 24.

¹⁴ Michel Humbert ‘The concept of equity in the *Corpus Iuris Civilis* and its interpretation by Pothier’ in Alfredo Mordechai Rabello (ed) *Aequitas and Equity: Equity in Civil Law and Mixed Jurisdictions* (1997) 29 at 30.

¹⁵ *Ibid*

crucial factors in this development: they criticised the *ius civile* and promoted *aequitas*,¹⁶ thus contributing to the gradual transformation of the rigid *ius civile*. Humbert attributes the supremacy of the edict (*ius honorarium*) solely to *aequitas*. There was a fundamental difference between the two legal systems: whilst the civil law was strict and rigid, the *ius honorarium* was more just and flexible. The magistrates therefore tempered the strict civil law by making it more equitable.

Law was created when certain customs that the jurists utilised were partially codified by the Twelve Tables and subsequently amended by other statutes (*leges* or *plebiscita*).¹⁷ Informal acts were of fundamental importance because of the Romans' increasing commercial relations with foreigners. By the first century BC it was not only foreigners who could perform informal acts¹⁸ but also the Romans themselves, who had soon realised that such acts were more just and fair than those of the *ius civile*, and consequently demanded that the *ius gentium* should apply to them as well.¹⁹

The Roman lifestyle emphasised tradition so that the Romans' attitude to the law was rather conservative. Legal development was a slow and gradual process, because of the firm belief that the law could not function if there were no constant and lasting will to give to each his due.²⁰ Besides, the law does not derive from committed lawmakers only; the community must always co-operate in this process.²¹

Roman legal terminology generally reflects the Roman emphasis on clarity and comprehensibility.²² It appears that the language of the *senatus consulta* and of the praetorian edict was changed for the sake of simplicity and clarity, and the language of written legal works

¹⁶ Ibid at 30–3.

¹⁷ J P V D Balsdon (ed) *The Romans* (1965) at 108–9.

¹⁸ Ibid at 113.

¹⁹ It should be mentioned that the appeal of Roman law for the men who subsequently used the *Digest* did not have much to do with its inherent qualities. Other than canon, law almost all law was unwritten custom, whilst Roman law was written in books, which was what was needed during the twelfth century. It should, however, be remembered that if this written Roman law had been regarded as unjust or unfair, it would certainly not have been accepted or received (see Balsdon op cit note 17 at 118). Roman law was characterised by its rational character and freedom from relativity so that the law contained in the *Digest* was considered good law. The Romans had constructed a body of law based on common sense that could be accepted by different peoples at different stages of their development. Common sense may be defined as 'good sense and sound judgement in practical matters' (see the *Oxford Paperback Dictionary, Thesaurus and Wordpower Guide* (2001 at 168) and something regarded as common sense would usually be considered fair and just.

²⁰ Cf note 6 supra.

²¹ Schulz op cit note 9 at 85–6. See also Cato in Cicero *De re publica* 2 1 2: 'Is dicere ut omnia complecterentur sine rerum usu ac vetustate.'

²² Schulz op cit note 9 at 79.

up to approximately AD 284 reflects the Roman striving for ‘simplicity, uniformity and homogeneity’.²³

It is interesting to note what Cicero has to say about the dominant role of bona fides in the restructuring of Roman law. After briefly relating the facts of the case involving Tiberius Claudius Centumalus,²⁴ he states that the claim was not based on strict law but was conceived as a bonae fidei iudicium. The judge’s decision on the scope of the seller’s duties was therefore based on ‘quicquid sibi dare facere oporteret ex fide bona’.²⁵ In terms of good faith the buyer had to be informed of all defects of which the seller was aware.²⁶ A seller who knew of defects but withheld that information was liable for any loss suffered by the innocent buyer. At the time of judgement (approximately 100 BC) this action and its outcome were commonplace. The date of the emergence of the bonae fidei iudicia is, however, uncertain.²⁷ Cicero’s version of the case also shows that the jurisprudence of the late Republic still took into account the differences between the ius civile and the ius honorarium. In addition, he wished to ascertain how the ideal of a ‘vir bonus’, an honourable man who would not commit fraud so as to obtain an advantage, was affected by the jurists’ work.²⁸ The story was told with a purpose, namely to demonstrate the improvement effected by judicial acknowledgement of bona fides. Cicero also states that any measure deriving from the concept of bona fides becomes rigid and unfair itself unless it is continuously adjusted to the changing concepts of bona fides. As a philosopher (not a lawyer) he was less interested in the contracting parties’ bona fides than in the principle of bona fides, an expression of aequitas, which always had to be applied continuously so as to remedy the inequities of the summum ius.²⁹

²³ Ibid at 80.

²⁴ Cicero *De officiis* 3 66.

²⁵ Ibid.

²⁶ Cicero *De officiis* 3 67: ‘Ergo ad fidem bonam statuit pertinere notum esse emptori vitium, quod nosset venditor.’

²⁷ Martin Josef Schermaier ‘*Bona fides* in Roman contract law’ in Reinhard Zimmermann & Simon Whittaker *Good Faith in European Contract Law* (2000) 63 at 68.

²⁸ Cicero *De officiis* 3 61: ‘Ita, nec ut emat melius nec ut vendat, quicquam simulabit aut dissimulabit vir bonus.’

²⁹ Schermaier op cit note 27 at 70.

III THE CONTRACT OF SALE

The gradual emergence of the consensual contract was of great significance in the history of Roman commerce.³⁰ Previously sale had probably depended on an exchange of stipulations in which the seller promised to deliver the object of sale, while the buyer promised to pay the price. This had a number of drawbacks: it was very formal; ordinary terms (eg warranties of quality) had to be explained and formally promised in each individual contract; and the parties had to meet personally in order to conclude the contract. The development of the consensual contract of sale not later than the second century BC did away with all these impediments. The consensual contract may, therefore, be regarded as an impressive achievement of republican jurisprudence, stemming from the *fides Romana*.³¹

Consensual contracts were concluded by means of consent: no formalities were required.³² The agreement between the parties was the only basis of each party's obligations. According to Gaius 'the parties are reciprocally liable for what each is bound in *fairness and equity* to perform for the other'.³³ Celsus' definition of the law³⁴ links up with this statement, so that the law applicable in a contract of sale may be regarded as good and fair.

The Romans probably regarded sale as a contract of good faith (*bona fides*) from the outset, because the contracting parties were bound by their words as well as all obligations flowing from good faith.³⁵ This was almost certainly required, because people had gradually come to expect certain actions to be in good faith.³⁶ This created the expectation that the law as well as the actions of the parties concerned would (and should) be fair and just.³⁷ The formal acceptance of sale as a consensual contract conferred a legal remedy when one was required.³⁸

³⁰ Johnston *Roman Law in Context* (2003) at 79.

³¹ Schulz *Classical Roman Law* (1961) at 525.

³² Reinhard Zimmermann *The Law of Foundations. Roman Foundations of the Civilian Tradition* (1996) at 230.

³³ *Inst* 3 137: 'Item, in his contractibus alter alteri obligatur de ex quod alterum alteri et bono et aequo praestare oportet' (my emphasis). Texts and translations from Gaius are taken from Francis de Zulueta *The Institutes of Gaius* Part 1 (Text with critical notes and translation) (1969).

³⁴ See *supra* note 1.

³⁵ James Gordley 'The origins of sale: Some lessons from the Romans' (2010) 84 *Tulane Law Review* 1437 at 1438.

³⁶ *Ibid* at 1443.

³⁷ Schulz *op cit* note 31 at 525.

³⁸ Gordley *op cit* note 35 at 1450.

IV THE SELLER'S WARRANTY AGAINST LATENT DEFECTS

(a) *Early law*

The Romans did not recognise any liability where the buyer was aware of defects in the thing purchased, or when the defects were so obvious that he should have noticed them.³⁹ The aim of the aedilician edict was to protect the buyer against the seller's artifices and there was no need to grant him any remedy against patent defects even if undeclared, for they spoke for themselves.⁴⁰ Obvious defects were therefore assumed to have been accepted by the buyer and were not covered by express warranties; and the buyer could not sue for a defect that the seller had declared. Nor could the seller be forced to deliver a thing free of defects, since he was only expected to deliver the thing that he had contracted to sell to the buyer.

During the time of the Twelve Tables there was no warranty against hidden or latent defects and a seller concealing a defect would only be liable for *dolus*.⁴¹ Since this was difficult to prove there was no effective protection. Descriptions of the thing to be sold (*dicta promissave*) may have created difficulties when it had to be decided whether the seller's promises constituted *dolus*. Before the emergence of the consensual contract, and even when express agreements had no legal consequences prior to formalisation, Roman law did not consider this to be problematic.

At first there were two formal actions as far as *mancipatio* was concerned. The first in ancient law was the *actio de modo agri*.⁴² In terms of this action, if a certain size was ascribed to

³⁹ See *Digest* 18 1 43 1, *Florentinus libro octauo institutionum*: 'Quaedam etiam pollicitationes uenditorem non obligant, si ita in promptu res sit, ut eam emptor non ignorauerit' ('There are, further, some undertakings which do not bind the vendor, the case being such that the purchaser cannot be unaware of the facts'); *Digest* 21 1 48 4, *Pomponius libro uicesimo tertio ad Sabinum*. Further F de Zulueta *The Roman Law of Sale* (1966) at 46.

⁴⁰ *Digest* 21 1 48 3, *Pomponius libro uicesimo tertio ad Sabinum*: 'Ei, qui servum uinctum uendiderit, aedilicium edictum remitti aequum est: multo enim amplius est id facere, quam pronuntiare in uinculis fuisse' ('It is right that the aediles' edict should not affect a vendor who sells a fettered slave; this course is infinitely preferable to requiring him to proclaim that the slave has been in chains').

⁴¹ *Digest* 21 1 14 9, *Ulpianus libro primo ad edictum aedilium curulium*: 'Si uenditor nominatim exceperit de aliquo morbo et de cetero sanum esse dixerit aut promiserit, standum est eo quod conuenit ... nisi sciens uenditor morbum consulto reticuit: tunc enim dandum esse de dolo malo replicationem' ('If the vendor expressly exclude some disease and, for the rest, declare the slave healthy or give security in respect thereof ... the agreement made is to be observed ... unless the vendor, knowing of the disease, deliberately kept silent about it; in such a case, the defence of fraud will be available'); *Digest* 18 1 43 2, *Florentinus libro octauo institutionum*: 'Dolum malum a se abesse praestare uenditor debet, qui non tantum in eo est, qui fallendi causa obscure loquitur, sed etiam qui insidiosae obscure dissimulat' ('The vendor must guarantee that he is free of fraud, which comprises not merely the use of obscure language in order to deceive but also circumventing concealment'). See, further, W W Buckland *A Manual of Roman Private Law* (hereafter '*Manual*') (1939) at 284; W W Buckland *A Text-book of Roman Law from Augustus to Justinian* (hereafter '*Textbook*') 3 rev ed by P Stein (1963) at 491.

⁴² *Pauli Sententiae* 2 17 4: 'Distracto fundo si quis de modo mentiatur, in duplum eius, quod mentitus est, officio iudicis aestimatione facta conuenitur.' This text tells us about the *actio de modo agri* which probably constituted the

land during the mancipation and afterwards it was found to be smaller, the buyer could claim from the seller.⁴³ If, therefore, the seller had lied about the size of the land, the buyer could reclaim twice the value of the disparity.⁴⁴ The seller would be held liable for *dolus* and the *actio empti* could be instituted against him if the buyer could prove that he had been aware of the defect. This was, however, always difficult to establish. The second action was an *actio auctoritatis*. If land was described as *optimus maximus* when mancipated and it afterwards appeared to be encumbered with a servitude, the buyer could hold the seller liable in *duplum* by means of this action.⁴⁵

Early law made no provision for a general warranty against latent defects. To begin with, therefore, the buyer carried the risk of defects in the goods: *caveat emptor*.⁴⁶ Only if the seller had fraudulently concealed the presence of defects in the goods, would the buyer have a remedy, because this would be considered a breach of good faith. The *actio empti et venditi* (*quidquid dare facere oportet ex bona fide*) brought into issue any *dolus* with which either party could be charged in the transaction.⁴⁷ *Bona fides* were not static. The parties' conduct was subject to the ever changing conventions of the people, but this had the disadvantage of uncertainty and possible change.⁴⁸ Even in Cicero's time, in the early days of *bonae fidei* actions, it was accepted that it was in conflict with *bona fides* for a seller not to disclose a defect of which he alone was aware and which would probably have changed the buyer's mind had he known about it.⁴⁹

Roman buyers did, however, not rely solely on *bona fides*. They also demanded explicit warranties. This could be done, either by means of *dicta et promissa* included in the contract, or by following the custom of using special stipulations. These were strictly binding and strictly construed additional contracts, whose formulation and interpretation had been settled by

basis of Cicero's generalisations that the seller of land is liable in *duplum* for statements made in connection with the sale.

⁴³ Cf *Digest* 19 1 4 1, *Paulus libro quinto ad Sabinum*; *Pauli Sententiae* 2 17 4. See also De Zulueta op cit note 39 at 47.

⁴⁴ *Pauli Sententiae* 2 17 4. See, too, Otto Lenel *Das Edictum Perpetuum* 3 ed (1927) 194.

⁴⁵ Cf *Digest* 21 2 75, *Uenuleius libro sexto decimo stipulationum*; *Digest* 50 16 126, *Proculus libro sexto epistularum*; *Digest* 18 1 59, *Celsus libro octauo digestorum*.

⁴⁶ Johnston op cit note 30 at 81.

⁴⁷ De Zulueta op cit note 39 at 8.

⁴⁸ *Ibid* at 9.

⁴⁹ *De officiis* 3 16 65–7; Valerius Maximus 8 2 1; *Digest* 19 1 11, *Ulpianus libro trigesimo secundo ad edictum*; *Digest* 18 1 35 8, *Gaius libro decimo ad edictum provinciale*; *Digest* 18 6 9, *Gaius libro decimo ad edictum provinciale*; *Digest* 19 1 21 1, *Paulus libro trigesimo tertio ad edictum*.

tradition.⁵⁰ A purchaser who wished to protect himself against defects consequently had to resort to an express stipulation in terms of which the seller would guarantee that the object of the sale was free of defects, or indeed did have certain features. Stipulations were flexible and allowed for any undertaking to be made actionable.⁵¹ Obtaining such a stipulation was, however, dependent upon the parties' bargaining positions and the seller was often unwilling to commit himself.

One may consequently state that at the time of the enactment of the *curule aediles'* edict there was no general warranty against latent defects in the object of sale. Apart from cases in which the seller could be held liable for *dolus* and where the *actio empti* could be instituted, it is doubtful whether liability for defects in things sold could be based on any legal ground other than stipulation at the time of the edict's introduction.

During the last century of the Republic the notion of *dolus* was extended. Two kinds of case were affected by this extension: first the case where a seller was responsible where he had fraudulently failed to disclose a defect known to him,⁵² and secondly the case where a seller was liable in terms of the *actio empti* if he had expressly assured the buyer that the object of the sale was free of defects or that it had certain features.⁵³ In these cases the seller was held liable under the *actio empti* for *quod actoris interest*.⁵⁴ This was a general doctrine not confined to defects in the thing sold. By this time the *actio empti* had become available where the seller had acted contrary to good faith.⁵⁵ The seller would be held liable for *dolus* and the *actio empti* could be instituted against him if the buyer could prove that he had been aware of the defect. This was, however, usually difficult to establish.

⁵⁰ De Zulueta op cit note 39 at 9.

⁵¹ It is interesting that specific stipulations developed for certain common agricultural objects, but that as result of the great variety of cases no other general forms were established: See, for example, Varro *De re rustica* 2 2 6 (sheep), 2 3 5 (goats) and 2 5 11 (oxen).

⁵² See *Digest* 18 1 35 8, *Gaius libro decimo ad edictum prouinciale*; *Digest* 19 1 6 4, *Pomponius libro nono ad Sabinum*; *Digest* 19 1 13pr, *Ulpianus libro trigesimo secundo ad edictum*; *Digest* 18 1.

⁵³ *Digest* 19 1 6 4, *Pomponius libro nono ad Sabinum*. See further Zimmermann op cit note 32 at 309.

⁵⁴ *Digest* 19 1 13pr, *Ulpianus libro trigesimo secundo ad edictum*

⁵⁵ Zimmermann op cit note 32 at 308.

(b) *The aedilitian edict*

In 367 BC the curule aediles were elected by the tribal assembly.⁵⁶ They operated as a college and their main responsibility was the administration of the city. They kept the state archives, and supervised the streets, aqueducts, buildings, bridges and the public marketplace.⁵⁷ Their magisterial authority empowered the curule aediles to issue edicts for matters within their sphere of office⁵⁸ and their edicts, the content and scope of which varied widely, reflected the development of the law.⁵⁹ Like the praetors, they issued edicts at the outset of their terms and they too were, therefore, able to adapt the laws of the market place by means of creative interpretation, relying on the *ius honorarium*.⁶⁰ As formal public statements these edicts retained their validity for the whole period of office of the issuing magistrate⁶¹ and had authority wherever the magistrates did. According to Gaius the edict of the curule aediles was applicable in ‘the provinces of the Roman people’, where the quaestors had aedilician jurisdiction, but not in ‘the provinces of Caesar’, where nobody had it.⁶² As jurisdictional magistrates they made an important contribution to the development of the Roman law of sale.⁶³ They introduced many new claims unknown to the *ius civile*. Furthermore, they no longer applied antiquated rules, but adapted the *ius civile*, and by admitting new kinds of defences tempered the rigidity of the *ius civile*.⁶⁴ They consequently changed the law to meet the requirements of the times according to the principles of contractual good faith (*fides*) and equity (*aequitas*).

As stated, their most interesting and important function was the control of the marketplace where they exercised civil jurisdiction. For purposes of the development of the law of sale their edicts were extremely important. The aediles curules publicly displayed (*proponere*) the principles they intended following in the exercise of their jurisdiction on a whitewashed wooden tablet (*album*) in the market.

⁵⁶ See Wolfgang Kunkel *An Introduction to Roman Legal and Constitutional History* (tr by J M Kelly) 2 ed (1975) at 18; O F Robinson *The Sources of Roman Law. Problems and Methods for Ancient Historians* (1997) at 6.

⁵⁷ Russ VerSteeg *Law in the Ancient World* (2002) at 273, 275.

⁵⁸ Robinson op cit note 56 at 39.

⁵⁹ Kunkel op cit note 56 at 91.

⁶⁰ Robinson op cit note 56 at 275.

⁶¹ Kunkel op cit note 56 at 92.

⁶² *Inst* 1 6: ‘item in edictis aedilium curulium, quorum iurisdictionem in prouinciis populi Romani quaestores habent; nam in prouincias Caesaris omnino quaestores non mittuntur, et ob id hoc edictum in his prouinciis non proponitur.’

⁶³ Kunkel op cit note 56 at 91.

⁶⁴ *Ibid*.

The 'slave market' constituted a large part of ancient business,⁶⁵ and the principal mode of acquisition of slaves⁶⁶ was purchase from slave traders in the market.⁶⁷ As early as the Republican period the curule aediles took measures to control the sellers of slaves, and later of cattle, in the markets of Rome⁶⁸ where 'many shady characters' were operative.⁶⁹ These traders were known to be dishonest, and one had to be careful when dealing with them 'for this class of person is more concerned with making profit or with underhand dealing'.⁷⁰ According to Paul these slave-dealers, *uenaliciarii*, also banded together in companies so that they could protect themselves when customers complained about the quality of the goods (slaves).⁷¹ In view of the fact that slave dealers had such a bad reputation, the edict was originally restricted to the sale of slaves.⁷² The object of the curule aediles was to punish fraudulent sellers⁷³ and specifically the slave dealers and (later) sellers of certain livestock (*iumenta*⁷⁴). Slaves, however, occupied a special place and the edict on them, necessitated by the disreputable behaviour of the slave dealers, was therefore promulgated first.⁷⁵ The slave edict undoubtedly dates from Republican times, and indeed appears to have been operating as early as the first half of the second century

⁶⁵ Crook *Law and Life of Rome* (1967) 179.

⁶⁶ except for those born and reared in households.

⁶⁷ Crook op cit note 65 at 180.

⁶⁸ De Zulueta op cit note 39 at 50; Buckland 'Textbook' note 41 at 491.

⁶⁹ Crook op cit note 65 at 181.

⁷⁰ See *Digest* 21 1 44 1, *Paulus libro secundo ad edictum aedilium curulium*, 'nam id genus hominum ad lucrum potius uel turpiter faciendum pronius est'.

⁷¹ *Digest* 21 1 44 1, *Paulus libro secundo ad edictum aedilium curulium*: 'quia plerumque uenaliciarii ita societatem coeunt, ut quicquid agunt in commune uideantur agere.'

⁷² Aulus Gellius *Noctes Atticae* 4 2 1: 'In edicto aedilium curulium, qua parte de mancipiis uendundis cautum est, scriptum sic fuit: "Titulus servorum singulorum scriptus sit curato ita, ut intellegi recte posit, quid morbi vitiue cuque sit, quis fugitivus errove sit noxave solutus non sit".'

⁷³ *Digest* 21 1 1 2, *Ulpianus libro primo ad edictum aedilium curulium*: 'Causa huius edicti proponendi est, ut occurratur falaciis uendendum et emptoribus succurratur, quicumque decepti a uenditoribus fuerint' ('This edict was promulgated to check the wiles of vendors and to give relief to purchasers circumvented by their vendors'). In *Digest* 21 1 23 4 (*Ulpianus libro primo ad edictum aedilium curulium*) the aedilician actions are in fact called 'penal' ('quamuis enim poenales uideantur actiones').

⁷⁴ The edict concerning livestock was promulgated after that on slaves. See *Digest* 21 1 38pr, *Ulpianus libro secundo ad edictum aedilium curulium* for the edict on *iumenta*.

⁷⁵ *Digest* 21 2 37 2, *Ulpianus libro trigesimo secundo ad edictum*: 'per edictum autem curulium etiam de seruo cauere venditor iubetur' ('The vendor of a slave is also required to give the undertaking in respect of a slave under the edict of the curule aediles').

BC.⁷⁶ There is no independent evidence of the praetor's edict, although it seems to have survived in written form into Justinian's time.⁷⁷

The Roman law of warranty, therefore, developed in an unusual way: the aediles curules, whose jurisdiction extended to the markets, found it necessary to make regulations governing one important kind of sale, namely that of slaves by slave dealers, who were known to be generally dishonest and deceitful. Because the sellers were not or liable at civil law or their liability was difficult to establish or enforce, it is possible that dissatisfied customers who had no real remedies expressed their dissatisfaction to the aediles or even caused disturbances of the peace to draw attention to the problems they encountered.⁷⁸

The ordinary principle in sale was *caveat emptor*; it was, in other words, up to the buyer to beware of making a defective purchase, and he could not complain afterwards. Although there were some limits to this general rule, the buyer remained in a weak position. The curule aediles, therefore, introduced a rather drastic rule to the market for slaves and cattle, namely that, unless there was a specific pact to the contrary,⁷⁹ the seller, who could generally not be trusted, had to explicitly guarantee against an array of defects.⁸⁰ He would be held liable for any such defects, even if he was unaware of them or he did not lack good faith.⁸¹ The curule aediles determined that in the sale of slaves (and later iumenta) these sellers would be obliged to reveal any disease (*morbus*) or handicap (*vitium*) in the thing sold. In the case of slaves, the seller also had to inform the prospective buyer whether the slave tended to wander off on his or her own (*erro*), was a fugitive (*fugitivus*) or was suspected of some crime (*noxum*⁸²) which might give rise to liability on the part of the subsequent owners. The curule aediles drew up a list of the defects

⁷⁶ Cato (d 152 BC) is quoted on the meaning of *morbus* in *Digest* 21 1 10 1, *Ulpianus libro primo ad edictum aedilium curulium*: 'Catonem quoque scribere lego, cui digitus de manu aut de pede praecisus sit, eum morbosum esse' ('I read Cato to have written that a slave who has had a finger or toe cut off is diseased'). Cicero mentions the edict in *De officiis* 3 71.

⁷⁷ In the preliminaries to the *Digest*, c Dedoken, s 18, refers to Julian's reduction 'in parvo libello'; cf also Aulus Gellius 11 17. The edict was carefully reconstructed by Lenel op cit note 44 as drawn from the *Digest*.

⁷⁸ Rogerson 'Implied warranty against latent defects in Roman and English law' in Daube (ed) *Studies in the Roman Law of Sale* (1959) 112 at 116.

⁷⁹ *Digest* 2 14 31, *Ulpianus libro primo ad edictum aedilium curulium*: 'Pacisci contra edictum aedilium omnimodo licet, siue in ipso negotio uenditionis gerendo conuenisset siue postea.'

⁸⁰ Crook op cit note 65 at 181–2.

⁸¹ Johnston op cit note 30 at 81.

⁸² The slave had to be *noxia solutum*, that is free of suspicion of having committed crimes.

whose absence the seller had to guarantee. Later it became possible to insist that the promise be given; and finally the warranty was implied in the contract.⁸³

The aediles' edict provided good protection, although in a restricted field.⁸⁴ It applied, first, only to sales in the market in Rome since the aediles' jurisdiction was limited to these sales. Secondly, it was applicable solely to sales of slaves (and later draught cattle) that took place before these aediles.⁸⁵ The edict contained, inter alia, two special actions that supplemented the buyer's civil-law remedy (the *actio empti*) by enabling him to sue the seller on an implied warranty of quality in cases where defects or illnesses appeared to be a problem, namely the *actio redhibitoria* and the *actio quanti minoris*.⁸⁶ With regard to slaves its most important provision was that the seller must, at the time of the sale, declare certain faults (mental,⁸⁷ moral and especially physical).⁸⁸ If he failed to do so, or to make good any express assurance given at the time of the sale, or give an assurance that the slave had no defects other than those he had already declared, an *actio redhibitoria* to cancel the contract lay for a period of two months, and an action for damages, namely the *actio quanti minoris*, lay for six months.⁸⁹ In addition, if serious defects appeared or it appeared that the seller's *dicta* or *promissa* were false, the *actio redhibitoria* in terms of which the contract could be cancelled was available to the buyer for a period of six months; while in terms of the *actio quanti minoris aestimatoria*, which was available for twelve months, the buyer could request a reduction in the price.⁹⁰

In addition, the aedilician edict contained a general clause against *dolus*. In a sense the edict may be considered to relate largely to fraud.⁹¹ The rationale in *Digest* 21 1 1 2 makes it clear that the reason for the edict was to prevent the commission of fraud by sellers. The justification for holding a seller liable, even though he did not know of the defect, was that he

⁸³ Johnston op cit note 30 at 81.

⁸⁴ See *Digest* 21 1 1 1, *Ulpianus libro primo ad edictum aedilium curulium*; *Digest* 21 1 38, *Ulpianus libro secundo ad edictum aedilium curulium*. Cf Aulus Gellius *Noctes Atticae* 4 2 1 who preserves part of an earlier version.

⁸⁵ Jolowicz & Nicholas *Historical Introduction to the Study of Roman Law* (1972) at 293.

⁸⁶ Buckland ('*Manual*' note 41 at 285) states that these actions were undoubtedly originally conceived, not as contractual, but as penal, based on a wrong, although the seller may have been quite innocent, being unaware of the defects.

⁸⁷ *Digest* 21 1 4 3, *Ulpianus libro primo ad edictum aedilium curulium*: 'et uidemur hoc iure uti, ut uitii morbiue appellation non uideatur pertinere nisi ad corpora: animi autem uitium ita demum praestabit uenditor, si minus, non.'

⁸⁸ Cf Aulus Gellius *Noctes Atticae* 4 2 1.

⁸⁹ See Buckland '*Textbook*' note 41 at 491.

⁹⁰ See Lenel op cit note 44 at 561. Cf also Schulz op cit note 31 at 537 according to whom this might have been a post-classical introduction.

⁹¹ Honoré 'The history of the aedilician actions from Roman law to Roman-Dutch law' in Daube *Studies in the Roman Law of Sale. Dedicated to the Memory of Francis de Zulueta* (1959) 132 at 135–6.

could have known about it. There was, therefore, no excuse for a seller who could reasonably have discovered the defect.⁹² Dolus, once established, gave rise to stringent liability at civil law in all kinds of sales.⁹³ The aediles, in using the word ‘pronuntianto’,⁹⁴ and later perhaps ‘palam recte dicunto’,⁹⁵ may have been thinking of a defect discoverable by the seller. Possibly, after the introduction of the concept that the buyer could compel the seller to guarantee the absence of edictal defects by stipulation, the seller gradually became liable for defects, whether he could have discovered them or not, a form of strict liability familiar in the case of a stipulation.⁹⁶

The requirements for both remedies were, first, that the seller must have knowingly or unknowingly failed to declare certain defects that he was compelled to declare in terms of the edict⁹⁷ or, secondly, that he had expressly stated or affirmed by declaration that the slave was free of any other defect or that he had special qualities; or, thirdly, that he had otherwise acted fraudulently.⁹⁸ The remedies were, in other words, available whether the seller was aware of the defect or not. The only requirements were that the defect must be of a substantial character; have been known to the buyer (for otherwise he could not say that he had been deceived); and that it was a latent defect, in other words invisible or of such nature that the purchaser would not have seen it had his attention not been drawn to it. Usually it might have been detected by an expert. The defect should obviously have existed at the time the contract was concluded. The buyer was expected to be alert, for he could not complain afterwards.⁹⁹ According to Aulus Gellius the sale ticket of each slave had to be written in such a way that these defects were disclosed:¹⁰⁰ slaves had to wear a board on which the seller informed potential buyers of defects that could be classified as *morbus* or *vitium*.¹⁰¹

⁹² Schulz op cit note 31 at 537.

⁹³ Rogerson op cit note 78 at 117.

⁹⁴ *Digest* 21 1 1 1, *Ulpianus libro primo ad edictum aedilium curulium*: ‘eademque omnia, cum ea mancipia uenibunt, *palam recte pronuntianto*’ (‘all these matters they must proclaim in due manner when the slaves are sold’). My emphasis.

⁹⁵ *Digest* 21 1 38pr, *Ulpianus libro secundo ad edictum aedilium curulium*: ‘Aediles aiunt: “Qui iumenta uendunt, *palam recte dicunto*, quid in quoque eorum morbi uitique sit”’ (‘The aediles say: “Those who sell beasts of burden must declare with all due publicity any disease or defect the beasts have”’). My emphasis.

⁹⁶ Honoré op cit note 91 at 136.

⁹⁷ Under the edict, the seller of a slave had to declare all *morbi* et *uitia* and also whether he was a runaway, liable to stray or subject to noxal duty.

⁹⁸ *Digest* 21 1 1 1, *Ulpianus libro primo ad edictum aedilium curulium*: ‘hoc amplius si quis aduersus ea sciens dolo malo uendidisse dicetur, iudicium dabimus.’

⁹⁹ *Digest* 18 1 15 1, *Paulus libro quinto ad Sabinum*: ‘Ignorantia emptori prodest, quae non in supinum hominem cadit.’

¹⁰⁰ *Noctes Atticae* 4 2 1.

¹⁰¹ Zimmermann op cit note 32 at 311.

Redhibitory defects are those defects that either destroy or weaken the sold thing's usefulness in terms of the usual purpose of things of that kind.¹⁰² In relation to slaves and animals, which are almost always used in illustration, Labeo distinguishes between a disease and a defect,¹⁰³ but Ulpian points out that that they are practically identical.¹⁰⁴ A clear line can probably not be drawn between a morbus and a vitium, and Gellius, after a consideration of all authorities, comes to the conclusion that it is indeed difficult to distinguish between these two concepts.

The aediles also made it possible for the buyer to insist that in the contract the seller promised reimbursement in case of eviction. According to Varro, in Cicero's time there was usually a promise that the slave was healthy and free from theft and noxa, or if the slave was not being mancipated, a promise of double the value or (if the parties so agreed) of the simple value.¹⁰⁵ The aediles made this custom obligatory and these promises thus became actionable like all contractual promises in any jurisdiction, not only that of the curule aediles.

The result of these edicts was that entirely new rules of law were introduced into sales within the jurisdiction of the aediles curules. What were apparently policy directives became a significant source of private law. Although these developments were outside the civil law and rather limited, it was from them that most of the law imposing liability for defects, in the absence of fraud or express promise, eventually arose. For a long time liability deriving from the edictal provisions still only applied to sales in the markets and to slaves and beasts. Not much was done to extend it beyond the markets and non-dealers.¹⁰⁶ In *Digest* 21 1 there is an almost complete absence of reference to sales of other kinds of property, although the sale of slaves is discussed in great detail. This is a strong indication that classical law did not really extend the aedilician rules. The development was only complete by the time of Justinian.

¹⁰² *Digest* 21 1 1 7, *Ulpianus libro primo ad edictum aedilium curulium*; *Digest* 21 1 1 8, *Ulpianus libro primo ad edictum aedilium curulium*.

¹⁰³ *Digest* 21 1 1 7, *Ulpianus libro primo ad edictum aedilium curulium*. The jurists' discussion of morbus and vitium in *Digest* 21 1 is neither clear nor enlightening. According to *Digest* 21 1 1 8, a defect or a disease will be ground for redhibition if it interferes with the slave's utility, and is not trivial. Justinian's law required slaves to be reasonably fit and suitable (*Digest* 21 1 1 10pr) for the purpose for which they were bought. It is difficult to draw a clear distinction between a morbus and a vitium, and much has been written about this, without any conclusion being reached.

¹⁰⁴ *Digest* 21 1 6, *Ulpianus libro primo ad edictum aedilium curulium*.

¹⁰⁵ Varro *De re rustica* 2 10 5.

¹⁰⁶ Rogerson op cit note 78 at 117.

In classical law the rather limited warranty for qualitative defects, introduced by the *ius civile*, therefore continued to exist side by side with the honorarian liability, created by the *aediles curules*. The aedilician edict was eventually codified by Julian and Ulpian. The text of the edict is preserved in *Digest* 21 1 1 1 and *Digest* 21 1 38pr. Although generally reliable, it is not complete. The original text of the aedilician action, dealing with the guarantees against latent defects and general misrepresentation, is missing. Part of this edict has fortunately been preserved by Aulus Gellius and his version is consequently quoted as authoritative.¹⁰⁷ It is probably the most ancient one in existence. Although there is no certainty about the date when the aedilician edict was introduced, Honoré states that it may possibly date from the early part of the second century BC, perhaps in the year 199 BC.¹⁰⁸

Initially, therefore, the *aediles curules* decreed that when slaves or beasts of burden were sold on the markets,¹⁰⁹ the seller had to make known any defect or illness, bodily or mental, that might be present in them. Later on, it was no longer necessary to make this *stipulatio* since it was accepted that the seller had given a tacit guarantee that no such defects or illnesses existed. Of importance is the edictal liability implied in the contract of sale.

Several contracts of sale of slaves have survived and from these it may be deduced how they worked in practice. Some of these documents give insight into the warranties. A papyrus dating from AD 151, for example, provides evidence of the sale of a slave, who was guaranteed to be free of *uitia et morbi* as determined by the edict of the *aediles curules*. In addition, the seller undertook to pay double the price if the buyer was evicted from possession.¹¹⁰ These warranties were given by *stipulatio*. It is interesting to note that the *stipulatio* included a reference to the *aediles'* edict, as well as the list of *morbi et uitia* inserted in the edict. It may have been done

¹⁰⁷ *Noctes Atticae* 4 2 1. Very little is known about Gellius. He was born *ca* AD 130 and died *ca* AD 180 (see Hosius *Paulys Real Encyclopädie der classischen Altertumswissenschaft* vol 7 (1912) sv 'Aulus Gellius' at 992–8; Lefranc Holford-Strevens sv 'Aulus Gellius' in Simon Hornblower, Antony Spawforth & Esther Eidinow (eds) *The Oxford Classical Dictionary* 4 ed (2012) 606; Lefranc Holford-Strevens *Aulus Gellius* (1988) 12). From the *Noctes Atticae* we know that he was chosen as a judge in *iudicia privata* (*Noctes Atticae* 13 13 1; 14 2 1). Elsewhere he mentions judicial functions (*Noctes Atticae* 12 13 1) and although the references are generally vague, they do seem to refer to a legal career: see *Noctes Atticae Praefatio* 23; 11 3 1; 12 13 1; 13 13 1; 16 10 1. After obtaining a discharge from his duties as judge, he continued his private studies and wrote the *Noctes Atticae*. The *Noctes Atticae* is a collection of twenty books with predominantly short chapters, dealing with a large variety of topics, inter alia philosophy, history, biography, law, grammar, literary criticism, textual criticism. It consists of a *Praefatio*, a table of contents, and twenty books, most of which have been preserved.

¹⁰⁸ Honoré op cit note 91 at 132–4. See also Zimmermann op cit note 32 at 311.

¹⁰⁹ Schulz op cit note 31 at 536.

¹¹⁰ Johnston op cit note 30 at 82.

because at the time the warranties still had to be made explicitly, or, perhaps the buyer wanted certainty and was not willing to rely on terms that were merely implied.¹¹¹

(c) *Later developments*

Under the Empire the process of extension continued by means of legal construction. Even during Labeo's time it was accepted that the aedilician actions applied to sales of all movable and immovable as well as animate things.¹¹² An implied warranty that the object of a sale was free of any defect that might prevent reasonable use was then considered to be inherent in every sale. Liability no longer depended on the seller's fault. By the time of Justinian it was accepted that these aedilician actions were applicable to all things, not just to slaves and beasts of burden.

A patent defect gave no cause for legal action. However, in terms of an implied warranty, the seller guaranteed that the object of sale had no serious defects at the time when the contract was concluded.¹¹³ Whether he was aware of it or not was of no importance, except with reference to the quantum of the damages.

During Justinian's time, any express promise regarding quality could be enforced, whether given formally by stipulatio or informally as part of the terms of the contract of sale itself. Dolus would often lead to breach of an express promise, and non-disclosure of a known material defect was likewise regarded as dolus. Finally, the seller may have been liable in the absence of both an express promise and dolus, if the thing sold turned out to have serious latent defects in it. This liability existed independently of the seller's knowledge of the defect.¹¹⁴ The application of these rules depended to a large extent on whether the defect was patent or latent and on the buyer's awareness of it at the time of the sale. Generally, however, the buyer was well protected.¹¹⁵ Developed Roman law, therefore, provided a substantial measure of implied protection against defects in the thing sold. It also reflected a considerable change of attitude

¹¹¹ Ibid 82. Cf *Fontes Iuris Romani Antiqui* 3 87–9 and 3 132–3. The contracts that were found amongst the Herculaneum Tablets (nos 59, 60 and 61) are also important, since they expressly refer to the aedilician edict as it was presented in the time of Nero.

¹¹² See *Digest* 21 1 1pr, *Ulpianus libro primo ad edictum aedilium curulium*; *Codex* 4 58 3, *De aediliciis actionibus* (Impp Diocletianus et Maximianus, 285).

¹¹³ De Zulueta op cit note 39 at 47.

¹¹⁴ Ibid at 113.

¹¹⁵ Ibid.

since early times when it had been left to the buyer to safeguard himself by means of stipulations.¹¹⁶ In the law of Justinian there were no limitations on protection: all sellers of all kinds of things in all places were liable for defects.¹¹⁷

IV CONCLUSION

Celsus' definition of the law and the discussions of a number of words and phrases linked to it reveal that the Romans had a fairly idealistic view of the law and its functions and applications. In addition, from the discussion of the aediles' edict, it emerges that it was in the interests of justice for regulations to be drawn up to protect the innocent buyer. Having recognised and identified the undesirable conditions obtaining in the markets, the aediles set out to improve matters and to protect the innocent victims of deceiving dealers. They introduced new measures, which would ensure that the law applicable in the market was good and fair. They were not bound by the strict and inflexible *ius civile*; their edicts constituted *ius honorarium*; and also, since most of these new rules applied to foreigners as well, they also constituted *ius gentium*. The new rules were naturally not strict and inflexible like the *ius civile*, but good and fair like the *ius gentium*.

A legal system based on justice and good faith may be expected to provide legal security. Implicit in that concept are that first, right will prevail over wrong, and, second, there is certainty on the content of the law, its recognisable character and the foreseeability of the legal consequences necessitated by a particular set of facts.¹¹⁸ It follows that this can only be ensured by electing appropriate people to administer the law. Under the Republic and the Principate the Roman state strove to appoint only suitable people as administrators of the law.¹¹⁹ With regard to certainty concerning the law, it should be noted that Roman law did not regard this as very important. It should, however, be borne in mind that in Rome laws were on display more often than in other cities and the provinces. The aediles' edict, which was displayed in the market, certainly did provide certainty on the content of the edict.

¹¹⁶ Ibid at 115.

¹¹⁷ *Digest* 21 1 1pr, *Ulpianus libro primo ad edictum aedilium curulium*: 'Labeo scribit edictum aedilium curulium de uenditionibus rerum esse tam earum quae soli sint quam earum quae mobiles aut se mouentes.'

¹¹⁸ Schulz op cit note 9 at 239.

¹¹⁹ Ibid at 240.

According to Schermaier¹²⁰ the early strict rules of form and doctrine in Roman law revealed contradictions between positive law and justice: *summum ius, summa iniuria* ('more law, less justice').¹²¹ However, the jurisdictional magistrates' new measures replaced the restrictions of the formal procedures. Under the influence of equitable ideas the strict law was modernised. This resulted in new laws that were flexible and just, and in actions introduced by the praetors and the aediles, which applied alongside those provided by the formal and rigid *ius civile*.

Roman consensual contracts demonstrate the common sense of the ancient Romans. No formalities were required for these contracts, but merely the agreement in good faith of the parties. Good faith was an element of the contract of sale and in any litigation that might arise the parties' dealings with each other were assessed on the basis of good faith.¹²² This meant that without additional promises and undertakings the development of the law of sale kept pace with changes in the customs relating to trade and commerce. It was the judge's duty to find that a party's failure to act in accordance with normal commercial standards was not in accord with good faith and consequently constituted a breach of contract. The concept of good faith thus ensured the extraordinary vigour and adaptability of the contract of sale. There was very little written law concerning Roman commerce, and apart from the aedilician edict on the sale of certain goods, which enriched Roman commercial law considerably, commercial law was constructed from the old *ius civile* by a combination of the *ius honorarium* and juristic interpretation.¹²³

The tacit guarantee against latent defects, an essential element of a contract of sale, underwent a long period of development. Initially the buyer was not protected against invisible defects in the object of the sale unless the seller knew of the existence of such defects but fraudulently concealed them. Later the parties would conclude stipulations in terms of which the seller would guarantee that the thing was free of defects, or indeed had certain qualities. During the Republican period the aediles curules took measures to foil dishonest sellers of slaves and

¹²⁰ Schermaier op cit note 27 at 64–5.

¹²¹ See Cicero *De officiis* 1 33: 'Existunt etiam saepe iniuriae calumnia quadam et nimis callida sed malitiosa iuris interpretatio. Ex quo illud "summum ius summa iniuria" factum est iam tritum sermone proverbium?' Cf, too, 'ius summum saepe summa est malitia' ('strictest law worst mischief').

¹²² Johnston op cit note 30 at 81

¹²³ Crook op cit note 65 at 206.

cattle in the markets of Rome. Subsequently a stipulation was no longer necessary since it was accepted that the seller had given a tacit guarantee that no such defects or illnesses existed.

The aediles curules, by introducing special provisions in their edicts on the public sales of slaves and certain livestock, ensured that warranties were no longer a matter of pure agreement between the parties, and thus ensured equality between the parties to the contract. This may be considered as an application of *aequitas*. Roman legislation creating a seller's liability for qualitative defects is generally commended. The aediles' edict that established a general and implied warranty against qualitative defects of any kind was an important contribution towards good and fair law.

The aediles had no intention of interfering in Roman civil law.¹²⁴ They merely wished to remedy certain abuses within their sphere of authority for which the civil law had not yet introduced a remedy. However, by means of one edict they brought about a remarkable improvement in the law concerning contracts of sale concluded in the markets. This development of the implied warranty illustrates how customary stipulations became a matter of *bona fides* incorporated into the contract of sale itself.¹²⁵ It may be said that the edict was drawn from good business practice, thus manifesting the sound and ethically reputable practice in the law to the limited extent to which it was possible.¹²⁶

It is generally accepted that Roman law developed from a primitive, fairly rigid legal system into a system characterised by its adjustability, flexibility, and fairness. In conclusion it may be stated that with the implied warranty in contracts of sale the edict of the *curule aediles* made a major contribution to this developed system.

¹²⁴ Rogerson op cit note 78 at 127.

¹²⁵ Ibid at 128.

¹²⁶ It was probably part of the development of the *bona fides* concept during this period. See Cicero *De officiis* 3 17 71: 'nec vero in praediis solum ius civile ductum a natura malitiam fraudemque vindicat, sed etiam in mancipiorum venditione venditoris fraus omnis excluditur. Qui enim scire debuit de sanitate, de fuga, de furtis, praestat edicto aedilium. Heredum alia causa est.'

THE TRANSFORMATION OF SOUTH AFRICAN ENRICHMENT LAW

Sieg Eiselen*

Professor, Private Law, University of South Africa

I INTRODUCTION

Unjustified enrichment law refers to the third major branch of the law of obligations in South African private law besides contract and delict.¹ Unlike contract and delict which have developed into principle based sources of obligations where liability is founded on general principles, unjustified enrichment has seemingly remained stuck in its original Roman-law-based matrix of liability founded on a number of different actions.² Although the rules of unjustified enrichment have undergone some important changes during the last century, these rules have not yet overtly evolved into a principle-based source of liability.³

During the middle part of the previous century the focus in this part of the law was very much on the existence or development of a general enrichment action.⁴ Wouter de Vos published the first major treatise on the subject for South African law based on his doctoral thesis. His objective was the recognition of a general enrichment action in our law.⁵ The early hopes for such an action to either replace or augment the existing actions were soon dashed in the watershed *Nortje v Pool*⁶ case where the Appellate Division held that no such general action existed in Roman-Dutch law and that such an action had also not developed in our law yet.⁷ The court did not entirely close the door on such an action but only went so far as to state that such an action could develop over time.⁸ Visser describes the decision in *McCarthy Retail Ltd v Shortdistance Carriers CC*⁹ as the next watershed case as the court in this case

* BJuris LLB (PU vir CHO) LLD (PU vir CHO).

¹ De Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* 3rd ed (1987) 1; Lotz & Brand 'Enrichment' in WA Joubert (founding ed) *Law of South Africa Vol 9 2* ed (2005) par 208; Sonnekus *Ongegronde Verryking in die Suid-Afrikaanse Reg* (2007) 10-12; Visser *Unjustified Enrichment* (2008) 9; Harms 'Obligations' in Joubert (founding ed) *Law of South Africa Vol 9 2* ed (2006) par 217. See also Beaton & Schrage (eds) *Unjustified Enrichment* (2003) 1-2.

² *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 All SA 236 (A) 8; Visser op cit note 1 at 4.

³ *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 All SA 236 (A) 8.

⁴ De Vos op cit note 1 at 1-4; Lotz & Brand op cit note 1 at par 208; Du Plessis *The South African Law of Unjustified Enrichment* (2012) 2-3; .

⁵ De Vos op cit note 1 at 1-4; 328 ff. See also Eiselen & Pienaar *Unjustified Enrichment – A Casebook* 3 ed (2005) 10.

⁶ *Nortje v Pool* NO 1966 3 SA 96 (A).

⁷ *Nortje v Pool* NO 1966 3 SA 96 (A) 135-140.

⁸ *Nortje v Pool* NO 1966 3 SA 96 (A) 140; Sonnekus op cit note 1 at 17-18; Du Plessis op cit note 4 at 4-5.

⁹ 2001 3 ALL SA 236 (A).

gave very strong indications in an *obiter* statement of Schutz JA that the Appellate Division would be inclined to recognise a general enrichment action when the appropriate case came before it.¹⁰ Twelve years have passed since that decision and still no decision has overtly recognised such an action.

In a sense the approach of De Vos and the quest for a general enrichment action has created a mind-set where one is still very much inclined to think in action-based terms when thinking about enrichment law.¹¹ De Vos extracted some generally applicable principles underlying all of the enrichment actions recognised at that time and proposed that these general principles be used as the requirements for the general enrichment action, whether that action replaced the existing actions or merely augmented them. This quest for the general enrichment action, however, created a false approach to the development of enrichment law. In its sister disciplines, contract and delict, liability had already been transformed from the Roman action-based approach to a principle based approach to liability. The real issue therefore is not the need for a general enrichment action but the need for a similar development in enrichment law where the liability will be based on general principles augmented by more nuanced rules and exceptions to provide for public policy and correctives where needed.

The first steps towards a principled approach were given in Lotz's exposition of the law of unjustified enrichment in the *Law of South Africa*.¹² For the first time Lotz stated the general principles extracted by De Vos from the various enrichment actions as prerequisites for any enrichment liability. Sonnekus refers to the adoption of these principles as requisites as prophetic, if not over enthusiastic, as this paved the way for the courts to do the same.¹³ These general principles had been applied by the courts for some time, but it was only with Lotz's exposition that a subtle paradigm shift took place and the focus became more and more directed on the general principles, rather than the specific actions, although they still remained very much in place. This shift of focus also influenced the approach by Eiselen and Pienaar in our case book, which followed Lotz's approach – the book became the leading student text and must in some way have influenced the thinking of a new generation of

¹⁰ Visser op cit note 1 at 6-7; Du Plessis op cit note 4 at 6; Sonnekus op cit note 1 at 17-18. See *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 All SA 236 (A) 8

¹¹ See for instance Du Plessis op cit note 4 at 6-10.

¹² Lotz 'Unjustified Enrichment' in Joubert (ed) *The Law of South Africa Vol 9* (1979) 45-66.

¹³ Sonnekus op cit note 1 at 19 fn 104 states: 'Die formulering van Eiselen en Pienaar was dus profeties juis hoewel dit op daardie stadium moontlik as iets té entoesiasies bestempel kon word.' in adopting the general requirements as prerequisites for all enrichment liability. That honour for the prophetic formulation however must go to Lotz in LAWSA on whose work we based our approach.

lawyers.¹⁴ This approach was finally adopted by the Supreme Court of Appeal in *Kudu Granite Operations (Pty) Ltd v Caterna Ltd*¹⁵ without much ado.¹⁶ In the *Glenrand* case, the Supreme Court of Appeal simply states that it is generally accepted that there is no general enrichment action, but that there are minimum of four general requirements that have to be met in all cases.¹⁷

Although the general enrichment action has still not been recognised as presaged by Visser relying on the *McCarthy* case,¹⁸ two recent decisions of the SCA¹⁹ have raised further questions about general enrichment liability, as neither of these cases referred to the requirements for any of the specific enrichment actions despite the courts *a quo* having done so. This contribution will analyse these cases against this general background, to establish whether or not these cases may now have established a principled approach to enrichment liability in South African law.

II NISSAN V MARNITZ²⁰

In this case Nissan South Africa (Pty) Ltd (“Nissan”) wanted to make payment to one of its creditors TSW Manufacturing (“TSW”) by way of an electronic funds transfer. The payment instruction to First National Bank was to transfer an amount of R 12,7 million to a certain Standard Bank account number provided by Nissan. The account number was, however, the account number of another Nissan creditor, Maple Freight CC (“Maple”) to whom Nissan did not owe any money at that stage. Nissan had no intention of paying Maple, it intended to pay TSW.²¹

Maple soon realised that the erroneous payment had been made and instead of paying the money back to Nissan, first obtained legal advice as to what to do. Streicher JA remarks

¹⁴ Eiselen & Pienaar *Unjustified Enrichment – A Casebook* (1992).

