DE JURE

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INHOUDSOPGAWE CONTENTS

Artikels/Articles

Aantekeninge/Notes

Onlangse regspraak/Recent case law

Editorial

Die huidige LLB-leergang kom in hierdie uitgawe onder die loep en die vraag is of dit voldoen aan die verwagtinge van studente en hulle toerus om tot die regspraktyk toe te tree. Die vraag is voorts, tot watter mate kan die leergang ook aangepas word om voorsiening te maak vir ware gemeenskapsgebaseerde onderrig.

Dat die huidige vierjaar-LLB-leergang ernstige gebreke toon, is nie altemit nie. Dit sal waarskynlik nie moontlik wees om studente in alle opsigte vir die praktyk voor te berei tydens hulle LLB-studies nie. Dit is waarom klerkskap vir kandidaatprokureurs of pupilskap vir advokate by die Balie steeds van groot belang is. Maar die LLB-graad is en bly 'n professionele kwalifikasie en die leerplan moet van tyd tot tyd heroorweeg word om te bepaal of dit steeds aan die behoeftes van die professies voldoen.

Een van die grootste tekortkominge in die huidige leergang is die karige taalopleiding wat studente ondergaan. Regslui het slegs een stuk gereedskap en dit is taal. Of dit nou die geskrewe of die gesproke woord is, iemand wat nie met groot vaardigheid met taal kan omgaan nie, is nie bevoeg om 'n prokureur, advokaat of regsadviseur te wees nie. Waar regstudente in die verlede minstens drie tale op 'n taamlike gevorderde vlak moes neem, is die taalvereistes en die taalkursusse nou so afgewater dat studente vir alle praktiese doeleindes nie die nodige geletterheids-vlakke het om doeltreffend die regsberoep te betree nie. Dit is 'n tendens wat nie alleen in Suid-Afrika voorkom nie, maar kollegas in baie ander lande opper dieselfde probleme.

'n Ander verskynsel wat oraloor begin kop uitsteek, is die opvatting dat wetgewing alle probleme oplos. Waaneer bepaalde sosio-ekonomiese of ander probleme opduik, is daar onmiddelik 'n beroep om meer wetgewing uit te vaardig sonder om ag te slaan op bestaande gemeenregtelike of statutêre maatreëls wat dalk reeds die probleem aanspreek. Die klem rus op die skepping van regsreëls wat dikwels niks nuuts bydra nie, terwyl die doeltreffende toepassing van bestaande of nuwe maatreëls bykans geen aandag geniet nie. Die chaos waarin die kantoor vir verbruikersbeskerming ten tyde van die skryf hiervan verkeer het, is 'n sprekende voorbeeld hiervan. Daar was oor die afgelope tien jaar verskeie stukke wetgewende maatreëls wat die reg op bepaalde terreine ingrypend verander het. Hier dink 'n mens veral op wetgewing wat van toepassing is op kredietooreenkomste, verbruikersbeskerming, minerale, ensovoorts.

The National Credit Act 34 of 2005 and the Consumer Protection Act 68 of 2008 have changed the landscape of consumer contracts forever. Some of the changes were long overdue, but many have caused more questions than they have answered. Furthermore, neither of these two pieces of legislation is an example of clear and concise drafting. It is therefore not surprising that, even years after the two acts were passed

into law, this volume of *De Jure* still contains multiple contributions which address various aspects of consumer credit.

Similarly, the Mineral and Petroleum Resources Development Act 28 of 2002 remains contentious and the issue of nationalisation of mines remains sensitive. As expected, this volume again contains contributions dealing with that act, as well as issues relating to the taxation of mining operations.

'n Verdere onderwerp wat altyd emosies aanwakker, is wanneer en deur wie die besluit geneem kan word om mediese behandeling te staak. In 2011 was daar 'n bydra in twee dele wat die reg van die individu om self vooraf te besluit, aangespreek het. Hierdie volume bevat 'n bydrae oor die posisie in die Verenigde State van Amerika, waar ouers van gestremde kinders vooraf sou aandui dat skole nie bepaalde mediese ingrype mag toelaat nie. Soos altyd is die vraag belaai met emosie en botsende belange wat teen mekaar opgeweeg moet word.

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The application of section 85 of the National Credit Act in an application for summary judgment

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OPSOMMING

Die toepassing van artikel 85 van die Nasionale Kredietwet in 'n aansoek om summiere vonnis

Voor die inwerkingtreding van die Nasionale Kredietwet 34 van 2005 (NKW) in 2007 was dit ietwat ongehoord om in Suid-Afrika te hoor van wetgewing gerig op verbruikersbeskerming. Een van die NKW se hoofdoelstellings is die beskerming van skuldenaars. Skuldberading ingevolge artikel 86 is een van die wyses waarop die wetgewer aan sodanige beskerming uiting gee. Artikel 85 bepaal dat 'n hof, in enige verrigtinge waarin 'n kredietooreenkoms ter sprake kom en indien die skuldenaar beweer dat hy oorverskuldig is, die kredietooreenkoms na 'n skuldberader mag verwys of self die skuldenaar oorverskuldig verklaar en sy skuld herstruktureer. In die praktyk word artikel 85 hoofsaaklik by aansoeke om summiere vonnis met betrekking tot ontroerende eiendom deur skuldenaars geopper. Artikel 85 verleen aan die hof die diskresie om die kredietooreenkoms na 'n skuldberader te verwys met die gevolg dat summiere vonnis uitgestel of gewysig kan word. Die onus rus op die skuldenaar om die hof te oortuig om sodanige verwysing te beveel. Die howe het 'n aantal aspekte geïdentifiseer wat oorweeg moet word by die toepassing van die hof se diskresie. Hierdie artikel is 'n kritiese bespreking van artikel 85 asook die uitleg daarvan deur die howe.

1 Introduction

The National Credit Act (NCA)[1] came into operation at a time when consumer laws were somewhat unheard of in South Africa. Prior to the NCA, the Credit Agreements Act[2] and the Usury Act[3] regulated the consumer credit industry and the only debt relief remedies available to the over-burdened consumer were sequestration[4] and administration,[5] which left a large portion of over-burdened consumers without an adequate remedy.

The introduction of the debt review process in section 86 of the NCA created an alternative remedy for over-indebted consumers. A duly registered debt counsellor is given the task to, firstly, determine whether the consumer is over-indebted, and secondly, to make a

1 34 of 2005.
2 75 of 1980.
3 73 of 1968.
4 In terms of the Insolvency Act 24 of 1936.
5 In terms of s 74 Magistrates' Courts Act 32 of 1944.

recommendation to court as to the restructuring of the consumer's debt.[6] Since the inception of the debt review process in June 2007, more than 184,000 consumers have applied for debt review.[7] This figure is not insignificant and reflects on South Africa's need for effective credit regulation and debt relief mechanisms.

One of the provisions pertaining to the debt review process introduced by the NCA is section 85. This section falls under Part D of Chapter 4[8] which, *inter alia,* deals with over-indebtedness and reckless credit. Section 85 allows the court to either refer a matter to a debt counsellor or to declare the consumer over-indebted and make an order to restructure the consumer's debts.

Due to the nature of the remedy provided by section 85 and its wide application, it has been the subject of a number of High Court cases. Section 85 is often raised by the consumer in a summary judgment application involving execution against immovable property. This article focuses on the courts' application and interpretation of section 85 in such instances.

2 Interpretation and Purpose of the NCA

The NCA has been the subject of a great deal of criticism, particularly relating to the drafting and wording thereof. In *FirstRand Bank Ltd v Seyffert*[9] Wallis J noted:