¹⁵ 2003 3 All SA 1 (SCA) par 16 to 17.

¹⁶ In *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 3 All SA 236 (A) 15 the SCA seems to have adopted these principles already, but *Kudu Granite* stated it more explicitly as a prerequisite. See also Sonnekus op cit note 1 at 19 who notes this shift.

¹⁷ *Glenrand MIB Financial Services (Pty) Ltd v Van den Heever NO* 2013 1 All SA 511 (SCA) par 16 with reference to Lotz & Brand op cit note 1.

¹⁸ Visser op cit note 1 at 7-8.

¹⁹ *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2006 4 All SA 120 (SCA); *Glenrand MIB Financial Services (Pty) Ltd v Van den Heever NO* 2013 1 All SA 511 (SCA).

²⁰ *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2006 4 All SA 120 (SCA). For a full discussion of this case see JE Du Plessis "The cause of action in *Nissan South Africa (Pty) Ltd v Marnitz NO* in Mostert & De Waal (eds) *Essays in Honour of CG van der Merwe* (2011); Visser op cit note 1 at 370 ff.

²¹ *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2006 4 All SA 120 (SCA) par 1-4.

that it was quite surprisingly advised that it should open a call account and transfer the funds into that account where it could earn interest and that Maple would be entitled to the interest. It was also advised that the money would eventually have to be paid back to the payor on demand by the payor.²²

Based on these facts one would have thought that this was a classic example of the *condictio indebiti* based on the general requirements of that classical enrichment action. There was an erroneous payment by Nissan to Maple, while there was no underlying debt to discharge as Nissan did not intend to pay Maple but TSW.²³ The court never examined the question of whether this error was an excusable error as required under the *condictio indebiti*. If one assumes that this was indeed a case of the *condictio indebiti*, then the legal advice obtained by Maple should not be regarded as so surprising, except in moral terms. There is no duty in terms of the *condictio indebiti* to take active steps to repay the money until such time as a demand has been made. When a person obtains knowledge of being enriched, such a person must care for the enriched property and becomes liable if the property should be negligently lost or damaged. Du Plessis, however, regards this case as one that should resort under the *condictio sine causa specialis* because of the absence of an intention to pay the specific recipient.²⁴

Furthermore, no mora interest is payable until such time as the enriched person is in mora.²⁵ As far as interest earned by the enriched party is concerned, the weight of Roman-Dutch law is that interest is not recoverable under the *condictio indebiti*.²⁶ The legal advice received by Maple should therefore not have been so surprising. The funds were, however, never transferred to the call account but were first transferred to a receipts account Maple held with FNB and later to a payments account also held with FNB. In that account the funds were used in the day-to-day affairs of Maple being conducted out of that account.²⁷

About a month later Nissan became aware of the error and demanded payment from Maple. Maple indicated that it was prepared to repay the amount subject to retaining all the

²² Par 3-7.

²³ Eiselen & Pienaar op cit note 5 at 102, 160; Sonnekus op cit note 1 at 249. See however Visser op cit note 1 at 372-373; Du Plessis op cit note 4 at 247.

²⁴ See Du Plessis Essays op cit note 20 at 1 ff; Du Plessis op cit note 4 at 247. See also Visser op cit note 1 at 370 ff.

²⁵ *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging* 1968 3 SA 283 (T) 284; De Vos op cit note 1 at 201; *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 652-653 and 659; Eiselen & Pienaar op cit note 5 at 40 ff, 56 ff; Du Plessis op cit note 4 at 390-395; 163-164.

²⁶ *Baliol Investments Co (Pty) Ltd v Jacobs* 1946 TPD 269 at 274; *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 659; Eiselen & Pienaar op cit note 5 at 55, 57; Du Plessis op cit note 4 at 392-393.

²⁷ *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2006 4 All SA 120 (SCA) par 6.

interest earned and payment of a 4% administration fee. Nissan then obtained a court order freezing Maple's bank accounts with FNB.²⁸ Stanley, the sole member of Maple, then resolved to have Maple put into liquidation as the business was in considerable financial strain due to the freezing of the court orders. At the time that the accounts were frozen an amount of only R 10,5 million was available in the account.²⁹ The liquidators of Maple resisted payment of the funds in the account to Nissan, because those funds formed part of the insolvent estate of Maple and were therefore subject to the *concursum creditorum*.³⁰ Nissan contended that at least R 9,75 million of that amount did not form part of the estate and could be traced back to the funds paid in error. The liquidators and Nissan agreed that the funds in the account be paid into an account under the control of the liquidators pending litigation.³¹

In the court *a quo* Mailula J held that Maple, and not FNB, had been enriched by the transfer of the funds and that the appellant, therefore, did not have a claim against FNB but had a concurrent claim against the insolvent estate of Maple.³²

The court, without referring to any of the established enrichment actions, regarded the basis for the claim in this instance as enrichment.³³ It apparently avoided applying the *condictio indebiti*, without ever naming that action, by holding that payment is a bilateral juristic act requiring the meeting of two minds.³⁴ Where A therefore intends to pay B and hands over money, while B knows that he is not entitled to the money, transfer of the money does not constitute payment and B is not entitled to appropriate the money. In these circumstances appropriation of the funds becomes theft.³⁵ Where the proceeds of the theft are deposited in a bank account, the bank is not obliged to make payment to B where the bank becomes aware that the funds may be tainted funds. The court then equates that situation with the present facts:³⁶

“The position can be no different where A, instead of paying by cheque, deposits the amount into the bank account of B. Just as B is not entitled to claim entitlement to be credited with the proceeds of a cheque mistakenly handed to him, he is not entitled to claim entitlement to a credit because of an amount mistakenly transferred to his bank

²⁸ Par 7.

²⁹ Par 8-9.

³⁰ *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2006 4 All SA 120 (SCA) par 9.

³¹ Par 9.

³² Par 10-11.

³³ Par 28.

³⁴ Par 24. See also *Burg Trailers SA (Pty) Ltd v ABSA Bank Ltd* 2004 (1) SA 284 (SCA) at 289B.

³⁵ Par 24 See also *S v Graham* 1975 (3) SA 569 (A) at 573E-H).

³⁶ Par 25.

account. Should he appropriate the amount so transferred, ie should he withdraw the amount so credited, not to repay it to the transferor but to use it for his own purposes, well knowing that it is not due to him, he is equally guilty of theft.”

In the course of the discussion the court referred to the decision in *First National Bank of Southern Africa Ltd v Perry NO*,³⁷ where the court was dealing with the proceeds of stolen cheques that after a number of intervening transactions eventually landed in a bank account of the thief. In that case Schutz JA went to great lengths to establish the correct enrichment action and then lamented the difficulties in applying the requirements of the action and distinguishing between the various actions.³⁸ Similarly in *McCarthy Retail Ltd v Shortdistance Carriers CC* he stated:³⁹

“However, if this Court is ever to adopt a general action into modern law, it would be wiser, in my opinion, to wait for that rare case to arise which cannot be accommodated within the existing framework and which compels such recognition. If once a general action is accepted much less energy, hopefully, will be devoted to the correct identification of a *condictio* or an *actio* than at present and more time to the identification of the elements of enrichment. This does not mean, however, that the old structure’s relatively few distinctive rules applying only to particular forms of action, such as the requirement in the *condictio indebiti* that the mistake should be reasonable, will disappear.”

In the *Nissan* case, however, the court did not try to pigeonhole the requisite enrichment action, but simply applied the general principles as they have evolved in our case law to arrive at a decision.⁴⁰ In the process the court probably also developed some of the rules applicable to the specific actions. The qualification of the payment requirement to take this kind of factual situation out of the possible scope of the *condictio indebiti* and the difficulties the requirements of that action could have caused in this case where the recipient is aware of the enrichment is a healthy development. The decision of the court *a quo* bears testimony of the difficulties that could have arisen in this case if the *condictio indebiti* had been applied. It would have been a travesty if it had been held that Nissan’s claim was a concurrent claim in the insolvent estate of Maple where Maple clearly was aware from the outset that the money was not owed to it.

The question now arises – if the courts can deal with enrichment liability sensibly as they have done here, based on the general principles rather than the vagaries of the specific

³⁷ *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA).

³⁸ Par 22.

³⁹ *McCarthy Retail Ltd v Shortdistance Carriers CC* 2001 3 All SA 236 (A) 10.

⁴⁰ Du Plessis op cit note 4 at 247.

actions, do we still need the specific actions? Should the focus not rather be on the general requirements and the correctives needed? Some of those correctives are already found in the rules of the specific actions. As Schutz JA indicated in the *McCarthy* case, some of the correctives, such as the reasonable error requirement under the *condictio indebiti* may remain and apply more widely. Or it may be that that particular rule can no longer be justified under a principled approach and should be jettisoned altogether, as has been suggested by many commentators.⁴¹

III GLENRAND V VAN DEN HEEVER⁴²

The second case where the Supreme Court of Appeal found liability based on enrichment liability without referring to the applicable enrichment action, is *Glenrand v Van den Heever*. The facts of this case involves a rather convoluted set of business transactions in the course of which an amount of R50 million was paid by a company Protector Group Holdings (Pty) Ltd (“Protector”), prior to its liquidation, to Glenrand MIB Financial Services (Pty) Ltd (“Financial Services”) to discharge a debt of another company, Freefall Trading 65 (Pty) Ltd (“Freefall”), owned by two of Protector’s directors. The liquidators of Protector claimed repayment of the amount of R 50 million.⁴³

The payment was made as a result of a transaction between Financial Services for the sale of its shares in Protector and a company called Newco or its nominee. The agreement was signed by one Seelenbinder, one of the directors of Protector and of Freefall, on behalf of Newco or its nominee. It was later suggested that Freefall had become the purchaser. Seelenbinder, however, never had the authority to sign the agreement on behalf of Newco and the agreement was accordingly invalid and unenforceable.⁴⁴ There was, therefore, no valid underlying agreement justifying the payment by Protector to Financial Services. After this invalid agreement had been signed, Protector made a transfer of R 63 million to an entity in Namibia. The entity in Namibia transferred R 50 million of those funds into the trust account of Edward Nathan Friedman, an attorney’s firm in South Africa. The attorneys in turn made payment of the R50 million to discharge Freefall’s purported debt to Financial

⁴¹ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) 224; Visser “Error of law and mistake in payment: a milestone” 109 (1992) *SALJ* 177 ff; Scott “The Requirement of Excusable Mistake in the Context of the Condictio Indebiti: Scottish And South African Law Compared” 124 (2007) *SALJ* 827; Du Plessis op cit note 4 at 135-139.

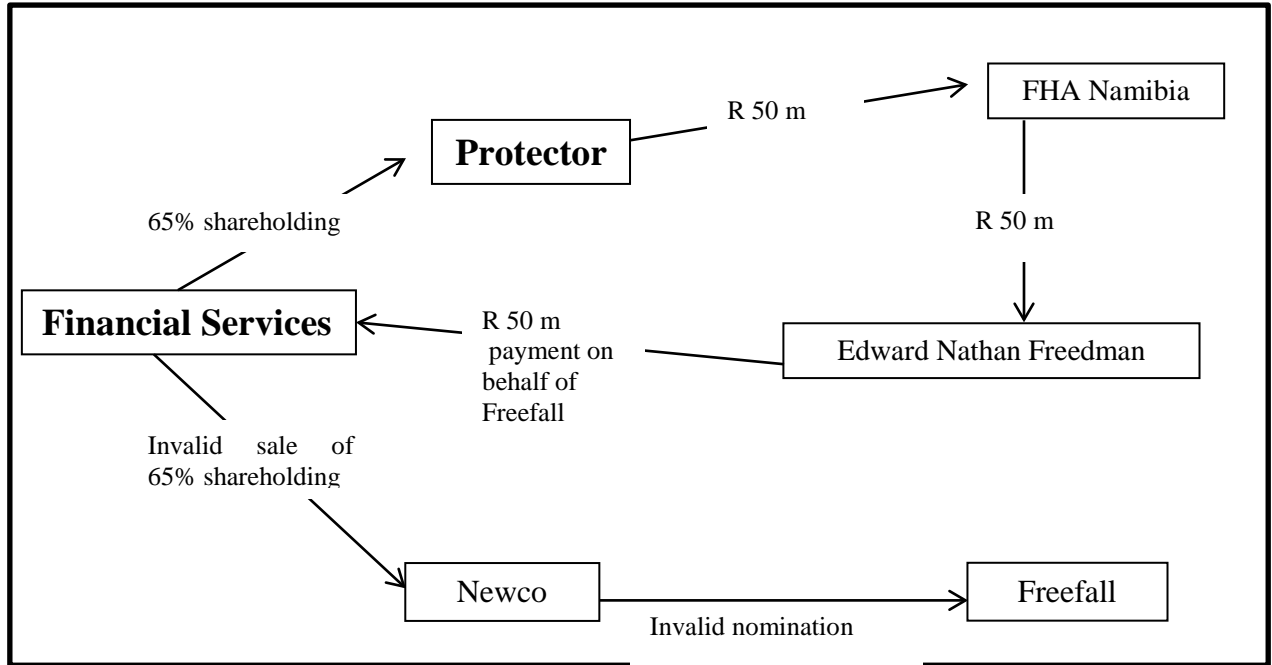
⁴² *Glenrand MIB Financial Services (Pty) Ltd v Van den Heever* NO 2013 1 All SA 511 (SCA).

⁴³ *Glenrand MIB Financial Services (Pty) Ltd v Van den Heever* NO 2013 1 All SA 511 (SCA) par 4-6.

⁴⁴ Par 23-29.

Services in terms of the invalid agreement.⁴⁵ The plaintiff's lodged a number of alternative claims for the repayment of the money, inter alia based on 'unjust (sic) enrichment'.⁴⁶

The following illustration provides a more graphic overview of these transactions:



The court starts off its discussion on the enrichment claim by saying the following:⁴⁷

“Although there is no general action based on enrichment in our law, it is generally accepted that for enrichment liability to arise there are a minimum of four requirements, namely: (1) the defendant must be enriched; (2) the plaintiff must be impoverished; (3) the defendant's enrichment must be at the expense of the plaintiff and (4) the enrichment of the defendant must be unjustified or sine causa.⁴⁸ This was the basis on which the case was argued by both Counsel.”

It seems that in the resolution of this dispute, counsel for all of the parties did not regard the identification and underlying rules of importance, but instead concentrated their arguments on these general principles and in particular on the causality question, as there were more than two parties involved in the series of transactions and payments.⁴⁹ The question here essentially was whether Protector had been impoverished at the expense of Financial Services.

⁴⁵ Par 4-7.

⁴⁶ Par 7.

⁴⁷ Par 15.

⁴⁸ Footnote: 9 LAWSA (2 ed) par 209.

⁴⁹ Par 16.

Financial Services argued that there had been no transfer of property from the impoverished party, Protector, to the enriched party (Financial Services). The enrichment, if there had been any, was not at the expense of the claimant (Protector) and for this reason the claim had to fail.⁵⁰

The court held, however, that the funds throughout remained the funds of Protector.⁵¹ There was no underlying reason for the transfer of the funds between Protector and FHA Namibia. That did not change when the funds were transferred to Edward Nathan Friedman. Although Edward Nathan Friedman purported to make payment on behalf of Freefall to discharge Freefall's purported indebtedness to Protector, the funds were still the property of Protector at that time. The court did not discuss on what grounds of liability Protector proceeded to pay Freefall's purported debt to Financial Services. The court did, however, find that there was a sufficiently strong causal link between the movement of the funds from Protector to Financial Services to satisfy the 'at the expense of' requirement.⁵²

The key to this decision lies in the assessment of the *sine causa* requirement. The appellants argued that the payment from Freefall to Financial Services was a deliberate act by Freefall to pay Financial Services a debt that it owed.⁵³ The court, however, found that the essential question on whether this payment was unjustified or not, relied on whether there was a valid sale of shares between Financial Services and Freefall.⁵⁴ Due to the fact that Seelenbinder had never been authorized by Newco to conclude the agreement, the agreement was void. Any payment was therefore without legal cause.⁵⁵ There was also no underlying debt between Protector and Freefall that justified Protector's payment of Freefall's purported debt. The court states:⁵⁶

"There was no legal ground for the money to have been transferred from Protector to Freefall and neither was there a legal ground for it to have been transferred from Freefall to Financial Services. Put differently, in these circumstances the enrichment did not leave Protector's estate in terms of a valid legal ground, nor did it enter Financial Services' estate in terms of a valid legal ground, as the payment to Financial Services was without causa.⁵⁷ In the view we take of the matter, the chain of causation linking Financial Services' enrichment with Protector's impoverishment, is not broken."

⁵⁰ Par 18.

⁵¹ Par 19.

⁵² Par 18-19.

⁵³ Par 20.

⁵⁴ Par 22.

⁵⁵ Par 29.

⁵⁶ Par 32.

⁵⁷ Du Plessis op cit note 4 at 305.

Although these facts as found by the court would normally have rendered this an instance to be dealt with under the *condictio indebiti*, that is, payment in error of a debt that is not owed, one is left with a distinct feeling that the various transactions between Protector, FHA Namibia and Freefall were not totally above board. The court did, however, not find it necessary to make such a finding.⁵⁸ If some of these transactions had been unlawful, the *condictio ob turpem vel iniustam causam* should have been applied. The court found it unnecessary to determine which enrichment action was involved, rather focusing solely on the general principles.⁵⁹

The next argument put forward on behalf of Financial Services was that it was no longer enriched at the time that the proceedings were lodged.⁶⁰ According to it R 38.1 million went towards discharging its debts towards its holding company and that a dividend of R 11.7 million was declared and paid to its shareholder.⁶¹ The court held, quite correctly, that the discharge of the debt did not extinguish that part of the enrichment, as Financial Services' obligations had been extinguished by an equal amount.⁶² The value of the enrichment was still within its patrimony. The payment of the dividend also did not diminish the enrichment, because Financial Services at the time of the declaration of the dividend was already aware of the enrichment, or should have realized that Financial Services was not entitled to the money.⁶³

It may be that this decision relied solely on the application of the general principles and requirements for enrichment liability, because this was the manner in which the matter was argued before the court.⁶⁴ However, a court is required to apply the law and cannot simply ignore parts of the applicable law which the court is deemed or expected to know because the parties did so. If on these facts, therefore, there were reasons why the enrichment claim should not have been allowed, such as rules under either the *condictio indebiti*, for instance the requirement of an excusable error, or under the *condictio ob turpem*, the court should have investigated that fact. If there was nothing untoward in the transactions, the proper action should have been the *condictio indebiti*, as Protector had the intention of paying, based on the belief that it was paying Freefall's purported debt.

⁵⁸ Par 11-15.

⁵⁹ Par 16-22 and 30-38.

⁶⁰ Par 33.

⁶¹ Par 33.

⁶² Par 34.

⁶³ Par 38.

⁶⁴ Par 16.

The same question asked after the *Nissan v Marnitz* case now arises – if the courts can deal with enrichment liability sensibly as they have done here, based on the general principles rather than the vagaries of the specific actions, do we still need the specific actions? Should the focus not rather be on the general requirements and the correctives needed? The court in this case explicitly stated that there is no general enrichment action⁶⁵ but proceeded to deal with the enrichment only on the basis of the general requirements. If the court rejected the claim on the grounds of one of these requirements, then there could have been an excuse for not looking at the further restrictions found under the specifically applicable action. When the court, however, finds these requirements fulfilled one would have thought that the requirements for the specifically applicable action should than also have been assessed. Maybe this is a case where one must look rather at what the court did, that is, apply general enrichment liability, than what the court said, namely that there is no general enrichment action.

One last critical remark - the court made an order for payment of the R50 million plus interest from 15 March 2004, the date on which the money had been transferred into the trust account of Edward Nathan Friedman. This was, however, not the date that the funds were received by Financial Services. That only happened on 22 June 2004. In any event in terms of the general rules of enrichment, no interest is payable unless there has been at least a demand by the impoverished party and the enriched party should reasonably have reckoned with such enrichment.⁶⁶ The interest then payable is *mora* interest.⁶⁷ The move away from the specific actions should not lead to courts abandoning the requirements of the specific actions without further ado. The rules and restrictions applicable to these specific actions should be assessed to establish whether they should continue to operate and if so, whether they should operate in respect of all actions or whether they should operate only in certain restricted circumstances.

⁶⁵ Par 16.

⁶⁶ *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging* 1968 3 SA 283 (T) 284; De Vos op cit note 1 at 201; *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 652-653 and 659; Eiselen & Pienaar op cit note 5 at 40-43.

⁶⁷ *Amalgamated Society of Woodworkers of SA v Die 1963 Ambagsaalvereniging* 1968 3 SA 283 (T) 284; De Vos op cit note 1 at 201; *CIR v First National Industrial Bank Ltd* 1990 3 SA 641 (A) 652-653 and 659; Eiselen & Pienaar op cit note 5 at 40-43.

IV SETTING A TREND?

Both the *Nissan v Marnitz*⁶⁸ and the *Glenrand*⁶⁹ cases were important cases, particularly having regard to the amounts involved that were not trifling (R 11 million and R 50 million respectively). The decision of the Supreme Court of Appeal not to refer to the specific actions involved could not have been accidental or without reason. The question now arises whether these two decisions are setting a trend to be followed by other courts or whether they are at this time only mere signposts on the way to the development of a principled approach to unjustified enrichment?

Glenrand was decided only recently (late in 2012) and one cannot yet, therefore, expect to find case law relying on its approach. *Nissan v Marnitz* however was already decided seven years ago in 2006 but has not been referred to in the case law all that often and then not in the context of the issues that are being discussed here.⁷⁰ There is, therefore, also no discernible evidence of this approach beginning to filter through to the lower courts.

There have, however, been a number of Supreme Court of Appeal cases in this period where that court has meticulously applied the requirements of the specific actions alongside the general requirements. A few examples will illustrate this.

In *Jacquesson v Minister of Finance* Ponnan JA states:⁷¹

“The appellant's entitlement to repayment of the moneys derived, so it is asserted, from the *condictio sine causa*. Without attempting to define its ambit, it is available to a claimant, it would seem, seeking to recover money or property that had been transferred in terms of a valid *causa* that has since fallen away (see *B & H Engineering v First National Bank of SA Ltd* 1994] ZASCA 152; 1995 (2) SA 279 (A) at 284G – 285C; 9 Lowsa (2ed) para 220).”

In *Afrisure CC v Watson NO* Brand JA states:⁷²

“4] I shall first deal with the main claim against Afrisure, based on unjustified enrichment. In this court, as in the court a quo, argument for the respondents started with the proposition that ‘there is a clear movement heralded by the Supreme Court of Appeal, away from the maintenance of a distinction between

⁶⁸ *Nissan South Africa (Pty) Ltd v Marnitz NO (Stand 186 Aeroport (Pty) Ltd intervening)* 2006 4 All SA 120 (SCA).

⁶⁹ *Glenrand MIB Financial Services (Pty) Ltd v van den Heever NO* 2013 1 All SA 511 (SCA).

⁷⁰ See for instance *Pestana v Nedbank Limited* 2008 1 All SA 603 (W); *Nedbank v Pestana* 2009 2 All SA 58 (SCA); *ABSA Bank Ltd v Intensive Air (Pty) Ltd (in liquidation)* 2011 3 All SA 2 (SCA); *Muller NO v Community Medical Aid Scheme* 2012 2 All SA 252 (SCA); *ABSA Bank Limited v Lombard Insurance Company Limited*; *FirstRand Bank Limited v Lombard Insurance Company Limited* 2012 4 All SA 485 (SCA).

⁷¹ *Jacquesson v Minister of Finance* 2006 (3) SA 334 (SCA) par 8.

⁷² *Afrisure CC v Watson NO* 2009 (2) SA 127 (SCA).

the various condictiones underlying the actions of unjustified enrichment in our law'. Relying on obiter dicta by Schutz JA in *McCarthy Retail Ltd v Short Distance Carriers CC* 2001 (3) SA 482 (SCA) paras 8-10 and *First National Bank of Southern Africa Ltd v Perry* NO 2001 (3) SA 960 (SCA) para 23, the court a quo not only acknowledged, but also expressed its support for this movement (paras 7-10). In my view it would, however, be unwise to enter into that debate. This is clearly not the case to decide whether we should grasp the nettle of a general enrichment action. The respondents did not rely on a general enrichment action or, for that matter, even on an extension of any recognised *condictio* (cf eg *Bowman, De Wet & Du Plessis NNO v Fidelity Bank Ltd* 1996] ZASCA 141; 1997 (2) SA 35 (A) at 40A-B). They sought to bring their claim within the framework of either the *condictio ob turpem vel iniustam causam* or the *condictio indebiti*. Whether they have succeeded in doing so is the question we have to decide."

In *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* 2009 (1) SA 196 (SCA) Burochowitz AJA states:⁷³

"The respondent seeks by means of the *condictio indebiti* to recover payment from the appellant of the amounts that were overpaid during the period April to September 2000.

24] The central requirement of the *condictio indebiti* is that the payment or transfer must have been effected in the mistaken belief that the debt was due. It is also an established requirement that the mistake, whether of fact or of law, must be excusable: *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue and another*.⁷⁴

In *Leeuw v First National Bank Ltd* Snyders JA states:⁷⁵

"8] The magistrate accepted that the *condictio indebiti* was 'not available' to a bank and found that the respondent, in any event, failed to prove the facts founding the *condictio indebiti* that it relied upon. On appeal to the court below the appellant and the respondent again accepted that the *condictio indebiti* was not the respondent's 'proper cause of action'. The respondent argued in the court below that the *condictio sine causa* was the appropriate remedy. The court below found that although that was not pleaded, its requirements were fully canvassed during the trial, the particulars of claim clearly based the respondent's claim on enrichment and the evidence required to prove the one would have sufficed to prove the other. These findings and an absence of prejudice to the appellant led the court below to conclude that the respondent should not fail for having pleaded the 'incorrect *condictio*'.

10] However, to avoid future confusion it needs to be stated that there is no principle that the *condictio indebiti* is not available to a bank. In *Absa Bank Ltd v De Klerk* 1999 (1) SA 861 (W), on similar facts, it was held, in my view correctly, that the *condictio indebiti* was the appropriate remedy for the bank to have relied upon. In *Saambou Bank Ltd v Essa* 1993 (4) SA 62 (N) a thorough comparative analysis was made of facts that would give rise to a bank being

⁷³ Par 23.

⁷⁴ Footnote 8: 1991 ZASCA 163; 1992 (4) SA 202 (A).

⁷⁵ 2010 (3) SA 410 (SCA) par 8.

entitled to rely on the *condictio indebiti* as opposed to the *condictio sine causa*. It was held that if a bank believed it was obliged to pay 'on demand any withdrawal sought by its customer] up to the amount of the credit standing in his account' the *condictio indebiti* was the appropriate remedy. *B & H Engineering v First National Bank of SA Ltd* 1995 (2) SA 279 (A), mentioned by the court below as if it entertained another view, dealt with the different scenario of a bank paying the amount of a cheque to a payee not realising that the cheque had been countermanded. There was no question in *B & H* of the bank performing vis-à-vis the payee. Hence the *condictio indebiti* did not arise.”

ABSA Bank Ltd v Lombard Insurance Company Ltd, Firstrand Bank Ltd v Lombard Insurance Company Ltd ⁷⁶ is the only case that may be evidence of a changing trend. In this case Malan JA mentions that the remedy relied on is the *condictio ob turpem vel iniustam causam* ⁷⁷ but then goes on to decide the case on general principles without referring to the specific requirements of the *condictio ob turpem*.

In *National Credit Regulator v Opperman* the Constitutional Court (Van der Westhuizen J) states: ⁷⁸

“A party who wants to claim the restitution of money paid or goods delivered in pursuance of an unlawful agreement cannot do so under the agreement and must make use of an action based on the unjustified enrichment of the receiver.” ⁷⁹ Professor Visser describes the basic function of the law of unjustified enrichment as 'to restore economic benefits to the plaintiff, at whose expense they were obtained, and for the retention of which by the defendant there is no legal justification'. ⁸⁰ The enrichment action relevant to this matter is the *condictio ob turpem vel iniustam causam*. Its requirements are generally described as follows: ownership must have passed with the transfer; the transfer must have taken place in terms of an unlawful agreement; ⁸¹ and the claimant must tender the return of what he or she received. ⁸²,”

At this stage it would be hard to argue that *Nissan v Marnitz* and *Glenrand* are setting a trend in the case law, as the above examples amply prove that the specific enrichment actions are still very much alive in the highest courts. They must, therefore, be treated as signposts that could lead to a trend over time, as the emphasis shifts more and more to the general principles and a principled approach and away from an action based approach.

⁷⁶ *ABSA Bank Ltd v Lombard Insurance Company Ltd, Firstrand Bank Ltd v Lombard Insurance Company Ltd* 2012 (6) SA 569 (SCA).

⁷⁷ Paras 7 and 11.

⁷⁸ *National Credit Regulator v Opperman* 2013 (2) SA 1 (CC) par 15.

⁷⁹ Footnote 17: Visser above n 14 at 442.

⁸⁰ Footnote 18: Id at 4..

⁸¹ Footnote 19: Lotz above n 14 at par 215. On this action, see Visser id at 414 and onwards.

⁸² Footnote 20. See the principles governing the reversal of payment or transfer as set out by Visser id at 441 and onwards.

V CONCLUSION

Where do these two cases leave us now? It would have been preferable if the Supreme Court of Appeal had indicated that it was embracing unjustified enrichment liability as a principled source of obligations, rather than as a jumble of different actions with some common underlying principles, to bring this part of our law on par with its sister disciplines in the law of obligations. One must, however, confess that, ever since the decisions in *McCarthy*⁸³ and *Kudu Granite*,⁸⁴ there has been a tendency in the courts, and specifically in the Supreme Court of Appeal, to focus more on the general principles, rather than on the specific actions.

This is already a remarkable transformation of the approach to unjustified enrichment. In this process of transformation from an action based to a principle based approach to enrichment liability, the general principles for enrichment liability that apply in all instances have now been firmly entrenched, as is evident from the simple way in which the Supreme Court Appeal stated this approach in the *Glenrand* case.

A gradual shift towards a principled approach does not necessarily mean that the rules that have been received from Roman-Dutch law and developed by our courts, have to be jettisoned in the process.⁸⁵ The shift in process does, however, mean that the specific rules that limit unjustified liability under the various actions, need to be reassessed to determine whether those rules should be of general application or whether they should apply only in certain limited instances or whether they should be retained at all having regard to the purpose and scope of the unjustified enrichment law.⁸⁶ The lines of distinction between the *condictio indebiti*, the *condictio causa data causa non secuta* and the *condictio sine causa specialis* (in its different forms) are notoriously difficult to draw.⁸⁷ The only easily recognisable distinction is between those actions and the *condictio ob turpem vel iniustam causam*. It would seem that today the most important remaining differentiation and restrictions existing between the various actions are the following:

⁸³ *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 All SA 236 (A).

⁸⁴ *Kudu Granite Operations (Pty) Ltd v Caterna Ltd* 2003 3 All SA 1 (SCA).

⁸⁵ See Du Plessis op cit note 4 at 6-10; Visser op cit note 1 at 7-10; Sonnekus op cit note 1 at 17 ff.

⁸⁶ Du Plessis op cit note 4 at 9-10; Visser op cit note 1 at 59-60; *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 All SA 236 (A) par 10.

⁸⁷ *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 All SA 236 (A) par 10; *First National Bank of Southern Africa Ltd v Perry NO* 2001 (3) SA 960 (SCA) par 23.

- (a) The public policy restrictions when dealing with factual situations currently resorting under the *condictio ob turpem vel iniustam causam*;⁸⁸
- (b) The excusable error requirement under the *condictio indebiti*; and⁸⁹
- (c) The application of the Placaeten.⁹⁰

There seems to be sound policy reasons for retaining the public policy restrictions that pertain to the *condictio ob turpem vel iniustam causam* and those restrictions should remain in place. The excusable error requirement has been the subject of criticism over many years and its retention must be seriously doubted today.⁹¹ The fear at the time of *Nortje v Pool*⁹² of introducing a general enrichment action was based largely upon legal uncertainty and the possibility of unlimited claims. The excusable error requirement is hardly a restriction that is necessary to address those fears. It should have become clear by now that the general requirements as adopted and applied by our courts contain the necessary constraints to prevent unlimited liability and legal uncertainty. The restriction in the Placaeten also needs to be reassessed in view of their history and the changes that have taken place in our society.

It is hoped that *Nissan v Marnitz* and *Glenrand* are indeed signposts leading to the adoption of a principled approach to unjustified enrichment and not merely two lonely swallows. Visser quite aptly states the following with regard to the difference between an action-based approach and principled approach:

“In South Africa, therefore, it is not so much a question of the forms of action ruling us from their graves, but that they have never died - causing us to continue thinking, quite primitively, in terms of 'actions' instead of principle; and keeping us from exploring, except in the most perfunctory way, the relationship between the law of enrichment and other areas of the law”.

Adopting a principled approach may also open the way for a different taxonomy based on principle of unjustified enrichment law, as proposed by Visser and Du Plessis⁹³ breaking

⁸⁸ *McCarthy Retail Ltd v Shortdistance Carriers* CC 2001 3 All SA 236 (A); *Afrisure CC v Watson NO* 2009 1 All SA 1 (SCA). See also Visser op cit note 1 at 415 ff; Du Plessis op cit note 4 at 204-211; 131 ff.

⁸⁹ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A).

⁹⁰ *Aviation Corporation (Pty) Ltd v Rand Airport Holdings (Pty) Ltd* 2006 (6) SA 605 (SCA). Sonnekus op cit note 1 at 188-190; 285-286.

⁹¹ *Willis Faber Enthoven (Pty) Ltd v Receiver of Revenue* 1992 4 SA 202 (A) 224; Visser op cit note 40 ff; Scott op cit note 40 827; Du Plessis op cit note 4 at 135-139.

⁹² *Nortje v Pool NO* 1966 3 SA 96 (A).

⁹³ They cluster the different enrichment situations into (a) enrichment by transfer; (b) imposed enrichment; and (c) enrichment by invasion of rights. See Visser op cit note 1 at vii-x; Du Plessis op cit note 4 at vii-x.

away from the interim position as evidenced in the works of Lotz and Brand,⁹⁴ and Eiselen and Pienaar⁹⁵. It may also open the way for developing an extension of enrichment liability to deal with factual situations currently not covered by any form of liability such as enrichment by invasion of rights as advocated by Visser⁹⁶ and Du Plessis⁹⁷. This will, however, require a paradigm shift from an action-based liability to a principle-based liability which is more in conformance with the modern Roman-Dutch common law of South Africa.

⁹⁴ Op cit note 1.

⁹⁵ Op cit note 5.

⁹⁶ Visser op cit note 1 at 651 ff.

⁹⁷ Du Plessis op cit note 4 at 331 ff.

SOCIAL JUSTICE AND THE CHANGING ROLE OF THE LAW OF DELICT IN SOUTH AFRICA^{*}

André Mukheibir^{**}

Professor and Head of Department, Private Law, NMMU

I INTRODUCTION

In 2009 in his inaugural lecture as honorary professor at the Nelson Mandela Metropolitan University, Prof Eltjo Schrage examined the role of private law in promoting social justice.¹ The topic was also the theme for the conference that was held on that occasion and which has taken place every year since then.² With the topic of this lecture and the annual conference, Eltjo Schrage has made us think about private law in a new way as well as examining its role in post-1994 South Africa. In this contribution the focus will be specifically on the law of delict, its changing role in the South African context and whether or not it is contributing to social justice in South Africa.

The constitutional imperative, described in *Carmichele v Minister of Safety and Security*,³ placed a duty on the courts to develop the law where it does not promote the “spirit, purport and objects”⁴ of the Bill of Rights,⁵ and in that particular instance the Constitutional Court expanded the “pre-constitutional test for determining the wrongful omissions”⁶ to hold prosecutors and police liable for negligent omissions.⁷ The Constitutional Court has also considered traditional law of delict and, where necessary, developed it, in cases such as *K v Minister of Safety and Security*,⁸ *F v Minister of Safety and Security*,⁹ *Khumalo v Holomisa*,¹⁰ *Dikoko v Mokgathla*¹¹ and *Le Roux v Dey*,¹² to

^{*} This article is very loosely based on a paper “The Law of Delict – *Requiescat in Pace*”, delivered at the Third Annual Private Law and Social Justice Conference in August 2011.

^{**} BMus BJur LLB (UPE) BA(Hons) (Unisa) DIur (Amsterdam)

¹ Schrage “The Role of Private Law in Promoting Social Justice” (2010) *Obiter* 1-9.

² The Department of Private Law at the Nelson Mandela Metropolitan University has held a conference on this theme every year since August 2009.

³ 2001 (4) SA 938 (CC).

⁴ S 39(2) Constitution of the Republic of South Africa, 1996.

⁵ Paras 36, 39.

⁶ Par 37.

⁷ Par 84.

⁸ 2005 (6) SA 419 (CC).

⁹ 2012 (1) SA 536 (CC).

¹⁰ 2002 (5) SA 401 (CC).

¹¹ 2006 (6) SA 235 (CC).

name a few examples. In other instances, legislation has been passed to supplement the traditional private law rules.¹³

In some areas delictual liability has been excluded, because the retention of these rules would reinforce inequality.¹⁴ This article deals with this exclusion, particularly in the light of the imminent adoption of the Road Accident Benefit Scheme Bill. When this legislation comes into force South Africa will take a further step on the road towards a comprehensive social security system.¹⁵ The 2005 Amendment of section 21 of the Road Accident Fund Act has already abolished common law liability for harm described in section 17 of the Act and the constitutionality of this section was unsuccessfully challenged.¹⁶ Currently the victim of a motor vehicle accident cannot recover common law damages for the balance of his claim from the wrongdoer, but the victim still, in order to claim from the Fund, has to prove fault on the part of the perpetrator.¹⁷ Once the Road Accident Benefit Scheme Bill becomes law, the victim will be able to claim irrespective of whether or not fault is established and the victim will even be able to recover damages where she caused the harm.¹⁸ How does this then affect the role of the law of delict in South Africa?

II THE LAW OF DELICT – AN EXCEPTION TO *RES PERIT DOMINO*

The maxim *res perit domino* formed the basis of compensation law for many years.¹⁹ “Damage lies where it falls”, unless there is a good enough reason to shift responsibility

¹² 2011 (3) SA 274 (CC).

¹³ Examples include the National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008. Labour legislation (some of which was passed before the Constitution came into force) has had a strong influence on employment contracts.

¹⁴ See the discussion below.

¹⁵ “Draft Policy on the Restructuring of the Road Accident Fund as Compulsory Social Insurance in relation to the Comprehensive Social Security System” GN 121 GG 32940 12 February 2010; *Law Society of South Africa v Minister of Transport* 2011 1 SA 400 (CC) par 45.

¹⁶ Par 3.

¹⁷ *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC).

¹⁸ Par 5.2.1 below.

¹⁹ Par 5.2.2 below.

¹⁹ *Telematrix (Pty) Ltd v Advertising Standards Authority* SA 2006 (1) SA 461 (SA) par 12, *Commercial Union Insurance Company of South Africa Ltd v Lotter* 1999 (2) SA 147 (SCA) par 17. See also Neethling Potgieter & Visser *Law of Delict* 6th ed (2010) 3; Van der Walt & Midgley *Principles of Delict* (2005) 31.

for that damage to someone else.²⁰ Examples of good reasons traditionally included breach of contract and delict.²¹ In *Telematrix (Pty) Ltd v Advertising Standards Authority SA*²² Harms JA held as follows:²³

“The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that ‘skade rus waar dit val.’ Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss.”

Even motor vehicle accident compensation systems have always relied on a reason (fault of the owner or driver of the motor vehicle) to shift the responsibility for the damage to someone else, initially a liability insurer and later a compensation fund.²⁴

Once delictual liability has been established and there is a reason to shift the loss, the victim becomes entitled to claim damages from the party who has been found liable. Traditionally the (main) function of delictual damages has been to compensate an aggrieved party.²⁵ Although tort law books also mention deterrence and punishment as functions of tort,²⁶ the function of delictual damages in South African law is compensation.²⁷ In the case of the *actio legis Aquiliae* the aim is to put the victim in the position she would have been in had the damage-causing event not taken place.²⁸ This is in accordance with the well-known sum-formula, or *Differenztheorie* of Mommsen.²⁹

²⁰ *Telematrix (Pty) Ltd v Advertising Standards Authority SA* 2006 (1) SA 461 (SA) par 12; *Commercial Union Insurance Company of South Africa Ltd v Lotter* 1999 (2) SA 147 (SCA) par 17. Neethling Potgieter & Visser *Law of Delict* 3; Van der Walt & Midgley *Principles of Delict* (2005) 31.

²¹ Neethling Potgieter & Visser *Law of Delict* 3; Van der Walt & Midgley *Principles of Delict* 31.

²² 2006 (1) SA 461 (SA).

²³ Par 12.

²⁴ See the wording of s 17(1) of the Road Accident Fund Act and its predecessors – there is a requirement that, for the Fund to be liable, the injury or death causing the harm has to be “due to to the negligence or other wrongful act” of someone.

²⁵ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC). See also generally Mukheibir *The Wages of Delict : Compensation, Satisfaction, Punishment?* (unpublished doctoral thesis, University of Amsterdam 2007).

²⁶ See for example Deakin, Johnson & Markesinis *Markesinis & Deacon’s Tort Law* 7ed (2013) 43 – 47; Harpwood *Modern Tort Law* 7ed (2009) pp 12 – 14; Murphy & Witting *Street on Torts* 13ed (2012) 17.

²⁷ See fn 25 above.

²⁸ Potgieter, Steyn & Floyd Visser & Potgieter *Law of Damages* 71 – 73.

²⁹ See also Erasmus and Gauntlett “Damages” par 21 in Joubert *LAWSA*, Potgieter, Steyn & Floyd Visser & Potgieter *Law of Damages* 72.

This formula is well entrenched in South African law. In *Transnet Ltd v Sechaba Photoscan (Pty) Ltd* the court held as follows:³⁰

“It is now beyond question that damages in delict (and contract) are assessed according to the comparative method. Essentially, that method, in my view, determines the difference, or, literally, the *interesse*. The award of delictual damages seeks to compensate for the difference between the actual position that obtains as a result of the delict and the hypothetical position that would have obtained had there been no delict.”

The sum-formula aims to compensate the victim as fully as possible – nothing less and nothing more.³¹ The specific rules of delictual damages aim to ensure that a plaintiff is not over-compensated.³² South African law does not recognize punitive damages in delict,³³ although traditionally the *actio iniuriarum* as an *actio vindictam spirans*³⁴ has retained a penal element from its Roman law origins.³⁵

The compensatory function of the law of delict is not at odds with the purpose of no-fault schemes, and in particular both the already implemented Compensation for Occupational Injuries and Diseases Act³⁶ and the envisaged Road Accident Benefit Scheme Bill³⁷ make provision for compensation of victims for certain losses. However, in both cases delictual claims are specifically excluded and no provision is made for truncated claims.³⁸ Both pieces of legislation form part of the broader social security network envisaged by the Government. The purpose of this, as will become clear from the discussion below, is to ensure fair access to benefits all citizens.

³⁰ 2005 (1) SA 299 (SCA) par 15.

³¹ Erasmus & Gauntlett “Damages” par 31. Mukheibir chapter 3.

³² Erasmus & Gauntlett “Damages” par 31. Mukheibir chapter 3. Examples of rules that ensure that the victim is not over-compensated include legal causation rules, the accounting of benefits rule, the mitigation of loss rule and the rules pertaining to contingencies.

³³ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 62, 63.

³⁴ Potgieter, Steyn & Floyd *Visser & Potgieter Law of Damages* 513.

³⁵ *Fose v Minister of Safety and Security* 1997 (3) SA 786 (CC) paras 62, 63. Potgieter, Steyn & Floyd *Visser & Potgieter Law of Damages* 534 however, argue that the *actio iniuriarum* no longer retains a penal element.

³⁶ Act 130 of 1993.

³⁷ 2013.

³⁸ See the discussion in par 5 below.

III FAULT V NO-FAULT³⁹

The global movement towards a no-fault regime commenced with the implementation of the first such system in Saskatchewan, Canada in 1946.⁴⁰ It received a boost with the well-known work by Keeton and O'Connell in terms of which they advocated a comprehensive insurance regime for victims of motor vehicle accidents.⁴¹ The right to recover compensation in terms of this scheme would not be based on fault, but on the fact of the claimant having suffered harm.⁴²

Although there are a myriad of no-fault schemes (proposed and implemented) there are some common denominators between these different schemes:⁴³

- (a) Delictual claims abolished for certain forms of harm, for example certain types of harm arising from motor vehicle accidents;
- (b) The Victim claims compensation, either in terms of a first party insurance contract or in terms of a state managed fund;
- (c) The victim is not required to prove the elements of delict such as wrongfulness, causation and fault; all that is required is that the victim suffered the type of harm envisaged in terms of the scheme.

The term “no-fault” is often confused with strict liability. In the case of a no-fault scheme, the person who caused the harm is not held liable for the compensation thereof; instead liability is shifted to an insurance company or a compensation fund. In the case of strict liability, however, the wrongdoer is held responsible without there being any fault on his or her part.⁴⁴ The term “no-fault” is therefore a misnomer, because what is actually envisaged is not liability, but compensation for harm. Traditionally it has been assumed that “faulters” are liberalists and “no-faulters” are socialists, but both systems have received support across the ideological spectrum.⁴⁵

³⁹ This section relies to a large extent on chapter 7 of Mukheibir *The Wages of Delict: Compensation, Satisfaction, Punishment?* (unpublished doctoral thesis, University of Amsterdam 2007) and the sources discussed therein. Additional sources have been added to this section where necessary.

⁴⁰ Anderson, Heaton & Carroll *The U.S. Experience with No-Fault Automobile Insurance* (2010).

⁴¹ *Basic Protection for the Traffic Victim. A Blueprint for reforming Automobile Insurance* (1965). See also “A Proposal for Improving Auto-Mobile Claim Systems” (1964) *Harvard Law Review* 329, that summarises the most important recommendations contained in the book.

⁴² Mukheibir 253.

⁴³ Mukheibir 253 - 255. See also the South African examples: the Compensation for Occupational Injuries and Diseases Act and the Road Accident Benefit Scheme of 1913

⁴⁴ Neethling, Potgieter & Visser *Law of Delict* 355 and further.

⁴⁵ Hutchinson “Beyond No-Fault” 1985 *California Law Review* 755 - 756 and further.

In the 1980's there was a huge surge towards no-fault systems, largely inspired the comprehensive accident insurance system adopted in New-Zealand in 1974 that almost completely abolished the tort liability system (but ironically retained the remedy of punitive damages).⁴⁶

Many books and articles have been written about the pros and cons of fault and no-fault systems.⁴⁷ The biggest indictment against the fault system is that it is very costly, that it only provides compensation to a small number of people and that it amounts to a lottery in that there is no certainty as to whether a claim will succeed or not.⁴⁸ Despite the fact that tort law has been subjected to much criticism and the fact that the liability insurance system in countries such as the United States of America faced a crisis in the 1980's, the tort liability system has prevailed and in some instances no-fault systems that were implemented were later revoked.⁴⁹ Massachusetts introduced a no-fault system for motor vehicle accident compensation in 1971.⁵⁰ 25 states eventually followed suit but by 2010 many of these, including Massachusetts, had reverted back to tort liability.⁵¹ Currently only 13 states in the United States still have no-fault compensation systems and in at least three of these claimants have a choice between no-fault compensation or traditional tort compensation.⁵² Anderson *et al* note that the promise of no-fault, namely reduced costs, never materialised and that the costs had in fact spiralled out of control.⁵³ This has resulted in the abolition of no-fault systems in states had not so long ago introduced them.

In Canada,⁵⁴ on the other hand, as well as In New Zealand, no-fault systems have remained in place.⁵⁵ The reason why these countries retained their systems while many

⁴⁶ See Schuck "Tort Reform Kiwi-Style" 2008 *Yale Law and Policy Review* 187 for an overview of the New Zealand system.

⁴⁷ See Mukheibir p240 footnotes 1 – 7 for sources critical of the tort law system. For an overview of the experience of no-fault systems and its problems, see Anderson, Heaton & Carroll *The U.S. Experience with No-Fault Automobile Insurance* (2010).

⁴⁸ Mukheibir 241 – 252 and sources cited there.

⁴⁹ Mukheibir 257.

⁵⁰ Anderson, Heaton, Carroll 35 and further; Mukheibir 256.

⁵¹ Anderson, Heaton, Carroll 58 – 50; Mukheibir 256 – 257. See the website of the Insurance Information Institute in July 2013: http://www.iii.org/issues_updates/no-fault-auto-insurance.html.

⁵² http://www.iii.org/issues_updates/no-fault-auto-insurance.html.

⁵³ Anderson, Heaton & Carroll 3

⁵⁴ See the website of the Insurance Bureau of Canada <http://www.ibc.ca/en/> for the degree to which tort has been retained. All provinces have some form of no-fault liability.

⁵⁵ See the website of the New Zealand Accident Compensation Corporation <http://www.acc.co.nz/> which sets out the claims procedure in terms of the Accidents Compensation Act 2001 (which is a variation of the comprehensive no-fault system introduced in 1974 with the Accidents Compensation Act of that year).

states in the US revoked no-fault systems could have to do with the fact that the US has always been regarded as a litigious society with a thriving contingency fee system, hence suing someone for compensation may be easier there than elsewhere. It could also be that in some of these countries tort liability was completely abolished and not retained as a choice, or a top-up.⁵⁶

Whether or not a fault-based system is in fact better or worse than a no-fault system depends not only on the ideology of the proponents, but also on what is intended with a no-fault system and how well it is administrated. The best-designed system with the most well-intentioned goals can be an abysmal failure if becomes a bureaucratic bungle, fraught with red tape and corruption.

The adoption of no-fault systems does away with the notion of “letting the damage lie where it falls” and instead is focusing more on the fact of harm being suffered and having to be compensated, rather than shifting the responsibility only if there is a good reason. In this regard Fleming⁵⁷ wrote the following:⁵⁸

“Our legal experience has long made us aware that there are several, rather than one, possible solutions to the problem of compensating accident victims. They range from “letting the loss lie where it falls” to providing compensation for all casualties. In between, the law of torts occupies a halfway, and increasingly half-hearted, position. Indeed, so rich is our experience that we have come to live with all of these different regimes at one and the same time.”

Although most compensation systems do not provide compensation for all casualties (in that they are limited to specific groups of victims, for example employees or victims of motor vehicle accidents), there is nevertheless a strong move away from *res perit domino* and the necessity on the part of the victim to prove why she should not bear her own loss. In this regard there is a marked deviation from what has hitherto been a fundamental principle of the law of delict.

⁵⁶ Anderson, Heaton & Carroll 11, 12.

⁵⁷ “Is there a Future for Tort?” 1984 *Louisiana Law Review* 1193.

⁵⁸ P 1193.

IV THE RIGHT TO SOCIAL SECURITY – A FUNDAMENTAL RIGHT

The Constitution of the Republic of South Africa is the supreme law of the land and any laws that are in conflict with it will be invalid.⁵⁹ Furthermore any duties imposed by the Constitution have to be fulfilled.⁶⁰ For this reason the courts are enjoined to develop the common law to ensure that it accords with the objects spirit and purport of the Bill of Rights,⁶¹ or, in other instances, to pass or amend legislation to give effect to the rights enshrined in the Bill of Rights.⁶²

The Constitution in the Bill of Rights makes provision for a fundamental right to “social security” in section 27:

- “(1) Everyone has the right to have access to-
- (a) health care services, including reproductive health care;
 - (b) sufficient food and water; and
 - (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance.
- (2) The state must take reasonable legislative and other measures, within available resources, to achieve the progressive realisation of each of these rights.”

In August 1997 the Government issued the White Paper for Social Welfare⁶³ that set out Principles, guidelines, recommendations, proposed policies and programmes for developmental social welfare in South Africa.⁶⁴ The white paper identified problems that existed in the South African context and particularly within the social welfare system, and sought to address these in an attempt to bring about a fair dispensation. The white paper set as one of its objectives the realization of the objectives in the Constitution.⁶⁵

Some of the “restructuring priorities set out in this policy included the

⁵⁹ S 2.

⁶⁰ S 2.

⁶¹ S 39(2) read with s 8(2) and s173. See *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

⁶² Examples of legislation which has had to be amended include sections of the Criminal Procedure Act 51 of 1977 referring to the death penalty (amended in terms of the Criminal Law Amendment Act 105 of 1997) pursuant to the decision of the Constitutional Court in *S v Makwanyane* 1995 SA 3 SA 391. New legislation that has been passed includes the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act No. 4 of 2000. These give effect to the right to equality in s9 of the Bill of Rights.

⁶³ The document may be downloaded from the South African Government Online website: [http://www.gov.za/documents/index.php?term=&dfrom=&dto=&tps\[0\]=5&subjs\[0\]=0&p=2](http://www.gov.za/documents/index.php?term=&dfrom=&dto=&tps[0]=5&subjs[0]=0&p=2).

⁶⁴ See the full title of the White Paper as well as the preamble.

⁶⁵ Chapter 2

following:⁶⁶

- Building consensus about a national social welfare policy framework.
- Creating a single national welfare department as well as provincial welfare departments and exploring the potential role of local government in service delivery.
- The phasing out of all disparities in social welfare programmes
- Restructuring and the rationalization of the social welfare delivery system, towards a holistic approach, which will include social development, social functioning, social care, social welfare services and social security programmes.

One of the strategic objectives of the Road Accident Benefit Scheme Policy of 2011 is that this benefit scheme should form part of a Comprehensive Social Security System – this accords with the White Paper’s priority of a “holistic approach” towards social security. In this regard the envisaged Road Accident Benefit Scheme Bill is therefore aligned with the objectives of the White Paper for Social Welfare and thus in compliance with section 27 of the Bill of Rights.⁶⁷

V NO-FAULT COMPENSATION IN SOUTH AFRICA

The notion of no-fault compensation is not new to South Africa. The Compensation for Occupational Injuries and Diseases Act⁶⁸ provides for no-fault compensation for the injuries and diseases of certain classes of employees, while at the same time excluding common law liability of the employer for compensation of this harm.⁶⁹

Should the Road Accident Benefit Scheme Bill become law, the notion of no-fault will expand to victims of motor vehicle accidents.

(a) *Compensation For Occupational Injuries And Diseases Act 1993*

⁶⁶ Chapter 1 Par. 21

⁶⁷ See also *Law Society of South Africa v Minister of Transport* 2011 (1) SA 400 (CC) par 52.

⁶⁸ Act 130 of 1993.

⁶⁹ See below.

The Compensation for Occupational Injuries and Diseases Act (hereafter referred to as COIDA) replaced the Workmen's Compensation Act.⁷⁰ The purpose of the Act as set out in the preamble is "[t]o provide for compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment, or for death resulting from such injuries or diseases; and to provide for matters connected therewith." This scheme is a no-fault scheme, hence the employee does not have to prove fault on the part of the employer.⁷¹ The right to institute a common law delictual action against the employer has, however, been abrogated by section 35.

Section 35 of the Act provides as follows:

- “(1) No action shall lie by an employee or any dependant of an employee for the recovery of damages in respect of any occupational injury or disease resulting in the disablement or death of such employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provisions of this Act in respect of such disablement or death.
- (2) For the purposes of subsection (1) a person referred to in section 56(1)(b), (c), (d) and (e) shall be deemed to be an employer.”

The constitutionality of section 35 was challenged in *Jooste v Score Supermarket Trading (Pty) Ltd*⁷² as infringing *inter alia* sections 8(1) and 22 of the interim Constitution.⁷³ In this instance the applicant was employed as a cashier in the respondent's supermarket. She was injured in the course of her duties and sued her employer for damages. The respondent raised a special plea to the effect that the applicant's claim was barred by section 35(1) of COIDA. The applicant replicated to this special plea on the grounds that section 35(1) infringed the interim constitution.⁷⁴

Section 8(1) (the equivalent of section 9(1) of the final Constitution) provides that

“Everyone shall have the right to equality before the law and has the right to equal protection of the law.”

⁷⁰ Act 30 of 1941.

⁷¹ S22 Act 130 of 1993.

⁷² 1999 (2) SA 1 (CC).

⁷³ Par 6.

⁷⁴ The matter was decided in the High Court on the basis of the final Constitution, but Yacoob J held that as the cause of action arose when the interim Constitution was in force, that Constitution should apply. Furthermore, the provisions were not materially different from those in the final Constitution.

Section 22 (the equivalent of section 34 of the final Constitution) makes provision for access to the courts:

“Every person shall have the right to have justiciable disputes settled by a court of law or, where appropriate, another independent and impartial tribunal or forum.”

The Court a quo found that section 35 infringed the equality clause and thus was unconstitutional. The Constitutional Court per Yacoob J held that the court a quo had erred and gave the following reasons:

- (1) Section 35 does not infringe section 8(1). The scheme is logically and rationally connected to the purpose of COIDA, namely “namely, a comprehensive regulation of compensation for disablement caused by occupational injuries or diseases sustained or contracted by employees in the course of their employment.”⁷⁵
- (2) Section 35 also does not infringe section 22. The contention was not that section 35 violated the right of access to the courts, rather, it was held, the fact that general damages could not be claimed, violated the right of access to the courts. In this regard Yacoob J held that section 22 of the interim Constitution did not call for the retention of all common law rights, hence the fact that a common law right was removed, in itself could not be seen as an infringement of section 22.⁷⁶

COIDA has been in force for 20 years in South Africa and serves as an example of a no-fault compensation system that has functioned fairly well in South Africa.

(b) Road Accident Compensation

Although compensation for Road Accident Victims is currently still fault-based,⁷⁷ the victims since 1 August 2008⁷⁸ no longer have a claim in terms of the common law of delict against the owner or the driver.⁷⁹ Various commissions of enquiry have considered and recommended the implementation of no-fault compensation since the

⁷⁵ Par 17.

⁷⁶ Par 21.

⁷⁷ See s17(1) Road Accident Fund Act 56 of 1996.

⁷⁸ The date upon which the Road Accident Amendment Act 19 of 2005 came into operation.

⁷⁹ See discussion below.

1970's,⁸⁰ but such a system has thus far not been implemented. In 2002 the Road Accident Fund Commission released a report in terms of which a no-fault system was recommended,⁸¹ culminating in the Road Accident Benefit Scheme Bill of 2013.⁸²

Once the Road Accident Benefit Scheme comes into force, the compensation of motor vehicle accidents will be based on a no-fault system in terms of which the victim has to prove that she suffered harm of the kind envisaged in the Act. The Road Accident Benefit Scheme will likewise exclude common law liability (see below).

(i) Road Accident Act 1996

Prior to the 2005 Amendments, the Road Accident Fund Act, like its predecessors, provided that where the Fund was liable to compensate victims for harm “arising from bodily injury or death, caused by or arising from the driving of a motor vehicle”⁸³ there would be no liability at common law. Prior to its amendment, section 21 of the Act read as follows:

“When a third party is entitled under section 17 to claim from the Fund or an agent any compensation in respect of any loss or damage resulting from any bodily injury to or death of any person caused by or arising from the driving of a motor vehicle by the owner thereof or by any other person with the consent of the owner, that third party may not claim compensation in respect of that loss or damage from the owner or from the person who so drove the vehicle, or if that person drove the vehicle as an employee in the performance of his or her duties, from his or her employer, unless the Fund or such agent is unable to pay the compensation. (own emphasis).”

Where the Fund's liability was limited, the balance of the harm could be recovered at common law. Likewise, where the liability of the Fund was excluded, compensation for the harm could be recovered by means of a delictual action, provided of course the elements were satisfied.

⁸⁰ Examples include the Wessels Commission of Inquiry in 1976 and the Grosskopf Commission of Inquiry in 1981.

⁸¹ *Report of the Road Accident Fund Commission* (2002), also known as the Satchwell Report; see also Smit and Van der Nest “The Satchwell Report: an analysis of and findings of the Road Accident Fund Commission” 2003 *TSAR* 677.

⁸² The proposals of the Satchwell Commission were initially rejected by the Road Accident Fund – see *LegalBrief Today* Commission recommendations rejected by Road Accident Fund

⁸³ Ss 17(1) and 21 of the Road Accident Fund Act 56 of 1996 – this wording is similar to that contained in the predecessors of the Road Accident Fund Act.

The 2005 Amendment changed this. The amended section 21 completely abolished the common law claim for harm “arising from bodily injury or death, caused by or arising from the driving of a motor vehicle”. Although certain limitations and exclusions on claims by passengers (section 18 and 19 of the pre-amendment Act) were abolished, other limitations on claims for loss of support and loss of future income were introduced. Furthermore, claims for “general damages” were excluded unless the plaintiff had suffered serious injuries.⁸⁴ The amended section 21 reads as follows:

“(1) No claim for compensation in respect of loss or damage resulting from the bodily injury to or the death of any person caused by or arising from the driving of a motor vehicle shall lie—

- (a) against the owner or driver of a motor vehicle; or
- (b) against the employer of the driver.

(2) Subsection (1) does not apply—

- (a) if the Fund or an agent is unable to pay any compensation; or
- (b) to an action for compensation in respect of loss or damage resulting from emotional shock sustained by a person, other than a third party, when that person witnessed or observed or was informed of the bodily injury or the death of another person as a result of the driving of a motor vehicle.”

The Amendment Act became the subject of a constitutional challenge that culminated in the Constitutional Court decision of *Law Society of South Africa v Minister of Transport*.⁸⁵ The Law Society of South Africa and a number of other parties challenged the constitutionality of a number of provisions, regulations and one government notice before the North Gauteng High Court. On appeal to the Constitutional Court the challenge was limited to the constitutionality of sections 21, 17(4) and Regulation 5(1).⁸⁶ For the purposes of this article only the challenge to section 21 will be discussed.

The plaintiffs inter alia averred that new scheme and in particular the abolition of the common law claim was irrational.⁸⁷

The court held that the issue of rationality relates to whether the provision is properly related to the public good it seeks to realize.⁸⁸ If the measure fails in this regard

⁸⁴ The proviso to s17(1) provides as follows: “Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum”

⁸⁵ 2011 (1) SA 400 (CC).

⁸⁶ Par 3.

⁸⁷ Par 3,4 and 29

⁸⁸ Par 37.

it will be regarded as unconstitutional.⁸⁹ The purpose of this amendment is to ultimately achieve financial viability and to also create an equitable platform for the delivery of social security services.⁹⁰ The court held that, on the face of it, the abolition of the common law claim in itself would not solve the financial viability problems of the fund, as this takes place outside of the “funding remit” of the Fund.⁹¹ However, in order to ensure equity, the Amendment Act has removed the caps on passenger claims provided for in terms of the pre-amendment sections 18 and 19.⁹² At the same time caps have been placed on the amounts claimed for loss of future earnings and loss of support and claims for general damages have been excluded insofar as the injuries of the claimant are not serious.⁹³ Limiting the latter head of damages could result in vast savings for the Fund, but at the same time it could, if the common law claim were not abolished, result in these claims being brought against negligent motorists.⁹⁴ The huge risk of these claims being levied against drivers, according to the court, lends further support to the abolition of the common law claim.⁹⁵ The retention of the common law claim would result in an “incongruity” specifically in the following regards:⁹⁶

- (a) The inability of certain drivers to pay damages – because a large number of drivers will not be able to pay large damages claims, it would mean that only a small number of claimants would recover damages in terms of the common law claim; and
- (b) Only a few people can afford legal representation; those that cannot would not be able to recover common law damages. Even if these claimants had access to legal aid it is unlikely that they would be granted legal aid for claims that are not recoverable because of the inability of defendants to pay.

This “incongruity” of the common law claim does not accord with a social security system that aims to provide compensation to all irrespective of their financial resources.⁹⁷ Hence, the court found, that the abolition of the common law claim would,

⁸⁹ Par 37.

⁹⁰ Par 48 – 54.

⁹¹ Par 48.

⁹² Par 42.

⁹³ Par 42 – Moseneke J is referring to ss 17(4)(c) and the proviso in S 17(1).

⁹⁴ Par 49.

⁹⁵ Par 50.

⁹⁶ Par 50.

⁹⁷ Par 50.

because of this, promote a more equitable dispensation with equal access to compensation.

Another argument in favour of the rationality of the abolition of the common law claim is that the scheme in terms of the Amendment Act is an interim measure.⁹⁸ The court held that not only the intermediate purpose in enacting the Amendment Act, but also the long-term purpose of reforming the motor vehicle accident compensation scheme into a no-fault system should be borne in mind.⁹⁹ The new scheme, with its abolition of the common law claim, already represents a significant step in that direction.

(ii) Road Accident Benefit Scheme

Background

The origins of the Road Accident Benefit Scheme Bill may be traced back to the 2002 Report of the Road Accident Fund Commission.¹⁰⁰ The Commission was appointed in terms of the Road Accident Fund Commission Act¹⁰¹ and headed by Judge Kathleen Satchwell.¹⁰² The Commission was appointed with the following mandate:¹⁰³

“To inquire into and to make recommendations regarding a reasonable, equitable, affordable and sustainable system, for the payment by the Road Accident Fund of compensation or benefits, or a combination of compensation and benefits, in the event of the injury or death of persons in road accidents in the Republic.”

The Commission compiled a report in excess of 1000 pages, in which it outlined all the problems experienced by the Road Accident Fund, including excessive costs, delays in settling claims and the fact that the Road Accident Fund has a huge deficit. The terms of reference within which the Commission had to make its recommendations included the following:¹⁰⁴

- a) reasonableness;
- b) equity;

⁹⁸ Par 51.

⁹⁹ Par 51 – 54.

¹⁰⁰ *Road Accident Fund Commission Report: Findings and Recommendations of the Interdepartmental Committee of the Department of Transport* (2002).

¹⁰¹ 71 of 1998.

¹⁰² *Road Accident Fund Commission Report* p 2.

¹⁰³ Road Accident Fund Commission Act 71 of 1998 s 2(2).

¹⁰⁴ *Road Accident Fund Commission Report* p 2.

- c) affordability;
- d) sustainability;
- e) payment of benefits or compensation by the Road Accident Fund;
- f) the Constitution of the Republic of South Africa;
- g) the solvency of the Road Accident Fund.

The Government's draft policy for the Road Accident Benefit Scheme was published for commentary in 2010,¹⁰⁵ and in 2011 the final policy document was released.¹⁰⁶ Subsequent to this the Road Accident Benefit Scheme Bill was published in the Government Gazette for commentary in February 2013.¹⁰⁷ A new version of this Bill was published in May 2014.

The aim of the Bill is to legislate for a move away from a liability insurance model towards social security principles.¹⁰⁸ Although road accident compensation has effectively since 1986 no longer been funded by insurance premiums, it has still functioned as a type of liability insurance in that compensation was claimed from the fund, instead of the perpetrator who had in a in a blameworthy and wrongful manner caused the harm.¹⁰⁹ In terms of the new dispensation fault no longer has to be proven.¹¹⁰ The new scheme ensures that every one, including a negligent driver, can claim compensation.¹¹¹ In terms of the Road Accident Fund Act, the wrongdoer can currently not recover compensation for harm to himself, because the claim would, but for section 21, not have existed at common law.¹¹²

Benefits in terms of the RABS

The Bill retains the exclusion of common law liability, particularly since the Constitutional Court has held that it passes constitutional muster.¹¹³

¹⁰⁵ "Draft Policy on the Restructuring of the Road Accident Fund as Compulsory Social Insurance System in relation to the Comprehensive Social Security System" GN 121 GG 32940 12 February 2010.

¹⁰⁶ "Policy Paper for the Road Accident Scheme" GN 815 GG 34765 21 November 2011.

¹⁰⁷ GN 98 GG 36138 8 February 2013.

¹⁰⁸ "Policy Paper for the Road Accident Scheme" GN 815 GG 34765 21 November 2011 p 5.

¹⁰⁹ See s 17(1) and its predecessors.

¹¹⁰ See also the preamble to the Road Accident Benefit Scheme Bill and the "Policy Paper for the Road Accident Scheme" GN 815 GG 34765 21 November 2011 p 5.

¹¹¹ There is no provision excluding the negligent driver from claiming compensation for his or her own damage.

¹¹² S 19(a) provides as follows: "The Fund or an agent shall not be obliged to compensate any person in terms of section 17 for any loss or damage—(a) for which neither the driver nor the owner of the motor vehicle concerned would have been liable but for section 21..."

¹¹³ "Policy Paper for the Road Accident Scheme" GN 815 GG 34765 21 November 2011 5.

The five objects of the Bill are set out in section 2. The following is relevant for the purposes of this discussion. In section 2(a) provision is made for a benefit scheme that covers damages in respect of injury and death “caused by or arising from road accidents.” The Bill also provides for a benefit scheme that is envisaged as “reasonable, equitable, affordable and sustainable”.¹¹⁴

Section 2(b) excludes common law liability of “certain persons” who are responsible for the bodily injuries or death. Section 29 specifically provides as follows:

“No civil action for damages in respect of bodily injury to, or the death of, any person caused by or arising from a road accident shall lie
(a) against the owner or driver of a vehicle involved in the road accident; or
(b) against the employer of the driver. “

Furthermore, provision is made for deduction of benefits received in terms of the Compensation for Occupational Injuries and Diseases Act, the Defence Act and the South African Police Services Act.¹¹⁵

Chapter 6 makes provision for specific benefits that may be recovered in terms of the Scheme. The categories of benefits are listed in section 30:

- (a) health care services;
- (b) income support benefits (this includes both temporary and long-term support benefits)
- (c) family support; and
- (d) funeral benefits.

Chapter 6 furthermore sets out exactly what benefits are included in each category of benefits. All the benefits that may be claimed are for patrimonial losses. There is no provision for recovery of non-patrimonial or “general damages” in terms of the act. In this regard the RABS goes further than the Amendment Act in that there is no general damages, even in the case of “serious injury”. If a claimant should suffer emotional shock to the extent that psychiatric treatment is required, it is envisaged that it would fall within the ambit of the specific health care benefits stipulated in section 31, but there will be no claim for general damages.

The RABS is a last step in the process of exclusion of the delictual liability for certain harm arising from motor vehicle accidents. Since 1946¹¹⁶ common law claims

¹¹⁴ S 2(a).

¹¹⁵ S28(c).

have been excluded for harm arising from bodily injury and death, caused by or arising out of the driving of a motor vehicle.¹¹⁷ The claims had, however, prior to the 2005 Amendment Act, been truncated in that to the extent that compensation in terms of the relevant legislation were limited or excluded, the victim still had a possibility to claim in terms of the common law.¹¹⁸ This changed with the Amendment Act, which completely excluded the common law claim for certain harm, as discussed above. Since 1946 the common law claim has, however, not been readily available as a first option. In that sense, therefore, the abolition of the common law claim the Road Accident Benefit Scheme Bill is not such a radical departure from the status quo.

VI THE CONTINUED ROLE OF THE LAW OF DELICT

The exclusion of delictual liability in the cases of employee road accident compensation was necessitated to facilitate a fair access to social security benefits. The existence of social security benefits does not, however, mean that the law of delict will be replaced. In 2010 Millard wrote that the law of delict continues to co-exist in countries with well-developed social security systems and will continue to fulfill an important function in South African law.¹¹⁹ Millard compared the interaction between social security and the law of delict in Belgium, Germany and South Africa. In Belgium and Germany there are well-developed social security systems that exist side by side with the law of delict, although the role of the latter has been reduced.¹²⁰ In South Africa, Millard concludes, delict still dominates as a compensation system.¹²¹ Millard's article appeared prior to the Constitutional Court decision in *Law Society of South Africa v Minister of Transport*¹²² and the publication of the Road Accident Benefit Scheme Bill, but it is submitted that the position is still the same.

¹¹⁶ The year in which the first motor vehicle accident compensation legislation, the Motor Vehicle Insurance Act 29 of 1942 came into force.

¹¹⁷ Section 13 of the Motor Vehicle Insurance Act.

¹¹⁸ This was also the case with the different acts that followed the Motor Vehicle Insurance Act: Compulsory Motor Vehicle Insurance Act 56 of 1972, the Motor Vehicle Accident Act 84 of 1986, the Multilateral Motor Vehicle Accidents Fund Act 93 of 1989 and the Road Accident Fund Act

¹¹⁹ Millard "For whom the bell tolls... Interplay between law of delict and social security law in three modern compensation systems" 2010 *TSAR* 532.

¹²⁰ Millard 547 – 555.

¹²¹ Millard 555.

¹²² 2011 (1) SA 400 (CC).

In South African law delictual actions will remain relevant in a number of instances – police misconduct continues, despite the fact that the Minister has paid out billions in compensation.¹²³ One only has to think of the landmark cases that have appeared before the Constitutional Court in the past decade and a half – *Carmichele*,¹²⁴ *K*¹²⁵ and *F*.¹²⁶ In these instances plaintiffs suffered damage as a result of police misconduct or omissions and sued for compensation. In *Media24 v Grobler*¹²⁷ a plaintiff instituted an action for damages against her employer for sexual harassment by a fellow employee and was successful.¹²⁸ Compensation for harm which falls within the ambit of the *actio iniuriarum* will also continue to be claimed –there are numerous cases dealing with defamation, wrongful arrest and imprisonment, malicious prosecution and the like.¹²⁹ The *actio iniuriarum* traditionally does not have a purely compensatory function; it has another purpose, namely satisfaction (“genoegdoening”). The actions instituted in terms of the *actio iniuriarum* are also very personal in nature and its functions can therefore not be fulfilled by a compensation scheme.

Claims instituted in terms of the Germanic action for pain and suffering have been greatly limited in terms of the amendments to the Road Accident Fund.¹³⁰ Once the Road Accident Benefit Scheme Bill becomes law, these claims will be excluded entirely for victims of motor vehicle accidents.¹³¹

VII CONCLUSION

The law of delict has undergone several changes over the past decades. In terms of the Constitutional imperative, the courts have developed this branch of the law to bring it within the object, spirit and purport of the Bill of Rights. Legislative intervention has resulted in delictual claims becoming supplementary or being entirely replaced by

¹²³ The Mail and Guardian online reported that claims for the 2011/2012 year could be as high as R14billion – see mg.co.za/article/2013-04-24-public-claims-against-police-exceed-r14bn.

¹²⁴ *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC).

¹²⁵ *K v Minister of Safety and Security* 2005 (6) SA 419 (CC).

¹²⁶ *F v Minister of Safety and Security* 2012 (1) SA 536 (CC).

¹²⁷ [2005] 3 All SA 297 (SCA).

¹²⁸ Par 68 and further.

¹²⁹ Where, however, the infringements of the rights in question also give rise to patrimonial loss, the *actio legis Aquiliae* will lie.

¹³⁰ S17(1).

¹³¹ S 30 lists the category of benefits and no provision is made for non-patrimonial loss.

statutory compensation systems. The latter is part of the Government's overarching social security plan for South Africa.

In the process the maxim of *res perit domino* has become less pronounced as a point of departure for claims for compensation and in the case of no-fault compensation systems, *res perit domino* is almost irrelevant for harm falling within the ambit of those compensation schemes.

The law of delict, despite being curtailed somewhat by the no-fault compensation systems, will continue to fulfil a role in promoting social justice. It continues to play a vital role in compensating harm, as has been seen in cases of those who have fallen victim to police misconduct and brutality. It is also available those who have had their rights to their good name, bodily integrity and dignity infringed providing satisfaction where these personality rights have been infringed. Although the opportunity to claim in terms of the Germanic action have been reduced, serious non-patrimonial harm in the form of emotional shock which requires medical intervention will be compensated in terms of the no-fault funds because the harm is also patrimonial.

The law of delict therefore has an important role in promoting social justice in the instances mentioned above by ensuring that certain victims receive compensation for harm. In other cases the compensatory role played by delictual actions has been taken over by legislation that purports to be more effective in the promotion of equality and fair access to compensation. One can only hope that these compensation funds will be administered properly and, furthermore, that the compensatory purpose of these funds will not be thwarted by administrative incompetence, red tape and corruption. Whether or not social justice will be promoted remains the question, not the least because (as Eltjo Schrage himself said) "it is often easier to determine what injustice is than what justice is."¹³²

¹³² Schrage "The Role of Private Law in Promoting Social Justice" (2010) *Obiter* 1 8.

*TOWARDS AN OLD SCHOOL THEORY ON (NEW) RIGHTS TO MINERALS**

PJ Badenhorst**

*Associate Professor of Law, Deakin University
Visiting Professor Nelson Mandela Metropolitan University*

I INTRODUCTION

After the discovery of diamonds and gold in 1867 and 1870, respectively, the Southern African legislature played an active part in the development of mineral law.¹ Since that time, broadly speaking, three distinct periods of legislation can be distinguished: The first is an initial halfway-house period during which prospecting and/or mining rights to different classes of minerals² were divided or shared between the State and private holders of mineral rights.³ The second is a period of privatisation during which state-held entitlements to minerals were re-vested in private holders of mineral rights,⁴ while the third period has been

*I wish to acknowledge the comments and suggestions of Professor JD Van der Vyver of Faculty of Law, Emory University. I, however, remain responsible for the correctness of the end product. The law is stated at 31 December 2013.

** BLC LLB (Pret) LLM (Wits) LLM (Yale) LLD (Pret).

¹ Badenhorst & Mostert *Mineral and Petroleum Law of South Africa* (2004) Revision service 9 at 1-20C.

² In terms of section 2(1) of the Mining Rights Act 20 of 1967 and section 2 of the Precious Stones Act 73 of 1964, the right to prospect for natural oil and the right to mine natural oil, precious stones and precious metals (on "state land" and "private land") were vested in the State. The rights to prospect for base minerals, precious stones and precious metals and the rights to mine base minerals were held by the holders of mineral rights. The rights to prospect for base minerals, precious metals and precious stones were vested in the owner of "alienated state land" (s 12(1) of the Mining Rights Act and s 5(1) of the Precious Stones Act), whilst the rights to mine such minerals were held by the State. Preceding union, colonial and republican legislation contained similar statutory reservations. The right to prospect and mine all minerals could also during the period have vested in the state. See for instance s 4 of the Natal Mines Law of 1887. See further, Dale *An Historical and Comparative Study of the Concept of Acquisition of Mineral Rights* (unpublished LLD thesis, Unisa, 1979) 175-247; Kaplan *The Development of Various Aspects of the Gold Mining Laws in South Africa from 1871 until 1967* (unpublished PhD thesis, University of the Witwatersrand, 1986); Badenhorst & Mostert *op cit* note 1 at 1-18 to 1-20; Van der Schyff *Constitutionality of the Mineral and Petroleum Resources Development Act 28 of 2002* (unpublished LLD thesis, Northwest University, 2006) at 22-53. In *Minister of Minerals and Energy v Agri South Africa* 2012 (5) SA 1 (SCA) it was, however, decided that the "State controlled the prospecting and mining of all minerals, precious and base, and either reserved them to itself or allocated them to the holders of minerals rights" (pars 61 66; see also, pars 48 99).

³ A holder of a mineral right could either be the owner of land (if mineral rights had not been separated from ownership of land) or the holder of a mineral right (if such separation had taken place).

⁴ It commenced on 1 January 1992 by virtue of section 5(1) of the Minerals Act 50 of 1991 (See Badenhorst "The re-vesting of state-held entitlements to exploit minerals in South Africa: Privatisation or deregulation?" 1991 *TSAR* 113; Kaplan and Dale *A Guide to the Minerals Act 1991* (1992) 5-6 14). Section 43 of the Minerals Act granted transitional rights to owners of the former category of "alienated state" (see further Kaplan & Dale 121-131; Badenhorst & Mostert *op cit* note 1 at 12-3 to 12-5). Statutory prospecting and mining rights survived as transitional rights (see further Badenhorst & Mostert *op cit* note 1 at 12-1 to 12-3 and 12-5 to 12-18). In *Minister of Minerals and Energy v Agri SA* supra note 2 pars 66-76, the restoration of common law rights by section 5(1) was, however, rejected by the Supreme Court of Appeal.

a transformation period, during which all rights to all minerals (except for transitional old order rights which could be converted into new prospecting and mining rights during differing periods of transition) were vested in the State.⁵

Pioneering academic works on mineral law were published during the initial period.⁶ Due to the scarcity of common law sources⁷ the courts relied, by analogy, on property law principles to develop the emerging indigenous area of law.⁸ Especially the servitude, as a limited real right, provided a necessary vehicle for the courts and academics to develop the concept of a mineral right⁹ with its *sui generis* features.¹⁰ The South African courts were unaware of the analysis done during the seventies by Jan De Boer,¹¹ a doctoral student of Eltjo Schrage, of the writings of the medieval scholar Paulus De Castro¹² on special mining problems that occurred during the Middle Ages.¹³ If the courts, in hindsight, had had the benefit of De Boer's doctoral thesis it might have led to the recognition of De Castro as (probably) the father of the notion of a separate mineral right (*ius fodiendi*), as a result of his pioneering working method of comparing mineral rights with servitudes and his early recognition of the *sui generis* nature of mineral rights. Ironically, the derivation of mineral rights from the common law was recently rejected by the Supreme Court of Appeal in *Minister of Minerals and Energy v Agri South Africa*¹⁴ ("Agri SA III"), still without the benefit of the research of De Boer and to the detriment and injustice of former holders of unused old order rights. The opus of the student under guidance of our Romanist maestro may have changed the course of (recent) legal history in South Africa.

⁵ It commenced on 1 May 2004 by virtue of section 3(2) of the Mineral and Petroleum Resources Development Act 28 of 2002 ("MPRDA") (See Badenhorst & Mostert "Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property clause" 2003 *Stellenbosch Law Review* 377). It was, however, decided in *Minister of Minerals and Energy v Agri SA supra* note 2 par 85 99 that the right to mine (in the sense of the "right to prospect and mine for minerals and extract and dispose of them") has always been vested in the state and was therefore not expropriated.

⁶ Nathan *Transvaal Gold and Base Metals Law* (1934); Franklin & Kaplan *The Mining and Mineral Laws of South Africa* (1982).

⁷ *Trojan Exploration Co (Pty) v Rustenburg Platinum Mines Ltd* 1996 (4) SA 499 (A) at 509D-G.

⁸ Badenhorst & Mostert *op cit* note 1 at 1-2.

⁹ Badenhorst & Mostert *op cit* note 1 at 1-2 and at 1-12 to 1-13. See further Badenhorst "Klassifikasie en kenmerke van mineraalregte" (1994) 57.1 *THRHR* 34.

¹⁰ As per Brink J in *Ex Parte Pierce* 1950 (3) SA 628 (O) at 634C/D: "Perhaps it is correct to say that mineral rights constitute a class of real rights *sui generis*". See also *Erasmus v Afrikander Proprietary Mines Ltd* 1976 1 SA 950 (W) at 956E; *Apex Mines Ltd v Administrator, Transvaal* 1986 4 SA 581 (T) at 590F.

¹¹ De Boer *De Winning van Delfstoffen in het Romeinse Recht, De Middeleeuwse Juridische Literatuur en het Franse Recht en het Franse Recht tot 1810* (doctoral thesis, Leiden, 1978) at 153-161 167-175 269-270.

¹² *Consiliorum, sive responsorum* Vol I and II Venetiis 1671 (as cited by De Boer).

¹³ See further Badenhorst "Trojan Trilogy: III Mineral rights and mineral rights law" (1999) 10.1 *Stell LR* 96 97-99.

¹⁴ *Supra* note 2 paras 26 56 68. Although mineral rights have their source in legislation which made separate registration of mineral rights possible (see paras 49-52) and the notion of traditional mineral rights, seems more correct, I will for ease of discussion continue to refer to common law mineral rights.

A mineral right was always recognised in South Africa case law as a limited real right that entitles its holder to go upon the land to which the mineral right relates and prospect for minerals, and if minerals are found, to mine the minerals and to dispose thereof.¹⁵ Holders of mineral rights could grant prospecting or mining rights by virtue of a prospecting contract or a notarial mineral lease, respectively.¹⁶ Ownership of minerals was acquired upon severance of the minerals from the land.¹⁷ It was recently explained that, prior to severance, a mineral right holder had contingent ownership in the minerals.¹⁸ Mining statutes during the halfway-house period provided for the granting of statutory prospecting and mining rights by the State.¹⁹ During the privatisation period these statutory rights survived as transitional rights.²⁰ The enactment of the Mineral and Petroleum Resources Development Act 28 of 2002 (“MPRDA”) on 1 May 2004 heralded the end or destruction of “common law mineral rights”²¹ and the replacement thereof by similar statutory rights granted anew²² by the Minister of Mineral Resources in terms of the MPRDA.²³ The common law and statutory mineral rights of the previous dispensation (or old order) remained relevant (a) as an element of old order rights for purposes of the exercise of such rights during the respective transitional periods provided for in the MPRDA,²⁴ (b) for conversion of these rights into new

¹⁵ *Van Vuren v Registrar of Deeds* 1907 TS 289 at 294 295; *Rocher v Registrar of Deeds* 1911 TPD 311 at 316; *Ex Parte Pierce* supra note 10 at 634 C-D; *Erasmus v Afrikaner Proprietary Mines Ltd* supra note 10 at 956E; *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* supra note 7 at 509G; *Franklin & Kaplan op cit* note 6 at 7; s 5(1) of the Minerals Act 50 of 1991. During the privatisation period statutory authorisation was still required before the entitlements of prospecting and mining could be exercised (s 5(2) of the Minerals Act).

¹⁶ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* 2011 (4) SA 113 (CC) Par 65.

¹⁷ *Trojan Explorations Co v Rustenburg Platinum Mines Ltd* supra note 7 at 509J-510A; Badenhorst “Trojan Trilogy: I Competing mineral rights - *Trojan Exploration Co (Pty) Ltd v Rustenburg Platinum Mines Ltd* 1996 4 SA 499 (A)” (1998) 9.2 *Stell LR* 143 147-150. See further Dale *op cit* note 2 at 79-81; Badenhorst “Mining of mixed minerals - *Trojan Exploration Co (Pty) Limited v AFC Investments Limited*” 1995 *TSAR* 570 573-574.

¹⁸ *Agri South Africa v Minister of Minerals and Energy* 2012 (1) SA 171 (GNP) paras 26 27 50.

¹⁹ The Mining Rights Act 20 of 1967 and the Precious Stones Act 73 of 1964 and preceding legislation.

²⁰ See chapter VII of the Minerals Act; Kaplan & Dale *op cit* note 4 at 56-74 and 80-132.

²¹ *Meepo v Kotze* 2008 (1) SA 104 (NC) Par 8.1; *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* [2011] All SA 364 (SCA) Par 24; *Agri South Africa v Minister of Minerals and Energy* supra note 18 Par 50; *Xstrata v SFF Association* 2012 (5) SA 60 (SCA) Par 8; *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* [2013] ZACC 45 par 10; Badenhorst “Mineral Rights: ‘Year Zero’ cometh?” (2001) 22.1 *Obiter* 119; Badenhorst “Exodus of ‘Mineral Rights’ from South African Mineral Law” (2004) 22 *Journal of Energy and Natural Resources Law* 218. In *Minister of Minerals and Energy v Agri South Africa* supra note 2 paras 68 81 the majority of the court decided that what have come to be referred to as common law mineral rights, do not in fact have their origin in the common law. Even though the notion of traditional mineral rights seems to me more appropriate, I shall for convenience sake, like the courts in the past, continue to use this nomenclature. So did Nugent JA in *Agri SA III*.

²² In other words, with the exclusion of converted old order prospecting rights or old order mining rights.

²³ *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* supra note 21 par 20.

²⁴ See *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA); Badenhorst “Mineral rights are dead! Long live mineral rights! *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2007 (2) SA 363 (SCA)” 2008 *TSAR* 158. See also *Minister of Minerals and Energy v Agri South Africa* supra note 2 74.

prospecting and mining rights,²⁵ and (c) in resolving disputes about compensation for expropriation by enactment of the MPRDA of underlying common law mineral rights.²⁶

An attempt was made during the early nineties²⁷ to develop a theory on common law and statutory mineral rights in terms of the Doctrine of Rights.²⁸ The Doctrine of Rights had an impact on some mining cases²⁹ and the formulation of some statutory provisions.³⁰ It has become necessary again to attempt to formulate a theory about statutory rights to minerals. This article will attempt to provide such theory or framework against the background of the provisions of the MPRDA and the analogous principles of the old order. For purposes of the MPRDA one can distinguish between rights to minerals and rights to petroleum. The term ‘right to minerals’ is used in order to distinguish it from the common law notion of mineral

²⁵ *Minister of Minerals and Energy v Agri South Africa* supra note 2 par 74; *De Beers Consolidated Mines Ltd v Regional Manager, Mineral Regulation Free State Region: Department of Minerals and Energy* [2009] JOL 23667 (O) par 2.5. As to conversions, see in general Dale, Bekker, Bashall, Chaskalson, Dixon and Grobler *South African Mineral and Petroleum Law* 2005 Service issue 10 at SchII-119 to SchII-157; Badenhorst & Mostert *op cit* note 1 at 25-11 to 25-30.

²⁶ *Agri South Africa and Van Rooyen v Minister of Minerals and Energy* 2010 (1) SA 104 (GNP) paras 7-9 (“Agri SA I”). See Badenhorst “Expropriations by virtue of the Mineral and Petroleum Resources Development Act: Are there some more trees in the forest? *Agri South Africa and Van Rooyen v Minister of Minerals and Energy* 2009 TSAR 600; Van Niekerk and Mostert, “Expropriation of Unused Old Order Mineral Rights: The Courts have its first say” (2010) 21.1 *Stell LR* 158; Leon “Compensation for expropriation of ‘old order mineral rights’” July 2011 *De Rebus* 47. In *Agri South Africa v Minister of Minerals and Energy* supra note 18 paras 23-28; 31-35 (“Agri SA II”) it was decided that expropriation of mineral rights took place and compensation was payable. See further Badenhorst, “Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* saga” (2011) *ARELJ* 261; Badenhorst and Olivier, “Expropriation of ‘unused old order rights’ by the MPRDA: You have lost it!” 2012 *THRHR* 329. In *Minister of Minerals and Energy v Agri South Africa* supra note 2 par 99 (“Agri SA III”) it was, however, decided that the “contention that all mineral rights that existed in South Africa under the 1991 Act were expropriated under the MPRDA is incorrect”. Compensation was not payable. See further Badenhorst, “Large-scale Expropriation of Mineral Rights in South Africa: The *Agri South Africa* fiasco” 2012 *ARELJ* 205; Badenhorst, “Expropriation of ‘unused old order rights’ by the MPRDA: You had nothing!” 2013 *THRHR* 472; Van der Vyver, “Nationalisation of Mineral rights in South Africa” 2012 *De Jure* 125. The majority of the Constitutional Court decided in *Agri SA v Minister of Minerals and Energy* 2013 4 SA 1 (CC) par 71 (“Agri SA IV”) that acquisition of mineral rights as element of expropriation did not take place. See further Badenhorst “Onteiening van onbenutte ou-orde regte: Het iets niets geword? *Agri South Africa v Minister of Minerals and Energy* (2013 (4) SA 1 (CC))” 2014 *THRHR* *

²⁷ Badenhorst “Towards a theory on mineral rights” 1990 TSAR 239 and 465; Badenhorst *Die Juridiese Bevoegdheid om minerale te ontgin in die Suid-Afrikaanse reg* (Unpublished LLD thesis, University of Pretoria, 1992).

²⁸ As to the Doctrine of Rights, see Joubert “Die Realiteit van die Subjektiewe Reg en die betekenis van ‘n Realistiese Begrip daarvan vir die Privaatreg” (1958) *THRHR* 12 and 98; Van der Vyver “The Doctrine of Private-law Rights” in Strauss (ed) *Huldigingsbundel vir WA Joubert* (1988) 201; Van der Vyver in Van der Vyver and Joubert *Persone en Familiereg* 2 ed (1985) 1-32; Van Zyl and Van der Vyver *Inleiding tot die Regswetenskap* 2 ed (1982) chs 10-12. As to the early roots of subjective rights, see Schrage *Actio en Subjektief Recht Over Romeinse en Middeleeuwse Wortels van een modern begrip* (1977).

²⁹ *Elektrisiteitsvoorsieningskommissie v Fourie* 1988 (2) SA 672 (T) 642A at 641G-J; *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* 2006 (1) SA 350 (T) at 382B-F; *Agri South Africa v Minister of Minerals and Energy* supra note 18 par 29. See further, Van der Vyver “Expropriation, Rights, Entitlements and Surface Support of Land” (1988) 105 *SALJ* 1; Van der Walt “Onteiening van die Reg op Laterale en Onderstut – *Evkom v Fourie*” (1987) 50.5 *THRHR* 642; Badenhorst “Mineral law and the Doctrine of Rights: A Microscope of Magnification?” (2006) 27.3 *Obiter* 539.

³⁰ See for instance s 5(1) of the Minerals Act.

rights. The focus of this article will be on rights to “minerals”.³¹ The theory on the right to minerals, as set out, applies *mutatis mutandis* to the rights to petroleum which will not be further discussed.

At the outset the theoretical basis for the vesting of the right to minerals in the State will be explained. Thereupon the content of the State’s right to minerals will be determined with reference to provisions of the MPRDA which empowers the State to grant different rights to minerals. This methodology is based upon (a) the assumption that the State cannot grant an entitlement or right in respect of minerals if it is not vested in the State, and (b) the similarity of content of a common law mineral right and statutory rights to minerals.³² Once the content of the State’s rights to minerals has been established as a point of departure, the granting of specific rights to minerals to applicants will be indicated. The rights to minerals that can be acquired by applicants from the State will be discussed with reference to their acquisition, nature, content, transfer and loss. A summary of the proposed theory will be provided at the end of this article.

II RIGHTS TO MINERALS

In terms of section 3(2)(a) of the MPRDA, the State, acting through the Minister, is empowered to “grant, issue, refuse, control, administer and manage” rights to minerals. These rights take the form of reconnaissance permissions, prospecting rights, permissions to remove minerals, retention permits, mining permits or mining rights. From this empowerment provision and other provisions, the prior vesting and content of the State’s right to minerals can be deduced and determined, respectively. The State’s right to minerals has as its object the minerals *in situ* or the demarcated land containing such minerals.

³¹ A “mineral” is defined in section 1 as “any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth or in or under water and which was formed by or subjected to a geological process”. For the sake of clarity, this wide definition of mineral includes “sand, stone, rock, gravel, clay, soil and any mineral occurring in residue stockpiles or in residue deposits”. From the term “mineral” is excluded: (a) water not taken from the land or sea for extraction of a mineral; (b) petroleum; or (c) peat. Petroleum is defined in section 1, whilst, peat is not defined. A definition of “topsoil”, which does not feature in the definition of a mineral and which should be treated as *pro non scripto*, is provided in section 1. “Residue stockpile” means “any debris, discard, tailings, slimes, screening, slurry, waste rock, foundry sand, beneficiation plant waste, ash or any other product derived from or incidental to a mining operation and which is stockpiled, stored or accumulated for potential re-use, or which is disposed of, by the holder of a mining right, mining permit or an old order right”. A “residue deposit” is defined as “any residue stockpile remaining at the termination, cancellation or expiry of a prospecting right, mining right, mining permit ... or an old order right” (s 1).

³² *Holcim SA (Pty) Ltd v Prudent Investors (Pty) Ltd* supra note 21 par 21; *Agri South Africa v Minister of Minerals and Energy* supra note 18 paras 52 and 81; *Minister of Minerals and Energy v Agri South Africa* supra note 2 par 89. In *Minister of Minerals and Energy Agri SA* Wallace JA also held: “In substance the rights remained largely the same, albeit with a different provenance” (par 94).

(a) Vesting

The MPRDA vested the rights to minerals in the State either by custodianship (*imperium*)³³ of mineral resources³⁴ or *eminent domain*.³⁵ It was decided in *Agri South Africa v Minister of Minerals and Energy*³⁶ (“Agri SA II”) that in the case of a common law mineral right (underlying an “unused old order right”) such a mineral right had “been expropriated by the enactment of the MPRDA, specifically in terms of section 5 read with sections 2 and 3 thereof”. The court held that the State acquired the substance of the property rights of the erstwhile holder of common law mineral rights.³⁷ The contingent ownership of minerals prior to their being severed has also disappeared.³⁸ The court reasoned that from a reading of sections 3 and 5 MPRDA, the Minister was, upon commencement of the Act, “vested with the power to confer rights, the contents of which were substantially the same as, and in some respects, identical to, the contents of common law mineral rights”.³⁹ In other words, some or most of the entitlements of common law mineral rights were acquired by the State upon enactment of the MPRDA. The right of the State to minerals applies to the respective demarcated portions of land subject to rights already granted or converted into prospecting or mining rights in terms of the transitional arrangements contained in the MPRDA.

In *Agri SA III* the Supreme Court of Appeal decided, however, that the right to mine was “never vested in the holders of mineral rights but was vested in the State”.⁴⁰ At times the court equated the right to mine to a mineral right,⁴¹ whilst it also construed the right to mine as “a matter of the substantive powers of the State, in contrast to private law rights to

³³ At present, I use *imperium* in the English law sense of custodianship or guardianship of natural resources (Webb and Stephenson *Land Law* 3 ed 2009 12). *Imperium* was the central concept in Roman Public law despite the absence of an extended discussion thereof (Johnston “The General Influence of Roman Institutions of State and Public Law” in Carey Miller & Zimmermann (eds) *The Civilian Tradition and Scots Law* (1997) 92). *Imperium* is defined in the Encyclopaedia Britannica to have meant the supreme executive power in the Roman state, involving both military and judicial authority (available at <http://www.britannica.com/EBchecked/topic/284011/imperium>, accessed on 25 May 2012). Pound (*An Introduction to the Philosophy of Law* (1954) 111 (as cited with approval by the Australian High Court decision of *Yanner v Eaton* (1999 166 ALR 258 par 0-29)) argued that wild animals and things not subject to private ownership are held by the state by *imperium* (guardianship for social purposes) and not in *dominium* (ownership in private sense). Section 3(1) of the MPRDA has introduced the concept of the state’s custodianship of mineral resources into current mineral law. In its capacity as custodian, the State is empowered to grant rights to minerals (s 3(2)).

³⁴ *Xstrata v SFF Association* supra note 21 par 8.

³⁵ The public right of the state to expropriate. See Gildenhuys *Onteieningsreg* (2001) at 9.

³⁶ Supra note 18 par 88.

³⁷ Par 82.

³⁸ Par 50.

³⁹ Par 82.

⁴⁰ Par 85; see par 99.

⁴¹ See paras 27 and 99.

property”.⁴² According to the court, the right to mine could, therefore, not have been “expropriated although rights flowing from the State’s allocation of the right to mine could.”⁴³ It has been argued that the decision of the Supreme Court of Appeal is clearly incorrect in this regard.⁴⁴

In *Agri SA v Minister of Minerals and Energy*⁴⁵ (“*Agri SA IV*”) the majority of the Constitutional Court, through Chief Justice Mogoeng, to a large extent recognised and restored the true content⁴⁶ and features⁴⁷ of mineral rights. Mogoeng CJ decided that holders of unused old order rights had been deprived of (a) the “free or unregulated right to sterilise mineral rights”; (b) the “right to sell or lease mineral rights” (if such suspended right was not revived in terms of transitional arrangements);⁴⁸ and (c) their mineral right/unused old order right (for which a prospecting right or mining right could not be acquired in terms of the transitional arrangements).⁴⁹ Froneman J, in the minority judgement, also decided that a deprivation of property had taken place.⁵⁰ Mogoeng CJ found that, despite the assumption by the State of custodianship of mineral resources on behalf of all the people of South Africa and the power to grant to others rights that could previously have been granted by holders of mineral rights, the State had not acquired any mineral rights (including those of the mineral holder in *Agri SA*) at commencement of the MPRDA.⁵¹ Froneman J decided that the State had acquired some of the entitlements of holders of unused old order rights.⁵² The appeal was, however, also dismissed by Froneman J, who decided that the transitional arrangements, as “compensation in kind”, constituted “just and equitable compensation”, as required in

⁴² Par 99.

⁴³ Par 85.

⁴⁴ See the critical discussions of the decision in fn 26 above.

⁴⁵ Supra note 26.

⁴⁶ The following “incidents” (par 7) or “essential components” (par 43) of mineral rights were recognised by Mogoeng CJ, namely, the entitlement: (a) to prospect, mine and dispose of minerals (*ius utendi*) (par 7 51); (b) to sell, lease or cede mineral rights (*ius disponendi*) (Paras 51 66); (c) not to mine or to sterilise minerals (*ius abutendi*) (paras 2 43 66); and (d) to encumber minerals by mortgage (paras 10 50). As to a list of more entitlements of former holders of minerals rights, see Badenhorst and Mostert *Mineral Law* 3-12 to 3-13; H Mostert *Mineral Law Principles and Policies in Perspective* (2012) 136.

⁴⁷ The following features of mineral rights were recognised by Mogoeng CJ, namely, mineral rights were: (a) registrable in the deeds office (par 12); (b) recognised as limited real rights that are enforceable against the whole world (par 9); (c) assets (par 10); (d) alienable by sale or lease (par 10); (e) alienable by the grant of a prospecting contract or mining lease (par 10); (f) transferable (par 10); (g) capable of encumbrance by mortgage or usufruct (see par 10); (h) capable of inheritance (see par 10); (i) valuable (par 41); and capable of expropriation upon payment of compensation (see par 41 43). As to a list of more features of mineral rights, see Badenhorst and Mostert, *Mineral Law* 3-23 to 3-24.

⁴⁸ Par 51. See also paras 2 66.

⁴⁹ See Par 66.

⁵⁰ Par 92.

⁵¹ Paras 68 71.

⁵² See paras 80 81 106.

terms of section 25(3) of the Constitution.⁵³ It has been argued that the decision of the Constitutional Courts was incorrect.⁵⁴

Uncertainty about the person in whom rights to minerals is vested, therefore, remains. It is assumed that the right to minerals is indeed vested in the State.

(b) Entitlements of right to minerals

Against the background of the provisions and definitions of the MPRDA and common law mineral right,⁵⁵ the State's right to a mineral has as its content the following entitlements:

(a) Exploitation, which entails the entitlement to use the land for the purposes of exploitation of minerals to which the right to minerals relates. The entitlement of exploitation in turn includes the entitlements to:

- (i) enter upon the land⁵⁶ for purposes of reconnaissance,⁵⁷ prospecting for, and/or mining of minerals;⁵⁸
- (ii) reconnoitre⁵⁹ for minerals;⁶⁰
- (iii) "prospect"⁶¹ for minerals;⁶²
- (iv) "mine"⁶³ minerals;⁶⁴
- (v) remove and dispose of minerals found during the course of prospecting or mining;⁶⁵

⁵³ Paras 79 88 90.

⁵⁴ See the discussion of the decision in fn 26 above.

⁵⁵ See Badenhorst & Mostert *op cit* note 1 at 3-12 to 3-13.

⁵⁶ Entry may take place together with employees. Entry takes place by bringing any plant, machinery or equipment upon the land to "construct or lay down any surface, underground or under sea infrastructure which may be required for the purpose of prospecting (or) mining". As to the meaning of prospecting and mining see fns 61 and 63 below.

⁵⁷ See s 15(1) of the MPRDA.

⁵⁸ Ss 5(3)(a) and 27(7)(a).

⁵⁹ A definition of "reconnaissance operation" is provided in section 1, namely any operation carried out for or in connection with the search for minerals by geological, geophysical and photo geological surveys (including any remote sensing techniques). Any activity carried on in connection with "prospecting", other than acquisition and processing of new seismic data, is excluded from the definition of "reconnaissance operation." A distinction has, therefore, to be drawn between reconnaissance and prospecting (see fn 61 below).

⁶⁰ See s 14(1).

⁶¹ "Prospecting" means intentionally searching for any mineral in order to establish the existence of any mineral and to determine the extent and economic value thereof. Prospecting has to take place by means of any method: (a) which disturbs the surface or subsurface of the earth (including any portion of the earth that is under the sea or under other water); or (b) in or on any residue stockpile or residue deposit; or (c) in the sea or other water on land (s 1).

⁶² S 5(3)(b) of the MPRDA.

⁶³ "Mine" means "the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity incidental thereto, in, on or under the relevant mining area" (s 1).

⁶⁴ Ss 5(3)(b) and 27(7)(d).

⁶⁵ Ss 5(3)(c) and 27(7)(d).

- (vi) remove and dispose of diamonds found in the course of mining operations;⁶⁶
 - (vii) use water as specified⁶⁷ on the land;⁶⁸ and
 - (viii) carry out any other activity incidental to prospecting or mining.⁶⁹
- (b) Disposition, which entails the entitlement to decide what may and what may not be done on the land for purposes of the exploitation of minerals;⁷⁰
- (c) Resistance, which entails the entitlement to resist any unlawful interference with the exercise of the right to minerals;⁷¹
- (d) Alienation, which entails the entitlement to grant rights to minerals in respect of the land;⁷²
- (e) Encumbrance, which entails the entitlement to grant a mortgage bond with regard to the right to minerals;
- (f) Income, which entails the entitlement to levy a fee⁷³ or royalty⁷⁴ from the grantee of a prospecting right or a mining right; and
- (g) A reversionary or minimum entitlement, that is, the entitlement to regain any of the above entitlements if they have been granted for a period, and the period has lapsed or been terminated.

The statutory notion of “minerals” and defined activities, such as reconnaissance operations, prospecting or mining,⁷⁵ circumscribe the extent and parameters of the entitlements by virtue of the right to minerals.

⁶⁶ S 5(3)(cA).

⁶⁷ Use of water may take place from “any natural spring, lake, river or stream, situated on, or flowing through, such land or from any excavation previously made and used for prospecting, mining, exploration or production purposes, or sink a well or borehole required for use relating to prospecting (or) mining ...on such land” (s 5(3)(d)). Use of water is, however, subject to the provisions of the National Water Act 36 of 1998 (s 5(3)(d)). See also s 27(7)(b).

⁶⁸ S 5(3)(d). See also section 27(7)(b).

⁶⁹ S 5(3)(e). The ancillary activity may not contravene any provision of the MPRDA (s 5(3)(e)).

⁷⁰ For instance, in *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* supra note 24 at 373F it was held that, due to the invasive nature of open-cast mining it should only be allowed if it is reasonably necessary. The SCA found that open-cast mining was reasonably necessary and had to be allowed (at 337F-G and 378E). The holder of the mineral right was, therefore, entitled to resort to open-cast mining.

⁷¹ In *Anglo Operations Ltd v Sandhurst Estates (Pty) Ltd* supra note 24 the holder of the mineral right was able to resist the interference with its entitlement to conduct open-cast mining. Upon interference by an owner or lawful occupier of land with the exercise of rights to minerals, a remedy is provided for by section 54 of the MPRDA.

⁷² S 3(2)(a).

⁷³ S 3(2)(b). The fees are determined and levied by the Minister of Mineral Resources.

⁷⁴ *Xstrata v SFF Association* supra note 21 par 22. In terms of s 3(4) royalties are determined and levied by the Minister of Finance in terms of the Mineral and Petroleum Resources Royalty Act 28 of 2008 (“MPRRA”).

⁷⁵ See fns 31, 59, 61 and 63 above.

For the sake of brevity, when referring to the components of the State's entitlement of exploitation one may refer to the entitlements to reconnoitre, prospect or mine for minerals, respectively. These listed entitlements include the corresponding entitlements to enter land for such a purpose, remove minerals, use water and entitlements ancillary to reconnaissance, prospecting or mining.

Ownership of minerals is acquired upon severance of the minerals from the land.⁷⁶ The entitlement to dispose of minerals is encompassed by ownership of severed minerals as new things.⁷⁷

Not all of the abovementioned entitlements (for instance, encumbrance) will be exercised by the State because the granting of rights to minerals (by virtue of the entitlement of alienation) to applicants is envisaged by the MPRDA. The entitlements listed in (a), (d) and (e) are provided for in the MPRDA, whilst the other entitlements are based upon the theory of mineral rights in terms of the common law.⁷⁸ The Minister is, however, obliged to ensure the sustainable development of South Africa's mineral resources within a framework of national environmental policy, norms and standards while promoting economic and social development.⁷⁹ It is an object of the MPRDA to give effect to the environmental rights protection in section 24 of the Constitution of the RSA.⁸⁰ The State's duties are supplemented by other objectives of the MPRDA.⁸¹

(c) Minerals in situ

Minerals in the land are the object of the right to minerals. In terms of section 3(1) of the MPRDA, mineral resources⁸² are "the common heritage of all the people of South Africa and the State is the custodian thereof for the benefit of all South Africans".

Ownership of minerals *in situ* cannot vest in the people of South Africa because the people or the nation are not legal subjects in law and have no legal personality enabling them to acquire or hold ownership or any rights in mineral resources.⁸³ Despite the evasive and foreign terminology used by the legislature, it is submitted that either custodianship

⁷⁶ See *Trojan Explorations Co v Rustenburg Platinum Mines Ltd* supra note 7 at 509J-510A.

⁷⁷ See further Badenhorst "Minerale" *op cit* note 27 147-149.

⁷⁸ See Badenhorst & Mostert *op cit* note 1 at 3-11 to 3-12.

⁷⁹ S 3(3) of the MPRDA.

⁸⁰ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* supra note 16 paras 34 75.

⁸¹ See further s 2.

⁸² The concept "mineral resource" is not defined in the MPRDA. A "mineral resource" is defined in the MPRRA as "a mineral or petroleum as defined in section 1 of the Mineral and Petroleum Resources Development Act, regardless of whether that mineral or petroleum undergoes processing ... or manufacturing".

⁸³ Dale *et al op cit* note 25 at MPRDA-5.

(*imperium*),⁸⁴ *dominium*⁸⁵ or property⁸⁶ of minerals *in situ* is vested in the State, as an exception to the maxim *cuius est solum eius est usque ad caelum et inferos*. Alternatively, it may be argued that the common law ownership of minerals has been extinguished by the State (without any vesting of ownership taking place),⁸⁷ whilst the State is exercising control over exploitation of minerals by virtue of its police power.⁸⁸ Even if ownership of minerals *in situ* has in terms of the *cuius est solum* rule been retained by the owners of land,⁸⁹ or if such ownership is subject to a public-trust doctrine,⁹⁰ ownership of minerals *in situ* (or the demarcated land containing it) remains subject to the State's or grantee's rights to minerals. In *Agri SA III*⁹¹ Wallis JA held that the section 3(1)-statement "encapsulates in non-technical language the notion that the right to mine vests in the State". According to Wallis JA nothing could be "gained by attempts to dissect these concepts and categorise them in terms of private law concepts such as ownership."⁹² The issue of whether South African law has incorporated elements of the public trust doctrine is dismissed as being "neither here nor there".⁹³ It is submitted that the mineral law world cannot only be viewed through public law glasses, and the private law concepts which have played a role over 150 years in the development of this indigenous area of law remain relevant.

In *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd*⁹⁴ Deputy Chief Justice Moseneke DCJ, in a separate judgement⁹⁵ decided that upon failure by one of two joint holders of old order mining rights to convert its old order mining right in terms of

⁸⁴ *Meepo v Kotze* supra note 21 par 8.1.

⁸⁵ See *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* supra note 16 par 63; Badenhorst & Mostert "Revisiting the transitional arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 and the Constitutional Property clause" 2003 *Stell LR* 377 382; Badenhorst and Mostert "Artikel (3)(1) en (2) van die *Mineral and Petroleum Resources Development Act* 28 of 2002: 'n Herbeskouing" 2007 TSAR 469 476. See, however, Dale *et al. op cit* note 25 at MPRDA-122 to MPRDA-123.

⁸⁶ Badenhorst "Publicly-owned minerals: Let the truth be spoken - *Cadia Holdings Pty Ltd v State of New South Wales* [2010] HCA 27" 2012 *De Jure* 605.

⁸⁷ In *Agri South Africa v Minister of Minerals & Energy* supra note 18 par 50 Du Plessis stated: "The mineral right holder's contingent ownership in the minerals, once severed, has similarly disappeared".

⁸⁸ As to the meaning of police power, see Gildenhuys *op cit* note 35 22-24.

⁸⁹ Dale *et al. op cit* note 25 at MPRDA-123. See *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* supra note 16 par 63.

⁹⁰ Glazewski *Environmental Law in South Africa* (2005) at 464 468; Van der Schyff *op cit* note 2 at 241-244. See, however, Dale *et al. op cit* note 25 at MPRDA-125 to MPRDA-128.

⁹¹ Supra note 2 par 86.

⁹² Par 86.

⁹³ Par 86.

⁹⁴ Supra note 21. For a critical discussion of the decisions of the court a quo and SCA in the *Sishen* case, respectively, see Badenhorst and Olivier "Conversion of 'old order mining rights': Sleeping at the MPRDA's wheel of (mis)fortune? - *Sishen Iron Ore Company (Pty) Ltd v Minister of Mineral Resources* (unreported decision) Case no 28980/10 (NGD)" 2013 (76) *THRHR* 269; Badenhorst and Olivier "Conversion of jointly-held old order mining rights: an all and nothing ruling? *Minister of Mineral Resources of the RSA v Sishen Iron Ore* (394/12) [2013] ZASCA 50 (28 March 2013) 2014 *THRHR* *"

⁹⁵ All the judges concurred with both the main and separate judgement.

the Schedule II to the MPRDA, it ceased to exist in relation to such holder but did not cease to exist in relation to the State.⁹⁶ It was held that upon expiry of the interim period, the mineral and land “revert to the State because it is the custodian of all mineral and petroleum resources”.⁹⁷ Jafta J, who delivered the main judgement was, however, of the view that “(o)wnership of all mineral and petroleum resources is now vested in the nation”.⁹⁸ The view of Moseneke DCJ that minerals are vested in the state is preferred as correct. By making the State the custodian of the mineral resources and vesting the control of the exploitation of these resources in the State, the MPRDA seeks to attain its transformation and black economic empowerment aims.⁹⁹

III SPECIFIC RIGHTS TO MINERALS

Specific rights to minerals may be acquired upon a grant from the State as holder of the right to minerals. The rights to minerals for which specific provision is made in the MPRDA are reconnaissance permissions, prospecting rights, permissions to remove minerals, retention permits, mining permits or mining rights. Prospecting rights and mining rights are registered in the Mineral and Petroleum Titles Registration Office,¹⁰⁰ whilst the other permissions and permits are only recorded in that registration office.¹⁰¹ The acquisition, nature, content, transfer and loss of the respective rights will now be set out.

(a) Reconnaissance permission

Upon lodging an application for a reconnaissance permission at the office of the regional manager and compliance with the requirements thereof,¹⁰² the Minister (or her delegate) must issue a reconnaissance permission to an applicant.¹⁰³ Upon issue of this permission by the

⁹⁶ At par 108.

⁹⁷ Par 108.

⁹⁸ Paras 16 44.

⁹⁹ *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* supra note 16 par 31; *Minister of Mineral Resources v Sishen Iron Ore Company (Pty) Ltd* supra note 21 paras 10 16 44 108.

¹⁰⁰ S 5(1)(d) of the Mining Titles Registration Act 16 of 1967 (“MTRA”); *Agri South Africa v Minister of Minerals and Energy* supra note 18 paras 45 and 47.

¹⁰¹ S 5(1)(v).

¹⁰² Section 13(1) of the MPRDA prescribes the place and format for the lodgement of the application. Section 13(2)(b) requires that no one else is holding a right to minerals for the same mineral and land. Section 14(1) requires further that: (a) the applicant has access to financial resources and has the technical ability to reconnoitre in accordance with the reconnaissance work programme; (b) the estimated expenditure is compatible with the proposed reconnaissance operation and duration of the reconnaissance work programme; and (c) the applicant is not in contravention of a relevant provision of the MPRDA.

¹⁰³ S 14(1).

Minister, a relative real right¹⁰⁴ is created. A reconnaissance permission may only be recorded.¹⁰⁵ It is submitted that, upon recording, it serves as notice to successors in title of ownership of the land.

A holder of a reconnaissance permission (as a relative real right) is entitled to enter the land for the purposes of reconnaissance¹⁰⁶ and reconnoitre, namely, to search for minerals by geological, geophysical, photo geological surveys and remote sensing techniques.¹⁰⁷ A holder of a reconnaissance permission is, however, not entitled to prospect or mine on the land¹⁰⁸ or to apply exclusively for a prospecting right, mining right or mining permit.¹⁰⁹ No linkage is provided between reconnaissance permission and future prospecting or mining rights. Prior to entry of the land, the holder of the reconnaissance permission must give written notice to the owner or lawful occupier of the land at least 14 days before entry.¹¹⁰ The reconnaissance permission also includes the entitlements of disposition and resistance for purposes of reconnaissance operations. Reconnaissance permission is valid for one year.¹¹¹ The reconnaissance permission does not include the entitlements of alienation and encumbrance: reconnaissance permission may not be alienated, transferred, ceded, let, sublet, disposed of, renewed, or encumbered by mortgage.¹¹² The holder of a reconnaissance permission has to keep records of operations and submit progress reports regarding operations to the regional manager.¹¹³

A reconnaissance permission terminates upon expiry of the period for which it was granted,¹¹⁴ cancellation¹¹⁵ upon specified grounds¹¹⁶ by the Minister¹¹⁷ or upon the

¹⁰⁴ This was previously regarded as a personal right (Badenhorst “Nature of New Order Rights to Minerals: a Rubikian exercise since passing the Mayday Rubicon with a Cubic Circonium” (2005) 26.3 *Obiter* 505 518 523). Van der Vyver in Van der Vyver and Joubert (*Persone en Familiereg* 2 ed 19-20; *Huldigingsbundel vir WA Joubert* 240-241) initially construed a relative real right as a real right that is only enforceable *inter partes*. Van der Vyver in Van der Vyver and Joubert (*Persone en Familiereg* 3 ed 18-20) subsequently (probably in the light of Van der Walt’s criticism in 1986 *TSAR* 176-177) construed such a right as real right, that in the normal course of events is not enforceable against successors in title (see Badenhorst *Minerale* 646-653). It is submitted that this particular relative real right created by the MPRDA is enforceable *inter partes* (which would include the owner of the land) and enforceable against successors in title with notice.

¹⁰⁵ See first par of III above.

¹⁰⁶ S 15(1) of the MPRDA.

¹⁰⁷ Definition of “reconnaissance operation” in section 1 (see fn 59). If reconnaissance operations are impeded by the owner or lawful occupier of the land, the holder of a reconnaissance permit may initiate a process in terms of section 54 of the MPRDA which may result in the payment of compensation.

¹⁰⁸ S 15(2)(a) and definition of “reconnaissance operation” in section 1.

¹⁰⁹ S 15(2)(b).

¹¹⁰ S 15(1).

¹¹¹ S 14(4).

¹¹² Ss 14(5) and 14(4).

¹¹³ S 21(1)). The reference in section 21(1) to prospecting operations of the holder of a reconnaissance permit is clearly a mistake as the holder of reconnaissance permission is not entitled to prospect for minerals.

¹¹⁴ Ss 14(4) and 56(a).

occurrence of specific legal events.¹¹⁸ Upon termination of the reconnaissance permission, entitlements of the relative real right are re-vested in the State by virtue of the State's reversionary or minimum entitlement.

(b) Prospecting right and permission to remove and dispose of minerals

Upon lodging of an application for a prospecting right at the office of the regional manager, compliance with the requirements thereof¹¹⁹ and forwarding it to the Minister (or delegate) for consideration,¹²⁰ she must grant the applicant a prospecting right.¹²¹ The granting of prospecting right is contractual in nature.¹²² If consensus is reached by the Minister and applicant as to the terms and conditions of the prospecting right, a granting of a prospecting right by notarial deed¹²³ may take place.¹²⁴ Personal rights, such as the rights to have a

¹¹⁵ The reconnaissance permission may be suspended by the Minister. The suspension may be lifted upon due compliance (s 47(5)).

¹¹⁶ If the holders has: (a) reconnoitred in contravention of the MPRDA; (b) breached a material term of the reconnaissance permission; (c) contravened any condition in the environmental authorisation; or (d) submitted inaccurate, false, fraudulent, incorrect or misleading information (s 47(1)). Section 47(2)-(4) prescribes the procedure which needs to be followed by the Minister prior to its cancellation.

¹¹⁷ S 47(1).

¹¹⁸ These are: (a) death of the holder of the reconnaissance permission in the absence of a successor in title; (b) deregistration of a company in the absence of ministerial consent to transfer it; (c) liquidation or sequestration of the holder; and (d) abandonment of the reconnaissance permission (s 56).

¹¹⁹ S 16(1) prescribes the place and format for the lodging of the application. Section 16(2)(b) requires that no one else may be holding a right to minerals for the same mineral and land. Section 16(2)(c) requires that no prior application for a prospecting right, mining right, mining permit or retention permit must have been accepted for the same mineral on the same land and which remains to be granted or refused. Upon acceptance of the application by the Regional Manager and notification of the applicant, the applicant has to submit environmental reports and consult in the prescribed manner with the landowner, lawful occupier and any interested and affected party and include the result of the consultation in the relevant environmental reports (s16(4); in terms of s 10(2) the application is also advertised by the regional manager who also calls upon interested and affected parties to submit their comments about the application). Proper consultation requires an invite to attend consultations and sufficient opportunity to take part (*Meepo v Kotze* supra note 21 par 19). Consultation requires *inter alia* that the applicant must: (a) sufficiently inform the landowner of what the prospecting operation will entail in order for the landowner to assess the impact the prospecting will have on his use of the land"; and (b) consult with the landowner to reach an agreement in regard to the impact of the proposed prospecting operation (*Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* supra note 16 par 67). Section 17(1) requires further that: (a) the applicant has access to financial resources and has the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme; (b) the estimated expenditure is compatible with the proposed prospecting operations and duration of the prospecting work programme; (c) the prospecting will not result in unacceptable pollution, ecological degradation or damage to the environment and an environmental authorisation is issued; (d) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996; and (e) the applicant is not in contravention of any relevant provision of the MPRDA. The application has to be refused if any of the grounds listed in s 17(2) are present. The Minister may, in terms of section 17(4), request the applicant to give effect to the objective to expand opportunities for historically disadvantaged persons and women to enter the mineral industries and to benefit from the exploitation of the nation's mineral resources.

¹²⁰ S 16(5).

¹²¹ S 17(1).

¹²² *Meepo v Kotze* supra note 21 par 46.3.

¹²³ For purposes of registration of a prospecting right the contract must be in notarial form (s 15(2) of the MTRA).

limited real right to prospect granted and the environmental authorisation considered and approved,¹²⁵ are acquired by the prospector upon the grant by the Minister.¹²⁶ A prospecting right must be lodged for registration in the Mineral and Petroleum Titles Registration Office.¹²⁷ Upon registration such right is recognised as a limited real right.¹²⁸

A prospecting right is subject to the limitations of the MPRDA, any other relevant law and the terms and conditions stipulated in the right.¹²⁹ With reference to the State's right to minerals and the mentioned limitation, a holder of a prospecting right (hereafter "prospector") has acquired upon registration the entitlements of prospecting, disposition and resistance for purposes of prospecting. The prospector is entitled to: (i) enter the land¹³⁰ for the purposes of prospecting for minerals,¹³¹ (ii) use water for such purpose,¹³² (iii) prospect for minerals,¹³³ (iv) remove and dispose of minerals found during prospecting for testing, identification or analysis,¹³⁴ and (v) carry out any other activity incidental to prospecting.¹³⁵ To prospect for minerals means to intentionally search for any mineral in order to establish the existence of any mineral and to determine the extent and economic value thereof. This search for minerals has to take place by any method which disturbs the surface¹³⁶ of the earth, in or on any residue stockpile or residue deposit or in the sea or water on land.¹³⁷ Removal and disposal of diamonds and bulk samples of minerals found in the course of prospecting operations may only take place if the Minister's written approval has been obtained.¹³⁸ Prospecting or removal of minerals during prospecting by a prospector may not take place without (a) an environmental authorisation;¹³⁹ (b) a prospecting right or permission to remove

¹²⁴ *Meepo v Kotze* supra note 21 par 46.3.

¹²⁵ *Meepo v Kotze* supra note 21 paras 46.3 and 46.4.

¹²⁶ Badenhorst (2005) *Obiter* 520.

¹²⁷ S 19(2)(a); *Meepo v Kotze* supra note 21 par 8.1. See the first par of III above.

¹²⁸ S 5(1); 2(4) of the MTRA.

¹²⁹ S 17(6) of the MPRDA.

¹³⁰ Entry may take place together with employees. Entry takes place by bringing any plant, machinery or equipment upon the land to "construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting".

¹³¹ S 5(3)(a) of the MPRDA.

¹³² S 5(3)(d).

¹³³ S 5(3)(b) of the MPRDA. If prospecting is impeded by the owner or lawful occupier of the land, the prospector may initiate a process in terms of section 54 of the MPRDA which may result in the payment of compensation.

¹³⁴ S 5(3)(c) read with s 20(1).

¹³⁵ S 5(3)(e). The ancillary activity may not contravene any provision of the MPRDA (s 5(3)(e)).

¹³⁶ Or sub-surface.

¹³⁷ As to the definition of "prospecting", see fn 61 above. As to the meaning of residue stockpile or residue deposit, see fn 31 above.

¹³⁸ S 20(2).

¹³⁹ S 5A(a).

minerals¹⁴⁰ and (c) giving the owner or occupier of land at least 21 days written notice.¹⁴¹ The prospecting right is said to become effective on the date of notarial execution.¹⁴² The entitlements of alienation and encumbrance are also granted: a prospecting right or a share in a prospecting right may be alienated, transferred, ceded, let, sublet, disposed of¹⁴³ with ministerial permission¹⁴⁴ or encumbered by mortgage.¹⁴⁵ These transactions need to be registered within the prescribed time.¹⁴⁶ The prospector is entitled to apply for a retention permit to suspend the prospecting right, whilst retaining the right to apply for a mining right.¹⁴⁷ The prospector has the exclusive right to apply for (a) the renewal¹⁴⁸ of a prospecting right¹⁴⁹ and (b) a mining right in respect of the mineral and prospecting area.¹⁵⁰ Linkage of a prospecting right with a future mining right is ensured. A prospecting right is valid for the specified period, which may not exceed five years¹⁵¹ or until the grant or refusal of an application for the renewal of the prospecting right.¹⁵² Specific duties are imposed on the prospector.¹⁵³

A prospecting right terminates upon expiry of the period for which it was granted,¹⁵⁴ cancellation¹⁵⁵ upon specified grounds¹⁵⁶ by the Minister¹⁵⁷ or upon the occurrence of

¹⁴⁰ S 5A(b).

¹⁴¹ S 5A(c).

¹⁴² S 17(5) read with the definition of the effective date in s 1.

¹⁴³ Before consent will be granted, section 11(2) requires that transferee, lessee, or the person to whom the right will be alienated or disposed of must be capable of complying with the obligations and terms of the prospecting right and satisfies the requirements of s 17(1) (see fn 119 above).

¹⁴⁴ S 11(1); *Mogale Alloys (Pty) Ltd v Nuco Chrome Bophuthatswana (Pty) Ltd* 2011 (6) SA 96 (GSJ) par 27. The prohibition against alienation also applies to an alienation of a controlling interest in a company or close corporation holding a prospecting right, unless the company is a listed company. As to the meaning of a “controlling interest”, see *Mogale* decision paras 31-38; Badenhorst and Du Plessis “Alienation or disposal of a ‘controlling interest’ in a prospecting company - *Mogale Alloys (Pty) Ltd v Nuco Chrome Boputhatswana (Pty) Ltd* 2011 (6) SA 96 (GSJ)” 2012 *De Jure* 388.

¹⁴⁵ Section 11(3) does not require ministerial consent for encumbrance by mortgage by a bank or financial institution if the mortgagee undertakes that any sale in execution or foreclosure will be subject to ministerial consent.

¹⁴⁶ S 11(4).

¹⁴⁷ See 3(c) below.

¹⁴⁸ Section 18 provides for a renewal application.

¹⁴⁹ S 19(1)(a). Renewal may take place once and the period of renewal may not exceed 3 years: s 18(4).

¹⁵⁰ S 19(1)(b); *Agri South Africa v Minister of Minerals and Energy* supra note 18 par 45.

¹⁵¹ S 17(6).

¹⁵² S 18(5).

¹⁵³ A prospector has to: (a) timeously lodge the prospecting right for registration at the Mineral and Petroleum Titles Registration Office; (b) timeously commence with prospecting activities; (c) continuously and actively prospect in accordance with the prospecting work programme; (d) comply with the terms of the prospecting right, the law and the conditions of the environmental authorisation; (e) pay the prescribed prospecting fees and royalties (in respect of any mineral removed and disposed of during prospecting operations); (f) submit progress reports and data to the regional manager e (s 19(2)); and (g) keep records of prospecting operations (s 21(1)).

¹⁵⁴ S 56(a).

¹⁵⁵ The prospecting right may also be suspended by the Minister. The suspension may be lifted upon due compliance (s 47(5)).

specific legal events.¹⁵⁸ Upon termination of a prospecting right, the entitlements are re-vested in the State by virtue of the State's reversionary or minimum entitlement.

(c) Retention permit

If a prospector wishes to suspend his prospecting right prior to its expiry,¹⁵⁹ whilst, retaining his right to apply for a mining right,¹⁶⁰ the prospector may apply at the office of the regional manager for a retention permit,¹⁶¹ which must, upon referral, be granted by the Minister,¹⁶² provided that certain requirements¹⁶³ are met.¹⁶⁴ A retention permit is a relative real right¹⁶⁵ and may be recorded.¹⁶⁶ It is submitted that upon recording it serves as notice to successors in title of ownership of the land. The retention permit is valid for the period specified in the permit, which may not exceed three years.¹⁶⁷ The suspended prospecting right runs concurrently with the period of the retention permit,¹⁶⁸ whilst the environmental authorisation remains in force.¹⁶⁹

The retention permit does not include entitlements of alienation and encumbrance: a retention permit may not be transferred, ceded, let, sub-let, alienated, disposed of, mortgaged or encumbered.¹⁷⁰ A holder of a retention permit (hereafter "retentor") has the exclusive right to apply for a mining right in respect of the retention area¹⁷¹ and may apply for its renewal.¹⁷² Specific duties are imposed on a retentor.¹⁷³

¹⁵⁶ If the prospector has: (a) prospected in contravention of the MPRDA; (b) breached a material term of the prospecting right; (c) contravened any condition in the environmental authorisation; or (d) submitted inaccurate, false, fraudulent, incorrect or misleading information (s 47(1)). Section 47(2)-(4) prescribes the procedure for cancellation.

¹⁵⁷ S 47(1).

¹⁵⁸ These are: (a) death of the holder of the prospecting right in the absence of a successor in title; (b) deregistration of a company in the absence of ministerial consent for transfer; (c) liquidation or sequestration of the holder; and (d) abandonment of the prospecting right (s 56).

¹⁵⁹ S 32(2).

¹⁶⁰ See s 35(1).

¹⁶¹ See s 31(1).

¹⁶² S 33 contains specific grounds for refusal of a retention permit.

¹⁶³ Section 31(1) states the formal requirements for the lodgement of the application by the prospector. Reasons for granting a retention permit must be given, the period for which it will be required must be indicated and a compliance report must be submitted. Section 32(1) requires that the prospector have: (a) prospected on the land; (b) completed the prospecting activities and feasibility study; (c) established the existence of a mineral reserve with mining potential; (d) studied the market and found that the mining of the mineral would be uneconomical due to prevailing market conditions; and (e) complied with the MPRDA, law and the terms of the prospecting right.

¹⁶⁴ S 32(1).

¹⁶⁵ See fn 104, which applies *mutatis mutandis* to a retention permit.

¹⁶⁶ See the first par of III above.

¹⁶⁷ S 32(4).

¹⁶⁸ S 32(2).

¹⁶⁹ S 32(3).

¹⁷⁰ S 36.

¹⁷¹ S 35(1); *Agri South Africa v Minister of Minerals and Energy* supra note 18 par 46.

Just like a prospecting right, a retention permit terminates upon expiry of the period for which it was granted, or cancellation of it upon specified grounds by the Minister or upon the occurrence of specific legal events.¹⁷⁴ Upon termination of a retention permit the entitlements of the relative real right are re-vested in the State.

(d) Mining permit

An applicant may apply for a mining permit for purposes of small-scale mining.¹⁷⁵ Once the application has been made and upon compliance with the requirements thereof,¹⁷⁶ the Minister or delegate must grant a mining permit to an applicant.¹⁷⁷ When the Minister grants the permit, the applicant acquires a relative real right.¹⁷⁸ A mining permit may only be recorded.¹⁷⁹ It is submitted that recording it serves as notice to successors in title of ownership of the land.

The holder of a mining permit (hereafter “small-scale miner”) (as a relative real right) is entitled to prospect,¹⁸⁰ mine, dispose and resist interference with mining. A small-scale miner is entitled to enter the land¹⁸¹ for purposes of mining,¹⁸² use water for such purposes,¹⁸³

¹⁷² S 34; *Agri South Africa v Minister of Minerals and Energy* supra note 18 par 46. The permit may be renewed once for a period not exceeding two years (s 34(2)).

¹⁷³ In terms of s 35(2) the retentor has to give effect to the conditions of the environmental authorisation, pay the retention fees and submit a six-monthly progress report to the regional manager.

¹⁷⁴ See termination of right under III(b) above.

¹⁷⁵ I.e., the mining area may not exceed 5 hectares in extent and the mineral must be capable of being optimally mined within two years (s 27(1)).

¹⁷⁶ S 27(2) prescribes the requirements that have to be met for the place and format for lodging of the application (s 27(6)(a)). Section 27(3)(b) requires that no one else may be holding a right to minerals for the same mineral and land. Section 27(3)(b) requires that the granting of a permit will not result in the applicant being granted more than one mining permit on the same or adjacent land. Upon receipt of the application and written notification by the Regional Manager the applicant has to (a) consult with the owner or lawful occupier of the land and interested and affected party and include the result of the consultation in the relevant environmental reports; and (b) submit the relevant environmental reports within 60 days from the date of the notice (s 27(5); in terms of s 10(2) the application is also advertised by the regional manager who also calls upon interested and affected parties to submit their comments about the application). Consultation is the means whereby an owner of land is apprised of the impact that mining activities may have on the land. Consultation after the lodging of an application for the grant of a mining permit is envisaged (*Joubert v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 202 (SCA) par 12; *Joubert NO v Maranda Mining Company (Pty) Ltd* 2010 2 All SA 67 (GNP) par 45). It is further required that the environmental authorisation must be been submitted (s 27(6)(b)); and (b) the applicant has the ability to comply with the provisions of the Mine Health and Safety Act 29 of 1996 (s 27(6)(c)).

¹⁷⁷ S 27(6).

¹⁷⁸ See fn 104 above, which applies *mutatis mutandis* to a mining permit.

¹⁷⁹ See the first par of III above.

¹⁸⁰ In terms of the common law the right to mine includes the entitlement to prospect. What has been indicated in respect of the content of a prospecting right applies *mutatis mutandis*.

¹⁸¹ Entry may take place together with employees. Any plant, machinery or equipment may be bought upon the land to “build, construct or lay down any surface or underground infrastructure which may be required for purposes of mining”.

¹⁸² S 27(7)(a); *Joubert v Maranda Mining Co (Pty) Ltd* 2010 (1) SA 202 (SCA) par 13; *Joubert NO v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP) par 44. If mining is impeded by the owner or lawful occupier of the land, a small-scale miner may initiate a process in terms of section 54 of the MPRDA which may

mine for and dispose of minerals.¹⁸⁴ To mine minerals means “the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity”.¹⁸⁵ Prospecting and mining may not take place without: (a) an environmental authorisation;¹⁸⁶ (b) a mining permit;¹⁸⁷ and giving the landowner or lawful occupier of the land in question at least 21 days written notice.¹⁸⁸ The mining permit does not include the entitlement of alienation: a mining permit may not be alienated, transferred, ceded, let, sublet, or disposed of.¹⁸⁹ The mining permit does include the entitlement to encumber the mining permit by mortgage only for the purpose of funding or financing of the mining project, and requires ministerial consent.¹⁹⁰ A mining permit is valid for the period specified in the permit, which may not exceed two years.¹⁹¹ A small-scale miner has the right to renew it.¹⁹² Renewal need not take place before expiry of the mining permit.¹⁹³ Specified duties are imposed upon a small-scale miner.¹⁹⁴

Just like a prospecting right, a mining permit terminates upon expiry of the period for which it was granted, or cancellation upon specified grounds by the Minister or upon the occurrence of specific legal events.¹⁹⁵ Upon termination of a mining permit the entitlements of the relative real right are re-vested in the State by virtue of the State’s reversionary or minimum entitlement.

result in the payment of compensation. See further, PJ Badenhorst “Conflict resolution between owners of land and holders of rights to minerals: a lopsided triangle?” 2011 *TSAR* 326.

¹⁸³ *Joubert NO v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP) par 44. See further, s 27(7)(b).

¹⁸⁴ S 27(7)(d).

¹⁸⁵ See definition of “mine” in s 1 (fn 63 above).

¹⁸⁶ S 5A(a).

¹⁸⁷ S 5A(b).

¹⁸⁸ S 5(4)(c).

¹⁸⁹ S 27(8)(b).

¹⁹⁰ S 27(8)(b). The mortgage of a non-transferable mining permit seems nonsensical.

¹⁹¹ S 27(8)(a).

¹⁹² S 27(8)(a). The renewal may be for “three periods each of which may not exceed one year”. In *Joubert NO v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP) Par 42 it was held that, in the absence of a renewal procedure in the MPRDA, the full application procedure is not required for renewal.

¹⁹³ See *Joubert NO v Maranda Mining Company (Pty) Ltd* [2010] 2 All SA 67 (GNP) Par 33.

¹⁹⁴ A small-scale miner has to: (a) pay state royalties (s 27(7)(c)); (b) submit the permit for recording at the Mineral and Petroleum titles Registration Office (s 27(7)(e)); (c) keep data about mining and processing of minerals (see s 28(1)) and (d) submit prescribed returns and reports and statements to the Director-General (see s 28(2)).

¹⁹⁵ See termination of right in III(b) above.

(e) Mining right

Upon lodging of an application for a mining right at the office of the regional manager, compliance with the requirements of the application,¹⁹⁶ application for an environmental authorisation, and forwarding the application to the Minister (or delegate) for consideration, she must grant a mining right to an applicant.¹⁹⁷ The granting of a mining right is contractual in nature.¹⁹⁸ If consensus is reached by the Minister and applicant as to the terms and conditions of the mining right, a grant of a mining right by execution of notarial deed¹⁹⁹ may take place.²⁰⁰ Personal rights, such as the rights to have a limited real right to mine granted and the environmental authorisation considered and approved,²⁰¹ are acquired by the miner upon the grant by the Minister.²⁰² A mining right must be registered.²⁰³ Upon such registration a limited real right is acquired.²⁰⁴

A mining right is subject to the limitations of the MPRDA, any relevant law²⁰⁵ and the terms and conditions stipulated in the right.²⁰⁶ With reference to the State's right to

¹⁹⁶ Section 22(1) prescribes the form and place for the lodgement of the application. No one else may be holding a right to minerals for the same mineral and land (s 22(2)(b)). No prior application for a right or permit must have been accepted for the same mineral and land (s 22(2)(c)). Upon acceptance of the application and notification by the regional manager, the applicant has to submit the relevant environmental reports notify and consult with "interested and affected parties" (s 22(4); in terms of s 10(2) the application is also advertised by the regional manager who also calls upon interested and affected parties to submit their comments about the application). An "interested party" is someone with a lawful interest, such as an owner or lawful occupier. An "affected party" is a person whose socio-economic conditions might be directly affected by the mining operations (*SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty) Ltd* [2011 4 All SA 168 (SCA) paras 30 31]). The purpose of the notification and consultation is to enable the applicant to assess the impact its mining operations may have on the parties and prepare an environmental management programme that takes their concerns into account (*SA Soutwerke (Pty) Ltd v Saamwerk Soutwerke (Pty)* par 29). Proper consultation requires an invite to attend consultations and sufficient opportunity to take part in it (see *Meepo v Kotze* supra note 21 par 19). Section 23(1) requires further that: (a) the mineral can be mined optimally in accordance with the mining work programme; (b) the applicant has access to financial resources and has the technical ability to conduct the proposed mining operation optimally; (c) the financial plan is compatible with the intended mining operation and its duration; (d) the mining will not result in unacceptable pollution, ecological degradation or damage to the environment; (e) the applicant has provided financially for the social and labour plan; (f) the applicant has the ability to comply with the relevant provisions of the Mine Health and Safety Act 29 of 1996; (g) the applicant is not in contravention of any provision of the MPRDA; and (h) the granting of such right will further the objects of black economic empowerment referred to in section 2 (d) and (f) of the MPRDA and be in accordance with the Mining Charter and the social and labour plan. The Minister can take into account whether beneficiation will take place (s 23(2)).

¹⁹⁷ S 23(1).

¹⁹⁸ See *Meepo v Kotze* supra note 21 par 46.3.

¹⁹⁹ For purposes of registration of a mining right the contract must be in notarial form (s 15(2) of the MTRA).

²⁰⁰ See *Meepo v Kotze* supra note 21 par 46.3.

²⁰¹ See *Meepo v Kotze* supra note 21 paras 46.3 and 46.4.

²⁰² Badenhorst (2005) *Obiter* 520.

²⁰³ S 25(2)(a); *Meepo v Kotze* supra note 2 par 8.1. See the first par of III above.

²⁰⁴ S 5(1) of the MPRDA; s 2(4) of MTRA.

²⁰⁵ In *Swartland Municipality v Louw NO* 2010 (5) SA 314 (WCC) par 20 and *City of Cape Town v Maccsand (Pty) Ltd* 2010 (6) SA 63 (WCC) 72A-E it was held that "relevant laws" include provincial legislation, such as the Land Use Planning Ordinance 15 of 1985 of the Western Cape ("LUPO"). LUPO regulates land use planning and zoning by municipalities. On appeal in *Maccsand v City of Cape Town* (2011 (6) SA 633 (SCA)

minerals and the afore-mentioned limitation, a holder of a mining right (hereafter “miner”) acquires upon registration the entitlements of prospecting,²⁰⁷ mining, disposition and resistance for purposes of mining. The miner is entitled to: (i) enter the land²⁰⁸ for the purposes of mining for minerals;²⁰⁹ (ii) use water for such purpose;²¹⁰ (iii) mine for minerals;²¹¹ (iv) remove and dispose of minerals found during prospecting or mining operations;²¹² (v) remove and dispose diamonds found during the course of mining operations;²¹³ and (vi) carry out any other activity incidental to mining.²¹⁴ To mine minerals means “the mining of any mineral, in or under the earth, water or any residue deposit, whether by underground or open working or otherwise and includes any operation or activity”.²¹⁵ Prospecting and mining may not take place without: (a) an environmental authorisation;²¹⁶ (b) a mining right;²¹⁷ and giving the landowner or lawful occupier of the land in question at least 21 days written notice.²¹⁸ The mining right is said to come into effect on the execution of the mining right.²¹⁹ The entitlements of alienation and encumbrance are also granted: a mining right or a share in a mining right may be alienated, transferred, ceded, let, sublet, disposed of²²⁰ with ministerial permission²²¹ or encumbered by mortgage.²²² These transactions need to be registered within the prescribed time.²²³ A mining right is valid for the

par 33) and *Louw NO v Swartland Municipality* (650/10) ([2011] ZASCA 142 paras 11 12) and *MaccSand (Pty) Ltd v City of Cape Town* 2012 (4) SA 181 (CC) par 51), it was confirmed that the exercise of a mining right granted in terms of the MPRDA is subject to LUPO.

²⁰⁶ S 23(6).

²⁰⁷ In terms of the common law the right to mine includes the entitlement to prospect. What has been indicated in respect of the content of a prospecting right applies *mutatis mutandis*.

²⁰⁸ Entry may take place together with employees. Entry takes place by bringing any plant, machinery or equipment upon the land to “construct or lay down any surface, underground or under sea infrastructure which may be required for the purposes of prospecting”.

²⁰⁹ S 5(3)(a) of the MPRDA. If mining is impeded by the owner or lawful occupier of land, a miner may initiate a process in terms of section 54 of the MPRDA which may result in the payment of compensation.

²¹⁰ S 5(3)(d).

²¹¹ S 5(3)(b) of the MPRDA.

²¹² S 5(3)(c) read with s 20(1).

²¹³ S 5(3)(cA). Removal and disposal of diamonds takes place subject to s 59B of the Diamonds Act 56 of 1968.

²¹⁴ S 5(3)(e). The ancillary activity may not contravene any provision of the MPRDA (s 5(3)(e)).

²¹⁵ See definition of “mine” in s 1 (see fn 63 above).

²¹⁶ S 5A(a).

²¹⁷ S 5A(b).

²¹⁸ S 5(4)(c).

²¹⁹ S 23(5) read with the definition of “effective date” in s 1.

²²⁰ Before consent will be granted, section 11(2) requires that the transferee, lessee, or person to whom the right will be alienated or disposed of must be capable of carrying out and complying with the obligations and the terms of the mining right and its requirements in terms of section 23(1) (see fn 196 above).

²²¹ S 11(1).

²²² Ministerial consent is not required for encumbrance by mortgage by a bank or financial institution if the mortgagee undertakes that any sale in execution or foreclosure will be subject to ministerial consent (s 11(3)).

²²³ S 11(4).

period specified, which period may not exceed 30 years,²²⁴ or until the granting or refusal of an application for the renewal of the mining right.²²⁵ A miner has the exclusive right to apply²²⁶ for a renewal of a mining right.²²⁷ Specific duties are imposed upon a miner.²²⁸

Just like a prospecting right, a mining right terminates upon expiry of the period for which it was granted, cancellation of it upon specified grounds by the Minister or upon the occurrence of specific legal events.²²⁹ Upon termination of a mining right the entitlements are re-vested in the State by virtue of the State's reversionary or minimum entitlement.

IV SUMMARY

With reference to the Doctrine of Rights, the theory on Mineral law can be summarised as follows: The State holds rights to minerals in relation to demarcated tracts of land (subject to prior granted or converted rights). The State's right to minerals has as its content the entitlement of exploitation which is, in turn, made up by the entitlements of reconnoitre, prospecting and mining, which entitlements include the corresponding entitlements of entry of land for a such purpose, removal of minerals, use of water, and entitlements ancillary to reconnaissance, prospecting or mining. Theoretically, should the State exercise the entitlements of prospecting and/or mining, and severance of minerals from the land takes place, ownership of such minerals is acquired by the State. Ownership of severed minerals has as its content *inter alia* the entitlement to dispose of severed minerals. The State's right to minerals also includes the entitlements of disposition, resistance, alienation, encumbrance, income, and a reversionary or residual entitlement. Unless the State becomes directly involved in prospecting and mining for minerals, it is unlikely that these and other entitlements will be exercised. The most important entitlement is the State's entitlement of alienation, whereby rights to minerals are granted to applicants.

Upon the granting of reconnaissance permission by the State, the holder acquires a relative real right which has as its content the entitlement of reconnoitre, disposition and

²²⁴ S 23(6).

²²⁵ S 24(5).

²²⁶ See s 24(1)-(3).

²²⁷ S 25(1). *Agri South Africa v Minister of Minerals and Energy* supra note 18 par 47. Renewal is for a period which does not exceed 30 years (s 24(4)).

²²⁸ A miner has to: (a) timeously lodge such right for registration; (b) timeously commence with mining operations; (c) mine actively in accordance with the mining work programme; (d) comply with the requirements of the law, the terms of the mining right, the conditions of the environmental authorisation and the social and labour plan; (e) pay the State royalties; (f) submit the prescribed annual report (s 25(2)); (g) keep data about mining and processing of minerals (see s 28(1)); and (h) submit prescribed returns and reports to the Director-General (see s 28(2)).

²²⁹ See termination of right in III(b) above.

resistance for purposes of reconnoitre. If a prospecting right is granted by the State and registered, the prospector acquires a real right which has as its content the entitlements of prospecting, disposition and resistance for purposes of prospecting, alienation and encumbrance. Upon prospecting and severance of minerals by the grantee of a prospecting right from the land for testing, identification and analysis, the prospector acquires ownership of such minerals. Ministerial permission is required for severance and disposal of bulk samples. A prospector may extend the duration of the term of a prospecting right by exercising the right of renewal. A prospector also acquires statutory rights to apply for a retention permit or a mining right. The retentor is entitled to suspend prospecting, whilst retaining the statutory right to apply for a mining right.

Upon the granting of a mining permit by the State, the small-scale miner acquires a relative real right which has as its content the entitlements of prospecting, mining, disposition and resistance for purposes of mining and encumbrance. Upon mining and severance of minerals from the land by the grantee of a mining permit, the small-scale miner acquires ownership of such minerals. A small-scale miner may extend the duration of a mining permit by exercising the right of renewal of the right. If a mining right has been granted and registered the miner acquires a real right which has as its content the entitlements of prospecting, mining, disposition and resistance for purposes of mining, alienation and encumbrance. Upon mining and severance of minerals from the land by the grantee of a mining right, the miner acquires ownership of such minerals. A miner may extend its duration by exercising the right of renewal of the mining right.

Prospecting fees and royalties are payable by prospectors, small-scale miners and miners in so far as the State has the entitlement to income of minerals.

Upon termination of prospecting rights, mining rights and other permissions and permits, the entitlements of the holders limited real rights or relative real rights are re-vested in the State by virtue of its reversionary or residual entitlement to the right to minerals.

The content of the State's rights to minerals and the different rights to minerals upon grant (and registration) can be schematically illustrated by the following diagram:

Entitlements by virtue of the State's right to minerals	Reconnaissance permission	Prospecting right (renewable)	Retention permit (renewable)	Mining permit (renewable)	Mining right (renewable)
reconnoitre	X				
prospecting		X	suspended	X	X
Mining				X	X

disposition	X (reconnoitre)	X (prospecting)	X	X (mining)	X (mining)
resistance	X (reconnoitre)	X (prospecting)	X	X (mining)	X (mining)
alienation		X (with ministerial consent)			X (with ministerial consent)
encumbrance		X (mortgagee prescribed)		X (for a mining project)	X (mortgagee prescribed)
income X					
right to acquire		X Retention permit and mining right	X mining right		
reversionary X					

The entitlements of ownership of severed minerals can be illustrated by the following diagram:

Entitlements by virtue of ownership of severed minerals	Reconnaissance permission	Prospecting right	Retention permit	Mining permit	Mining Right
Disposal		samples; bulk minerals (with permission)		X	X

V CONCLUSION

Despite the aversion of the Courts to examine the new mineral order in terms of private law concepts, this article attempts to show that such an analysis can provide a legal theory for the new mineral law regime. The proposed new theory of rights to minerals illustrates the origin, acquisition, transfer and loss of entitlements by virtue of an encompassing right. The point of departure is the right to minerals held by the State in respect of land, and is still based upon the entitlements that were previously held by holders of common law mineral rights and the similarity between common law rights to minerals and new rights to minerals. The point of departure is established by the provisions of the MPRDA which empowers the State to grant specific rights to applicants, and by the theory of mineral rights. Rights to minerals with land as its object are real in nature, whether absolute or relative in operation. Whether or not the mineral *in situ* is owned by owners of land, the State or a trust becomes less important because the land or minerals *in situ* are subject to the right to minerals vested in and held by

the State.²³⁰ The theory illustrates how specific rights are acquired by applicants as well as the content of those rights. This new theory is consistent with previous theories on mineral rights. Despite the so-called new order created by the MPRDA, and the unrecognised losses suffered by holders of unused old order rights, the underlying theory seems to be “old school” after all: “plus ça change, plus c'est la même chose!”

²³⁰ See *Minister of Minerals and Energy v Agri SA* supra note 2 par 86.

*CIVIL LAW FOR COMMON LAWYERS: A TEACHING EXPERIMENT AT THE UNIVERSITY OF MELBOURNE**

Daniel Visser**

Deputy Vice-Chancellor Research, University of Cape Town

I INTRODUCTION: WHY SHOULD A LAW SCHOOL TEACH COMPARATIVE LAW?

Eltjo Schrage and I have many things in common: a doctoral supervisor, a love of good red wine, and an interest in unjustified enrichment, legal history, and comparative law. It is a great pleasure and honour to be able to contribute to this *Festschrift* to my friend of long standing, and I have decided to devote this contribution to the last of these shared interests: comparative law – and more specifically, the teaching of comparative law.

The value of engaging in comparative law is widely acknowledged – by academics analysing legal concepts, judges seeking solutions to novel situations – or novel solutions to old situations – and law commissioners engaging in law reform,. Does this mean, however, that one needs to teach it to all law students? Certainly, law schools across the world have been divided on the question as to whether it is necessary to include comparative law as a significant component of the curriculum.¹ There are many reasons to teach comparative law, but, to my mind, the dominant reason for making comparative law a part of the general curriculum of the basic law degree is its capacity to disrupt the false certainties that the education within a specific legal system tends to create.² Of course, certainty is a very important value in law. Indeed, the very fact that law provides the facility to predict the outcomes of disputes with (more or less) certainty is the primary reason why law is such a useful tool for ordering society. There is, however, a dark side to the law's goal to provide certainty: the necessity to maintain a high degree of certainty requires law teachers to instil the habit of consistent interpretation and respect for precedent before they teach their students how to be creative within the confines of the canon. Lesser law schools sometimes never get

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** BLuris LLB LLD (Pret) Diur (Leiden).

¹ For an analysis of the landscape in the United States, see Ugo Mattei 'Some realism about comparativism: Comparative law teaching in the hegemonic jurisdiction' (2002) 50 *The American Journal of Comparative Law* 87 (available at: http://works.bepress.com/ugo_mattei/26).

² See Fletcher 'Comparative law as a subversive discipline' (1998) 46 *The American Journal of Comparative Law* 683.

to the second part, while good schools do a great deal to show their students that they can play a role in shaping the law – but in all cases teaching students ‘to think like a lawyer’ tends to lure them into thinking, like Lord Coke, that their own legal system ‘is itself nothing else but reason’. Including jurisprudence in the law curriculum and requiring law students to major in another discipline besides law are both ways of helping law students to be able to question the status quo, but comparative law can provide living examples of what is ‘unthinkable’ in the home jurisdiction.³

The purpose of this contribution is to examine an example of a comparative law course that was taught as part of the general curriculum of a law degree, with a view to highlighting the details of how one might achieve the objective of equipping law students with a critical facility in their engagement with their own law.

II THE COMPARATIVE LAW COURSE IN THE ORIGINAL MELBOURNE JD PROGRAMME

A decade or so ago the University of Melbourne decided to experiment with a compulsory course in comparative law as part of a larger experiment with teaching law at postgraduate level in Australia, introducing, on the US model, a JD degree. An invitation to me and François du Bois⁴ to teach the comparative law course in this JD programme – with a specific focus on the civil-law/common-law divide – gave us a particularly exciting opportunity. In this first incarnation of Melbourne University’s post-graduate law degree, the Law School selected only high scholastic achievers with further work experience for this degree. The Teacher’s Guide for that version of the Melbourne JD Programme set out the criteria for selection as follows:

“The JD is open to admission to mature graduates who have a good degree in a discipline other than law and significant employment experience. The Selection Committee carefully considers all applications with consideration given both to prior academic qualifications and employment subsequent to graduation. With each intake limited to approximately 25 students, the rigorous selection process results in a highly motivated student body comprised of a diverse range of backgrounds and academic qualifications”.

³ As Fletcher (ibid at 695) remarks: ‘The promise of comparative law is that it enables us to get beyond ourselves to look back, with slightly alienated eyes, on the assumptions that American lawyers simply accept without reflection. It would be difficult to function in any legal system without heuristic rules about options that are simply off the table. Some solutions are out of range. They are not “thinkable.” The advantage of comparative law is that it expands the agenda of available possibilities.’

⁴ Then a colleague at the University of Cape Town, but now Professor of Law at the University of Leicester.

This admission policy ensured that each cohort consisted of an exceptionally talented and motivated group of students. That, coupled with the fact that the University took the step of making the comparative law course one of the compulsory courses in the curriculum, made it possible to design a high-level offering that would stretch the students. To accommodate the lecturers traveling from Cape Town in order to present the course,⁵ it was designed as an ‘intensive’, which meant that the students would receive the readings at the beginning of the trimester⁶ and work through them in accordance with a reading guide; and then — midway through the trimester — one of us would go to Melbourne to teach for two weeks, during which time the whole timetable would be cleared and only comparative law taught each day, all day. At the end of the teaching period the students wrote an essay and then had the rest of the trimester to prepare for the examination at the end. Lastly, a noteworthy aspect of the course was that it was placed in the second trimester of the first year of law studies.

In summary, then, the course can be described as follows: a compulsory comparative law course, taught as an intensive to a rigorously selected post-graduate class from diverse backgrounds and work experience in their first year of a primary law degree. I think that it is fair to say that this is an unusual profile for a comparative law course.

The Teacher’s Guide to the Melbourne JD Programme (that is to say, the version of the degree which was in place until 2007) is summarized as follows:

“The Melbourne JD is a graduate qualification which has been approved by the Council for Legal Education as meeting the academic requirement for admission to legal practice in all Australian jurisdictions. It is taught at an academic level intermediate between a master’s degree and a professional doctorate. By choosing the name “JD” the Law School follows a successful and established form of legal training available in the USA. The program has been introduced to meet the high demand for a sophisticated and intensive graduate legal qualification, from people who already have significant professional experience. It is likely therefore to be of interest to anyone whose career would be enhanced by a legal qualification or who is seeking a new career direction.”

It should be noted that the University of Melbourne, in a bold and imaginative move, phased out all undergraduate legal training and now only offers the post-graduate JD.⁷ Many other Australian universities have also now introduced the JD, but often with the retention of

⁵ There were two intakes into this programme per year and Francois du Bois and I alternated in teaching the course.

⁶ This JD programme was divided into trimesters without significant breaks in order to allow the program to be completed in two calendar years.

⁷ See the Melbourne Law Faculty website: <http://www.law.unimelb.edu.au/melbourne-law-school>

the undergraduate LLB combined with another bachelor's degree.⁸ The curriculum of the new Melbourne JD is different to the one we taught, it is not solely focused on post-experience students, and the numbers in the classes are of necessity far larger than was the case with the pilot model. In the new curriculum, comparative law is not a compulsory course – although it could from time to time be an elective, but I imagine that if it were, in the nature of things, not be possible to teach it in the way that we taught it from 2003 to 2007. This course stands, therefore, as a completed experiment.

III OUR APPROACH TO THE COURSE

Our brief was to teach comparative law with an emphasis on the difference between common law and civil law. Our course had a private-law slant⁹ (although we did bring in public-law concerns as much as possible, as will appear from the discussion below). We taught the course under three wide rubrics: (1) 'Why and how do we study the law comparatively?'; (2) 'The soul of a legal system: what makes common law different from civil law?'; and (3) 'Two views of the cathedral: specific examples of the difference in approach between civil law and common law'.

Teaching with a theoretical perspective

We attempted, under the first rubric, to give the students a flavour of the 'climate' of comparative law and the various debates taking place between scholars, in order to lead them to developing, even if at a basic level, their own approach to what the purpose of comparative law is. In this regard we were explicit that an important goal for us was to provide a perspective that would allow them to interrogate the validity of what they were learning in their mainstream courses – in other words to give them the tools to be more sophisticated students of their own legal system.

We showed them that the study of comparative law inevitably happens against a background of contestation about what comparative research should do. When we were teaching the

⁸ This is, for instance, the position in the Law Faculty of the Australian National University and the University of Sydney.

⁹ The differences between common-law and civilian systems can be demonstrated very effectively through the medium of private law.

course, the challenge posed by the ‘difference theorists’¹⁰ to orthodox theory (which in many ways championed the cause of finding the deeper similarities that lay below the apparent differences between legal systems) was at its height. The difference theorists poured scorn on those who seek to find common ground between the two legal families¹¹ (and indeed they even rejected the very notion of there being enough commonality between legal systems to divide them into families). They, for their part, sought to place difference at the centre of comparative work in law.¹²

We used this peak in the work of the difference theorists to show that it is important to take difference seriously, even if one is ultimately interested in finding common ground: even though case law plays an increasing (and an increasingly acknowledged) role in civilian systems; and even though we know that judges in, say, England and France do not work quite as differently from each other as the stereotypes would have us believe,¹³ much of the thinking which underlies the common law remains far removed from that in codified systems. So, we tried to show the students that when Pierre Legrand states that ‘the elimination of difference in the law narrows the possibilities for creativity and experimentation and may be compared to the extinction of animal and plant species that results from the destruction of natural habitat’,¹⁴ he does have a point (even if he greatly overstates it) – and that they could use these differences to understand their own law better and to be more effective actors within it.

In teaching difference, we placed emphasis on the role that the general culture, as well as specifically legal culture, of a jurisdiction inevitably plays in shaping a legal system. For instance, we used William Ewald’s ‘Comparative jurisprudence I: What was it like to try a rat?’,¹⁵ in which he brilliantly uses the sixteenth-century trial of the rats of Autun in France for ‘wantonly destroying’ the town’s barley crop to illustrate how it is essential for us to understand a particular society’s culture when we want to understand its law. We brought in the nuanced work of Mitchel de S.-O.-I’E Lasser on how judgments are constructed in the French legal system to reveal the necessity of understanding the specifically legal culture of a

¹⁰ See, for example, Legrand “Against a European Civil Code” (1997) 60 *Modern LR* 44 at 55 .

¹¹ See, for instance Legrand’s ‘The Same and the Different’, in Legrand & Munday *Comparative Legal Studies: Traditions and Transitions* (2003) 240, 249 in fine, 250) reference to “the control desks in Hamburg, Trento, Osnabrück, Maastricht, Rome, Utrecht and Copenhagen” [whence] ... the self-appointed spokesmen of reason ... wage an unceasing campaign to smother difference ...”.

¹² See Hyland ‘Comparative Law’ in Patterson (ed) *Blackwell’s Companion to Law and Legal Theory* (1997) 193.

¹³ See De S.-O.-I’E. Lasser ‘Judicial (Self-)Portraits: Judicial Discourse in the French Legal System’ (1995) 104 *Yale LJ* 1325.

¹⁴ The quote is from Hyland op cit note 11 at 195.

¹⁵ (1995) 143 *University of Pennsylvania LR* 1889.

jurisdiction when comparing its law with one's own (about which more below).¹⁶ Furthermore, when I taught the course, I also used the work of Geert Hofstede in measuring cultural differences and how those differences play a role in shaping both the form and the substance of the law in each jurisdiction.¹⁷

We taught them that difference comes in a variety of – sometimes unexpected – forms and that it is useful to keep in mind the lesson that the experience in private international law has taught us about various levels of difference. In this context we highlighted Kurt Lipstein's¹⁸ distinction between instances where legal institutions or rules in different systems are (i) identical in form, but different in substance, (ii) identical in substance, but different in form, (iii) partly identical in form and substance, and (iv) existent in both form and substance in one system, but completely absent in another. We also added that institutions are sometimes identical or similar in form and/or substance, but are simply differently conceived at a conceptual level and thus explained in different dogmatic terms.

We put so much emphasis on difference because we realized that our JD students would benefit most from seeing that solutions to problems could be approached completely differently from the way that the Australian legal system approaches them. The knowledge of alternative ways of viewing and solving problems would not only give them a platform for interrogating their own law, but it would also sensitize them when they were working in an international context to the nuances of other legal paradigms, and in a globalizing world, all legal practitioners should of course be as literate as possible about the various legal paradigms that they are likely to encounter in their careers.

However, just because emphasis on difference is important when comparative law is included in the curriculum of a general law degree, we did not want to leave them with the notion that difference is all that matters in comparative law and that there was no answer to Legrand's ideological attack on European harmonization. We were, therefore, at pains to show that there are many situations in which it is of great value to seek out similarity and harmony. Legal systems are, after all, part of the culture of the community that they serve, and culture can be unlearned just as well and as quickly as it is learnt, while learning can occur

¹⁶ See Lasser op cit note 13 as well as the deepened and expanded treatment of the subject in his book *Judicial Deliberations: A Comparative Analysis of Transparency and Legitimacy* (Oxford Studies in European Law) (2009).

¹⁷ See Visser 'Cultural forces in the making of mixed legal systems' (2003-2004) *Tulane LR* 49, in which I drew on the debate between Alan Watson and Pierre Legrand to foreground the role language, education, perceptions of identity, political orientation, values, and intellectual inspiration play in the creation of a legal system.

¹⁸ Chapter 5, 'Characterization', in the *International Encyclopaedia of Comparative Law* vol III (1999) 9-21 (5-24 to 5-49).

when legal systems grow closer to each other and new and healthy diversities can (and inevitably will) be created after the learning involved in growing together has been exhausted. We demonstrated the importance of the attempts aimed at the harmonization or unification of European law¹⁹ to the students (for example, Reinhard Zimmermann's various interventions on behalf of re-establishing a European legal science,²⁰ Ugo Mattei's 'common core' project,²¹ Hein Kötz and Axel Flessner's as well as Christian von Bar's books on European private law,²² and Ole Lando's restatement of European contract law).²³ We taught them that far from 'suppressing the flowering of different and productive ideas' as Legrand would have us believe,²⁴ these are heroic attempts at creating one text out of many — and that they may themselves turn out to be as important for our millennium as Justinian's sixth-century project was for the previous one. (If we had been teaching the course in the UK or the rest of Europe, it might have been appropriate to have given equal weight to similarity as to difference, given the imperatives of the European Union.)

At the end of the first section of the course, we asked the students to formulate their own approach (however tentative this might be) to comparative law, given the purpose for which they were using it. Our experience was that this initial exercise of bringing the students into the theoretical debate gave them a sense of empowerment: they could take sides — and Legrand's aggressive and passionate style pitted against Zimmermann's calm rationality encouraged them to do so.

Teaching with primary materials

The value in law teaching of utilizing primary materials to a significant degree is widely accepted, but when teaching a course in comparative law this poses a particular challenge: not only must cases be found that are *in pari materia*, but they must also be translated (or

¹⁹ For an overview, see Reid & Zimmermann 'The Development of Legal Doctrine in a Mixed Legal System' in Reid & Zimmermann *A History of Private Law in Scotland* vol I: *Introduction and Property* (2000)1-3.

²⁰ See, for instance Zimmermann 'Savigny's Legacy: Legal History, Comparative Law, and the Emergence of European Legal Science' (1996) *LQR* 576 at 579, *passim*.

²¹ See Bussani & Mattei 'The Common Core Approach to European Private Law' (1997-1998) 3 *Columbia Journal of European Law* 339; and see also, for a practical implementation of the theory, Zimmermann & Whittaker (eds) *Good Faith in European Contract Law* (2000) and Gordley (ed) *The Enforceability of Promises* (2001).

²² Kötz & Flessner *European Contract Law*; vol I (1997), translated by Weir; Von Bar *The Common European Law of Torts* vol I (1998) and vol II (2000).

²³ Lando & Beale (eds) *Principles of European Contract Law* (1999).

²⁴ See generally Legrand, note 4 above, at 249 in fine — 250, where he refers to 'the control desks in Hamburg, Trento, Osnabrück, Maastricht, Rome, Utrecht and Copenhagen' [whence] ... the self-appointed spokesmen of reason ... wage an unceasing campaign to smother difference ...'

existing translations have to be found). In this regard we found particularly helpful works such as those in the *Common Law of Europe Casebooks* series (for example, *Tort Law* (2000) by Walter van Gerven, Jeremy Lever and Pierre Larouche and *Unjustified Enrichment* (2003) by Jack Beatson & Eltjo Schrage) as well as books such as Basil Markesinis' *The German Law of Obligations* vol II *The Law of Torts, A Comparative Introduction* (3rd edn) (1997) and *The German Law of Contract: A Comparative Treatise* (2nd edn) (2006) by Basil Markesinis, Hannes Unberath and Angus Charles Johnston. The importance of these works is twofold: the case law contained in them has selected by experts of the law of that country and, furthermore, the books are written in or translated into English. We have, however, also found other translations or made our own where we needed specific examples to contrast civilian and common-law positions, or differing positions within these systems. The detective work involved in finding analogous cases (and meaningful commentary on each of them) for the specific corners of the legal systems that we wanted the students to study has proven to be one of the great joys of presenting the course. As valuable as the general casebooks are, any teacher of comparative law knows that one has to establish a bank of cases that illuminate the points that one wishes to convey in a course.

Teaching broader differences, teaching detail differences

After the initial discussion on the aims and methods of comparative law, the course introduced the differences between the common law and the civil law in greater detail at two different levels.

First, under our second broad heading, 'The soul of a legal system: what makes the common law different from the civil law?' the students were introduced to the 'operational reality', of the different legal systems, since form so often shapes substance. The way in which 'the law-job is done' in France and Germany on the one hand, and in England and Australia on the other, was analysed (and so were the differences between systems that fall within the same 'family' – that is to say, we also considered the differences between Australian and English law and those between German and French law). We looked at the form of judgments, at the way that courts function, at legal education, at the role of academic scholarship – and tried to separate reality from myth in order to arrive at an understanding of all the factors that give each system its distinctive shape, and to establish whether there really is an 'immutable core', an 'irreducible element of autochthony' in each of these legal systems, as Legrand would have it.

Secondly, under the rubric ‘Two views of the cathedral’ there followed a series of specific issues in the law, through which the detailed substantive differences between the systems were concretely illustrated and through which the general differences taught in the first part were reinforced.

We varied the course content over the years and below I provide a general idea of what we selected for this part of the course and how we used those materials.

IV THE SOUL OF A LEGAL SYSTEM: WHAT MAKES THE COMMON LAW DIFFERENT FROM THE CIVIL LAW?

We began by sketching – principally through the work of these two authors, but with a good deal of ancillary material²⁵ – first of all the ‘official portrait’ of French judgments and then the ‘unofficial portrait’, the hidden reality, of what is involved in the adjudication of disputes in French courts.²⁶

We used the startling (at least to common-law eyes) shortness of the judgment of a French court (essentially amounting to a single sentence – stretching perhaps over a page – in which syllogistic reasoning is employed to apply a principle, derived from the provisions of the Code, to the facts) to get the students thinking about the legal-cultural imperatives that could be behind French judgments being so different in form to common-law judgments.

First, we explained the historical origins of the notion that, while ‘[t]he American judge is somehow expected to judge, really to judge, [i]n France, the Code is supposed to have already judged’²⁷ The reason why the Code is taken ‘to have already judged’ – and the consequent (ostensible) strict adherence to purely deductive reasoning – goes back to the desire to limit the excessive powers which French judges had assumed before the French Revolution. This led to an explicit prohibition against judges making law.²⁸ However, all judges in codified systems make law,²⁹ and the French judges are no exception, but the

²⁵ For example, we used introductory texts such as Bell, Boyron & Simon Whittaker *Principles of French Law* Oxford (1998); Dadomo & Farran *The French Legal System* London (1993) and Watkin *An Historical Introduction to Modern Civil Law* (1999).

²⁶ The following description is adapted from what I contributed to a joint chapter with Helen Scott, entitled ‘The Impact of Legal Culture on the Law of Unjustified Enrichment: the Role of Reasons’ in Bant and Harding (eds), *Exploring Private Law* (Cambridge, Cambridge University Press, 2010) 153-174.

²⁷ Lasser op cit note 13 at 1325.

²⁸ Art 5 *Code civil*.

²⁹ See Zimmermann & Jansen ‘Quieta movere: Interpretative change in a codified system’ in Cane and Stapleton (eds) *The Law of Obligations. Essays in Celebration of John Fleming* (1998) 285.

unique circumstance that they are formally forbidden to do so requires the reasoning behind the changes in the law to be obscured by the formality of their terse, syllogistic judgments.

Secondly, we outlined the role of the court of final instance, the *Cour de Cassation*, as the guardian of the coherence of French law and how it hears vastly more cases than courts of the final instance typically hear in common-law countries. This it can do exactly because it is not a court of appeal, as courts of the final instance typically are in the common-law world, but a court of review, with the result that its judgments serve a different purpose than that of courts of appeal. It does not rule on the overall merit of a case, but only checks if the law has been applied correctly – if not, it quashes the decision and sends it back to the lower court that originally heard the case.³⁰

Once we have guided the students to see and appreciate the existence of a very different world in terms of the style and apparatus for applying the law, we proceed to again turn things upside down by showing that – contrary to widespread stereotyping – there is, under the surface, much in common between legal reasoning in France and England. As Bell puts it: ‘We have a difference in the character and perceived necessity of the reporting of judicial decisions, not in how they are arrived at.’³¹ In addition to the reasoning *visible* in the judgment of a French court there is the ‘unofficial discourse’ that takes place in the magistracy in the form of *conclusions* and *rapports*, which I have previously summarized as follows (and it is also more or less how we explained it to the students):

“At the start of the case a *rapporteur* prepares an analysis of the case for the court and the reasoning in it is not unlike that in a typical common law judgment.³² At the end of the case another magistrate (the ‘reporting judge’) writes a conclusion which reflects on the reasons that might and should underlie the judgment and which is similar in style and content to the rapport. (In the *Cour de cassation* a conclusion by the *Avocat-General* is mandatory.)³³ These rapports and conclusions have much in common with the familiar style of reasoning in common law judgments, that is to say they are discursive, contain reference to case law (*‘jurisprudence’*), and employ socio-economic and other policy arguments, often gleaned from discussion of the issues by academic writers (*‘doctrine’*).³⁴ The reports and conclusions are not anonymous and are written in a dialectical style, since their purpose is to convince the court that it should adopt the solution proposed in the document. If a court in fact adopts a solution so proposed— and if that solution cannot be produced by a straightforward deduction from the Code—the result is new jurisprudence, new judge-made law, which has a peculiar position in the French legal system as a whole. It will be reported in the formal style of the *arrêt*, and as such there will be no formal acknowledgement that it is not ‘law’ as contemplated by the Code, yet the insiders to

³⁰ See generally the website of the *Cour de Cassation*: <http://www.courdecassation.fr/>

³¹ Bell op cit note 25

³² Beatson and Schrage at 18.

³³ Ibid.

³⁴ Ibid; Lasser at 1346.

the system know—and operate on the basis that—‘jurisprudence is not a real source of law’.³⁵ Thus French legal culture adopts a bifurcated approach to the reasons for a judgment: it distinguishes between the formal reason given in the *arrêt*, namely that the facts necessitate the application of a particular provision of the Code (which Lasser terms the grammatical approach to reasoning), and informal reasons, namely the various policy considerations that compel a particular outcome even though it is not indicated by simple deductive reasoning from the provisions of the relevant article of the Code (which Lasser terms the hermeneutic approach to reasoning). This bifurcated approach allows the French legal system to move forward without having to directly challenge the principle (as contained in article 5 of the Code) that only the legislature can make law.”³⁶

This created the basis for debating the role of transparency (the reports and conclusions are only available if their authors release them and they are only sometimes published) and the relevant degrees of creativity that judges can manage in their respective jurisdictions (French judges, unlike their counterparts in, say, Australia and England, only resort to the more extensive type of reasoning – and employ policy in the course of it – when the solution to the matter with which they are seized is perceived to be uncertain. This limits their scope for creativity, but, simultaneously, the lack of transparency about the reasoning also creates the possibility of ‘creativity without accountability’, because the French judges do not need to justify their decisions other than by formulating a brief deductive argument relating to a provision in the Code.

After dealing with French judgments, we introduced German civil procedure and the German approach to judgments. Using John Langbein’s essay ‘The German advantage in civil procedure’,³⁷ we prompted the students to ponder yet another aspect of arriving at a judgment, namely the respective roles of legal counsel and judges in investigating the facts. In respect of judgments, we utilized Reinhard Zimmermann and Nils Jansen’s work on judgments in Germany. German judgments, although nowhere near the expansiveness of common-law judgments³⁸ (the detail of which, as Hein Kotz famously remarked, can cause someone from a civilian jurisdiction to feel as if he or she ‘has been submerged in an oxygen bath’),³⁹ are somewhere between the openness of common-law judgments and the terse obscurity of French judgments. They are also anonymous, but the reasoning – including the deployment of policy is openly displayed. Also leaning on the German example, we foregrounded the influence of academic interpreters of the judgments in civilian jurisdictions,

³⁵ Lasser at 1354

³⁶ See Scott and Visser *op cit* note 22.

³⁷ John H Langbein ‘The German advantage in civil procedure’ (1985) Faculty Scholarship Series, Paper 536 (available at http://digitalcommons.law.yale.edu/fss_papers/536).

³⁸ Zimmermann and Jansen .

³⁹ See Smits ‘How to take the road untravelled? European private law in the making’ *Maastricht* (1999) 6 *Journal of European and Comparative Law* 25 at 45

which is typically far greater than in common-law countries. George Fletcher encapsulated this notion very well when he remarked;

“Prior to my delving deeply into German criminal law, I had learned [a] lesson from a brilliant professor of private law in Freiburg, Ernst von Caemmerer, for whom in the mid-1960s I wrote a seminar paper analyzing the case law on a particular question of private law. In his critique of the paper, van Caemmerer brought home the point that what the cases say is less important than what the scholars think they say or at least, what they say that the cases say. At that moment I grasped the difference between the American and German legal traditions.”⁴⁰

With a good sense of the many ways in which courts do their work; of the fact that much of a legal system’s soul is in its procedural arrangements and not only in its substantive law; and of the folly of legal chauvinism, our students were ready to get into the belly of the beast and look at the approach to specific issues and problems in common law and civil law.

V TWO (OR MORE) VIEWS OF THE CATHEDRAL(S)

The specific topics that we taught over the existence of the programme varied: some we taught each time the course was presented, some only once, and some intermittently.

Overview of the specific topics

We typically began by comparing the law of delict/tort, and we did so in three parts, namely the high-level differences between the common-law and civilian systems (but also highlighting the differences between civilian systems), the different approaches within the two systems to the liability of public officials for harm caused, and how each system deals with defamation and privacy in the context of private law being influenced in different parts of the world (and to differing degrees) by human-rights instruments. Preceding the third topic, we taught the history and different manifestations of the ‘horizontal operation’ of constitutions, since constitutions are often the source of the human rights that could influence private relations. In contract we considered how the enforceability of promises is viewed in the various systems, the role of respectively ‘consideration’ and ‘cause’ in respectively Australian and French law to demonstrate the limitations of each, the concept of good faith and the best way to incorporate it into a legal system, as well as the traditional ways of

⁴⁰ See Fletcher op cit note 2 at 692.

dealing with specific performance as a remedy, to then be able to ask how different the common law and the civil law approaches really are. We taught the different conceptualizations of unjust/unjustified enrichment in the two systems (and internal differences within, respectively, common-law and civilian systems) – and we ended with an exploration of the remedies at the borderline between contract, tort and unjust enrichment.

In the interests of keeping this contribution to a reasonable length, I will not discuss all the topics that we included in the course. Instead, I will attempt to provide a sense of this part of the course by giving a brief overview of how we dealt with the law of delict/tort.

Delict/tort compared at a system level

In the first of the three topics dealing with delict/tort, we explored the main differences between Australian/English, German and French law. When I taught the course,⁴¹ I thought it best – since the students had just recently been exposed to tort law for the first time – to start with what was familiar to them. I therefore began with an analysis of the neighbour principle's origins in *Donoghue v Stevenson*⁴² and its subsequent fate in the common law – and, since I was teaching in an Australian law school, its interpretation specifically in Australia. I presented the famous central dictum from *Donoghue v Stevenson* to the students, juxtaposed with the Australian tort lawyer John Fleming's question about its meaning.

In response to the statement in *Donoghue* that, in the legal version of 'love thy neighbour', those who qualify as my neighbour are persons that 'are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called into question',⁴³ John Fleming pointedly put this question:

“Although this inspired passage became a sacrosanct preamble to judicial disquisitions on duty, it contains a fateful ambiguity. Does it propound merely a test

⁴¹ In teaching the specific issues, Francois du Bois and I agreed on the material that we would prescribe, but we did not confer on exactly how we would bring it across, so in this section the description of my approach to the teaching does not necessarily reflect how my colleague approached things when he did the teaching. Below I will try to give an idea of how and what we taught in each of these sections, and also of the materials that were used, but of necessity I can only do so selectively. (The full reading list is on archive with the author. Clearly, if the course were taught today, one would, in some cases, prescribe different materials since the law and the literature keep evolving, but the idea here is to give an account of how we actually taught the course.)

⁴² [1932] AC 562.

⁴³ Ibid.

of foresight or, if it does make allowance for other factors, does that raise a tension between ‘principle’ and ‘policy’?”⁴⁴

I used these passages to first stimulate a general debate about how liability for foreseeable harm ought to be limited by policy considerations. In a comparative course, one has the space to consider the roots of concepts in more detail than time would allow in the ordinary teaching of the courses to which those concepts relate. Using an Australian case, *Sullivan v Moody*,⁴⁵ (in which it had to be determined whether medical practitioners working at Sexual Assault Referral Centres owed a duty of care to a father who had wrongly accused of sexual abuse) I could illustrate how, despite the fact that the High Court of Australia had disavowed the three-pronged English test for the existence of a duty of care (as captured in *Caparo Industries Plc v Dickman*)⁴⁶ for being too loose and capable of being misunderstood as an invitation to formulate policy rather than to seek for principle’,⁴⁷ it could not get away from doing exactly that. Moreover, I could examine how the policy factors that have played a role in past cases should be used as signposts and weighed against each other to determine whether or not a duty exists in a novel case.

Once the students, while appreciating the difficulty of formulating exactly the test for the existence of a duty of care, had internalized the limiting role of the duty of care in negligence cases through the incremental development of policy, I proceeded to illustrate its equivalent, ‘unlawfulness’, in German law, pointing out both the similarities and the differences as to when a duty of care/unlawfulness was generally held to exist in the two systems. For example, I showed them that in respect of the policy factors that played a role in the case of liability for omissions, there was a considerable convergence in approach in that the German courts developed so-called ‘Verkehrssicherungspflichten’ (duties of care in social interaction),⁴⁸ which, if breached by omission, could lead to liability. I also demonstrated that in the case of pure economic loss there was an important difference between the two systems, in that the wording of paragraph 823 BGB⁴⁹ does not in principle allow claims for pure economic loss (although the German courts have found their way around this to a limited

⁴⁴ *The Law of Torts* (1998) at 439.

⁴⁵ *Sullivan v Moody; Thompson v Cannon* [2001] HCA 59.

⁴⁶ [1990] 2 AC 605: was the harm foreseeable?; was there the appropriate measure of proximity between the plaintiff and defendant; and was it fair, just and reasonable to impose liability in the circumstances.

⁴⁷ Para 49 of the judgment.

⁴⁸ Markesinis.

⁴⁹ ‘Any person who willfully or negligently unlawfully injures the life, body, health, freedom, property or other right of another is bound to compensate him for any damage arising therefrom.’ (Para 823(1) BGB.)

extent).⁵⁰ This exercise not only illustrated how conceptual apparatuses in different systems can approximate each other and how studying them tends to reveal their underlying principles (sometimes unarticulated), but also how the ‘text’ with which lawyers in a particular system have to work (be it a leading court decision or a provision of a code) can determine the limits of liability.

After this exercise it was time to once again disrupt the certainties that the students had been experiencing through seeing the substantial degree of similarity in regard to the English and German laws’ approaches to liability for negligently caused harm. This was done by introducing French law’s lack of a concept of unlawfulness or a generalized duty of care. In France, through the provisions of the Code civil in art 1382 (‘anyone who, through his act, causes damage to another by his fault shall be obliged to compensate the damage’) and in art 1383 (‘everyone is responsible for the damage caused not only by his act but also by his negligence or carelessness’), *faute* (fault) rules supreme and there is no a priori limitation as to a class or protected persons, no duty of care limiting the scope of liability in respect of foreseeable plaintiffs: *victimes par ricochet* are automatically included. All of this, as Vinney points out, makes for a very flexible system, in which new rights and novel types of harm can be protected, but it also leads to unpredictability and the possibility of adverse economic effects. To illustrate the wideness of the French approach, we used the famous Branly case⁵¹ (or the case of ‘the imprudent historian’ as the case has been branded),⁵² in which the *Cour de cassation* found that Professor Albert Turpain had breached a duty to represent history objectively by not mentioning the contribution of Eduoard Branly to the invention of wireless telegraphy in his piece *Historique de T.S. F.* – an instance that almost certainly would not have led to liability in any common-law jurisdiction. For the students to see an actual case of the imposition of liability in another system which in terms of their training ought never to have occurred, served to underline the necessity of having a limiting device beyond foreseeability.

⁵⁰ The German Courts, following the lead provided by the academic commentators, have managed to introduce a limited number of instances of liability for pure economic loss, for example causing harm through a boycott to an ‘established and operating business’ is treated as being similar to property damage.

⁵¹ Cour de cassation, Chambre Civil, 27.2.1951, D 1951, 329; comm Desbois, S 1951.I.158; JCP 1951.II.6193.

⁵² For the text in French, see Lawson & Markesinis *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law* 2 ed (1982) at 193. We used the translation in Van Gerven, Larouche and Lever, *Cases, Materials and Text on National, Supranational and International Tort Law* (2000). See generally also Van Dam *European Tort Law* (2013) at 25.

The liability of public authorities

The discussion of general differences in respect of liability for negligently caused harm, was followed by a more detailed discussion on the tortious liability of public officials. This topic provided an ideal opportunity to view very different legal-cultural approaches in a specific setting.

As is well-known, the interpretation of the courts in England (and generally in the common-law world) of the duty of care in the context of the liability of public officials has led to a situation in which such a duty is not easily imposed on officials. The Australian case of *Sullivan v Moody*⁵³ (discussed above) is one such example and in England a long line of cases, such as *Hill v Chief Constable of West Yorkshire*,⁵⁴ *Stovin v Wise*⁵⁵ and, in recent times, *Van Colle v Chief Constable of Hertfordshire Police*,⁵⁶ have reinforced what has essentially been the position since the 19th century, namely that ‘in the absence of express statutory authority, a public body is in principle liable for torts in the same way as a private person’.⁵⁷

On the other hand, civilian systems show a much greater openness to imposing liability on public officials and indeed provide specifically for liability in cases of harm caused by public bodies. This dramatic difference in approach, we illustrated by means of, firstly, German law and, secondly, French law. Thus in German law, art 839 BGB decrees as follows:

“If an official, wilfully or negligently commits a breach of official duty incumbent upon him as against a third party, he shall compensate the third party for any damage arising therefrom. If only negligence is imputable... he may be held liable only if the third party is unable to obtain compensation elsewhere.”

At first sight, this is a very restrictive measure, since its import is that officials are liable personally only if the official acted intentionally or, in the case of negligence, only if there is no other source from which the victim can claim compensation. However, the fact is that there is a definite other source of compensation to found in art 34 of the *Grundgesetz*:⁵⁸

⁵³ See above note 38.

⁵⁴ [1989] AC 53f.

⁵⁵ [1996] 1 AC 923; [1996] 3 All ER 801.

⁵⁶ [2009] 1AC 225.

⁵⁷ *Stovin v Wise* supra.

⁵⁸ See Van Gerven, Lever & Larouche Tort Law (2000)

“If any person, in the exercise of a public office entrusted to him, violates his official obligations to a third party, liability shall in principle rest on the state or the public body which employs him... the jurisdiction of the ordinary courts may not be excluded.”

To illustrate the liability of public officials in Germany, we used the case of a travel company that sued the state for compensation due to the effect of a long-running period of industrial action in terms of which air-traffic controllers reported sick on a regular basis or adopted a ‘go-slow’ approach in an effort to improve their working conditions.⁵⁹ The *Bundesgerichtshof* found in favour of the plaintiffs, who had lost business as a result of the strike. Reasons for this decision include the following:

“For the defendant to be held liable for the damage in respect of which the plaintiff claims, the air-traffic controllers must have been culpably in breach of an official duty to the plaintiff as a “third party” (art 34 GG and the first sentence of para 839(1) BGB’. ... Whether the person injured... is a “third party” within the meaning of § 839 BGB is determined according to whether the official duty is intended specifically, though not exclusively, to serve his interests.”⁶⁰

The court went on to remark that ‘there is much evidence in the present case in favour of a finding that the patrimony of the plaintiff falls within the protective area of the official duties incumbent on air-traffic controllers’.⁶¹

After dealing with the German law, we explained the French system of holding public officials and bodies liable – which differs even more from the common-law model than does the German system, in that a special regime, brought about by the *Conseil d’Etat* at the end of the 19th century, obtains (which deals with the liability of such officials through special administrative courts). We outlined the history of how this regime came about, looking at the developments following the decision of the *Tribunal des Conflits* in *Blanco* (1873)⁶² that the *Code civil* does not apply in these instances. We sketched how the non-codal regime worked out by the *Conseil d’Etat* brought about the situation in which this part of French law became ‘more generous to plaintiffs and more ready to accept the existence of liability than is private

⁵⁹ BGH, 16 June 1977.

⁶⁰ Translation by Van Gerven et al op cit note 46 at 373.

⁶¹ Ibid. The court further noted that the plaintiff’s claim is also justified on another ground: ‘By virtue of his office, he [the official] is under an obligation to take care that in the exercise of his office he does not interfere in any way in the sphere pertaining to others... Accordingly, the official... is obliged to refrain from any interferences in the rights of others which would be tortious within the meaning of the civil law, and thus also under § 823(1) BGB. An official who, in the exercise of his public office, commits a tort in this manner, thereby at the same time commits a breach of an official duty towards the holder of the right ...’

⁶² Tribunal des Conflits 8.2.1873, *Blanco*, *Recueil des arrêts du Conseil d’Etat* 61, conclusion David. (See

liability law’⁶³ – a regime which has at its heart, amongst other things, the ‘socialisation of risks’⁶⁴ – and in respect of which (in the felicitous phrasing of Brown and Bell)⁶⁵ ‘the French were to bless the good fortune which had given them, almost by historical accident, this novel institution before which even the humblest citizen could arraign and call to account the all-powerful and interfering state’.

The dramatic divergence in approach between common-law and civilian systems in regard to the impact of human rights on the liability of public authorities produced a further opportunity for our teaching of difference. After the European Court of Human Rights (ECtHR) found in *Fayed*⁶⁶ that ‘it would not be consistent with the rule of law in a democratic society ... if, for example, a state could, without restraint or control by the Convention enforcement bodies, remove from the jurisdiction of the courts a whole range of civil claims or confer immunities from civil liability on large groups or categories of persons,’⁶⁷ a tussle developed between it and the courts in the United Kingdom in respect of the interpretation of the duty of care as it pertains to the liability for public authorities (which the UK courts defined without reference to human rights). The ECtHR pushed for the integration of human-rights concerns into the fabric of the duty of care in cases involving public authorities, but the notion that the liability of public officials in tort should to be defined with reference to the Human Rights Act eventually won through (at least for the time being), with the result that any violations of the Human Rights Act must be addressed separately with the remedies offered by the Human Rights Act itself.⁶⁸ We used this battle, as it played out in cases such as *Osman v United Kingdom*,⁶⁹ *X v Bedfordshire County Council*⁷⁰ and *Z v United Kingdom*⁷¹ to illustrate the different effects of either adapting the duty of care to include human-rights concerns or of keeping its traditional formulation and addressing human-rights violations through separate proceedings. This tussle brought important insights to the students at this early stage of their career in the Law School. What

⁶³ Markesinis, Auby, Coester-Waltjen, Deakin *Tortious Liability of Statutory Bodies: A Comparative and Economic Analysis* (1999) 16.

⁶⁴ Ibid.

⁶⁵ *French Administrative Law* 4dn (1993) 47.

⁶⁶ (1994) 18 EHRR 3903.

⁶⁷ At 429, as quoted by Weir ‘Downhill – all the way?’ (1999) *Cambridge LJ* 4 at 5.

⁶⁸ See for the current position *Van Colle v Chief Constable of Hertfordshire*; *Smith v Chief Constable of Sussex Police* [2008] UKHL and in respect thereof Francois du Bois ‘Human rights and the tort liability of public authorities’ (2011) 127 *LQR* 589 and generally John Blackie ‘Liability of public authorities and public officials’ in Reid and Visser (eds) *Human Rights and Private Law: Bringing Rights Home* (2013) 235 at 252.

50; [2009] 1 A.C. 225.

⁶⁹ [1998] EHRR 10.1

⁷⁰ [1995] 3 All ER 353.

⁷¹ (2002) 34 EHRR 3.

unfolded from these readings was the story, not only of a marked difference in legal cultures, but also a conversation between those cultures. They saw how in *Osman* the ECtHR had held that the decision in England (in a case involving the murder of the plaintiff's husband by a former teacher of their son who was besotted with the boy) that there was no duty of care on the police, amounted to conferring an immunity contrary to art 6 of the ECHR. (It had been alleged that the police were liable in damages because they had failed to protect Ahmet Osman after clear signals that his life was in danger.) They then encountered two other phenomena: first, the reaction in the UK that this view of the ECtHR amounted to a misunderstanding of the law of negligence, in that, by finding that a duty of care did not exist, the English courts merely determined the extent of liability in terms of the law of negligence and did not prevent the question of whether a right to compensation should exist in negligence from being argued before the courts; and, second, the ECtHR recanting in *Z v United Kingdom*⁷² (a case involving the responsibility of a local authority in preventing child abuse) in which the UK interpretation was accepted.

Here we could not resist introducing South African law, where the Bill of Rights in the Constitution (with its explicit recognition of the imperative to transform private law in the image of the constitution) has produced, as part of the manifold and varied transformation that it has brought about, an increased scrutiny of the protective duty of public authorities and officials.⁷³

I think it is easy to see how the knowledge of the potential influence that an enforceable human-rights instrument could have on the substance of private law gave the students an important vantage point from which to analyse their own law. In other words, it was an example of their minds being opened to the 'unthinkable' in their own system. Recently John Blackie has reminded us of the following in this context:

"It is possible for legal systems reasonably to differ on the level of protection for which public authorities should be responsible, and on the role of delictual damages actions in promoting such protective duties. Whether in this context a human rights claim is treated as separate from (as in Scotland and the United Kingdom more generally) or intertwined with a common law claim (as in South Africa) is less important than the attitude the legal system takes to such claims anyway."

⁷² Supra note 73.

⁷³ See for example *Carmichelle v Minister of Safety and Security* 2001(4) SA 938 (CC) and *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA).

I believe our students were brought to this realization through the study of these materials – and to the realization that they need not be passive appliers of the status quo, but that the legal system can be shaped by arguments that are to be found (or made stronger) by looking at other legal systems.

The influence of human rights on the law of tort/delict generally

This consideration of the role of human rights in the sphere of the liability of public authorities opened the door for a fuller and more general discussion of the role of human rights in the law of torts/delict, centering mainly on the law of defamation. For the Australian students (since there is no enforceable Bill of Rights in Australia) this discussion provided a vantage point to consider to what extent their law was responding to human-rights imperatives in spite of the absence of a Bill – and it opened a view on the various possibilities for their law if such an instrument were ever to be adopted.

When I presented the course, I began by outlining the history of the ‘horizontal’ application of human-rights instruments by detailing the history of ‘Drittwirkung’ in Germany (beginning with the *Lüth* case,⁷⁴ in which the German Constitutional Court held that the *Grundgesetz* contains an objective order of values that pervade the whole legal system and that radiate into private law, mainly by interpreting general phrases such as ‘reasonableness’ and ‘fairness’ in the BGB in conformity with the expectations of the Constitution). The *Lüth* case resulted from the compelling drama in which the mayor of Hamburg - Lüth - called for the boycott of a film, ‘*Unsterbliche Geliebte*,’⁷⁵ because it, although completely harmless in and of itself, had been directed by Veit Harlan, who had made Nazi-sympathetic films during the Third Reich) – and was vindicated by the Constitutional Court.⁷⁶ I also dealt with the application of the *Lüth* principles in subsequent

⁷⁴ (1958) 7 BVerfGE 198.

⁷⁵ ‘Eternal beloved’.

⁷⁶ Applicant Veit Harlan relied on para. 826 of the BGB:, which determines that ‘a person who wilfully causes harm to another in a manner which is contra bonos mores is obliged to compensate the other person for the harm suffered’. Harlan succeeded in the civil courts and obtained an injunction. In his appeal, the defendant, Lüth, relied primarily on the guarantee of freedom of speech in para 5(1) of the *Grundgesetz*: ‘Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.’ Harlan replied to this argument by pointing out that art 5(2) of the *Grundgesetz* limited the rights enshrined in it: ‘These rights are limited by the provisions of the general laws, the provisions of law for the protection of the youth and by the right to the inviolability of personal honour’ – and para 826 of the BGB was just such a general law. The Court held that the principles of the *Grundgesetz*, on the one hand, and those of the BGB, on the other, have a reciprocal effect (‘Wechselwirkung’) on each other – the basic rights in the *Grundgesetz* ‘beam’ their values into the BGB, but the BGB can also

cases, for example the ‘Soldiers are Murderers II’ case⁷⁷ and the ‘Stern-Strauss’ case,⁷⁸ to explore the factors relevant in the balancing of freedom of speech against the right to an unimpaired reputation, such as political speech versus ‘ordinary speech’ and speech with a serious purpose versus speech that has no serious purpose (other than financial gain), leading to the position that intentionally harming someone’s reputation does not amount to libel if it is done with a purpose sufficiently important to cause art 5(1) of the Basic Law⁷⁹ to trump ordinary law.

In my background sketch I also included the approach to the application of human rights to private law that had been developed in Canada⁸⁰ as well as South Africa’s constitutionalization of its private law⁸¹ to demonstrate just how much an appropriately formulated constitutional text can contribute to the importation of human-rights concerns into private law.

This background allowed the students to interrogate Australia’s approach to balancing the right to an unimpaired reputation with freedom of speech. In *Theophanous v Herald & Weekly Times Ltd*⁸² and in *Stephens v West Australian Newspapers*⁸³ the High Court of Australia, in the absence of a Bill of Rights, had implied a right of free speech in political matters based on the fact that Australia was a constitutional democracy and a democracy necessarily could only operate in a climate of free speech. In *Lange v Australian Broadcasting Corporation*,⁸⁴ (in which the former Prime Minister of New Zealand, Sir David Lange, sued for defamation) the High Court held that this freedom of speech implied the Constitution only moderated how organs of state could act and did not provide a defence in a defamation action brought under the common law. However, it held that the common-law defence of qualified privilege could be developed to balance appropriately freedom of speech

(through art 5(2) restrict the operation of the basic rights: Whenever this kind of oppositional situation occurs the Court must balance the competing rights by taking account of the purpose which the rule in the BGB promotes and deciding whether, if it is allowed to restrict a basic right, that purpose will be achieved in a way which does not place a disproportionate value on this purpose of the BGB. The court held that in this case the purpose of para. 826 BGB could not oust the operation of article 5(1) of the Basic Law: the ‘basic right to freedom of expression... is absolutely essential to a free and democratic state... it is the basis of freedom itself’.

⁷⁷ BVerfG 93, 266 [1995].

⁷⁸ BVerfG 82, 272 [1990]).

⁷⁹ ‘Everyone shall have the right freely to express and disseminate his opinion by speech, writing and pictures and freely to inform himself from generally accessible sources. Freedom of the press and freedom of reporting by means of broadcasts and films are guaranteed. There shall be no censorship.’

⁸⁰ *Retail, Wholesale and Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573 and *Hill v Church of Scientology (Manning v Hill)* [1995] 2 SCR 1130.

⁸¹ *National Media Ltd v Bogoshi* 1998 (4) SA 1196 (SCA) and *Khumalo v Holomisa* 2002 (5) SA 401 (CC).

⁸² (1994) 124 ALR 1.

⁸³ (1994) 182 CLR 211.

⁸⁴ (1997) 189 CLR 520.

with an unimpaired reputation. The experience in Germany, Canada and South Africa with adapting the law of defamation to reflect the values enshrined in a constitution or bill of rights provided the wherewithal for the students to see the *Lange* judgment in its global context and to appreciate its intellectual antecedents in other jurisdictions.

VI CONCLUSION

In my view the clearest benefit of this course to the students was the understanding it gave them at an early stage in their legal studies of the fact that for almost every principle that a legal system accepts, there is a counter-principle tugging at the collective consciousness of that system for recognition, and that, therefore, the solutions provided by one's own legal system can almost always be configured differently. The fact that they acquired this information in an intensive teaching stint early in their law studies created for them the means with which to contextualize the work that they were doing in other courses, as well as their overall knowledge of law and its role in society.

I end this contribution with an example of an examination paper to illustrate the level which the students were able to attain in this course.

COMPARATIVE LAW 730-516 EXAMINATION QUESTIONS

Question 1

Victoria's Charter of Human Rights and Responsibilities Act 2006 clearly establishes only 'rights between the government and the people'. In its report the Human Rights Consultation Committee on the introduction of a Charter of Human Rights and Responsibilities for Victoria stressed that 'since there is one unified common law of Australia, which is not susceptible to direct influence from any one State' the Charter could not include provisions that would give it 'horizontal' operation. Write a memorandum to the Department of Justice and explain, making use of examples from other countries:

(a) why, if in the future there is to be a national Human Rights Act, it should contain a clause which ensures that its provisions are ‘horizontally’ applicable; and

(b) how it should be worded.

Question 2

(a) Write an essay in which you compare the role of the courts and court decisions in the development of the law in France, Germany and Australia.

OR:

(b) Write an essay in which you explore what you consider to be the most important differences between Civil-law and Common-law systems.

Question 3

Compare how, and to what extent, a balance between freedom of speech and the right to an unimpaired reputation is achieved in the law of Australia and of Germany.

NOTE: In answering this question you may substitute the law of Germany with the law of any of the other jurisdictions that you studied in this course. Irrespective of the legal system chosen for comparison with Australian law, you may, in addition, include remarks about any of the other legal systems that you studied in relation to this topic.

Question 4

Henrik Lando and Caspar Rose, “The Myth of Specific Performance in Civil Law Countries” (2004) *American Law and Economics Association Annual Meetings* Paper 15, argue that specific performance does not play much of a role in many civil-law countries. However, the decision in the Scottish case of *Highland and Universal Properties Ltd v Safeway Properties Ltd* 2000 SC 297 shows that this view might not be true of all civilian systems. Write an essay in which you (a) give your assessment of the degree of difference between common-law and civilian legal systems in regard to the availability of the remedy of specific

performance and (b) discuss how you think a legal system should approach the availability of this remedy.

Question 5

“The question of deciding which promises are legally binding is one that has occupied all developed legal systems ... Where the systems differ is as to the criteria they use to determine the seriousness (and binding nature) of a declared human will. The Common law’s prime test is, of course, consideration; but as Zweigert and Kötz correctly observe: ‘By taking counter-performance as the sole indication of seriousness ... the Common law renders it impossible to do justice in all cases.’”

-B S Markesinis, W Lorenz & G Dannemann *The German Law of Obligations, vol 1: The Law of Contracts and Restitution: A Comparative Introduction* (1997) 81.

Write an essay in which you

- (a) compare the approach of Australian law to that of French and German law in regard to the problem outlined in the quote above and
- (b) consider briefly whether Australian law can do without a concept of consideration.

Question 6

Write an essay in which you compare the approach of Australian law to the liability of public bodies and officials for harm caused by their omissions with the approach to this problem in France or Germany (or both).

***TEKENBEVOEGDHEDE VAN 'N SENIOR BEAMPTTE TEN BATE
VAN 'N UNIVERSITEIT – WAAR BLY DIE BILLIKHEID?***

Jean Sonnekus*

Professor of Private Law, University of Johannesburg

Die jubilaris, Prof Dr Eltjo Schrage, is nie alleen 'n vermaarde en gerekende Romanis van faam nie, maar in eie reg ook 'n gedugte privatis wat nooit geskroom het om hom energiek te begeef in daardie dele van die materiële privaatreg wat tradisioneel bestempel word as “moeilik”, en “lastig” en op die grense van die vermeend waterdigte kompartemente van die privaatreg lê nie. Sy bydraes in die standaard literatuur vêr buite die eng grense van Nederland op die gebied van die verrykingsreg en ander aspekte van die billikheidsgebaseerde regsfigure is bekend. Oor vele jare sedert ons gemeenskaplike studentetyd was dit vir my altyd net verrykend om met Eltjo gedagtes te kon wissel oor die aspekte van die privaatreg wat ons gemeenskaplik boei. Met hierdie bydrae word bewustelik hom ter ere ook op die grensgebied beweeg.

1 Van oudsher word gewaarsku om nie alle skyn vir die werklikheid te aanvaar of alles wat opgedis word vir soetkoek op te eet nie. Die onderskeid tussen skyn en werklikheid moet deur volwasse deelnemers aan die handelsverkeer voor oë gehou word ten einde tussen goud en klatergoud te kan onderskei. Nie almal wat hulself met die titel van 'n bestuurder sier, is iets meer as die bestuurder van 'n voertuig van die firma nie en alleenstaande sê die posbenaming niks oor daardie bestuurder se gedelegeerde bevoegdheid om namens sy werkgever regshandeling te kan verrig nie. Dít kan slegs 'n gemagtigde met 'n omskrewe mandaat doen. Blyk by nabaat dat die vermeende verteenwoordiger geen mandaat gehad het nie, het geen kontrak gebaseer op wilsooreenstemming tussen die misleide party en die vermeende prinsipaal tot stand gekom nie. Mits egter aan al die vereistes van estoppel as verweer voldoen word, kan die estoppelontkenner verhinder word om hom op die regswerklikheid te beroep en steeds indirek dieselfde feitelike gevolge vir die suksesvolle estoppelopwerper bereik word as wat uit die beoogde kontrak sou voortvloei het hoewel estoppel geen regsveranderende gevolge meebring nie.

Dikwels misluk die beroep op estoppel reeds weens nievoldoening aan die eerste vereiste, te wete 'n regtens relevante skynverwekking deur die estoppelontkenner. Daar is slegs sprake van mits die redelike persoon in die skoene van die estoppelopwerper eweneens weens die

* BA Law LLB LLM(RAU) DrsJur LLD (Leiden).

gedrag van die estoppelontkenner mislei sou wees om te aanvaar dat hy met 'n mandataris te doen het wat die inhoud en grense van sy mandaat ken en dit nie sal oorskry nie. Daar moet gevolglik telkens gevra word of die estoppelopwerper wat hom bekla oor die feit dat hy deur die skynverwekkende gedrag van 'n ander mislei was om tot sy nadeel sy posisie te verander, nie tekort geskiet het aan die norm van waaksaamheid wat van 'n redelike persoon in sy posisie geverg word nie. Die redelike persoon is nie alte goedgelowig nie en sal veral as daar omstandighede is wat hom op sy hoede stel dat nie alles pluis is met die oënskynlike posisie nie, moeite doen om homself van die ware toedrag van sake te vergewis. Omgekeerd beteken dit sekerlik ook dat as daar niks is om die redelike persoon in sy posisie op sy hoede te stel nie, die redelike persoon nie van self só wantrouig is dat hy geen woord sal glo wat hom meegedeel word tensy dit nie deur die heer van die huis self bevestig is nie.

Soms is dit moeilik om te bepaal waar die streep getrek behoort te word sodat die nadeel wat gely is weens 'n skynverwekking nie noodwendig rus waar dit val te wete by die misleide persoon nie, maar verskuif kan word na die ander rolspelers betrokke met inbegrip van die werkgewer van die aktiewe misleier. Hoewel estoppel as billikheidsgebaseerde verweer nie gebaseer kan word op iets analoog aan middellike aanspreeklikheid nie en die estoppelontkenner slegs blameer kan word vir sy eie blaamwaardig skynverwekkende gedrag, is daar omstandighede waar die werkgewer van die aktiewe misleier minstens die geleentheid vir laasgenoemde geskep het om skynverwekkend op te tree jeens 'n derde en daarom die risiko van benadeling wat daaruit voortvloei, behoort te dra.

Moontlik word onvoldoende rekening gehou met die skynverwekking wat voortvloei uit die stilswyende gedoog deur 'n werkgewer van gedrag van een van sy werknemers wat homself belangriker voordoen as wat hy werklik is, maar die werkgewer nie ongeneë is om die voordele te geniet wat daaruit vir die werkgewer mag voortvloei nie. As dit geruime tyd reeds die geval is, mag die nalate van die werkgewer om teen die pretendent op te tree self die skyn verwek van 'n bewuste gedoog van sy gedrag en neerkom op 'n stilswyende uitbreiding van sy mandaat tot die omvang van die pretensie. Dit kan ook op ratifikasie van die aanvanklik ongemagtigde optrede neerkom.¹

¹ Sien die bespreking van 'n soortgelyke situasie in *Glofinco v ABSA Bank Ltd t/a United Bank* 2002 (6) SA 470 (HHA) toe die bank van Horne nie ongeneë was om die voordeel van die besigheid van die werksaamhede van Horne te geniet ondanks die feit dat sy as bankbestuurder haar bevoegdhede soos beperk in die interne riglyne van die bank vêr te buite gegaan het toe sy die tjeks namens die bank as avalis en wisselgarant gewaarborg het nie – Sonnekus *Die Estoppelleerstuk in die Suid-Afrikaanse Reg* (2012) 83 ev en “Estoppel en oënskynlike volmag van amptenare van owerheidstrukture” 2012 TSAR 593-606.

2 *Oppex Consultant CC v The University of KwaZulu-Natal*² is 'n uitspraak gemerk as “ongemerk” wat klaarblyklik impliseer dat dit nie geoormerk is om in enige van die gedrukte hofverslae gerapporteer te word nie, wat jammer is, want só dra dit minder by tot regsontwikkeling, raak 'n aspek van gedelegeerde bevoegdheid om namens 'n prinsipaal bepaalde regshandeling te kan verrig. Oppex (O), as besigheid wat spesialiseer in die verskaffing van advies aan grootmaat stroomverbruikers oor wyses waarop hulle hul stroomverbruik kan verminder én met die benutting van die mees gepaste rekeningstruktuur wesenlik geld kan bespaar in die lig van die hemelhoë elektrisiteitspryse, het die universiteit geïdentifiseer as 'n potensiele grootmaat stroomverbruiker. Nadat telefonies navraag by die universiteit gedoen is oor die juiste persoon in die universiteitstruktuur om daaroor te kontak en mee te onderhandel, is Rajesh Dhuni (D) aan O uitgewys as net die man. Nadat die konsep in die kantoor van D op die kampus aan hom verduidelik is, is ooreengekom op die werkswyse én dat vergoeding vir die konsultasiediens slegs geskied mits 'n aansienlike besparing daadwerklik vir die universiteit bewerkstellig word en dan op 'n ooreengekome persentasiegrondslag. Slegs tot die mate wat die insette van O werklik tot 'n besparing bydra, is O geregtig op sy vergoeding wat 'n persentasie van die daadwerklike besparing beloop – dus “no cure no pay”. Daarop is 'n oënskynlik geldige diensverskaffingsooreenkoms deur Maine (M) namens O as konsultant met die universiteit soos verpersoonlik in D, gesluit.³

“Maine testified that on 21 November 2006 he had a meeting with Dhuni in Westville. During that meeting he asked Dhuni whether he had the requisite authority to conclude the agreement on behalf of the defendant. Dhuni answered that question in the affirmative. The defendant did not dispute Maine’s evidence in this regard. ... He specifically expressly said to Dhuni ‘who has the authority to conclude this agreement?’ and Dhuni had an expression of how could he doubt that he had the authority. Dhuni picked up the agreement and signed it on behalf of the defendant and below his signature and wrote ‘Head of Expenditure’. That cemented his belief that he was dealing with the right person. He, in turn, took the agreement and signed it. After they both signed he was thereafter satisfied that the parties had concluded a binding agreement which entitled the plaintiff to commence the work”.

O het werk gemaak van sy onderneming en die universiteit het reeds in die eerste ses maande van die tersake rekeningtermyn waarvoor die ooreenkoms voorsiening gemaak het 'n besparing van meer as R1 miljoen geniet onder andere danksy die terugbetaling deur die munisipaliteit van ongegronde of andersins verkeerdelik betaalde dienstegelde wat deur die owerheid van die universiteit gevorder was. O het dus sy onderneming gestand gedoen en 'n

² 2012 JOL 29375 (KZD), ook beskikbaar as 2012 JDR 0955 (KZD).

³ Par 10 saamgelees met par 23.

wesentliche besparing vir die universiteit bewerkstellig en dan behoort die beginsel toepassing te vind dat die arbeider sy loon werd is.

Die universiteit ontken egter aanspreeklikheid vir die ooreengekome vergoeding aan O op sterkte van die feit dat D ondanks al die voorgee en tooisels waarmee hy omgee was nie oor die nodige bevoegdhede beskik het om die universiteit te bind nie. Die universiteit het 'n ongeopenbaarde "signatory list" as lys van persone wat deur die raad van die universiteit per termyn aangelys word as bevoeg om bepaalde transaksies waarby bepaalde bedrae betrokke is namens die universiteit aan te gaan.⁴ Die lys is vervat in die raadsnotules wat egter nie gebruiklik in die publieke domein geplaas word nie, maar dit gee nietemin die feitelike toedrag van sake juis weer: D se naam was nie op die tersake lys vir die tydspan toe die ooreenkoms onderteken is nie. Hy het dus in die oë van die universiteit geen magtiging gehad om die universiteit te verbind nie – selfs nie vir 'n ooreenkoms waaruit die universiteit nêr voordeel kon trek en geen nadeel kon ly nie.

Hoewel hierdie saak nie oor 'n tipiese ongemagtigde uitgawe soos die aankoop van 'n luukse voertuig of fotostaatmasjien gaan waar die universiteit geld moet betaal waarvoor nie begroot is nie, en in werklikheid in die geval heelwat geld bespaar is, weier die universiteit om O se rekening vir die benutte konsultasiediens te vereffen op sterkte van die feit dat D nie oor die nodige interne magtiging vir die transaksie beskik het nie. Daar kan kwalik getwyfel word dat die universiteit ook nie sou skroom om in die daaropvolgende jare aan die hand van die reeds bewese suksesvolle strategie soos dit aan die universiteit gedemonstreer is deur O, voort te gaan om soveel as moontlik geld op sy elektrisiteitsrekening aldus te bespaar nie. Deur te maai waar nie gesaai is nie, of dan te ploeg met 'n ander man se kalf, staan die universiteit 'n goeie kans om dit wesentlik te verryk.

3 Dhuni was geensins 'n junior amptenaar van daardie universiteit nie. Hy was volgens die getuienis van Pillay wat namens die universiteit getuig het, die hoof van uitgawes wat aan Pillay as finansiële bestuurder en D se direkte hoof gerapporteer het.⁵ By ander tersiêre instellings met ander universiteitstrukture en posbenamings mag die terminologie verskil, maar die beginsel van gedelegeerde bevoegdhede vir telkens afnemende bedrae des te verder in die ketting van delegasie afgedaal word, word algemeen in die sektor aangetref. Soos uit die aanhaling hierbo⁶ blyk, het D bewus die indruk gewek het dat hy sonder twyfel die

⁴ Par 12 van die uitspraak.

⁵ Par 10.

⁶ Par 2.

bevoegdheid het om namens die universiteit dié ooreenkoms met die eiser aan te gaan wat net tot die universiteit se voordeel kon strek. Hy was volgens Pillay egter bewus dat slegs die gelyste persone gemagtig was om namens die universiteit ooreenkomste aan te gaan.

Onduidelik uit die uitspraak is of ook slegs persone op die “signatory list” bevoeg sou wees om ’n skenking of selfs ’n legaat namens die universiteit te aanvaar. Hoe dit ook sy, daardie lys is egter nie algemene kennis nie. ’n Mate van onsekerheid het blykbaar geheers oor die juiste posoms krywing van D want dit blyk dat nadat die vermeende ooreenkoms reeds gesluit was, is sy posoms krywing gewysig.⁷ D was wel voor die samesmelting van die inrigtings waaruit die universiteit saamgestel is, verantwoordelik vir die diensterekening van die universiteit wat moontlik ook sy oortuiging verklaar dat hy binne sy mandaat optree met die ooreenkoms wat tot ’n potensiele besparing vir die inrigting op die diensterekening mag lei. Ongeag egter of hy toe méér bevoegdhede gehad het as ná die samesmelting en sy posoms krywing dit juis aangedui het, staan dit vas dat hy nie ten tye van die ondertekening van die ooreenkoms in 2006 die bevoegdheid as een van die gelystes gehad het nie. By gebrek aan ’n geldige mandaat kan die vermeende mandator nie kontraktueel gebonde wees nie.

4 O beroep dit op die verweer van estoppel ten einde die universiteit die mond te snoer en te verhinder dat die universiteit die daadwerklike gebrek aan magtiging van D pleit en sodoende aanspreeklikheid ontken. Vir doeleindes van die estoppelverweer is die skynverwekking deur ’n oënskynlike verteenwoordiger oor sy eie magtiging om namens die vermeende prinsipaal regshandelinge te kan verrig, van geen betekenis nie. Die uitdruklike gedrag van en bevestiging deur D oor sy beweerde magtiging soos uit die bogemelde aanhaling in paragraaf 2 blyk, kan dus nie die universiteit as skynverwekking toegereken word nie. Dit was die ongemagtigde D wat homself as die Meneer voorgedoen het en nie die universiteit as sy werkgewer wat gehandel het nie. Dít is egter nie die einde van die saak nie, want daar moet afsonderlik gevra word of die universiteit as oënskynlike prinsipaal nie deur sy optrede en deur die optrede van ander werknemers van die universiteit wél die indruk gewek het dat die voorstelling deur D oor sy beweerde magtiging die regsposisie juis weergegee het nie. Dít is waar die skynverwekkende gedrag van die universiteit as estoppelontkenner ter sprake kom.

⁷ Par 14 van die uitspraak.

Nadat vasstaan dat D nie oor die nodige magtiging beskik het nie, kon O met die eerste oogopslag slegs oor die boeg van die estoppelverweer slaag mits aangetoon kon word dat die universiteit met sy gedrag die skyn verwek het dat D oënskynlik die nodige magtiging gehad het om die ooreenkoms met O te sluit. Omdat die universiteit as *universitas* slegs deur middel van sy personeel kan handel, behoort die vraag dus te wees of van sy personeel se gedrag in die verband wel die skyn soos voorgehou deur D oor sy mandaat ondersteun of selfs bevestig het in die oë van die redelike buitestaander in die posisie van O. Vir die doel is dit myns insiens futiel om dan van die buitestaander te verwag om vooraf outomaties insae te hê oor die presiese funksie van iedere personeellid van die inrigting ooreenkomstig die inrigting se interne organogram ten einde te weet wie van hulle wél met die nodige magtiging bekleed is om die inhoud van 'n bepaalde ander werknemer soos die van die skynverwekker D korrek te omskryf. As 'n buitestaander immers só heldersiende is om presies vooraf met outomatiese insig in die organogram van die werkgewer geseënd te wees om te weet wát die juiste bevoegdheid is van die personeellid wat hom verwys na die vermeend gemagtigde amptenaar waarmee hy moet onderhandel, spreek dit tog vanself dat hy dan sekerlik ook heldersiende genoeg sou wees om te weet dat D homself bedrieglikerwys voordoen as gemagtig.

By nabaat weet almal nou dat dié amptenare met wie O te doen gekry het nie die topstruktuur van die regspersoon vorm nie, maar kon die redelike derde in die posisie van die estoppelopwerper dit destyds weet en weet dat hulle vir hom vals inligting sal verskaf oor wie die gemagtigde mandataris is? Skynverwekking word egter nie by nabaat en met die voordeel van binnekennis beoordeel nie, maar vanuit die skoene van die redelike man in die posisie van die estoppelopwerper en met inagneming slegs van dié kennis waaroor hy kon beskik het ten tyde van sy beoordeling van die voorstelling rakende die feitelike posisie aan hom gemaak en wat hom beweeg het om sy posisie tot sy nadeel te verander. Dit is sonder óf die organogram van die instelling óf insae in die raadsnotules óf insae in die instelling se sogenaamde struktuur van gedelegeerde bevoegdhede wat iewers op die interne intranet van die inrigting beskikbaar mag wees, maar waartoe geen buitestaander toegang het of van weet nie.⁸ Die buitestaander wat soos M in die geval gedoen het, uitdruklik 'n oënskynlik senior amptenaar vra of hy die gemagtigde mandataris is om namens die instelling die ooreenkoms te sluit, het moontlik soos die redelike persoon opgetree tensy daar iets was wat hom op sy hoede moes gestel het.

⁸ In paragraaf 8 word teruggekeer na die kousaliteitsaspek.

Daar is reeds tevore in die regspraak melding gemaak van die vermeende heldersiendheid van die redelike persoon wat wonderbaarlik reeds by voorbaat met die voordeel van insig by nabaat geseën sou wees. As dié premis van heldersiendheid van sodanige “redelike persoon” in die skoene van die estoppelopwerper sou klop, was daar nooit ruimte vir ’n regsbegrip soos oënskynlike volmag nie en tog word dit algemeen benut deur die Engelse reg en met goedkeuring gevolg deur die Suid-Afrikaanse hoogste hof. Logies kan geen geldige gevolgtrekking uit ’n valse premis getrek word nie. Regter Mnguni steun in die onderhawige uitspraak swaar op die bekende formulering uit die Engelse reg in die verband. In *Hely-Hutchinson v Brayhead Ltd*⁹ (en waarna met goedkeuring verwys is in *NBS Bank Ltd v Cape Produce Co (Pty) Ltd*¹⁰ én in *South African Broadcasting Corporation v Coop*¹¹) het Lord Denning gemeld:¹²

“Ostensible or apparent authority is the authority of an agent as it appears to others. It often coincides with actual authority. Thus, when the board appoint one of their number to be managing director, they invest him not only with implied authority, but also with ostensible authority to do all such things as fall within the usual scope of that office. Other people who see him acting as managing director are entitled to assume that he has the usual authority of a managing director. But sometimes ostensible authority exceeds actual authority. For instance, when the board appoint the managing director, they may expressly limit his authority by saying he is not to order goods worth more than £500 without the sanction of the board. In that case his actual authority is subject to the £500 limitation, but his ostensible authority includes all the usual authority of a managing director. The company is bound by his ostensible authority in his dealings with those who do not know of the limitation. He may himself do the “holding-out”. Thus, if he orders goods worth £1,000 and signs himself “Managing Director for and on behalf of the company”, the company is bound to the other party who does not know of the £500 limitation ...”

Nie alleen is D deur die universiteit in ’n oënskynlik senior posisie as “Head of Expenditure” aangestel nie, maar hy is deur meerdere werknemers van die universiteit aan O uitgewys as die juiste persoon om mee te onderhandel.¹³ Die redelike persoon wat as buitestaander kennis neem van ’n posbenaming soos dié word myns insiens nie daardeur op sy hoede gestel dat die posbekteër in werklikheid nie op die “signatory list” van die raad is nie – daargelaat of hy van die bestaan van sodanige lys eers bewus sou wees. Dit was ook die bevinding van die

⁹ 1967 3 All ER 98.

¹⁰ 2002 (1) SA 396 (HHA).

¹¹ 2006 (2) SA 217 (HHA) par 65.

¹² 102A-E.

¹³ Par 19-20 van die uitspraak,

hof *a quo* in *Company Unique Finance (Pty) Ltd v Johannesburg Northern Metropolitan Local Council*:¹⁴

“It is also plain from the evidence of the witnesses called by the council, that anyone dealing with the council would be entitled to accept information given to him by senior council officials, as in fact occurred.”

D se kantooropset was sodanig dat kwalik beweer kan word dat dit die redelike persoon op sy hoede sou stel dat die skynbare senioriteit waarmee hy homself omgee nie met die werklikheid ooreenstem nie en dat hy nie eens die bevoegdheid het om ’n kontrak namens die universiteit te sluit wat slegs tot die voordeel van die universiteit kon strek soos ook die geval met ’n eensydige kontrak sou wees nie.¹⁵

Die vraag is dus of die universiteit as werkgewer met die oogluikende medewerking tot die daarstel van die tersake tooisels wat die indruk van die meneer se senioriteit wek, nie blaamwaardig bygedra het tot die skyn van sy oënskynlik bemaagtigde posisie nie – ongeag die feit dat ná insae in die vertroulike lys van gemagtigdes dit duidelik was dat hy nie die nodige magtiging gehad het nie. Die redelike buitestaander het nie werklik die geleentheid om insae te hê in daardie lys nie en word ook nie juis bewus gemaak van die feit dat hy om insae in sodanige lys moet vra nie. Dit is nie bekend dat ’n enkele universiteit by sy hoofingang ’n waarskuwing op het om besoekers te waarsku om vooraf kennis te neem van die dan geldende lys van gedelegeerde gemagtigdes met tekenbevoegdheid tot bepaalde bedrae namens die universiteit nie. Terwyl die redelike persoon nie sou aanvaar dat die grasmašienoperateur wat hy toevallig op pad na die hoofingang raakloop, gemagtig is om vir die rektor ’n blink nuwe koets aan te koop nie, is daar niks wat hom op sy hoede sou stel dat die hoof van krediteure in werklikheid nie oor die nodige magtiging beskik om ’n ooreenkoms te sluit soortgelyk aan die van O wat die universiteit geld mag bespaar nie. Om skuil te gaan agter die semi geheime lys van gemagtigdes wat in die raadsnotule opgeneem is, kom verdag dig by die abortiewe pogings in die verlede om agter private instruksies te wil skuil teen ’n suksesvolle opwerp van estoppel.

Selfs as binne die instelling aanvaar word dat ’n verpligting op enige buitestaander rus om hom te vergewis van die magtiging van die amptenaar met wie hy namens die inrigting onderhandel, is dit onduidelik met welke vorm van bevestiging van die beweerde magtiging vir lief geneem mag word en of hoegenaamd enige ander amptenaar as die rektor bygestaan

¹⁴ 2011 (1) SA 440 (GSJ) 460E.

¹⁵ Par 21-22.

deur die voorsitter van die raad se woord aanvaar kan word. Hieronder word beweer dat na aanleiding van die uitspraak in *TEB Properties CC v MEC, Department of Health & Social Development, North-West*¹⁶ klaarblyklik nie eers daardie kombinasie voldoende sal wees nie, want in daardie saak was die hoof van die staatsdepartement se woord nie as deurslaggewend geag om 'n regtens relevante skynverwekking daar te stel nie.¹⁷

5 Regter Mnguni behandel nie in sy uitspraak die onderskeie vereistes vir 'n suksesvolle beroep op estoppel agtereenvolgens en stelselmatig nie sodat nie duidelik blyk of hy wel naas die vraag of regtens relevante skynverwekking die universiteit ten laste gereken kan word ook enige van die ander vereistes oorweeg het nie. Tog word die universiteit toegelaat om agter die interne private instruksie (die sogenaamde “signatory list”) te skuil van wie vir die toepaslike termyn gemagtig was om namens die universiteit te kontrakteer. Sodoende kan die universiteit ná die genot van die besparing wat ten grondslag van die ooreenkoms gelê het, dit distansieer van aanspreeklikheid vir die ooreengekome vergoeding vir die gelewerde dienste deur O.

Vir die buitestaander wat navraag doen om na die toepaslike gemagtigde amptenaar van die universiteit verwys te word, is dit uiters moeilik om die gesaghebbendheid van die verwysende amptenaar te beoordeel. Die redelike persoon in die posisie van die estoppelopwerper durf tog seker aanvaar dat die instelling slegs bekwame personeel aanstel wat die omvang en grense van hul eie bevoegdhede ken. Soos in die geval van die bankbestuurder in die *NBS*-saak gaan dit werklik te vêr om van die redelike persoon wat met so 'n instelling skakel, te verwag om uit te gaan van die veronderstelling dat die aangestelde personeel deurgaans onbekwaam én onbetroubaar is en dat hy hom onder geen omstandighede op inligting verskaf namens die universiteit deur sy personeel mag verlaat tensy dit uit die mond van die rektor en die raad bevestig word nie. Die werkgewer is die enigste party in die posisie om beheer uit te oefen oor wie hy aanstel en om via interne dissiplinêre stappe te verseker dat die aangesteltes presies weet wat hulle mág sê en welke verwysings hulle aan buitestaanders mág gee. As dit nie gebeur nie, behoort die gevolge van die risiko vir sodanige ongedisiplineerde gedrag sekerlik nie voor die deur van die onbetrokke buitestaander gelê te word nie.

¹⁶ 2012 1 All SA 479 (HHA).

¹⁷ Sien ook die bespreking van die uitspraak in 2012:1 *Juta Quarterly Review* sv “contract” 2.1.1 en 2.5.1.

Tog is dít die denkllyn van regter Mnguni om soos president Mpati in *Northern Metropolitan Local Council v Company Unique Finance*¹⁸ te aanvaar dat alle derdes by voorbaat oor die kennis moet beskik wat hy danksy die bestudering by nabaat van die organogram van die werkgewer het oor wat die status van 'n bepaalde werknemer is en hoe ver sy bevoegdhede strek: “it seems to me that the switchboard operator and a person in the Finance Department to whom the switchboard operator referred Maine’s call, are lowly ranked employees of the defendant in an elaborate administrative set up”.¹⁹

6 Die estoppelopwerper het nie net gesteun op die mondelinge verwysings na D as die bevoegde persoon nie maar het ook gesteun op sy indruk oor die oënskynlike posisie van senioriteit en dus vermeende magtiging van D soos verkry uit sy kantoor-opset, die tooisels van sy oënskynlik private sekretaresse (wat volgens die regter bloot die kantoor organiseerder was), die feit dat hy in M se teenwoordigheid genader is deur ander werknemers van die universiteit vir goedkeuring teen sy handtekening vir bepaalde dokumente. Tog bevind die hof dat die som van die oënskynlike magtigingstooisels onvoldoende was om die universiteit onder die vaandel van oënskynlike magtiging te bind.²⁰

“[F]or the reason that the representations allegedly made by the defendant were not in a form *that the defendant, would have reasonably been expected* the outsiders to act on the strength thereof”.

Die probleem met die formulering is dat estoppel nie afhanklik is van die redelike oordenking deur die estoppelontkenner van sy eie skynverwekkende optrede nie, maar wel of die redelike derde in die posisie van die estoppelopwerper (en nie die ontkenner nie), deur die skynverwekkende gedrag mislei sou wees – ongeag wat die estoppelontkenner gedink het. Op daardie wesenlike vraag verskaf die abrupte formulering van die regter geen antwoord nie. Tog beslis die hof:²¹

“Based on the evidence aforementioned, I have to conclude that the plaintiff’s official (Maine) could not have relied on the representations as pleaded and alluded in his evidence, as there were no representations made by the defendant or its officials either in words or conduct that he could have reasonably relied on, and acted upon”

¹⁸ 2012 (5) SA 323 (HHA) par 40.

¹⁹ Par 25.

²⁰ Par 29 – my kursivering.

²¹ Par 30.

Hieruit is duidelik dat na die oordeel van die regter die beweerde skynverwekkende optrede van die universiteit en sy personeel hoegenaamd geen voorstellings was nie daargelaat nie regtens relevante skynverwekkings nie. Daarmee was dit dus klaarblyklik in die oë van die regter gedaan wat die beroep op estoppel betref.

7 In die onderhawige geval is dit vreemd dat die inrigting nie met bewuswording van die suksesvolle benutting van die insette en werk deur O wat op die aansienlike besparing vir die universiteit uitgeloop het, hulself distansieer het van die ooreenkoms met O nie, maar daarmee gewag het tot die vordering vir die vermeend ooreengekome vergoeding gebring is. Dit kan vergelyk word met 'n universiteit wat nadat bekend gemaak is dat navorsingsleerstoele daaraan toegeken is, geen dissiplinêre stappe neem teen 'n senior amptenaar wat die handtekening van die rektor vervals het op aansoekvorms vir die leerstoele nie. Só 'n houding van “die doel heilig die middele” boesem geen vertrouwe in nie, maar laat ruimte vir slegs één afleiding: die onregmatige optrede van die amptenaar is gekondoneer en geratifiseer.

Daar is geen aanduiding uit die uitspraak dat D op enige stadium dissiplinêr vervolg is omdat hy met sy eiegeregtigde en ongemagtigde optrede die universiteit soveel geld bespaar het nie. Die inrigting het klaarblyklik nie gehuiwer om die aansienlike finansiële voordele wat uit die ooreenkoms gevloei het soos beliggaam in die noemenswaardige besparing op die elektrisiteitsrekening van R1 Miljoen rand vir die tersake ses maande periode, toe te eien nie.

8 Die uitspraak bied geen aanduiding dat die hof oorweeg het of die objektief waarneembare gedrag van die universiteit ná ontvangs van die meevaller van meer as 'n miljoen nie minstens as oënskynlike ratifikasie interpreteer kon word deur die redelike persoon in die skoene van O as die estoppelopwerper nie. Dáárdie gedrag van die instelling strook immers nie met die van 'n onthutste prinsipaal wat hom distansieer van die ongemagtigde optrede van die oënskynlike verteenwoordiger wat homself bedrieglikerwys méér bevoegdhede aangematig het as waaroor hy werklik beskik nie.

Hoewel die aanvaarding van die voordeel deur die universiteit uiteraard nie kousaal verbind kan word met die sluit van die aanvanklike ooreenkoms nie en dus nooit sou kwalifiseer as die oorsaak vir O se handeling tot sy nadeel met die aangaan van die vermeende ooreenkoms met D namens die universiteit nie, sou die konstruksie van 'n oënskynlike ratifikasie gebaseer op die daadwerklike gedrag van die instelling wel 'n afsonderlike eisgrond vir O bied en dan kan ook met voldoening aan die kousaliteitsvereiste

wel suksesvol 'n beroep op estoppel gedoen word om die instelling te verhinder om die oënskynlike ratifikasie te ontken. Daar moet dus onderskei word tussen enersyds die benutting van estoppel soos in die gevalle van oënskynlike magtiging gebaseer op die vermeende prinsipaal se optrede vooraf wat gelei het tot die aanvanklike “ooreenkoms” enersyds en andersyds die feit dat estoppel ook aangewend kan word om die prinsipaal te verhinder om te ontken dat hy *ex post* gesien deur sy gedrag om die vrugte van die ongemagtigde optrede van die vermeende mandataris te geniet, die skyn verwek het dat die ongemagtigde optrede geratificeer is. Dit impliseer uiteraard dat die pleitstukke dienoreenkomstig opgestel moet word.

In die woorde van appèlregter Schutz in die *NBS*-saak, dra ook die gedrag van die universiteit sedert die aanvanklike ondertekening van die ooreenkoms en tot en met die ontkenning van aanspreeklikheid jeens O ná ontvangs van die eis vir vergoeding by tot die geheel van die “fasade” dat D oënskynlik met die magtiging en die seën van die universiteit – indien nie ter aanvang nie dan wel by nabaat as ratifikasie - die ooreenkoms beklank het waaruit die universiteit die wesenlike voordeel geput het:²²

“All in all the NBS created a facade (I use that word only because I am concentrating on outward appearances) of regularity and order that made it possible for Assante, for a time, to pursue his dishonest schemes. And *it is in the totality of the appearances that the representation is to be found*. That representation was that Assante was authorised to agree to terms of deposit and take money deposited, even in non-routine transactions such as were concluded with Lapiner”.

9 In die *Oppex*-saak word die universiteit toegelaat om agter die interne private instruksie van wie vir die termyn gemagtig was om namens die universiteit te kontrakteer, te skuil téén aanspreeklikheid vir die ooreengekome vergoeding vir die gelewerde dienste. In só 'n geval behoort die inrigting ook nie as semi-staatsinstelling geriefshalwe te kan skuil agter sy anderdes onbekende interne organogram en private instruksies nie. Juis van so 'n openbare liggaam word verwag dat dit die verantwoordelikheid vir interne kontrole self dra maar ook nie die gevolge van 'n breuk daarvan op derdes af te wentel nie – veral nie nadat dit reeds die voordeel van die besparing geniet het nie. Estoppel as verweer moes myns insiens toepassing gevind het om die universiteit te belet om die ongebondenheid aan die skynbevoegdheid van Dhuni te pleit.

Na aanleiding van die *TEB*-saak is die billikheid nie ooglopend wanneer die hof beslis om die verweer van estoppel nie te handhaaf teen die owerheid nie en dit nieteenstaande die feit

²² 414G-H.

dat bevind is dat die waarnemende departementshoof van die tersake staatsdepartement persoonlik betrokke was in die sluit van die huurooreenkoms en uitdruklik persoonlik op navraag van die verhuurder bevestig het dat alle prosedures daarvoor korrek gevolg is. By nabaat blyk dat dit 'n leuen was en is die huurooreenkoms as nietig verwerp deur die owerheid waarvan die leuenaar die effektiewe departementshoof was omdat hy inderdaad nie die nodige bevoegdheid gehad het om die tersake ooreenkoms aan te gaan nie. Die probleem ook in daardie geval van 'n werklik hoë profiel amptenaar was dat die redelike buitestaander geen manier het om op sy hoede gestel te word oor die leuen wat aan hom voorgehou is nie. Soos die redelike derde persoon het die verhuurder aanvaar dat só 'n senior amptenaar sekerlik nie sy pos sou bekom het tensy sy werkgewer oortuig was van sy integriteit nie. Daardie buitestaander het die "fout" gemaak om nie méér wantrouig te wees oor die gehalte van die persoon wat in die pos in die staatsdiens aangestel is nie ondanks die feit dat daar niks was wat hom of die redelike persoon in sy posisie op sy hoede kon gestel het nie.

Sekerlik behoort die staat en ander tersake owerheidsliggame op 'n manier verantwoordelik gehou te kan word vir nadeel wat regssubjekte ly omdat hulle afgaande op die skuldige skyn van oënskynlik betroubare amptenare hul posisies verander het. Die owerheid of 'n universiteit kan nie telkens bloot pleit dat hy nie buite sy statutêre kompetensies aanspreeklik kan wees, en dan tóg voortgaan om onbetroubare amptenare in senior posisies aan te stel en nooit die gevolge te dra vir sodanige aanstellingsbeleid nie.²³ Indien die onderliggende gedagte vervat in artikel 24(a) en (b) van die oorgangsgrondwet²⁴ nog van toepassing is, behoort meer aandag gegee te word aan die regmatige verwagtings van die burgers wat so grondwetlik erkenning geniet.

“Elke persoon het die reg –

(a) op regsgeldige administratiewe optrede waar enige van sy of haar regte of belange geraak word;

(b) op prosedureel billike administratiewe optrede wanneer enige van sy of haar regte *of regmatige verwagtings* geraak word.”

Ingevolge item 23(2)(b) van Bylae 6 tot die Grondwet²⁵ was daardie artikel nog as oorgangsmaatreël van toepassing ná inwerkingtreding van die nuwe grondwet, maar is sedertdien vervang met die inwerkingtreding van die Wet op die Bevordering van Administratiewe Geregtigheid 3 van 2000 en waarin die formulering gewysig is sonder dat

²³ Sien ook *Mavericks Revue CC v Director-General of the Department of Home Affairs* 2012 JOL 28639 (WKK) in par 25.

²⁴ Grondwet van die Republiek van Suid-Afrika 200 van 1993.

²⁵ Grondwet van die Republiek van Suid-Afrika, 1996.

uitgespel is dat daarmee die onderliggende beginsel eweneens geskrap is. Dit is te hope dat die onderliggende gedagte steeds van toepassing is. Sekerlik bedoel die grondwetgewer om te onderskei tussen 'n “verwagting” en 'n “reg” want daar sou geen sin in wees om te argumenteer dat 'n verwagting wat nie op 'n reg gebaseer is nie, daarom *onregmatig* is nie terwyl hier uitdruklik formuleer is “regmatige” verwagtings. 'n Regmatige verwagting is eerder die resultaat van 'n regtens relevante skynverwekking en daarteen behoort die magiese skild van “ultra vires” nóg die owerheid nóg 'n universiteit as kwasi staatsinstelling weens die befondsing subsidie te beskut.

10 Hierbo is reeds in die verbygaan opgemerk dat die universiteit waarskynlik sou voortbou op die besparing wat na aanleiding van die insette van O verhaal kan word – om dit nie te doen nie, mag as verkwistend tipeer word. Daar is geen rede hoekom die instelling noudat dit geleer het hoe om so 'n groot bedrag op sy elektrisiteitsuitgawe te bespaar dit nie sou doen nie. In die onderhawige saak was O se vordering gebaseer op die vermeende dienskontrak wat nou by nabaat blyk geen kontrak was nie. Slegs omdat O van mening was dat daar 'n dienskontrak was, was dit bereid om sy bewese kundigheid in verband met besparings op elektrisiteitsrekenings met die universiteit te deel en die instelling die voordeel daarvan te laat geniet. Daar is in beginsel geen rede hoekom 'n party in die posisie van O nie sou kon oorweeg om sy vordering te baseer op die ongegronde verryking van die universiteit indien die vermeende *causa* vir die verryking danksy die bespaarde uitgawes nie op 'n kontrak gebaseer kan word nie. Sonder die kontrak was die vermoënsverskuiwing immers *sine causa*.

Hoewel die verstekformulering vir doeleindes van 'n vordering gebaseer op ongegronde verryking verwys na hetsy die bedrag van die ongegronde verryking of dié van die ongegronde verarming “welke ook die minste is”, word reeds in die onderskeie vergelykbare regstelsels aanvaar dat in bepaalde omstandighede die eiser steeds met 'n verrykingsvordering kan slaag indien die bevoordeling van die verweerder ongegrond is ondanks die feit dat die benutting deur die verweerder van die kundigheid van die verrykingseiser laasgenoemde oënskynlik nie verarm het nie. In die gevalle word met die konstruksie van die geïmpliseerde lisensie gewerk en word die verweerder se aanspreeklikheid bereken aan die hand van wat dit sou gekos het om vir die lisensie vir die benutting van die kundigheid of diens van die eiser te betaal. Die besparing van daardie kostes vertaal in die boedel van die verrykingseiser as die verarming wat hy gely het. Die agterliggende konstruksie is nie wesensverskillend van dit wat 'n eis *quantum meruit* onderlê nie. Die billikheidsoortuiging van die gemeenskap kan nie dermate afgestomp wees dat 'n

verweerder in die posisie van die universiteit in dié geval eenvoudig met die substansiële finansiële voordeel kan bly sit wat dit alleen geniet danksy die benutting van die kundigheid van die eiser onder omstandighede waar toevallig iets haper met die onderliggende ooreenkoms wat vir die lisensiëring van daardie kundigheid voorsiening sou gemaak het nie.

In bepaalde omstandighede gee die ongemagtigde gebruik of benutting van 'n ander se vermoënsgoed nieteenstaande die aanvanklike skepsis oor die aanwending van 'n verrykingsvordering gebaseer op 'n *factum*, wél aanleiding tot 'n verhaalbare verrykingsvoordeel. In *Liebenberg v Liebenberg*²⁶ misluk die vordering gebaseer op die benutting van die huurperseel hoofsaaklik omdat verryking nie oorspronklik die eisgrond was nie, maar die eisgrond aanvanklik die beweerde stilswyende huurooreenkoms was. Pas op appèl het die verrykingsaspek te berde gekom en die hof beslis dat die respondent as vermeend verrykte party benadeel sou word om die gewysigde pleit op die stadium te aanvaar.²⁷ Daarmee is egter nie beslis dat ongemagtigde gebruik hoegenaamd nooit as verrykende feit erken kan word nie. In latere uitsprake is ongemagtigde gebruik en benutting wel as verrykende feit erken by okkupasie van onroerende sake.²⁸

Die howe hier te lande is traag om verryking van die verweerder enkel weens die benutting van 'n ander se geestesgoed te erken. Vermoedelik berus die traagheid op 'n persepsie dat dit problematies is om die verarming van die reghebbende te bewys. In *Greenhills Producers (Pty) Ltd v Benjamin*²⁹ bevind die hof dat die vermoënsverskuiwing wat in die vorm van bespaarde uitgawes vir die verweerder plaasgevind het, nie verhaalbaar is nie. Van der Walt kritiseer tereg dié aspek van die uitspraak omdat die subjektiewe dwaling van die partye oor die bestaan al dan nie van die kontrak nie objektief die vermoënsverskuiwing *cum causa* maak nie.³⁰ Daarmee word die probleem om die ekonomiese skadebegrip wat 'n deliktuele vordering sou kelder ook tot struikelblok vir 'n verrykingsvordering verhef sonder dat dit logies volg.

Nóg die Duitse nóg die Anglo-Amerikaanse howe het enige probleem om wat in die Duitse reg as die “Lizenzgebühr”-gevalle bekend staan, wel as ongegronde baattrekkingsgevalle te hanteer. Die berugte formulering van die *BGH* destyds in die

²⁶ 1971 (1) SA 878 (K).

²⁷ 884E.

²⁸ Sien Sonnekus Ongegronde Verryking in die Suid-Afrikaanse Reg (2007) 47 ev.

²⁹ 1960 (4) SA 188 (OK) 192-193.

³⁰ (“Die *condictio indebiti* as verrykingsaksie” 1966 *THRHR* 220 223.

“Herrenreiterentscheidung” wat nie die *quantum* van die ongegronde verryking kon identifiseer nie, word vandag as ’n historiese relik uit ’n vergange era hanteer:³¹

“Demgemäß hängt ein Bereicherungsanspruch in Höhe des Entgelts, das bei einem Vertragsschluß zu zahlen wäre, nicht von der Voraussetzung ab, daß der Bereicherungsgläubiger sich auf einen solchen eingelassen hätte. Am Rande sei im übrigen noch angemerkt, daß der BGH sogar für einen Schadensersatzanspruch auf der Basis einer Lizenzanalogie schon lange nicht mehr an dem Erfordernis festhält, es müsse bei korrektem Verhalten des Verletzers tatsächlich zum Abschluß eines Lizenzvertrages gekommen sein.”

“Ob der Eigentümer entreichert ist, spielt keine Rolle. Er hat den Bereicherungsanspruch auch dann, wenn er das Feld nicht bestellt hätte, etwa weil er demnächst darauf bauen will.”³²

Daar word *in abstracto*, tot die teendeel deur die kwynt van ’n weerleggingslas deur die verweerder bewys kan word, aanvaar dat die ongemagtigde gebruiker deur sy ongemagtigde benutting van die saak van die eiser te kenne gegee het dat hy begerig was om die saak te benut selfs teen betaling van die gebruiklike vergoeding. Dit is die weerleggingslas van die verweerder om te bewys dat hy inderdaad geen voordeel ontvang het en ook nie van plan was om ’n vermoënsvoordeel te bekom uit die ongemagtigde benutting van die eiser se vermoënsgoed nie en dié begrip sluit ook immateriële goed in.

’n Uitspraak van die *Handelsgericht Zürich*³³ bevestig dat dit soms uiters lastig kan wees om die weerleggingslas te kwynt.³⁴ Die verweerder in daardie geval het na afloop van ’n gebruikersooreenkoms vir die benutting van bepaalde rekenaar sagteware van die eiser nagelaat om die program van sy rekenaars te laat verwyder hoewel hy hoog en laag gesweer het dat hy dit nie meer benut het nie. Die sagteware maatskappy het geslaag met ’n verrykingsvordering gebaseer op die beweerde verryking van die verweerder uit die potensiaal om ongemagtig die program te kon bly gebruik nieteenstaande die feit dat werklike gebruik na afloop van die kontraktermyn nie bewys is nie. Daardie hof het wel ’n

³¹ Canaris “Gewinnabschöpfung bei Verletzung des allgemeinen Persönlichkeitsrechts” in Ahrens; v Bar ea *Festschrift für Erwin Deutsch zum 70. Geburtstag* (1999) 85 90, ook opgeneem in Neuner en Grigoleit *Claus-Wilhelm Canaris Gesammelte Schriften* (2012) 872– met verwysing na BGHZ 119, 20, 26.

³² Wieling *Bereicherungsrecht* (1999) 2. Sien ook König “Gewinnhaftung” in Ficker ea (reds) *Festschrift für Ernst von Caemmerer* (1978) 179 188. Sien verder die bespreking van meerdere voorbeelde uit die praktyk by Kröll *Das Merkmal der Be- bzw. Entreichung* in § 812 *BGB* (1978) 2-24 en Beckmann en Köhler “Das ‘lizenzrechtliche Element’ beim Kauf von Standardsoftware – oder: Wie kommt der Endnutzer zu seiner Nutzungsbefugnis?” in Stamm *Festschrift für Helmut Rüßmann* (2013) 389.

³³ 31-01-2008.

³⁴ 2008 *SJZ* 436-439.

“skadevergoedingseis” ten bedrae van CHF 17 570 teen die bank toegestaan hoewel die kwantifisering van die skade anders dan die formulering hierbo benut, nie duidelik is nie:³⁵

“[D]ie rechtliche Konstruktion des faktischen Vertragsverhältnisses [findet] unter anderem dort Anwendung, wo eine Partei ohne Bezahlung eine Leistung erhält, von der sie weiss, dass sie unter den gegebenen Umständen und nach den bestehenden gesellschaftlichen Anschauungen *nur gegen Entgelt* erfüllt wird.”

Daardie eis is ingestel met verwysing na die klassieke algemene verrykingsaksie-artikel vervat in artikel 62 van die *Schweizerisches Obligationenrecht (OR)*:

“(1) Wer in ungerechtfertigter Weise aus dem Vermögen eines andern bereichert worden ist, hat die Bereicherung zurückzuerstatten.
(2) Insbesondere tritt diese Verbindlichkeit dann ein, wenn jemand ohne jeden gültigen Grund oder aus einem nicht verwirklichten oder nachträglich weggefallenen Grund eine Zuwendung erhalten hat.”

Die hof beslis:³⁶

“Indem die Beklagte die Software nicht vertragsgemäss löschte, griff sie in die Urheberrechte der Klägerin ein und verschaffte sich so ohne Rechtsgrund eine geldwerte Leistung, wodurch sie sich im Umfang der Ersparnis einer dieser Leistung angemessenen Entschädigung bereicherte.”

In die Engelse reg staan die formulering deur Lord Denning reeds meer as ’n halfeeu vas:³⁷

“It does not lie in the mouth of such a defendant to suggest that the owner might not have found a hirer; for in using the property he showed that he wanted it and he cannot complain if it is assumed against him that he himself would have preferred to become the hirer rather than not have had the use of it at all.”

Lord Denning het aldaar na die vordering van die eiser verwys as ’n eis “for restitution rather than an action of tort”.³⁸

Die eiegeregtigde benutting van immateriële regsgoed van die eiser sonder nakoming van die nodige lisensiëringsvereistes het reeds aanleiding tot meerdere uitsprake ten gunste van

³⁵ 438.

³⁶ 439. Sien verder Bürgi-Wyss se hantering van die begrip “im Sinne einer Pflicht zur lizenzanalogen Abgeltung” *Der unrechtmässig erworbene Vorteil im schweizerischen Privatrecht – zugleich ein Beitrag zur Dogmatik der ungerechtfertigten Bereicherung und der Geschäftsführung ohne Auftrag* (2005) n 460 en 252-257.

³⁷ *Strand Electric & Engineering Co Ltd v Brisford Entertainments Ltd* 1952 1 All ER 246 257.

³⁸ 255.

die verrykingseiser gelei. 'n Bekende voorbeeld uit die Duitse reg is die *Paul-Dahlke*-saak. 'n Persfotograaf het die bekende rolprentheld afgeneem waar hy op 'n bepaalde skopfiets gery het. Die foto is aan die vervaardiger van die soort skop-fiets verkoop wat dit in 'n suksesvolle reklamekampanje benut het met 'n reklamespreuk: bekende rolprentpersoonlikheid benut bekende skopfiets. Die *BGH* het aan die akteur 'n verrykingsvordering teen die persfotograaf toegestaan vir die bedrag wat gebruiklik vir sodanige lisensies van foto's betaal moes word.

In *Sempra Metals Ltd (formerly Metallgesellschaft Ltd) v Inland Revenue Commissioners*³⁹ merk die hof met betrekking tot die ongemagtigde trek van 'n rente-voordeel uit fondse van 'n ander op:⁴⁰

“In the ordinary course the value of having the use of money, sometimes called the ‘use value’ or ‘time value’ of money, is best measured in this restitutionary context by the reasonable cost the defendant would have incurred in borrowing the amount in question for the relevant period. That is the market value of the benefit the defendant acquired by having the use of the money. This means the relevant measure in the present case is the cost the United Kingdom government would have incurred in borrowing the ACT for the period of prematurity. Like all borrowings in the money market, interest charges calculated in this way would inevitably be calculated on a compound basis” § 103. “So the Revenue must give back to *Sempra* the whole of the benefit of the enrichment which it obtained.”

Ook die Nederlandse reg is nie onbekend met sodanige konstruksie nie. Schoordijk verwys reeds na dieselfde beginsel ten aansien van die Nederlandse reg⁴¹ as hy verwys na die toe nog voorgestelde a 6.1.9.9a vir die nuwe *BW* wat in die huidige *Wetboek* as a 6: 104 *BW* opgeneem is:⁴²

“Indien iemand die op grond van onrechtmatige daad of een tekortkoming in de nakoming van een verbintenis jegens een ander aansprakelijk is, door die daad of tekortkoming winst heeft genoten, kan de rechter op vordering van die ander *de schade begroten op het bedrag van die winst of een gedeelte daarvan*.”

11 Die uitspraak dui nie aan in welke mate die gedrag van O van die van die redelike persoon in sy skoene afgewyk het en sy sorgsaamheid gemeet teen daardie maatstaf te kort geskiet het nie. Die regter het nie aangedui dat die redelike persoon in die eiser se posisie

³⁹ 2007 4 All ER 657 (HL) 696.

⁴⁰ § 31 671. Sien vir die Amerikaanse reg *Restatement* § 157 “Restitution of direct product and compensation for use”.

⁴¹ *Nogmaals: Ongegronde Vermogensvermeerdering* (1986) 14.

⁴² My kursivering.

méer op sy hoede gestel sou gewees het deur die gedrag van die universiteitspersoneel waarop O dit verlaat het nie.

Veral met inagneming van die oënskynlike ratifisering van die ongemagtigde optrede deurdat die universiteit homself die voordeel met ope arms toeëien, sou betoog kon word dat binne 'n nieformalistiese milieu van redelikheid en billikheid dit onbillik is indien die universiteit skotvry kan wegkom met die lukratiewe benutting van die kundigheid van 'n konsultant soortgelyk aan sy immateriële geestesgoed sonder om daarvoor te betaal bloot omdat die universiteitsamptenaar nie gemagtig was om 'n ooreenkoms te sluit wat net tot die voordeel van die universiteit kon strek en gestrek het nie. Die samespel tussen beide billikheid gebaseerde regsfigure (estoppel en ongegronde verryking) behoort 'n ander resultaat as te lewer as wat met die uitspraak bereik is.

‘TIGER! TIGER! BURNING BRIGHT’: THE COMMON-LAW AND STATUTORY PRINCIPLES GOVERNING THE OWNERSHIP OF EXOTIC WILD ANIMALS IN SOUTH AFRICA

Warren Freedman^{*}

Professor of Law, University of Kwa-Zulu Natal

Shannon Hocter^{**}

Professor of Law, University of Kwa-Zulu Natal

“I am looking for friends. What does that mean – tame?”

‘It is an act to often neglected,’ said the fox. ‘It means to establish ties.’

‘To establish ties?’

‘Just that,’ said the fox. ‘To me, you are still nothing more than a little boy who is just like a hundred thousand other little boys. And I have no need of you. And you, on your part, have no need of me. To you I am nothing more than a fox like a hundred thousand other little foxes. But if you tame me, then we shall need each other. To me, you will be unique in all the world. To you, I shall be unique in all the world . . .’

– Antoine de Saint-Exupéry *The Little Prince* (1995) at 113.

I INTRODUCTION

On 27 and 28 July 2010, the online news site, News24.com, published a series of articles in which it reported that a 17-month-old Bengal Tiger named Panjo had been caught near to Verenea in Mpumalanga and returned to its owner, a certain Mr Goosey Fernandes, who kept him as a pet. Panjo, the reports went on to explain, had escaped from Mr Fernandes’s physical control three days earlier by jumping out of the back of his bakkie while on the road between Delmas and Groblersdal. At the time that Panjo escaped, the reports explained further, Mr Fernandes was travelling back to his farm after taking the tiger to see a vet in Springs.¹

This rather unusual incident gives rise a number of interesting property law questions. One of these is whether Panjo could be classified as an un-owned thing (a *res nullius*) after he escaped from the back of Mr Fernandes’s bakkie? This issue is interesting

^{*} B Com (Wits); LLB (Wits), LLM (Natal); Advanced Postgraduate Certificate in High Education (Natal).

^{**} BA LLB LLM (UCT) DJuris (Leiden) PG Dip Latin (UWTSD).

¹ See SAPA “Tiger “on the loose” in Mpumalanga” 27 July 2010 *News24* <http://www.news24.com>; Hess “Missing tiger’s owner heartbroken” 27 July 2010 *News24* <http://www.news24.com>; Edwards “Panjo may be heading home” 27 July 2010 *News24* <http://www.news24.com>; Edwards “Panjo still roaming free” 27 July 2010 *News24* <http://www.news24.com>; SAPA “Panjo’s owner hopeful after sighting” 28 July 2010 *News24* <http://www.news24.com>; SAPA “Panjo search widens” 28 July 2010 *News24* <http://www.news24.com>; Wallace du Plessis “Panjo found unharmed” 28 July 2010 *News24* <http://www.news24.com>; Gloria Edwards “Zingele sniffs out Panjo” 29 July 2010 *News24* <http://www.news24.com>; and SAPA “Panjo relaxing at home” 29 July 2010 *News24* <http://www.news24.com>.

because the common-law principles governing the ownership of wild animals provide that if Panjo could be classified as a *res nullius* after he escaped, then Mr Fernandes would have lost his ownership of Panjo, at least for the three days that he was wandering about the Mpumalanga countryside.²

In order to answer this question, however, a number of issues need to be considered. One of these is whether Panjo could be defined as a “wild animal” in terms of the common law. Another is whether Panjo regained his “natural state of freedom” when he escaped from the back of Mr Fernandes’s bakkie. Apart from these two questions, it is also important to determine whether Panjo could be labelled as “game” for the purposes of the Game Theft Act.³ This is because the Game Theft Act has made important changes to the common law.

Before turning to consider these issues, it will be useful to set out the legal principles governing the acquisition of ownership of a wild animal by means of *occupatio*.

II THE COMMON LAW

(a) Introduction

Following the approach adopted in both Roman and Roman-Dutch law, South African law draws a distinction between those things that can be privately owned (*res in commercio*) and those that cannot (*res extra commercium*).⁴ Those things that can be privately owned are subdivided into things that are currently owned (*res alicuius*), things that are not currently owned (*res nullius*) and things that have been abandoned (*res derelictae*), while those that cannot be privately owned are subdivided into common things (*res omnium communes*), public things (*res publicae*) and religious things (*res divini iuris*).⁵

Res nullius are those things that can be privately owned, but which are not owned by anyone at a particular point in time. This category of things includes wild animals that have always lived in a natural state of freedom as well as those that were living in a state of

² Van der Merwe and Rabie “Animals” in *LAWSA Vol 1* 3ed (2014) at para 399; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* 5ed (2006) at 32 and Mostert and Pope *Principles of the Law of Property in South Africa* (2010) at 30.

³ 108 of 1995.

⁴ Van der Merwe “Things” in *LAWSA Vol 27* 2ed (2002) at para 212; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* (note 2) at 24; and Mostert and Pope *Principles of the Law of Property in South Africa* (note 2) at 28.

⁵ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* (note 2) at 25-33; Van der Merwe and Pope “The law of property, the concept of property and real rights” in Du Bois (ed) *Wille’s Principles of South African Law* 9ed (2007) at 416-419; and Mostert and Pope *Principles of the Law of Property in South Africa* (note 2) at 29-31.

captivity but which have subsequently escaped and regained their natural state of freedom.⁶ The fact that a wild animal in its natural state of freedom is classified as a *res nullius* is significant. This is because ownership of a *res nullius* may be acquired by means of *occupatio*.⁷

In order to acquire ownership of a *res nullius* by *occupatio* a person (the captor) must unilaterally take physical control of the thing with the intention of becoming the owner. This essentially reflects Roman law as received in the Netherlands. The requirements for *occupatio* are therefore (a) the thing in question must be a *res nullius*; (b) the captor must have the intention to be the owner of the thing (*animus occupandi*); and (c) the captor must exercise the necessary physical control over the thing.⁸

(b) Control

Insofar as the physical control element is concerned, a distinction may be drawn between the requirements that must be satisfied in order to establish physical control over a wild animal and the requirements that must be satisfied in order to maintain physical control of a wild animal.⁹

When it comes to establishing physical control over a wild animal, the courts have adopted a strict approach. In this respect, they have held that it is not sufficient to merely wound or closely pursue the animal, except in those cases in which the animal is so severely wounded or so closely pursued that escape is impossible. Instead, the captor must actually catch or seize the animal. In other words, it must be under his or her direct physical control.

⁶ Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 399; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (note 2) at 32; and Mostert and Pope *Principles of the Law of Property in South Africa* (note 2) at 30.

⁷ Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 399; Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (note 2) at 137; and Mostert and Pope *Principles of the Law of Property in South Africa* (note 2) at 163.

⁸ Badenhorst, Pienaar and Mostert *Silberberg and Schoeman's The Law of Property* (note 2) at 137; Van der Merwe and Pope *Wille's Principles of South African Law* (note 5) at 489; and Mostert and Pope *Principles of the Law of Property in South Africa* (note 2) at 161. These requirements were referred to with approval most recently by the KwaZulu-Natal High Court in *Magudu Game Company (Pty) Ltd v Mathenjwa NO* [2008] 2 All SA 338 (N) at par 18 and the Supreme Court of Appeal in *Mathenjwa NO v Magudu Game Company (Pty) Ltd* [2009] 4 All SA 15 (SCA) at para 24. For an interesting discussion on the acquisition of ownership of wild animals by *occupatio* in Serbia see Polojac "Gaius, Hadzic and *Occupatio* of Wild Animals – Classical Roman Law in the Serbian Civil Code" (2014) 20(2) *Fundamina* 738.

⁹ As Anderson points out, the requirements that must be satisfied in order to establish physical control over an animal can give rise to difficult and complex questions. This is because, unlike other movable things, animals do not stay where they have been put. Instead, they can and do act of their own volition and in ways that may be unpredictable. It is, therefore, difficult to establish physical control over an animal (see Anderson *The physical element of possession of corporeal moveable property in Scots law*, unpublished PhD, University of Edinburgh, (2014) at 205).

An important consequence of this approach is that “where A wounds a wild animal and B captures it, [B] becomes the owner of the animal”.¹⁰

Insofar as this strict approach is concerned, it must also be noted that the captor does not necessarily have to be physically present in order to exercise direct physical control over the wild animal. Where a person uses a trap to catch wild animals, for example, he or she becomes the owner of the animal as soon as it is caught in the trap even if he or she was not present at the time the trap was sprung. The same principle applies to wild animals born in a game farm or zoological garden. As soon as they have been separated from their mothers, they belong to the owner of the farm or zoo.¹¹

It also does not matter where a wild animal (which is a *res nullius*) is captured. A hunter who captures a wild animal while trespassing on another person’s land or on land belonging to the state becomes the owner of that animal.¹² Even if a landowner expressly forbids the hunter from hunting on his her land, the trespassing hunter still becomes the owner of any wild animals he or she has caught.¹³ While a landowner may not claim damages in respect of the animal itself in such a case, if his or her rights of personality have been infringed by the unlawful entry, the landowner may claim damages in terms of the *actio iniuriarum*.¹⁴

Once the captor has acquired ownership of a wild animal, he or she must maintain physical control over the animal. This is because, unlike other things, a wild animal reverts to its status as a *res nullius* if it escapes from captivity and regains its “natural state of freedom” (this sometimes referred to as the “escape rule”). Ownership of the wild animal may then be

¹⁰ Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 399. In those cases in which a third party has assisted in capturing a wild animal, he or she is entitled to a share of the income derived from the wild animal. The share to which the third party is entitled must be proportionate to the value of the assistance he or she gave. If it is not possible to determine the value of the assistance that the third party gave, then he or she is entitled to half the income derived from the wild animal (see *Langley v Miller* (1828-1849) 3 Menzies 584).

¹¹ *Richter v Du Plooy* 1921 OPD 117; *Lamont v Heyns* 1938 TPD 22; and *R v Butelezi* 1959 (1) SA 191 (N).

¹² *Inst* 2.1.12; *D* 41.1.3.1; De Groot *Inleidinge tot de Hollandsche Rechtsgeleertheyd* (1631) 2.4.9 (hereinafter “Grotius *Inleidinge*”); Voet *Commentarius ad Pandectas* (1698-1704) 41.1.4 (hereinafter “Voet *Commentarius*”); Van der Keessel *Praelectiones Iuris Hodierni Ad Grotii Hugonis Introductionem Ad Iurisprudentiam Hollandicam* (Van Warmelo; Coertze; Gonin; and Pont (eds) (1961-1967) 2.4.9 (hereinafter “*Praelectiones*”); *De Villiers v Van Zyl* 1880 Foord 77 at 78; *R v Maritz* (1908) 2 SC 787 at 788; and *S v Mnomiya* 1970 (1) SA 66 (N) at 68.

¹³ *Breda v Muller* (1828-1829) 1 Menzies 425. It follows from these principles, that the mere fact that a wild animal is present on private land does not justify an inference of possession by the landowner (see *S v Mdaba* 2002 (1) SACR 556 (E) at 558b-c).

¹⁴ Voet *Commentarius* (note 12) 41.1.4 and Van Leeuwen *Censura Forensis, Theoretico-Practica* (1662) 1.2.3.8 (hereinafter “*Censura Forensis*”). In several early judgments, the courts incorrectly based this action on the grounds of trespass (see *De Villiers v Van Zyl* supra; *Wright v Ashton* (1905) 2 BAC 240; and Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 399).

acquired by *occupatio* again.¹⁵ A wild animal that has escaped is considered to have regained its “natural state of freedom” when it has disappeared from sight; or, if still in sight, is difficult to pursue.¹⁶ These principles were referred to with approval in *R v Mafohla*,¹⁷ where the Court held as follows:¹⁸

“It appears, therefore, that the rule [in Roman Law] was as follows: (a) where a wild animal had been reduced into possession it does not upon escape regain its natural liberty until it has passed from sight or, though still in sight, its pursuit has become difficult. (For a modern view on when pursuit has become difficult, see *Kearry v Pattinson* 1939 (1) A ER 65, a case concerning bees); (b) when it has not previously been reduced into possession the wild animal becomes a man’s property only when he actually captures it.”

When it comes to maintaining physical control of a wild animal, however, the courts have not adopted the same strict approach they have adopted when it comes to establishing control. In this respect, they have held that it is not necessary for the captor to exercise direct physical control over the animal. Instead, the captor may simply exercise indirect physical control by restricting the animal’s freedom to roam. A captor may restrict an animal’s freedom to roam by keeping it in a cage, a hive, a pool, a tank, a warren or some other type of enclosure.

In this respect the courts have held that even a large open space enclosed with a fence may be sufficient to maintain physical control. The fence must, however, be of such a nature that it can keep the wild animals in the enclosed space. This is a question of fact. Thus, in *Lamont v Heyns*¹⁹ the court held that a fence of five and a half feet surrounding an area of 300 morgen was sufficient to retain ownership of 110 blesbok, while in *Richter v Du Plooy*²⁰ the court held that an ordinary fence surrounding an area of 800 morgen was not sufficient to retain ownership of 57 wildebeest.²¹

¹⁵ *Wright v Ashton* supra; *R v Maritz* supra 787; *Richter v Du Plooy* supra and *Mathenjwa NO v Magudu Game Company (Pty) Ltd* supra.

¹⁶ *Inst* 2.1.12; *D* 41.1.32; Grotius *Inleidinge* (note 12) 2.4.34; and Voet *Commentarius* (note 12) 41.1.3.

¹⁷ 1958 (2) SA 373 (SR). See also *Mathenjwa NO v Magudu Game Company (Pty) Ltd* supra at para 24.

¹⁸ At 374.

¹⁹ 1938 TPD 22. See also *R v Butelezi* supra.

²⁰ 1921 OPD 117.

²¹ As Anderson points out, enclosing a large open space with a fence may not always be sufficient to establish physical control over an animal. This is because the open space may be so large (or of such a nature) and the animal may be so small that the owner may not be able to find it, except purely by chance. If an owner cannot find the enclosed animal at will, he argues, it cannot be said that the fence by itself has reduced the animal’s liberty to such an extent that the owner can now be said to be in physical control of it (see Anderson *The physical element of possession of corporeal moveable property in Scots law* (note 9) at 226).

Provided wild animals that have been caught and reduced to ownership remain confined within land that is sufficiently enclosed, the mere fact that the owner has been denied access to that land and therefore is no longer in control of the wild animals does not necessarily deprive the owner of his or her ownership. This is because the wild animals themselves have not escaped and reverted to their natural state of freedom.²²

In *Strydom v Liebenberg*,²³ for example, the respondent was the owner of two pieces of land and the sole shareholder of a company that owned another two pieces of land. All four pieces were adjacent to one another. In 1997, the respondent erected a game proof fence around the outer perimeter of all four pieces creating a single rectangular unit. He then stocked it with a wide variety of game he had bought and began running a game hunting business on the land.

Approximately four years later the company ran into financial difficulties and was liquidated. The liquidator then sold the two pieces of land owned by the company – but not the game owned by the respondent – to the first and second appellants. Shortly after the appellants took occupation they denied the respondent access to their respective pieces of land, thus cutting him off from access to his game as well.

The respondent then claimed his game back on the grounds that they still belonged to him. In response the appellants argued that the respondent lost ownership of the game because he no longer controlled them. The game, therefore, had become *res nullius*. The Supreme Court of Appeal rejected this argument. In arriving at this conclusion, the Court held that the game remained confined within the four portions that had been fenced and did not revert to their natural state of freedom. The fact that respondent also pledged the game as security for a loan was clear indication that he did not intend to relinquish ownership.²⁴

The reason why the courts have adopted a much stricter approach when it comes to establishing control is because the physical control element fulfils a publicity function. It serves to show the world that the captor has established a real right of ownership in respect of the wild animal in question.

Finally, it should be noted that there is an exception to the rules conferring ownership. As has been noted by Grotius, this will not occur where, in the circumstances, hunting is prohibited.²⁵ It seems that Grotius is referring to laws in derogation of the common-law

²² See *Strydom v Liebenberg* Case Number: 293/06, [2007] ZASCA 117 (25 September 2007); *Magudu Game Company (Pty) Ltd v Mathenjwa NO* supra; and *Mathenjwa NO v Magudu Game Company (Pty) Ltd* supra.

²³ Supra.

²⁴ At para 5.

²⁵ Grotius *Inleidinge* (note 12) 2.4.5.

principle, and his statement is followed by examples limiting the acquisition of rights in certain species of game to the nobility.²⁶

Furthermore, Voet²⁷ has been taken as authority for a general rule that the unlawful taker does not become owner. This approach was indeed followed in *Dunn v Bowyer*.²⁸ However the correctness of this decision has been questioned in *R v Mafohla*.²⁹ Van der Merwe and Rabie argue that the court in the *Dunn* case projected the blameworthiness of the unlawful hunt onto the question whether the unlawful hunter becomes owner of the wild animal so hunted, and comment that although the hunter would be criminally liable in terms of the prohibition on hunting, this should not affect the issue of *occupatio*.³⁰

It was held in *S v Frost*, *S v Noah* that the owner of a fishing boat acquired a catch by *occupatio* regardless of the fact that the fishing was in contravention of the law.³¹ In this case the common-law authorities were considered, and the court held that the question whether ownership could follow despite the capture being contrary to the law, “must depend on the construction of the legislation concerned”. Thus, as indicated by this case, and favoured by the majority of writers, the Roman-Dutch rule does not form part of South African law.³² Unless the game or fish laws unequivocally state otherwise – in other words, unless acquisition is precluded by law overriding the common law – the fact of the unlawfulness of the conduct is irrelevant.³³

III THE GAME THEFT ACT

The common-law principles relating to the acquisition and loss of ownership of wild animals have been qualified by the Game Theft Act 105 of 1991.³⁴ The Act was promulgated to protect the interests of the game-farming and eco-tourism industry.³⁵ Its main aim is to clamp down on the poaching of wild animals, and to this end it regulates the ownership of a certain class of wild animal referred to as “game”, which is defined as “all game kept or held for

²⁶ Grotius *Inleidinge* (note 12) 2.3.5 and 2.4.7, 8, 26, 27.

²⁷ Voet *Commentarius* (note 12) 41.1.7.

²⁸ 1926 NPD 516 at 518.

²⁹ 1958 (2) SA 373 (SR) at 374H.

³⁰ Van der Merwe and Rabie “Eiendom van wilde diere” (1974) 37 *THRHR* 38 at 46.

³¹ 1974 (3) SA 466 (C) at 472A.

³² Badenhorst, Pienaar and Mostert *Silberberg and Schoeman’s The Law of Property* (note 2) at 138 and Carey Miller *The Acquisition and Protection of Ownership* (1986) at 3.

³³ Carey Miller *The Acquisition and Protection of Ownership* (note 32) at 3.

³⁴ Following recommendations by the SA Law Commission in Working Paper 27 (1989) entitled *Acquisition and Loss of Ownership of Game*.

³⁵ See, for a discussion of the context of the introduction of this legislation, Van der Merwe and Rabie “Wildboerdery in regspektief: Enkele kwelpunte” (1990) 1 *Stell LR* 112.

commercial or hunting purposes, including the meat, skin, carcass or any portion of the carcass of that game”.³⁶

Section 2 of the Act significantly amends the common-law provisions in respect of those animals falling within the category of “game”.³⁷ In terms of s 2(1)(a), notwithstanding the provisions of any other law or the common law, if game escapes from a sufficiently enclosed camp (proof of sufficient enclosure based on the certification process indicated in s 2(2))³⁸ or pen or kraal or vehicle, the owner of such game retains ownership. Thus the common-law rule that ownership is lost as soon as a wild animal escapes from the owner’s physical control is abolished in respect of “game”. Moreover, the rule that once a wild animal has regained its natural freedom, any other person may acquire it by means of *occupatio*, also falls away in respect of “game”.³⁹ The legal position for “lost game” is now similar to the legal position of other lost things which continue to belong to their owners.

The Act goes even further in s 2(1)(b), protecting even owners of game farms for which no certificate of sufficient enclosure has been obtained. In terms of this provision – notwithstanding the provisions of any other law or the common law – a person who contrary to the provisions of any law or without the consent of the owner or lawful occupier of the land, hunts, catches or takes possession of game does not acquire ownership. Ownership remains vested in the original owner. Thus, in respect of “game”, the common-law rule that an occupator becomes the owner of a wild animal when he captures it on another person’s land, and when the landowner has prohibited the occupator from hunting or catching animals on the land is abolished. It is further clear that the rule set out in *Frost, Noah*, whereby an

³⁶ Section 1.

³⁷ The provisions of section 2(1) are as follows:

“Notwithstanding the provisions of any other law or the common law –

- (a) a person who keeps or holds game or on behalf of whom game is kept or held on land that is sufficiently enclosed as contemplated in subsection (2), or who keeps game in a pen or kraal or in or on a vehicle, shall not lose ownership of that game if the game escapes from such enclosed land or from such pen, kraal or vehicle;
- (b) the ownership of game shall not vest in any person who, contrary to the provisions of any law or on the land of another person without the consent of the owner or lawful occupier of that land, hunts, catches or takes possession of game, but it remains vested in the owner referred to in paragraph (a) or vests in the owner of the land on which it has been so hunted, caught or taken into possession, as the case may be.”

³⁸ The provisions of section 2(2) are as follows:

- “(a) For the purposes of subsection (1) (a) land shall be deemed to be sufficiently enclosed if, according to a certificate of the Premier of the province in which the land is situated, or his assignee, it is sufficiently enclosed to confine to that land the species of game mentioned in the certificate.

- (b) A certificate referred to in paragraph (a) shall be valid for a period of three years.”

³⁹ Freedman “Rules of the ‘game’: A comment on section 2 of the Game Theft Act” (2000) 7 *SAJELP* 137 at 141.

occupator acquires ownership of a wild animal when physical control of that animal is obtained in contravention of a statute, does not apply to “game” in the light of the Act.⁴⁰

Thus section 2 makes provision for the fact that an owner may institute the *rei vindicatio* against the person capturing the animal. There may however be great practical difficulties in proving ownership in the absence of distinctive branding.⁴¹ Moreover, since “game” extends to the meat, skin, carcass or any portion of the carcass, the landowner remains owner of these products, and may reclaim them by means of the vindictory action⁴² – although once again, proof of ownership may be rather difficult.

Van der Merwe points out that the exact scope of the statutory protection of ownership in the Act is open to doubt. He questions whether this provision has in fact altered the status of wild animals sufficiently such that a mere certificate from the Premier transfers to the landowner ownership of all game within an enclosure, and points out that the Act does not directly deal with acquisition of ownership, but instead is focused on combating the problems of theft and wrongful hunting.⁴³

The fact that the Act refers only to “game” has naturally given rise to some speculation as to how all-encompassing this term is intended to be. Milton⁴⁴ states that

“The description “game” is ordinarily applied to wild animals hunted for sport or amusement (hence the name). In so far as the use of this word to describe the sorts of wild animals in respect of which ownership is acquired suggests that only those animals traditionally the subject of the hunt and the chase come within the purview of the Act, it suggests a limitation upon the category of animals that is not reflected in practice. Thus the term “game” is not usually applied to reptiles such as crocodiles, yet these are animals that are extensively farmed. The import of the definition thus seems to be that any wild animal (whether game in the traditional sense or not) is game for these purposes if it is an animal that is kept or held for commercial or hunting purposes.”

Nevertheless, the Act will not apply to *all* wild animals, but only to those which: (a) fall within the definition of “game” and (b) can be kept on enclosed land, or in a pen, kraal or vehicle.

The common-law rules will therefore continue to apply to those wild animals which cannot be classified as game. Wild animals which are not kept for commercial purposes or wild animals which are not hunted for either sport or food would accordingly be excluded

⁴⁰ Ibid.

⁴¹ Van der Merwe “Original acquisition of ownership” in Zimmermann and Visser *Southern Cross – Civil Law and Common Law in South Africa* (1996) 701 at 719.

⁴² Ibid.

⁴³ Ibid.

⁴⁴ Milton *South African Criminal Law and Procedure Vol II: Common-law Crimes* 3ed (1996) at 603n253.

from this definition. This could include animals kept in a nature reserve for non-commercial environmental purposes, as well as animals kept in captivity for the purposes of scientific research which is not of a commercial nature or animals not hunted for sport or food such as aardvarks, baboons, monkeys and giraffes.⁴⁵

The common-law rules will also continue to apply to those wild animals which cannot be kept in enclosed land, or a pen, a kraal, or a vehicle. This could include wild animals which are kept in rivers or the sea.⁴⁶

In relation to those animals which can be categorised as game, it is submitted that the Game Theft Act does not create any new forms of acquiring ownership of wild animals, at least in so far as the private law of property is concerned. Instead it provides for a fictitious form of ownership which operates only within the context of the criminal law, and which is aimed at facilitating the establishment of a new crime of game theft.⁴⁷

IV WAS PANJO A WILD ANIMAL?

(a) Introduction

Having set out the relevant legal principles, we may now turn to consider the questions identified in the introductory section of this chapter, namely whether Panjo could be classified as a “wild animal”; whether Panjo regained his “natural state of freedom” when he escaped from the back of Mr Fernandes’s bakkie; and, finally, whether Panjo could be defined as “game” for the purposes of the Game Theft Act.

(b) Could Panjo be classified as a wild animal?

Insofar as the first question is concerned, it is important to note that that common law distinguishes between various categories of animals. The most significant of these are domestic animals (*animalia mansueta*) and wild animals (*animalia ferae naturae*). This distinction is based on the species to which an animal belongs and not on its individual characteristics. A dog, therefore, will be classified as a domestic animal not matter how

⁴⁵ Van der Merwe “Original acquisition of ownership” (note 41) at 720.

⁴⁶ Ibid.

⁴⁷ Freedman (2000) *SAJELP* (note 39) at 142.

savage it might be and a lion will be classified as a wild animal no matter how tame it might be.⁴⁸

Apart from domestic and wild animals, the common law also distinguishes between livestock and other domestic animals, between domesticated wild animals (*animalia mansuefacta*) and other wild animals and between game and other wild animals.⁴⁹ For the purposes of determining whether Panjo was a wild animal, however, the three most important classifications are domestic animals, wild animals and domesticated wild animals. Each of these will be considered in turn.

Domestic animals are those species of animals that are considered to be tame by nature, for example horses, oxen and mules,⁵⁰ cattle and sheep,⁵¹ pigs and dogs,⁵² and hens and geese.⁵³ The question whether a particular species is tame or not depends on the views of the community in which the species is found.⁵⁴ A number of consequences flow from this classification. One of the most significant is that unlike a wild animal, a domestic animal remains the property of its owner irrespective of where it is and cannot be appropriated by means of *occupatio* unless it has been abandoned and becomes a *res derelictae*.⁵⁵

Wild animals are those species of animals that are considered to be wild by nature. This class of animals may be divided into wild beasts, birds and fish.⁵⁶ Wild beasts include bears, lions, panthers, elephants, camels,⁵⁷ deer,⁵⁸ wolves⁵⁹ and wild boars⁶⁰ and birds

⁴⁸ Nicholas *An Introduction to Roman Law* (1962) 131; Thomas *Textbook of Roman Law* (1976) 167; McLeod "Wild and Tame Animals and Birds in Roman Law" in Birks (ed) *New Perspectives in the Roman Law of Property: Essays for Barry Nicholas* (1989) 169; and Pretto-Sakmann "You never can tell with bees: Good advice from Pooh for students of the *Lex Aquilia*" in Burrows and Rodger (eds) *Mapping the Law: Essays in Memory of Peter Birks* (2006) at 485.

⁴⁹ Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 392.

⁵⁰ *D* 9.1.1.4.

⁵¹ *D* 10.2.8.2.

⁵² *D* 41.1.44.

⁵³ *Inst* 2.16 and *D* 41.1.5.6. Horses, oxen, mules, dogs, hens and geese were also identified as domestic animals in Roman-Dutch law (Grotius *Inleidinge* (note 12) 2.4.16 and Voet *Commentarius* (note 12) 9.1.4, 5 and 6 and 41.1.3). In addition, Voet refers to rams, bulls, pigs, "sheep and other cattle which graze in flocks or herds" as examples of domestic animals (Voet *Commentarius* (note 12) 9.1.5 and 41.1.3). In South African case law the following animals have been recognised as domestic animals: dogs (*O'Callaghan v Chaplin* 1927 AD 310 and *Lever v Purdy* 1993 (3) SA 17 (A)); mules (*SAR&H v Edwards* 1930 AD 3); sheep, (*Coetzee and Sons v Smit* 1955 2) SA 553 (A), horses (*Solomon NNO v De Waal* 1972 (1) SA 575 (A) and *Walker v Redhouse* 2007 (3) SA 514 (SCA)); and cattle (*Loriza Brahman v Dippenaar* 2002 (2) SA 477 (SCA)).

⁵⁴ Van der Merwe *Sakereg* (1989) 218 and Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 393.

⁵⁵ Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 397 and Olivier, Pienaar and Van der Walt *Law of Property Students' Handbook* (1989) at 100.

⁵⁶ *Inst* 2.1.12 and *D* 41.1.1. Somewhat similarly, Grotius divided wild animals into birds and any creatures that fly, fish and wild four footed animals (*Inleidinge* (note 12) 2.4.6, 17 and 25). He also divided wild four-footed animals into large game (*Inleidinge* (note 12) 2.4.26) and small game (*Inleidinge* (note 12) 2.4.27). Like Grotius, Van Leeuwen also distinguished between large game and small game (see Simon van Leeuwen *Het Rooms-Hollands Regt* 2.3.3 (1664) (hereinafter "*RHR*").

⁵⁷ *D* 9.2.2.2.

⁵⁸ *D* 41.1.5.5.

include bees,⁶¹ doves,⁶² peacocks,⁶³ wild hens and wild geese.⁶⁴ As we have already seen, a wild animal which has always been in its natural state of freedom or a wild animal which has escaped from captivity and regained its natural state of freedom is considered to be *res nullius* and may be appropriated by means of *occupatio*.

Domesticated wild animals are those animals that are wild by nature, but which have been tamed to such an extent that they have developed the habit of returning to their enclosures (*animus revertendi*).⁶⁵ In Roman law this category of animals was initially restricted to doves,⁶⁶ peacocks⁶⁷ and the like. Later it was extended to include bees⁶⁸ and deer.⁶⁹ In Roman-Dutch law it was extended even further to include falcons and hawks⁷⁰ and

⁵⁹ *D* 10.2.8.2 and *D* 41.1.44.

⁶⁰ *D* 41.1.44.

⁶¹ *Inst* 2.1.14 and *D* 41.1.5.2.

⁶² *Inst* 2.1.15 and *D* 41.1.5.5.

⁶³ *Ibid.*

⁶⁴ *Inst* 2.1.16 and *D* 41.1.5.6. Deer, wolves, wild boars, bees, doves, peacocks, wild hens and wild geese were also identified as wild animals in Roman-Dutch law (Grotius *Inleidinge* (note 12) 2.4.14, 15 and 26; Voet *Commentarius* (note 12) 41.1.3, 4 and 6; and Van Leeuwen *RHR* (note 56) 2.3.1 and 3). In addition, the Roman-Dutch jurists also referred to hares and rabbits (Grotius *Inleidinge* (note 12) 2.4.27, Voet *Commentarius* (note 12) 41.1.6 and Van Leeuwen *RHR* (note 56) 2.3.3), eagles, falcons and hawks (Van Leeuwen *Censura Forensis* (note 14) 1.2.3.7 and Van der Keessel *Praelectiones* (note 12) 2.4.7), and ducks and swans (Grotius *Inleidinge* (note 12) 2.4.10 and 12; Voet *Commentarius* (note 12) 41.1.6; and Van Leeuwen *RHR* (note 56) 2.3.5 and 6) as examples of wild animals. In South African case law the following animals have been recognised as wild animals: wild ostriches (*De Villiers v Van Zyl* supra and *R v Bekker* (1904) 18 EDC 128); springbok (*R v Bekker* supra); steenbok and guinea-fowl (*Wright v Ashton* supra); wildebeest (*Richter v Du Plooy* supra); deer and lions (*R v Sefula* 1924 TPD 609 and *Sambo v Union Government* 1936 TPD 182); hippopotamus (*Dunn v Bowyer* (1926) 47 NPD 516 and *Mbhele v Natal Parks, Game and Fish Preservation Board* 1980 (4) SA 303 (D)); blesbok (*Lamont v Heynes* supra and *Strydom v Liebenberg* supra); kudu (*R v Mafohla* supra and *Strydom v Libenberg* supra); rhebok (*R v Butelezi* supra); rabbits (*S v De Kok* 1964 (2) SA 46 (T)); bees (*S v Mnomiya* supra and *S v Gumede* 1971 (1) SA 324); porcupines (*S v Gawaseb* 1980 (4) SA 399 (SWA)); eland (*Horak v Smit* [1994] 4 All SA 405 (T)); bush buck (*S v Mdaba* supra); and rooibokke, waterbokke and roohartbeeste (*Strydom v Libenberg* supra). A long list of wild animals is also referred to in *Magudu Game Company (Pty) Ltd v Mathenjwa NO* [2008] 2 All SA 338 (N). Among these are buffalo, giraffe, nyala, impala, warthog, bushpig, zebra, grey duiker, blue duiker, tsessebe, bush buck, white rhinoceros, elephant, steenbuck, caracal, serval, antbear, lynx and blesbuck. This judgment was upheld on appeal in *Mathenjwa NO v Magudu Game Company (Pty) Ltd* supra.

⁶⁵ Although it appears to be nonsensical to base this classification on an animal's subjective intention (the *animus revertendi*), this criterion is usually established by taking into account the animal's object behaviour (the *consuetudo revertendi*). See B W Frier "Bees and Lawyers" (1982/3) 78 *Classical Journal* 105 at 110 and Pretto-Sakmann "You never can tell with bees: Good advice from Pooh for students of the *Lex Aquilia*" (note 48) at 486.

⁶⁶ *D* 10.2.8 and *D* 41.1.5.5.

⁶⁷ *D* 41.1.5.5.

⁶⁸ *D* 10.2.8.1 and *D* 41.1.5.2.

⁶⁹ *Ibid.* See Daube "Doves and Bees" in Cohen and Simon (eds) *David Daube: Collected Studies in Roman Law* (1991) at 899 and 912. Doves, peacocks, bees and deer were also identified as domesticated wild animals in Roman-Dutch law (Grotius *Inleidinge* (note 12) 2.4.13 and 15; Voet *Commentarius* (note 12) 41.1.3; and Van Leeuwen *RHR* (note 56) 2.3.1 and *Censura Forensis* (note 14) 1.2.3.7).

⁷⁰ Voet *Commentarius* (note 12) 41.1.7; Van Leeuwen *Censura Forensis* (note 14) 1.2.3.7; and Van der Keessel *Praelectiones* (note 12) 2.4.13.

in modern South African case law to include ostriches⁷¹ and rabbits.⁷² It appears, therefore, that this category can be extended to include additional animals.

Unlike wild animals, domesticated wild animals remain the property of their owner irrespective of where they are and cannot be appropriated by means of *occupatio*.⁷³ This category of wild animals is particularly interesting because the legal rules governing them appear to extend the normal principles governing the physical control (*corpus*) element of possession. This is because they provide that domesticated wild animals can be possessed not by exercising direct physical control over them or by keeping them in a sufficiently enclosed space, but rather by taming them to such an extent that they develop the habit of returning. The reason for this extension to the normal principles of possession can be traced back to Roman law itself.

According to Frier the decision to classify doves, peacocks, bees and deer as domesticated wild animals in Roman law was based not only on the fact that they possessed the habit of returning to their enclosures, but also on the fact that they were productive animals and that this characteristic depended, at least to some extent, on their ability to fly or roam freely. In order to protect and encourage a person's investment in such animals, therefore, his or her ownership had to be guaranteed, even when the animal in question had flown or wandered away.⁷⁴

Frier traces this requirement back to a passage in the *Collatio* which deals with a beekeepers right to claim damages after his bees have flown onto a neighbour's property and the neighbor has destroyed them. In this passage, the Roman jurist Celsus argues that the beekeeper is entitled to claim damages from his neighbour, even though the bees have flown away, because they still belong to him. The bees still belong to the beekeeper, Celsus argued further, because "bees are accustomed to return and are *a source of profit*" (our emphasis).⁷⁵

⁷¹ *Le Roex v Smit* (1864-1867) 5 Searle 327.

⁷² *S v De Kok* 1964 (2) SA 46 (T). Doves and deer have also been identified as domesticated wild animals in South African case law (*R v Fellers* 1961 (1) SA 524 (C), *S v Moale* 1962 (3) SA 211 (T) and *R v Sefula* 1924 TPD 609). In *Richter v Du Plooy* supra the court suggested without deciding that a wildebeest might be a domesticated animal (at 118).

⁷³ Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 398 and Olivier, Pienaar and Van der Walt *Law of Property Students' Handbook* (note 55) at 100.

⁷⁴ Frier "Bees and Lawyers" (note 65) at 112-113.

⁷⁵ *Collatio* 12.7.10. Frier translates this passage as follows: "Likewise Celsus, in the twenty-seventh book of his Digests, writes that if my bees fly over onto your (property) and you burn them up, some jurists deny that the action under the *Lex Aquilia* lies; among them is Proculus, on the theory that the bees are not my property. But Celsus says this is false, since the bees are accustomed to return and are a source of profit for me. But Proculus was swayed by the fact that they are neither domesticated nor sufficiently enclosed. Still, Celsus himself says that there is no difference between them and doves, which, if they escape the hand, still fly home" (see Frier *A Case Book on the Roman Law of Delict* (1989) at 110). An abbreviated version of this text was included in Digest. This abbreviated version reads as follows: "If, when my bees had flown off to join yours, you burn them

Finally, it is important to note that some Roman-Dutch jurists argued that the *animus revertendi* requirement did not form a part of Dutch customary law and that once a wild animal had been tamed it remained the property of its owner, even if it had lost the habit of returning.⁷⁶ According to Van der Keessel, however, this rule applied only to those domesticated wild animals that could be clearly identified by some or other mark (for example a bell, brand, ring or tattoo).⁷⁷

Although Van der Merwe and Rabie suggest that it is unlikely that the South African courts will follow Van der Keessel in this regard because the rule referred to above “was created with an eye to certain species of exotic birds like hawks and eagles, which could not easily fall within the class of domesticated animals”, there are some arguments that may be made in favour of the courts adopting this rule.⁷⁸

One of these is that it allows the owner of a wild animal that has been marked to distinguish his or her wild animal from other wild animals. This is significant because it negates the grounds on which the “escape rule” is based, namely that the owner of the escapee has abandoned his or her animal because it is difficult to trace and the reason why it is difficult to trace is because it cannot be distinguished from other wild animals in their natural state of freedom.⁷⁹

Another is that it gives effect to the principle of publicity and thus protects third parties against being misled by the fact that the wild animal in question has escaped from

out, Celsus says the action on the *Lex Aquilia* lies” (see Mommsen, Krueger and Watson (eds) *The Digest of Justinian* Volume 1 (1985) 284-5). For a different translation and interpretation of the text see Pretto-Sakmann “You never can tell with bees: Good advice from Pooh for students of the *Lex Aquilia*” (note 48) at 493-494.

⁷⁶ Voet *Commentarius* (note 12) 41.1.7, Van Leeuwen *Censura Forensis* (note 14) 1.2.3.7 and S van Groenewegen van de Made *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus ad Inst* (B Beinart (ed)) (1975) 2.1.15. According to Van Leeuwen, this customary law rule applied particularly to certain kinds of animals, for examples hawks and falcons.

⁷⁷ Van der Keessel *Praelectiones* (note 12) 2.4.13. See also H de Groot (Grotius) *De jure belli ac pacis* (1625) 2.8.3. The approach adopted by Van der Keessel and Grotius is derived from French and not Roman law (see Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 398). Insofar as Roman law was concerned, there is no evidence that the law of property made any special provision for wild animals which had been marked. In order to retain ownership of a marked wild animal, therefore, the owner had to maintain physical control of that animal. As soon as it escaped and regained its natural state of freedom it reverted to its status as a *res nullius* (see Anderson *The physical element of possession of corporeal moveable property in Scots law* (note 9) at 232).

⁷⁸ Van der Merwe and Rabie *LAWSA Vol 1* (note 2) at para 398. Unfortunately, Van der Merwe and Rabie do not explain why hawks and eagles would not easily fall within the class of domesticated animals.

⁷⁹ See Grotius *De jure belli ac pacis* (note 77) 2.8.3. In this passage Grotius states that the “ownership is not actually lost because the wild beasts have escaped, but because of the natural inference that we have abandoned ownership on account of the difficulty of pursuit, especially since the wild creatures that belonged to us cannot be distinguished from others”. “This inference”, however, he goes on to state, “can be made invalid by other inferences such as would be warranted, for example, if “identification marks”, or bells, were placed on the wild creature; this, we know, has been done in the case of deer and hawks, which, when identified thereby, have been restored to their owners” (translated by Kelsey).

captivity and is roaming freely in the wild. In this respect it appears to provide third parties more protection than the habit-of-returning criterion does.

Last, it may also be argued that it promotes the principles of fairness and justice. A person who comes across a wild animal that is roaming freely, but which is also clearly marked must know (or ought to know) that it belongs to someone else. It would, consequently, be unfair and unjust for the law to allow such a person to claim that the wild animal was a *res nullius* in the face of such strong indications to the contrary.⁸⁰

Apart from the *animus revertendi*, therefore, it may be argued that a marking of some sort is one of the characteristics that distinguish domesticated wild animals from other wild animals.⁸¹

While tigers have a strong homing instinct and Panjo was raised as a pet, it is unlikely that he could be classified as a domesticated wild animal.⁸² This is because he was found approximately 88 kilometres from Mr Fernandes's farm in Delmas and 115 kilometres from his home in Springs and there was nothing in the facts that indicated that Panjo was returning towards either of these places at the time he was caught. In addition, there was also nothing in the facts that indicated that Panjo had been marked in a way that indicated that he belonged to Mr Fernandes or anyone else.

(c) Did Panjo regain his natural state of freedom?

Having come to the conclusion that Panjo was a wild animal and not a domesticated wild animal, we may now turn to consider whether he regained his "natural state freedom" after escaping from the back of Mr Fernandes's bakkie.

⁸⁰ In his doctoral thesis, Anderson concludes that in Scotland there is no secure basis for the rule that physical control and therefore ownership of an escaped wild animal is retained through distinctive markings alone, irrespective of whether those markings are natural or artificial. He arrives this conclusion on the following grounds: first, that the general principle of Scottish law is that a person must maintain physical control over a wild animal in order to retain his or her ownership of that animal; second, that a person cannot be said to be exercising physical control over a wild animal simply by marking it; and, third, that the rule that ownership of an escaped animal may be retained by marking that animal, therefore, is contrary to the general principle. In addition, he argues further, this rule would undermine the general principle to such an extent so as to render it essentially redundant. It could also give rise to various practical problems, for example, it may not be possible for a hunter to see the mark at a distance. The wild animal may also be marked for research purposes and not to indicate ownership ((see Anderson *The physical element of possession of corporeal moveable property in Scots law* (note 9) at 231-238).

⁸¹ This is the approach followed in Scotland (see Van der Merwe and Bain "The Fish that Got Away: Some Reflections on *Valentine v Kennedy*" (2008) 12 *Edinburgh Law Review* 418 at 421).

⁸² While it is unlikely that Panjo could be classified as a domesticated wild animal, there is no doubt that he could be classified as a wild animal. This is because the South African courts have accepted that tigers may be classified as wild animals on several occasions (see *Myburg v Jorgenson* 1914 EDL 89 at 98; *Boyce v Robertson* 1912 TPD 381 at 384; and *Chandler v Middelburg Municipality* 1924 TPD 450 at 465).

Insofar as this question is concerned, there is no doubt that Panjo regained his freedom after escaping from the back of Mr Fernandes's bakkie. This is because he disappeared from sight. Given that Bengal Tigers are not indigenous to South Africa, however, the more difficult question is whether Panjo regained his "*natural* state of freedom".⁸³ Unfortunately, this issue does not appear to have been expressly addressed by the Roman jurists, the Roman-Dutch jurists or the South African courts.⁸⁴ It has, however, been considered by the courts in the United States, Canada and Scotland.

The *locus classicus* in the United States is *Mullett v Bradley*.⁸⁵ In this case the appellant captured a sea lion near San Francisco and shipped it to New York. Not long after arriving in New York, however, the sea lion escaped into the Atlantic Ocean. It was subsequently caught by a fisherman who sold it to the respondent. Approximately a year later, the appellant discovered the sea lion in the respondent's possession and claimed it back. The appellant based his claim on the ground that the sea lion still belonged to him because it had not regained its natural state of freedom after it escaped. The sea lion had not regained its natural state of freedom, he argued, because they are not indigenous to the Atlantic Ocean, but rather to the Pacific Ocean.

The Court rejected this argument. In arriving at its conclusion, the Court held that a wild animal regains its natural state of freedom when it has escaped from captivity and is able "to provide for itself in the broadest sense which this phrase may be used". In short, the Court held further, "[a wild animal] may be said to have regained its natural liberty when, by its own volition, it has escaped from all artificial restraint and is free to follow the bent of its natural inclination".⁸⁶ In other words, the Court held that a wild animal does not have to

⁸³ The natural habitat of the Bengal Tiger is dry and wet deciduous forests, grassland and temperate forests, and mangrove forests (<http://www.worldwildlife.org/species/bengal-tiger>, last accessed 2014/07/02).

⁸⁴ The fact that the Roman and Roman-Dutch jurists did not expressly address the fact that it is difficult, if not impossible, for an escaped exotic wild animal to return to its natural habitat suggests that they did not distinguish between exotic and indigenous wild animals and that the same rules applied to both classes, at least insofar as the law of property is concerned. In order to retain ownership of an exotic wild animal, therefore, the owner had to maintain physical control of that animal. As soon as it escaped and regained its natural state of freedom it reverted to its status as a *res nullius*, even though it has not actually returned to its natural habitat. Watkins argues in this respect that Roman law did not protect the ownership of exotic wild animals that had escaped because the keeping of such animals for large profits or decadent delights was not considered by Roman traditionalists to be of sufficient civil or moral worth to merit the protection of the law (see TG Watkin "*Occupatio and the Pastio Villatica*" (1990) 11 *Journal of Legal History* 5 at 23).

⁸⁵ 24 Misc. 695, 53 NYS 781 (1898) New York. See also *Hughes v Reese* 144 Miss. 403, 109 So. 731 (1926) Mississippi and *Butler v City of Palos Verdes Estates* 135 Cal. App. 4th 174, 37 Cal. Rptr. 3d 199 (2005) California as well as *Campbell v Hedley* (1917) 37 DLR 289 (CA).

⁸⁶ At 783.

return to its natural habitat in order to regain its natural state of freedom. Instead, it simply has to be able to provide for itself and thrive in its new environment.

A similar approach was followed in *Wiley v Baker*.⁸⁷ In this case the appellant owned a game farm in Texas. An American Elk escape from his game farm and he was unable to recapture it. Approximately three months later, the elk was shot and killed by the respondent who mistook it for a deer. The appellant then claimed the value of the elk from the respondent. The appellant based his claim on the grounds that the elk still belonged to him when it was shot and killed by the respondent because, *inter alia*, it had not reverted to its natural state of freedom. The elk had not reverted to its natural state of freedom, the appellant argued, because American Elk are not indigenous to Texas.

The Court rejected this argument. In arriving at its conclusion, the Court began by pointing out that in terms of the common law a wild animal which has escaped and regained its natural state of freedom becomes an un-owned thing.⁸⁸ There are, however, three exceptions to this rule: (a) animals that have been domesticated; (b) animals that demonstrate an intention to return; and (c) animals that, after their escape, are hotly pursued by their first owner. It was quite clear in this case, however, the Court pointed out further, that none of these exceptions applied. This is because the elk had been roaming free for over a month before the respondent shot and killed it. It had, therefore, regained its natural state of freedom. The fact that the elk was not indigenous to Texas was also irrelevant, at least insofar as the common law rules governing the ownership of wild animals was concerned.⁸⁹

The broad approach adopted towards the “natural state of freedom” requirement in *Mullett* and *Wiley* was modified in *EA Stephens & Co v Albers*⁹⁰ where the Court held that the “escape rule” does not apply when, *inter alia*, the wild animal in question is obviously not indigenous to the area in which it was caught, or, to put it another way, where the wild animal is extremely out of place in the area in which it was caught.

In this case the respondent, who lived in Colorado, bred silver foxes for their pelts. One of these foxes escaped from its enclosure after the gate was mistakenly left open. Although the respondent initially pursued the fox, she lost sight of him when night fell and gave up the chase. The following evening the fox was shot and killed by a farmer who discovered him prowling near his chicken house. The farmer then took the pelt and gave it to a trapper who sold it to the appellant. Sometime later, the respondent discovered the pelt in

⁸⁷ 597 S.W. 2d 3 (1980) Texas.

⁸⁸ At 5.

⁸⁹ At 6.

⁹⁰ 81 Colo. 488, 256 P. 15 (1927) Colorado. See also *Kesler v Jones* 50 Idaho 405, 296 P. 773 (1931) Idaho.

the appellant's possession and claimed it back. The respondent based her claim on the grounds that the fox still belonged to her because it was a domesticated wild animal. The fox was domesticated, she argued, because he was tame enough to take food from the hand of his keeper, his ears were tattooed to identify him and that he was not indigenous to Colorado.

The Court accepted this argument. In arriving at its conclusion, the Court began by stating that the fox was held in captivity; that it was semi-domesticated; that it escaped by accident; that it fled against the will of its owner; and that pursuit was abandoned by compulsion. In addition, the Court stated further, the appellant knew that the pelt was the product of a vast, legitimate and generally known industry; that it had a considerable and easily ascertainable value; that it bore signs of ownership; that it had been taken in an unusual way; that the seller was not the owner; that no right of innocent purchasers had intervened; and that it was taken from an animal that was not indigenous to the state of Colorado.⁹¹

Insofar as this last factor was concerned, the Court specifically went on to hold that it was not prepared to accept that "that a man may capture a grizzly bear in the environs of New York or Chicago, or a seal in a millpond in Massachusetts, or an elephant in a cornfield in Iowa, or a silver fox on a ranch in Morgan County, Colo. and snap his fingers in the face of its former owner whose title had been acquired by a considerable expenditure of time, labor, and money; . . .". In other words, the Court was not willing to accept that the escape rule applies when the animal in question is obviously not indigenous to the area in which it was caught.⁹²

A similar approach was followed more recently by the Ontario Superior Court in *Nakhuda v Story Brook Farm Primate Sanctuary*.⁹³ In this case the plaintiff, who lived in Toronto, Ontario, bought a Japanese Macaque monkey and kept it as a pet. Sometime after buying the monkey she went shopping and took him with her. While she was in the shop, she left the monkey in a double-locked crate inside her locked car. Unfortunately, he managed to escape from both the crate and the car and ran away. Shortly thereafter he was caught by Toronto Animal Services and handed over to the defendant for safekeeping. When the plaintiff discovered that the monkey was in the defendant's possession she claimed him back. The plaintiff based her claim on the grounds that the monkey still belonged to her because, *inter alia*, it had not regained its natural state of freedom when it escaped. It had not regained

⁹¹ At 496-7.

⁹² Ibid.

⁹³ Case Number 81654/12, [2013] ONSC 5761 (13 September 2013).

its natural state of freedom, she argued, because Japanese Macaque monkeys are not indigenous to Ontario.

The Court rejected this argument. In arriving at its conclusion, the Court began by pointing out that in *Mullett v Bradley* and *Wiley v Baker* the American courts had adopted a broad approach to the “natural state of freedom” requirement. Both of these cases, however, the Court pointed out further, were distinguishable from the case at hand because the animals in question were more or less in their natural habitats after they escaped. In addition, they were not binding on Canadian courts. Given that Japanese Macaque monkeys are obviously not indigenous to Ontario, the Court went on to point, it could not be said that the monkey had regained its natural state of freedom when it escaped from the plaintiff’s car. Instead, it would have only regained its natural state of freedom if it had been taken back to the country where its species exists in the wild. This meant, the Court went on to conclude (somewhat surprisingly), that the requirement that a wild animal must regain its natural state of freedom before ownership is lost simply did not apply to the facts of this case.

In *Valentine v Kennedy*⁹⁴ the Scottish Sheriff’s Court also held that the “escape rule” does not apply when the wild animal in question is obviously not indigenous to the area in which it was caught. In this case the four accused were charged with stealing approximately 17 rainbow trout by catching them in a burn during a nocturnal fishing expedition. The burn was located near to a stank which had recently been stocked with rainbow trout by the owner of the fishing rights in the reservoir. A stank is an enclosed body of water with obstacles placed in it to prevent fish escaping from it. The owner had bought the rainbow trout from fish farms in the vicinity and released them in the stank so that members of the public could buy permits from him entitling them to fish for the trout in the stank.

The key issue the Court had to determine was whether the rainbow trout were *res nullius* at the time they were caught. This is because an accused person cannot be convicted of theft in terms of Scottish common law if the thing he or she is alleged to have stolen is a *res nullius*.⁹⁵ Insofar as this issue was concerned, the Court began by pointing out that while the rainbow trout were confined in the stank they could not be classified as *res nullius*. Instead, they were *res alicuius*. The mere fact that they escaped from the stank and regained their freedom, however, did not make them *res nullius*. This is because they could still be

⁹⁴ 1985 SCCR 89 (Sheriff’s Court). For a very insightful discussion of this case, see Van der Merwe and Bain “The Fish that Got Away: Some Reflections on *Valentine v Kennedy*” (note 81).

⁹⁵ The position is the same in the South African law of theft: Milton *South African Criminal Law and Procedure Vol II* (note 42) at 602-3.

identified as the property of the owner of the fishing rights and, consequently, the accused must have known that they were his property.

The reason why the rainbow trout could still be identified as the property of the owner of the fishing rights, the Court pointed out further, is because, first, the only place from which they could have come was the stank, there being no other source of rainbow trout within a reasonable distance; and, second, unlike brown and yellow trout, rainbow trout are not indigenous to Scotland and are unable to survive in waters such as the burn and stank during the Scottish winter. If the trout had been brown trout they would have reverted to their status as *res nullius* when they escaped and regained their natural state of freedom. Given that the rainbow trout were not *res nullius* at the time they were caught, the Court then concluded, the accused could be found guilty of the common law crime of theft.

Although the *Stephens*, *Nakhuda* and *Valentine* cases all deal with the circumstances in which a wild animal may regain its status as a *res nullius*, in order to avoid having to create a new category of animals – namely, those wild animals that have escaped and regained their freedom, but which have not reverted to their status as *res nullius* because they are obviously not indigenous to the area in which they were caught – it is suggested that the “obviously not indigenous” criterion applied in these cases should rather be employed as a criterion in terms of which a wild animal may be classified as a domesticated wild animal.

Apart from avoiding the necessity of having to create a new category of wild animals, this approach has the following advantages:

First, given that the sorts of wild animals we are dealing with here will often be those that have been acquired for commercial purposes (for example the silver fox in *Stephens* and the rainbow trout in *Valentine*),⁹⁶ the adoption of the “obviously not indigenous” criterion as an additional criterion for classifying certain kinds of wild animals as domestic wild animals is consistent with the policy considerations identified by Celsus for engaging in this exercise, namely that domesticated wild animals are a source of profit for their owners.

Second, given that the sorts of wild animals we are dealing with here are obviously not indigenous to the area in which they were caught and are therefore easily identifiable, the adoption of the “obviously not indigenous” criterion as an additional criterion for classifying domestic wild animals is consistent with the approach adopted by Van der Keessel towards this exercise, namely that a wild animal should be classified as a domesticated wild animal

⁹⁶ Arguably Mrs Nakhuda’s monkey can also be used as an example for this point. Although she bought him as a pet, the facts of the case indicate that the person who sold the monkey to her made his living buying and selling exotic pets.

not only if it has the *animus revertendi*, but also if it possesses a mark that indicates that it belongs to someone else.

It is difficult to know whether the South African courts will accept the arguments set out above. If we assume that they will for the purposes of this chapter, then we can safely conclude that Panjo did not regain his *natural* state of freedom after he escaped from the back of Mr Fernandes's bakkie and, consequently, that he did not revert to his status as a *res nullius*. Instead, he remained the property of Mr Fernandes while he was wandering about the Mpumalanga countryside.

(d) Could Panjo be labelled as "game" for the purposes of the Game Theft Act?

Having come to the tentative conclusion that Panjo did not revert to his status as a *res nullius* after he escaped from Mr Fernandes's bakkie, it is strictly speaking not necessary to go on and consider whether he could be defined as "game" for the purposes of the Game Theft Act. For the sake of completeness, however, we will do so. Insofar as this question is concerned, it is quite clear that Panjo could not be defined as "game". This is because while tigers do fall into the ordinary English definition of game, the facts show that Panjo was not kept for commercial or hunting purposes. He consequently did not fall into the definition of "game" set out in section 1 of the Act and the provisions of the Game Theft Act did not apply to him.

V CONCLUDING REMARKS

Despite the compelling arguments against owning exotic pets,⁹⁷ it is likely that given the interest in these creatures, they will continue to proliferate. It is further likely that at least some of these creatures will escape and regain their freedom, and thus it is anticipated that the sorts of problems we have discussed above will have to be dealt with by the courts in the future.

Finally, it remains for us to acknowledge the scholarship, humility and humanity of Eltjo Schrage, and to express our personal appreciation for his enormous contribution to legal scholarship.

⁹⁷ See <http://www.nspca.co.za/page/exotic-pets>, accessed 2014/07/02.

EMPOWERING THE PROSECUTOR: EVALUATING A DUTCH DEVELOPMENT

ADRIAAN ANDERSON*

Senior Lecturer, School of Law, University of Limpopo

I INTRODUCTION

The European Convention on Human Rights (ECHR), applicable to the Dutch criminal justice system, guarantees persons accused of committing a crime various rights, including the right to a prompt, fair and public trial before an ordinary court. The separation of powers between legislative, executive and judicial bodies is also guaranteed, creating important checks and balances against the danger of one institution arrogating too much power, or encroaching on the functions of others. It is against this background that the tendency of granting the prosecuting authority greater power within the prosecution process is examined.

Traditionally a person can only be regarded as having committed a crime if an independent adjudicator (judge/magistrate) declares him or her guilty after consideration of all the admissible evidence. Any punishment for such crime is also determined by the adjudicator, based on factors such as the blameworthiness attached to the crime. Increasingly we find that many aspects of this adjudication, if not the entire process, are turned over to the prosecuting authority. Prosecutors are, therefore, no longer only responsible for presenting the charges and evidence against the accused to the impartial adjudicator, but are increasingly also empowered to make final decisions regarding criminal charges.¹ Prosecutors in European inquisitorial systems have been referred to as the “judge before the judge” in the discretion they exercise and the various “case-ending” methods at their disposal.² A case-ending decision simply means one that ceases further criminal proceedings. Often this does not require judicial approval.³ Examples of such methods include unconditional disposals, public interest waivers, penal orders, the Dutch strafbeschikking and more recently in Italy, France and Germany, plea-agreements or negotiated settlements. A penal order (German strafbefehl,

* B Iuris LLB (Potch) LLM (Pret) PhD (Amsterdam).

¹ A complete volume of the *European Journal on Criminal Policy and Research* (vol 14, Issue 2-3 Sept 2008) has been dedicated to “Prosecution and Diversion within Criminal Justice Systems in Europe”.

² Luna & Wade “Prosecutors as Judges” (2010) 67 *Wash. & Lee L. Review* p. 1413 at 1461.

³ Tak “Tasks and powers of the prosecution services in the EU member states” in Jeille & Wade *Coping with overloaded criminal justice systems: the rise of prosecutorial power across Europe* (2005) and also the earlier Van den Beken & Kilchling (eds) *The role of the public prosecutor in the European criminal justice systems* (2000).

French *ordonnance penale*) is a procedure where the prosecuting authority initiates the issue by applying to court for the authorisation of the penal order. The prosecutor specifies the charge, suggests a certain sanction and requests the court to authorise it. The “checking” by the court is usually on paper only and relies on the content of the police/prosecution dossier. The accused has the right to contest the order, but if this is not done, the order is seen as a conviction and sentence which commonly results in a criminal record.

A radical new method in the Netherlands takes prosecutorial adjudication one step further. This is called the *Strafbeschikking* and has been available in the Netherlands since February 2008. The prosecuting authority – Openbaar Ministerie [OM] - is vested with the mandate to impose criminal penalties independent of judicial authorisation. In effect it entails the prosecutor determining the guilt (of the accused) and imposing a sentence which becomes final and is equated to a conviction (and sentence) by the court, unless the accused takes timely steps to oppose it. This procedure resembles the penal order, except that authorisation by the court is not required. The determination of guilt and the pronouncement of the sentence are determined by the prosecutor alone. Unlike the existing *transactie*⁴ procedure, the *strafbeschikking* is not a form of diversion of prosecution, but in fact a new method of prosecution.

II STRAFBESCHIKKING

(a) *Introduction*

The new disposal method amounts to a departure from the traditional principle that only a criminal court or judge may impose criminal penalties. This can now be done by the prosecuting authority, whereas judicial adjudication only occurs when it is necessary, considering the serious nature of the offence or when the accused⁵ objects against the punishment order. The new provision is an adaptation of previously suggested alternatives.⁶

⁴ Transaction – a method of out-of-court disposal of criminal cases employed extensively prior to the introduction of the *strafbeschikking*. The *transactie* boils down to an offer made by the prosecutor regarding an out-of-court settlement of the charge and relies on the consent of the accused for it to become valid.

⁵ The *strafbeschikking* provisions introduces a new concept – the person whose conduct is subject to the *strafbeschikking* is not referred to as accused, or suspect, but is called “*bestrafde*” – literally “penalised person”. However, as I will indicate later, whenever the *strafbeschikking* is opposed, and the matter results in a trial before a judge, the “*bestrafde*” becomes suspect or accused again. For purposes of clarity I will therefore use the term accused throughout.

⁶ Commissie Heroverweging Instrumentarium Rechtshandhaving (Commissie Korthals Altes). *Rapport: Het recht ten uitvoer gelegd: oude en nieuwe instrumenten van de rechtshandhaving* Den Haag: ministerie van Justitie 1995.

An extensive research project regarding the criminal procedure, the Onderzoeksproject *Strafvordering* 2001, recommended that the OM should obtain the authority to impose criminal penalties (the so-called OM-fine⁷) that are not dependent on the courts or on the co-operation of the accused. These earlier proposals, together with developments in administrative penalties, have led to the introduction of a new heading into the Criminal Procedure Code (Sv): “Prosecution through a *strafbeschikking*”.⁸ The purpose of the new provision is to improve public safety and to increase the capacity in the criminal justicesystem to allow for the rising demand for norm-enforcement. Improving or enlarging the possibility and efficiency of out-of-court disposal of criminal cases is of great importance in this regard.⁹ The OM is given a separate/independent power to impose penalties, which are not reliant on either the judge, or the co-operation of the accused.

A *strafbeschikking* is a procedure whereby the prosecutor determines or establishes the guilt of an accused and pronounces an appropriate sentence or penalty. It is a written document that must contain the name and address of the accused, the charge against him as well as the facts upon which the charge is based, a short description of the prohibited conduct as well as the time and place of its commissioning. In addition the document must indicate the penalty imposed, the date of issue of the *strafbeschikking*, as well as the manner in which opposition to it may be lodged. Lastly the document also contains information on how the *strafbeschikking* will be executed. The *strafbeschikking* becomes an irrevocable order - similar to an order of court - unless the accused lodges a timeous protest, in which case a normal trial before a judge will result. A prosecutor will be able to impose a *strafbeschikking* for crimes with a maximum sentence of not more than six years imprisonment. A *strafbeschikking* is, however, specifically excluded when “contra-indications” are present, for example where a person is a repeat offender, or in public- or media-sensitive cases.¹⁰

The new method has the effect of altering the legal basis of the out-of-court disposal of criminal cases in the Netherlands. Prosecution is not averted, since the new process is regarded as an act of prosecution of a criminal charge in terms of the Criminal Procedure

⁷ For a critical discussion of the suggested OM-fine, see Crijns “De strafrechter buiten spel, Buitengerechtelijke afdoening van strafbare feiten in heden en toekomst” (2002) 51 AA p. 35.

⁸ Wet van 7 juli 2006 tot wijziging van het Wetboek van Strafrecht, het Wetboek van Strafvordering en enige andere wetten in verband met de buitengerechtelijke afdoening van strafbare feiten (Wet OM-afdoening: Disposal of Cases (Public Prosecution Service) Act). Stb 2006, 330. Also relevant in this regard are a number of “aanwijzingen” – directives. Originally the Aanwijzing OM-afdoening 2007A007 Stcrt 2008 nr 19, with the latest being the Aanwijzing OM-afdoening (2012A010).

⁹ Kamerstukken II 2004/05 29849, nr 3, p.1.

¹⁰ Aanwijzing OM-afdoening (2012A010).

Code. But what is meant by “an act of prosecution”?¹¹ Although the Code does not contain a definition, it has always been understood that prosecution entails bringing a criminal charge, together with evidence in support thereof, before a judge in a criminal court. If there is no trial before a judge, there is also no “prosecution”. In the new section of the Code a strafbeschikking is specifically indicated as being an “act of prosecution”. The punishment is based on the prosecutor establishing the guilt of the person. Whereas other disposal methods such as conditional waiver of prosecution or transactie can be seen as agreements between prosecution and accused, and therefore as consensual procedures, the strafbeschikking is an one-sided act by the prosecutor which becomes final unless the accused takes legal steps to oppose it. The only consensus required from the accused relates to his willingness - or not - to perform certain penalties. The legal character of the strafbeschikking is similar to, or equated to, a conviction and sentence by the court. This means that sanctions [straffen] and measures [maatregelen] are imposed and executed without the co-operation of the accused. Being a “criminal charge”, the strafbeschikking will, therefore, also have to comply with Article 6 of the European Convention on Human Rights (ECHR).¹² The exclusive right to punish criminal offenders that the judge used to have is now also being shared with the prosecuting authority.

A number of reasons are forwarded for this new process. First, the aim is to conserve the overburdened judicial capacity for serious cases that really warrant adjudication in an open court and/or the imposition of jail sentences. The second reason is to align developments in the administrative law¹³ with the criminal law. Thirdly, the fact that the co-operation of the suspect is not required will speed up the execution of fines. A fourth reason offered is the fact that the prosecutor is already authorised to make “penalty” decisions (outside the realm of the criminal law) in terms of the Wet Administratiefrechtelijke Handhaving Verkeersvoorschriften¹⁴ (WAHV). The new strafbeschikking is therefore an extension of these possibilities.

¹¹ See Borgers “Het vervolgingsbegrip anno 2013” 2013 *DD*, p. 20.

¹² A criminal charge is “the official notification given to an individual by the competent authority of an allegation that he has committed a criminal offence”. European Court of Human Rights, 10 December 1982 A56, *NJ* 1987, 828 m.n.t. Van Dijk, Zaak Foti.

¹³ In (Dutch) administrative law it has become practice that officials may make far-reaching decisions amongst which are the so-called administrative fines.

¹⁴ Administration of Road-Traffic Offences Act- introduced on 3 July 1989.

(b) *Penalties imposed by the strafbeschikking*

Dutch criminal law distinguishes between sanctions and measures¹⁵, both of which can be imposed as penalty for criminal conduct. The following are sanctions and measures that may be contained in a strafbeschikking:

- a. A (community) service order to a maximum of 180 hours;¹⁶
- b. A fine – payment of an amount of money to the state;¹⁷
- c. Confiscation of certain items;
- d. Compensation – payment of an amount of money to the state, but which will be for the benefit of the victim(s) of the offence;
- e. Suspension of a driver's license for a maximum of six months.

In addition to the sanctions and measures listed above, the strafbeschikking may also contain a number of instructions, directives or orders [aanwijzingen], with which the accused must comply:

- a. Relinquishing or renunciation of title to objects that have been seized and that are subject to forfeiture or confiscation;
- b. Surrendering (or payment of the estimated value) to the state of objects that are subject to forfeiture or confiscation;
- c. Payment of a sum of money (or transfer of seized objects) to the state with the aim to deprive the accused, in whole or in part, of the illegally obtained gains acquired by means of, or derived from, the criminal offence;¹⁸

¹⁵ Straffen en Maatregelen - Crijns "Het wetsvoorstel OM-afdoening: een wolf in schaapskledij" (2004) 4 *Sancties* 227 argues that the still existing distinction between straffen and maatregelen is further eroded by mentioning it in the same sentence in the wet OM-afdoening. In Dutch criminal justice a distinction is made between sanctions (straffen) and measures (maatregelen). Both can be imposed for an offence (on its own or together). A sanction is intended to be punishment and should be in proportion to the seriousness of the offence. A measure, on the other hand, does not have the specific function to punish but serve other purposes eg treatment to reduce recidivism. In principle a measure therefore need not be in proportion to the offence. Bijleveld "Sex Offenders and Sex Offending" in Tonry & Bijleveld (eds) *Crime and Justice in the Netherlands* Univ. of Chicago Press (2007) p. 325.

¹⁶ This is notably less than the maximum of 480 hours that a court may impose but also significantly more than the 120 hour maximum that was available in a transactie.

¹⁷ There is no maximum amount prescribed, but most offences have a maximum fine amount indicated.

¹⁸ The artikel 36e Sr procedure which applies during a trial is followed.

- d. Payment of a sum of money into the criminal injuries compensation fund or for the benefit of an organisation for the interests of crime victims;¹⁹
- e. Other instructions concerning the conduct of the accused for a probationary period not exceeding one year.

The penalties may be imposed individually or cumulatively. By not only restricting the penalties of the strafbeschikking to fines, but also including the possibility a various other sanctions, measures and instructions, the ambit of this method of disposal is quite comprehensive. The “instructions” relate closely to conditions imposed in conditional sentences by the court or conditional withdrawals by the prosecutor. It can include aspects like participation in a drug rehabilitation program or a prohibition to have contact with certain persons. The forfeiture of property and relinquishing of illegal gains cannot be included as sanction or measure in a strafbeschikking because these are both matters that often involve complicated value determinations. It may, however, be included as instructions but cannot be executed without the compliance of the accused. Sanctions that are for the first time introduced in the ambit of disposal without trial include the payment of compensation on behalf of/in favour of the crime victim²⁰ and the suspension of a driver’s licence for a maximum period of six months.²¹ These aspects have, up to now, often featured as conditions of a conditional withdrawal but they are now authorised by legislation. The instructions concerning the conduct of the accused may not infringe on religious or conscience rights of the accused or limit his constitutional freedoms or rights.

(c) Hearing the view of the suspect

Whenever more invasive penalties are included in the strafbeschikking, the requirements for its validity become more strenuous. In some instances the accused has a right to be heard, and in some instances to be heard in the presence of his or her lawyer. It has been existing practice to hear or consult with the accused²² in cases where a (community) service order is the subject of a transactie or conditional waiver, in order to establish whether the person is able and willing to comply with the service-order. This “right to be heard” is now a compulsory part of the process and the accused must indicate his willingness to comply with

¹⁹ Which amount may in any event not exceed the maximum fine applicable for the applicable offence.

²⁰ Artikel 257a tweede lid d.

²¹ Artikel 257a tweede lid e.

²² The so-called “officiërszitting”.

the service order or the instruction regarding conduct. A suspect must also be consulted when the suspension of a driver's license or instructions concerning the conduct of the suspect is considered. The existing practice whenever high transactie amounts are considered is to discuss it with the accused, together with his lawyer. The reason for this is that a high transactie amount is an indication that it relates to a more serious offence. The idea behind the involvement of defence council is that it compensates for the guarantees usually associated with a judicial adjudication of the matter. The new strafbeschikking provision, therefore, also prescribes that where a fine and/or compensation award is in excess of €2 000 the accused must be heard in the presence of his lawyer.²³ In cases of economic crimes this amount is €10 000.²⁴

The purpose behind the right to be heard is first that it adds to the diligence with which the guilt of the accused is determined. The accused is given a chance to give "his side of the story". Secondly, the accused gets a chance to indicate what the effect of the proposed sanction may be on him, for example, his need to retain his driver's license or that he cannot afford the fine – that may lead to a different sanction or a lower fine being imposed. Thirdly, the accused may indicate that he will not accept the strafbeschikking, in which case the prosecutor can therefore skip this step and continue straight to the issuing of a summons for trial. If the accused is unwilling to comply with the proposed sanction, the matter should preferably be directed to trial. The Code does not prescribe the manner in which the consultation must take place, but the guideline indicates that it must be by way of an "OM-zitting" where the accused is afforded the opportunity to give certain inputs. There may also be the need to have a translator present. Before the conversation begins, the accused must be informed of his right to silence and that he does not have to answer any questions. The prosecutor must make a written report of the conversation.²⁵ If the strafbeschikking deviates from the express viewpoints of the accused, the OM must indicate why he decided on those sanctions/measures in the strafbeschikking in any event.²⁶

²³ Artikel 257c lid 2. If the person is not represented the matter should rather proceed to court. Kessler & Keulen *De Strafbeschikking Studiepocket Strafrecht* deel (2008) p. 32.

²⁴ Artikel 36, lid 2, Wet op de economische delicten. No distinction is made between natural or legal persons and the requirement of legal representation is also absent.

²⁵ Artikel 257c lid 3.

²⁶ This is the so-called motiveringsplicht. The prosecutor must motivate why he includes the aspects in the strafbeschikking even though it is contra to what the accused indicated.

(d) *Issuing, service or sending of strafbeschikking*

In some instances the accused may be given a notification that a strafbeschikking will be issued. This will be the case where a police official takes down the particulars of an offender, or where such notice is attached to the offending vehicle by an investigating official. This notice has no legal consequence, except to inform the person of the likelihood that a strafbeschikking may follow.²⁷ Once the strafbeschikking is issued²⁸ it must be brought to the attention of the accused. The Code does not prescribe the manner in which it must be delivered to or served upon the accused. Preference is given to personal service but if that is not possible, the document is sent by regular mail²⁹ to the accused's registered address, his work-or residential-address or the address given/provided by him. In the case of high fines or compensation orders the letter must be sent by registered mail.

(e) *Opposing a strafbeschikking and consequences of not opposing*

An accused that does not agree with a strafbeschikking has the right to oppose it and to insist on a trial before a judge. This is an important new element in that the onus shifts to the accused to take steps. Opposing a strafbeschikking - called *verzet* - is done in person (or by a legal representative) or in writing within fourteen days of receiving it or of becoming aware of it. The opposition procedure takes place at the OM office mentioned in the strafbeschikking, indicating the name of the accused, the strafbeschikking that is being opposed and an address in the Netherlands for further notices. Process documents mailed to this address are deemed to have been served in person. The grounds for opposition to a strafbeschikking need not be given. The prosecutor may require a higher amount to be paid if the case proceeds to court and the accused has not indicated a reasonable reason for the opposition.³⁰ An accused that is legally represented may waive the right to oppose a strafbeschikking, but this must be done in writing. Once a strafbeschikking is opposed, the prosecutor may withdraw³¹ or amend³² it, giving the accused a copy of the notice of

²⁷ Artikel 257c lid 4 Sv.

²⁸ In terms of artikel 126 RO the prosecutor can mandate other persons working for the prosecuting authority to issue the strafbeschikking on behalf of the prosecutor. Also *Aanwijzing OM-afdoening* (2012A010).

²⁹ Research has shown that the Dutch postal service delivers 99,8 per cent of mail items within 48 hours of it being posted.

³⁰ This will be the case where the accused opposes the matter simply to gain time. *Aanwijzing OM-afdoening* 2007A007. The increase that the prosecutor may ask in these circumstances may be to a maximum of 20 per cent. The strafbeschikking must clearly indicate this risk of "unwarranted" opposition.

³¹ An obvious reason for withdrawal will be if the prosecutor concludes that the objection is valid, for example as a result of the acquittal of the accused. It is not quite clear whether a prosecutor may withdraw a strafbeschikking where no protest is lodged. See T Kooimans & S Meijer "De positie van het openbaar

withdrawal or the amended strafbeschikking.³³ The amended strafbeschikking must still be based on the same prohibited conduct, but the prosecutor may decide to charge for a lesser offence or punish differently. The accused may withdraw his opposition against the amended strafbeschikking, or may comply therewith, effectively bringing the opposition to an end. It is, however, not necessary for the accused to lodge a new opposition to the amended strafbeschikking – the initial opposition remains valid unless the accused withdraws it or complies therewith. If the strafbeschikking or the opposition thereto is not withdrawn, the matter will result in a trial before a judge.

(f) *Trial before a judge*

The prosecutor must notify the accused at least ten days before the date of the trial. The call-up notice [oproeping] contains the charges³⁴ that the court will adjudicate. The call-up notice may be issued there and then when the accused visits the OM office to oppose the case. When the opposed matter is heard in court, the (criminal) trial court continues with a complete trial on the merits and it is not merely testing whether the correct procedure was followed as is the case with WAHV protest before the (administrative) judge. The trial continues, even if the accused is not present that day, if the call-up had been done properly. The judge may rule that the opposition is not valid if it was done outside time or does not comply with the requirements. A trial before a judge will also result in cases where the penalties contained in the strafbeschikking cannot be (fully) executed or where the Court of Appeal has ordered prosecution in terms of artikel 12 Sv after a complaint.³⁵ Whenever the court adjudicates the matter it can make any order allowed for by law, but it will “destroy” the strafbeschikking in the process.

ministerie in de executie-fase na inwerkingtreding van de Wet OM-afdoening 2007 DD p. 459. From the Memorie van Toelichting (Kamerstukken II 2004, 05.29849 p 73) it seems to be possible.

³² After receiving the opposition the prosecutor may conclude that the strafbeschikking could be improved – in essence creating a new strafbeschikking which may again be subject to opposition.

³³ It can well be argued that this opportunity of the OM to “reassess” the matter after receiving the opposition is in effect an informal re-evaluation of the case. The Aanwijzing indicates that the reassessment must be done by a different prosecutor than the one who issued it in the first place.

³⁴ Tenlastelegging. In essence the same charges originally contained in the strafbeschikking but possibly in more detail.

³⁵ A copy of the strafbeschikking must be provided to any person with a direct interest in or who has suffered harm because of the offence, who has the right to complain against the fact that a strafbeschikking is offered instead of a criminal trial. If a trial is indeed ordered by the court of appeal in terms of Artikel 12 in instances where the accused has complied with the strafbeschikking in full, the trial court will have to take this into consideration in determining an appropriate sentence.

(g) *Execution/enforcement of a strafbeschikking.*

If no opposition is lodged, the execution of a strafbeschikking can commence fourteen days after it has been served in person or has been sent by mail, unless the accused waived his right to protest, in which case execution can commence immediately. The central judicial collection agency (CJIB) assists in this regard. Execution is temporarily suspended by an opposition which is still pending, unless the OM is of the opinion that the opposition was done clearly out of time. Execution follows the normal process³⁶ as if the strafbeschikking was a judgment or sentence by court. In principle the strafbeschikking is deemed to be executable without the co-operation of the accused. Where there is money in a bank account, or a garnishee order against salary is possible, this is indeed the case. When the penalty entails the completion of community service or some other action by the accused, the principle does not really hold. If a fine is not paid, or not paid in full, a procedure is available to the prosecutor to bring the matter before a judge with the sole purpose of obtaining an order for the temporary detention – known as *gijzeling* - of the accused, pending the payment in full. The duration of temporary detention is one day for each €25 outstanding, with a maximum of one week per charge contained in the strafbeschikking. The court does not consider the validity of the strafbeschikking or adjudicate the charges; it only deals with the matter of non-payment. The accused receives a call-up notice to appear before the court and has a right to state his reason for not paying. If it is clear that the accused is unable to pay, *gijzeling* will not be ordered. The purpose of *gijzeling* is to force those who can, but are unwilling to pay, to do so. The detention is terminated upon payment of the outstanding amount. The *gijzeling*, however, does not cancel the fine. If *gijzeling* is also not successful, the prosecutor may set the matter for trial where it is possible that the trial judge may impose regular imprisonment as sentence in place of the fine.

Full compliance of a strafbeschikking entails completion of all sanctions, measures and instructions contained therein. What method is used in the case of non-compliance with other penalties (service order, victim compensation etc.)? In this situation the OM can reassess the situation to determine whether it wants to continue with the matter to trial before a judge – if further prosecution is indeed expedient.³⁷ The OM will also have to determine what sanctions will be requested, since the sanctions originally contained in the

³⁶ Artikel 24b Sr prescribes a warning-notice following sentence/strafbeschikking. Thereafter a further notice in terms of Artikel 573 Sv must follow to inform the person that the money will now be deducted from his bank account or other measures of recovery which will be followed.

³⁷ Aanwijzing gebruik sepotgronden (2009A016). At this stage it is still possible to waive (further) prosecution.

strafbeschikking are not effective. If the OM decides to continue with the matter before a judge, he will have to summon the accused and a call-up notice will not suffice. If a matter lands before a judge as result of an unsuccessful execution, the judge will take the sanctions that have indeed been successfully executed as well as any temporary detention that may have taken place into consideration when determining an appropriate sentence. The OM will in such an event request a more severe penalty than the penalty that was initially included in the strafbeschikking.

(h) Consequence of a strafbeschikking

If a strafbeschikking has been fully executed or withdrawn by the prosecutor, no further prosecution with regard to the same facts is possible, unless ordered by the court of appeal in terms of Artikel 12 or when new facts emerge. A strafbeschikking contains a determination of guilt and is equated to a judicial conviction. Therefore, it follows that a strafbeschikking may be of public interest. General administrative measures may prescribe that strafbeschikkingen relating to certain categories of felonies be given publicity. This will not be the case with regard to misdemeanors. The Code also provides that persons with a direct interest in the alleged offence, or who have suffered harm, must be supplied with a copy of any strafbeschikking issued as result of the offence.³⁸ Unlike the transactie, which is in essence an (indirect) agreement, the strafbeschikking is an independent determination of guilt, and thus more in line with a conviction by court. Similar to a transactie, however, all strafbeschikkingen, except those relating to misdemeanors or involving a fine of less than €100, are registered as “judicial information” and may only be supplied to persons/institutions executing a public function.³⁹

(i) Staged/phased introduction of strafbeschikking

Different parts of the act have been introduced in stages over a period of time. This has the implication that the transactie will still be used until such time as it has completely been replaced by the strafbeschikking. For a time it may even be possible that either a strafbeschikking or a transactie may be considered as reaction to delinquent conduct. In principle it is also possible to bring the (traffic) offences currently handled under the WAHV into the scope of a strafbeschikking, but this is, for now, not immediately applicable. The introduction of the strafbeschikking commenced for misdemeanors and “simple” felonies that

³⁸ Which information is necessary if they are to effectively exercise their rights to complain to Artikel 12 Sv.

³⁹ Artikel 3 Besluit justitiële gegewens.

are standardized by prosecution guidelines. Since 1 February 2008 a strafbeschikking can be imposed in the districts of Amsterdam and Den Bosch in case of contravention of artikel 8 WVV (driving under the influence). In practice this is done by the CJIB on behalf of the OM. Initially only a fine could be imposed, but this has now been extended to include a confiscation order and the suspension of the person's driver's licence. In terms of the second phase police and other officials will be authorized to also issue strafbeschikkingen. During a third phase the strafbeschikking will be extended to the full scope of misdemeanors and felonies with a maximum penalty of six years incarceration.⁴⁰ A prosecutor is compelled to apply a strafbeschikking if the case falls within the scope indicated in the directive. During the period of transition some measure of unfairness may occur. This is inevitable, given the staged introduction of the new measure. The directive contains a number of contra-indications. When these are present, a strafbeschikking may not be employed. In the initial phase this relates to aspects such as whether the offence occurred in connection with other offences or whether the accused is a recidivist, under-age. An evaluation of the implementation of the new measure will be done five years after its introduction. Only then, after a positive evaluation, will the transaction-measure finally be scrapped.

(j) Strafbeschikking by investigating officials (police) or administrative bodies

In the beginning the authority to issue a strafbeschikking was not extended to other persons or institutions, except the OM but in the second phase this may now take place.⁴¹ Police officials and other administrative bodies executing public functions may also now issue a strafbeschikking for certain limited categories of offences (so-called "code offences") and to a maximum fine of €350.⁴² Administrative bodies - and local authorities - are authorised to issue strafbeschikkingen in terms of artikel 257ba Sv and the offences are at present limited to a number of offences regarding nuisance (overlast - littering, noise etc.).⁴³ The local authority decides to impose a strafbeschikking. It then compiles an official charge - process-verbaal - that is forwarded to the CJIB who in turn issues, and administers the execution, of the strafbeschikking. Opposition thereto is, however, lodged with the relevant OM. Since 1

⁴⁰ Although the strafbeschikking is not yet fully implemented, more than 80 800 strafbeschikkingen were issued in 2011: 25 300 for felonies, and 55 000 for misdemeanors. Source: Jaarbericht OM 2011.

⁴¹ Besluit tot wijziging van het Besluit OM-afdoening en het Transactie-besluit 1994. Besluit van 29-3-2010, Stb. 255. Applicable since 1 April 2010.

⁴² Gonzales "Opportuniteit: niet het exclusieve domein van het Openbaar Ministerie" (2010) 3 *Strafblad* p. 232.

⁴³ Aanwijzing bestuurlijke strafbeschikking overlastfeiten (2008A027) and Richtlijn voor strafvordering bestuurlijke strafbeschikking overlastfeiten (20008R007) – applicable since 1 January 2009. Hartmann "De bestuurlijke strafbeschikking: panacee voor de gemeentelijke handhaving?" (2010) 89 - 2 *PROCES* p. 64.

July 2011 it has also been possible for the Receiver of Revenue to issue a fiscale strafbeschikking.⁴⁴ The fiscale strafbeschikking cannot impose a penalty of (community) service. However, any strafbeschikking is still issued under the indirect supervision and according to the guidelines of the Board of Attorneys-General who heads the OM. The OM is still responsible as from the moment an opposition is lodged, regardless of whether the strafbeschikking was originally issued by the OM or any other body. A strafbeschikking issued by other bodies may be withdrawn or amended by the OM.⁴⁵ The result is therefore that the police as well as administrative bodies are allowed to conclude an act of prosecution, thereby bringing the OM's prosecution monopoly to an end.⁴⁶ De Lange therefore argues that the OM will in future have to work closely together with other agencies to create synergy of resources like investigative capacity, information and knowledge.⁴⁷

III EVALUATION OF STRAFBESCHIKKING

(a) *Introduction*

The introduction of the strafbeschikking is a move away from consensual criminal justice processes in the Netherlands – and also represents a harder line taken against crime in general. With conditional withdrawal, transactie and other out-of-court processes, prosecution is averted, whereas with the application of the strafbeschikking-method delinquent behaviour will result in prosecution far more often, albeit in the easier, quicker form of a strafbeschikking. Crijns is quite correct to call it a significant reform that goes to the core of the justice system.⁴⁸ The advantages brought by the strafbeschikking is first that the OM can now plan better and that there are shorter time-frames within which steps can/must be taken.⁴⁹ If no opposition is lodged within fourteen days, execution may start. Secondly the extended sanctions (including aanwijzingen) allows for a more nuanced and responsive

⁴⁴ Besluit van 23 december 2009, Stb. 2010, 10 and Besluit van 20 juni 2011, Stb 2011, 308. See also Hartmann “De strafbeschikking: naar nieuwe grenzen van buitengerechtelijke afdoening binnen het strafrecht” 2012 *Tijdschrift voor sanctierecht & compliance* p. 58 as well as various sources cited by him on p. 65. Also P Fortuin “De Strafbeschikking” (2011) 44 *Nederlands Tijdschrift voor Fiscaal Recht*,.

⁴⁵ Artikel 257e, achtste lid Sv.

⁴⁶ De Lange “Over de vlag en de lading. Een bespreking van de Wet OM-afdoening” 2007 *Strafblad* p.69. Also Hartmann “Strafbeschikking en bestuurlijke boete: wildgroei in de handhaving?” (2005) 31 – 6 *Justitiële verkenningen* p. 85 - 96.

⁴⁷ De Lange “De strategische terugtocht van een monopolist – in het belang van een beheerste en evenwichtige toepassing van het strafrecht” (2010) 3 *Strafblad* p. 176.

⁴⁸ Crijns op cit note 15 at 225.

⁴⁹ Hartmann “Buitengerechtelijk strafrecht – strafbeschikking door Openbaar Ministerie” (10 november 2006) 15 *Advocatenblad* p. 740.

reaction to a particular case, whereas the easy-to-execute fine will be used extensively for standard, uncomplicated and high-volume cases. Similar to the South African plea-and-sentence-agreement, the accused knows what to expect. It takes away some of the uncertainty of a judicial sentence. The process is quick, there is no - potentially damaging - public trial and the accused still gets his twenty per cent discount on sentence!⁵⁰

(b) *Constitutional and Treaty requirements*

The question can indeed be asked whether the strafbeschikking complies with the Dutch Constitution, and more specifically artikel 113, eerste lid. In terms of this section the courts, not the prosecution service, are tasked with the adjudication of criminal offences [berechting van strafbare feiten]. Mevis, however, argues that the legislator is undermining this by declaring that many forms of conduct no longer constitute strafbare feiten, but rather gedragingen that are handled administratively.⁵¹ Rechtspreken is also the function of the courts. So what is it that the prosecutor is doing when issuing a strafbeschikking? This depends on how section 113 is interpreted. Administrative bodies already have the authority to impose punitive sanctions but this is not regarded as “berechting” as meant in the constitution. Crijns argues that the fact that administrative bodies can “punish” is at most an explanation and not a justification to also expand this possibility to punish to the prosecuting authority.⁵² The task of the courts is to adjudicate crimes, and not the more limited “imposing of penalties”. Adjudication of cases does not exclude other methods of bringing a matter to an end. If one were to interpret artikel 113 in a narrow sense, then it in fact means that no other method of dealing with a criminal case is valid if it does not entail presenting it for adjudication to a judge.⁵³ Disposal by the prosecutor cannot be equated to adjudication by the court and is thus not rechtspreken. The issuing of a strafbeschikking cannot be equated with a judicial function, since it in effect leads, unless protested, to a situation where no adjudication [berechting] takes place. The argument here is that, once a judge has adjudicated a matter, he or she becomes functus officio regarding that matter. This is not the case where the OM has issued a strafbeschikking. When the strafbeschikking is opposed, or its execution is unsuccessful, the prosecutor gets another chance to decide what to do now. By opposing the strafbeschikking the accused also withdraws from its consequence, but a suspect cannot

⁵⁰ This is because the policy is to issue the strafbeschikking for an amount of twenty percent less than the fine that would be requested should the matter go to court.

⁵¹ Mevis *Constitutioneel strafrecht* (oratie Rotterdam) Deventer, Gouda Quint (1998) 31.

⁵² Crijns op cit note 15 at 229.

⁵³ Alberts “De Gemeentestem, De Wet OM-afdoening. Nagel aan de kist van de bestuurlijke boete?” Gst. 2008, 70 Kluwer online research

withdraw from a judgment by the court.⁵⁴ Another argument is that lid 3 (of the same artikel 113) specifies that a sentence of incarceration [vrijheidsontneming] may only be imposed by the court [rechterlijke macht]. The implication is therefore that other sentences may indeed be imposed by others who do not form part of the judiciary.⁵⁵

There is a similar dilemma or question as to whether a strafbeschikking complies with the ECHR. Although the European Court for Human Rights has ruled that imposing administrative fines are not in conflict with section 6 of the Convention (in the *Öztürk* and *Bendenoun* cases⁵⁶) for as long as access to the courts is guaranteed, Crijns⁵⁷ argues that the strafbeschikking is indeed very different from the administrative fine in that the strafbeschikking is firstly regarded as an “act of prosecution” and secondly entails the determination of guilt of the accused. A strafbeschikking is also not only limited to the payment of a fine, but can include other far-reaching penalties.⁵⁸ The fundamental difference is that the one is a (voluntary) agreement to avoid prosecution, and the other amounts to one-sided imposition of punishment that is recorded as a previous conviction. The counter-argument is that nothing prevents the suspect in case of a conditional waiver, transactie or strafbeschikking to insist on the matter being brought before a judge. By accepting (in case of the first two), or not lodging opposition (in case of a strafbeschikking), the accused is waiving his right to insist on the protection of Section 6.⁵⁹

(c) *Criticism of the Strafbeschikking*

There are quite a number of controversial aspects to the strafbeschikking. The classic criminal law has at its heart that no penalty may be imposed without the guilt of the accused having been determined. This guilt determination has always been reserved for an independent judge during a public process following pre-determined rules of procedure and the presentation of evidence, whilst also guaranteeing due-process rights to the accused. Dutch lawyers have always stated that a critical function of the criminal (investigation and) trial has been the search for material truth. Attached to that is also the presumption of

⁵⁴ Cleiren & Verpalen *Text en Commentaar Strafvordering* 9 ed. (2011) 863 –4.

⁵⁵ It also depends on one’s understanding of the term “vrijheidsontneming”. Is your freedom also impaired when you must do community service, or when your driver’s licence is withdrawn?

⁵⁶ *Öztürk* case ECHR 21 – 2 – 1984, Series A 73, NJ 1988, 937 and *Bendenoun* case ECHR 24 – 2 – 1994, Series A 284, NJ 1994, 496 m.nt.EAA.

⁵⁷ Crijns op cit note 15 at 232.

⁵⁸ De Graaf “Doelmatigheid boven rechtmatigheid, bespreking van het concept-wetvoorstel Wet OM-afdoening” (2003) 33 *DD* p. 819. Also Cleiren & Verpalen op cit note 54 at 864.

⁵⁹ Drok “Voldoet de strafbeschikking, zoals opgenomen in de Wet OM-afdoening, and art. 6 EVRM?” (2008) 4 *Tijdschrift voor Formeel Belastingrecht*.

innocence and various other due-process rights. A lot of this is out of the window when a strafbeschikking is applied. Determining guilt can now be done one-sidedly by the prosecuting authority. It is not a public process. It is not certain what evidentiary guarantees exist and no right *audi alteram partem* is applied consistently.⁶⁰ The (so determined) guilt and penalty imposed, become final unless the accused opposes it within a very short time-frame. Ironically, in the document introducing the strafbeschikking to parliament, the minister stated that at present (before the strafbeschikking) many cases are dealt with by the judge in the absence of the accused [*bij verstek*], which is disappointing, mainly because only one side is being heard – “zaak slechts van één kant wordt belicht”. The minister finds this unsatisfactory, but then continues to sing the praises of a system that is even more one-sided and where the judge (usually) doesn't play any role at all!⁶¹ In the words of Luna and Wade, with a strafbeschikking the prosecutor is not the “judge before the judge” anymore, but the “sole judge of the case”.⁶²

The second point of contention relates to the unhealthy accumulation or concentration of power with the OM: various criminal justice tasks and responsibilities are given to the same functionary. The OM determines prosecution policy, basically deciding how it is going to react to certain offences. The OM then also implements this policy, leading the investigation into crime and deciding when sufficient evidence has been gathered. Consequently the OM prosecutes the case by issuing a strafbeschikking wherein the sentence is determined the sentence by the OM.. The OM also takes the steps to execute the sentence. The already powerful position of the OM in the justice system is indeed further intensified. Especially in the prosecution phase the Dutch prosecutor must act “judicially” whilst at other times he is regarded as a public official. This dilemma of centralisation of power also plays out in instances of administrative strafbeschikking. The official responsible for enforcement of regulations is now suddenly placed in a position where he must make an independent, impartial “judicial” determination of guilt.⁶³ The OM, at least, can be regarded as a “judicial” official. Can the same be said of an administrative functionary in these circumstances? And are there sufficient checks and balances?⁶⁴

A third concern has to do with confusion between procedures. It is argued that many citizens already perceive a transactie or administrative fine as a penalty, so this extension into

⁶⁰ Crijns op cit note 15 at 230.

⁶¹ Kamerstukken II 2004/0529 849, nr. 3, p. 19.

⁶² Luna & Wade op cit note 2 at 1461.

⁶³ Kwakman “Twee nieuwe sanctiestelsels ter bestrijding van overlast in het openbare ruimte op lokaal niveau” (2009) 9-01 *NJB* p. 9.

⁶⁴ Hildebrandt “Het consensuele moment in het strafprocesrecht,” 1996 *DD* p. 21.

the strafbeschikking should not be regarded as too far-reaching. The distinction between crimes [strafbare feiten] and administrative transgressions [bestuursrechtelijke feiten] is not, however, always clear. In fact – the very same conduct can be both crime as well as administrative transgression (for example fraud with regard to tax). Hartmann argues that, where in addition to the new strafbeschikking, various administrative fine processes as well as the WAHV process may still remain, it is confusing, not only for the enforcers of the law, but most certainly for citizens.⁶⁵ How are they supposed to know or appreciate the difference between a strafbeschikking and an administrative beschikking? One is equal to a conviction by court, the other not. Some regulations refer to a “gedraging”, others to an “overtreding”. If opposed, the strafbeschikking leads to a complete trial before a criminal judge, including the leading of evidence, determination of guilt and questions regarding an appropriate sentence. If an administrative beschikking is opposed it is adjudicated by a civil judge who only restricts his adjudication to the correctness, or not, of the decision. In case of a strafbeschikking, the execution of the sentence is suspended when it is being opposed, whereas this is not the case with an administrative beschikking. Different rules of evidence and procedure are applied.⁶⁶ This is confusing indeed. To add further to the confusion: the wet OM-afdoening further provides that the authority to impose strafbeschikkingen is extended to certain administrative bodies. Even the OM will, therefore, be put before the decision of whether to apply the administrative fine, or the strafbeschikking procedure. Hartmann⁶⁷ goes so far as to argue that this confusion could possibly be construed, not only as detrimental to the legitimacy of the law, but also as an unlawful obstruction of the right to access to court in terms of section 6 of the ECHR.

In the fourth place, it has been said that the strafbeschikking will not replace the practice of administrative penalties or fines. Administrative and criminal procedures do indeed have more in common than before, but there are still some distinctions. The administrative process will be utilised when it involves the transgression of an ethically-neutral norm and the facts are easily proven. The criminal process will normally follow the transgression of more serious norms or where there is a need for more severe punishment or wider-ranging methods of investigation. This, however, makes no sense now that the strafbeschikking can be issued by the local authority for something as trivial as not having

⁶⁵ Hartmann op cit note 46 at 94.

⁶⁶ Alberts, op cit note 53.

⁶⁷ Hartmann op cit note 46 at 94.

your dog on a leash. The distinction between criminal conduct, and morally-neutral conduct is blurred even further.

The fifth concern has to do with impartiality. The OM has always been an autonomous public body that takes great pride in its independence. The OM is fulfilling a quasi-judicial function, whilst remaining completely objective in the pursuit of the truth.⁶⁸ We know, however, that by far the majority of strafbeschikkingen will not be issued by the prosecutor. They will be issued by administrative assistants working in the office of the prosecutor, and by the police, and the local authority, and the receiver of revenue. The receiver is most certainly not impartial, but a process-party to the tax dispute.⁶⁹ Since January 2009 local authorities can also issue an administrative strafbeschikking, used mostly for municipal transgressions such as dogs not on a leash, consuming alcohol in public, urinating in the street, erroneous presentation of refuse etc. It has proven to be hugely popular.⁷⁰ Is it maybe because the local authority receives financial compensation for processen-verbaal which are correctly presented to the CIJB? These are hardly grounds for the existence of impartiality!

In the sixth place fears have been raised regarding the quality of the justice dispensed. There is nothing wrong with a quick resolution of criminal cases, as long as there are sufficient safeguards against abuse and/or mistakes.⁷¹ When expectations on the OM increase to dispose of as many matters as possible out-of-court, the quality of prosecution may be put under pressure. More cases mean less time spent per case. Less time may be spent on investigations, and cases that may have required a trial may slip through as strafbeschikking. Many of the run-of-the-mill strafbeschikkingen will actually be issued not by the prosecutor him or herself, but by the administrative assistants at the OM, increasing the risk of mistakes. There are also those who argue that the OM has become so concerned with efficiency and control functions that it has lost its earlier focus on justice and its unique position with regard to the judge.⁷² The new accelerated assessment and punishment scheme [ZSM] illustrates the danger that increased expediency may actually lead to less accuracy and less attention for the

⁶⁸ Van Zijl "Het OM beschikt tot straf: een strafrechtelijk novum" (2005) 31 – 6 *JV* p. 101.

⁶⁹ Fortuin op cit note 44 at 44.

⁷⁰ In the period 1/1/2009 till 11/2/2012 a total of 51.290 such strafbeschikkingen were presented to the CJIB. WODC onderzoek Bestuurlijke strafbeschikking en bestuurlijke boete overlast, 2012-07-11T11:51:10. Also important are the Richtlijn voor strafvordering bestuurlijke strafbeschikking overlastfeiten as well as Aanwijzing bestuurlijke strafbeschikking overlastfeiten (2010A003). See also Besluit van 5 april 2012, houdende wijzigings van het Besluit OM-afdoening en enkele andere besluiten in verband met de invoering van de besluit bestuurlijke strafbeschikking, Staatsblad 2012, 150.

⁷¹ Spronken "The Dutch Exception" (2012) oct *NJB* 27.

⁷² See debate between Schalken and de Wit (2006) 2 & 13 *NJB*.

protection of the process rights of the suspect as well as the interests of victims.⁷³ Since it is predicted that the bulk of ZSM-cases will be handled by way of a strafbeschikking which is issued on the spot, questions regarding the supposed *search* for material truth can rightly be asked.⁷⁴ The determination of a strafbeschikking is a decision that should not be taken lightly. It is, after all, a determination of guilt which - unless opposed - has the same weight of a conviction and sentence by court. Since there is no external (judicial) control, the internal control will have to be exemplary.

Reverting to the compliance with human rights requirements, the following has to be noted: A number of writers have expressed opinions that the once-sided determination of the guilt of a person by the prosecuting authority will not fall foul of the ECHR because the path to the judge remains available. Is this realistic?⁷⁵ It requires insight into the nature of the document found in the mail alleging contravention of the criminal law (police or OM-strafbeschikking) or the traffic laws (WAHV notice), or the tax law (fiscale strafbeschikking) or a municipal by-law (overlast strafbeschikking) etc. Going to court costs money and requires time off from work. In addition, when the strafbeschikking is opposed, it can lead to a more severe penalty being imposed by the court after a complete criminal trial has taken place. It is not so much that the fine is increased, but that the discount which the offender would have received for not opposing the strafbeschikking falls away. Indeed various obstacles in the way of “going to the judge”.

A last concern deals with the crucial question: Where does one draw the line? One of the reasons forwarded to justify the “extra-ordinary” procedure of giving sentencing powers to the OM is the “lack of judicial capacity”.⁷⁶ If capacity were put under even further pressure, would there not be the temptation to extend the application of a strafbeschikking to even more serious offences, warranting more extensive and far reaching sentences? Or to extend the discretion to issue a strafbeschikking to more and more non-judicial bodies/institutions?⁷⁷ When is the bridge too far?

⁷³ Kwakman “Snelrecht en de ZSM-aanpak” (2012) 17 *DD*. See also Factsheet ZSM at www.om.nl/onderwerpen/zsm/158586/factsheet-zsm/

⁷⁴ Dreissen & Spronken “Een burger straffen voor wat hij heeft gedaan” (2012) 1266 *NJB*.

⁷⁵ Crijns op cit note 15 at 232.

⁷⁶ Kamerstukken II 2004/05 29 849 nr. 3, p. 1.

⁷⁷ Mevis “Strafbeschikking OM, WAHV en “kleine ergernissen”” (2004) *DD* p. 24, Hartmann op cit note 44 at 64.

(d) *Strafbeschikking here to stay?*

Regardless of the criticism, the strafbeschikking seems to be well on its way to becoming ingrained in the Dutch criminal justice system. The application thereof is made possible by the extensive infrastructure and processes previously used for the transactie. It seems to be effectively implemented and enforced. The Government - at least - is satisfied that the strafbeschikking is not in conflict with the provisions of the ECHR (because the offender retains the right to a complete trial before an independent judge if he so wishes), nor with the Dutch constitution (since a sentence of incarceration is not imposed and there is no berechting by the OM).⁷⁸ The method does, from the view of a common law observer, provide an unusual accumulation of power upon the OM. What the strafbeschikking does achieve is to require a more active and alert attitude of the offender, failing which they may end up guilty.⁷⁹

IV CONCLUSION

The move towards alternative disposal of criminal cases, where prosecutors are vested with greater authority to dispose of, or independently adjudicate, criminal cases, is an international phenomenon. The punishment of persons who have committed crime, is increasingly taken out of the hands of judges and instead we find augmented prosecutorial discretion to reach case-ending solutions without the intervention of judicial officers. This development is often ascribed to rising crime and the need to reduce criminal case loads, the need for more efficient solutions, and also for financial considerations. This is achieved by allocating responsibilities which have traditionally belonged to judicial officers, to the prosecuting service. The Netherlands is an example of a country where serious efforts have been made to reduce pressure on the criminal courts by channelling certain matters to the authority of the prosecuting service at an early stage. A range of alternative disposal methods have resulted, including the new strafbeschikking method. The question is whether the strafbeschikking is in harmony with the minimum due process requirements laid down in the Dutch Constitution and the ECHR and whether the important constitutional rights and guarantees are sufficiently protected in circumstances where judicial oversight is limited, or even lacking altogether.

⁷⁸ Drok op cit note 59. Also Kamerstukken II 2004/05 29 849 nr 7, p..3.

⁷⁹ Crijns "Efficiëntie in het kwadraat: over de lotgevallen van de kleine strafzaak na invoering van de strafbeschikking en het verlostelses" (2010) 89 *Proces* p. 6.

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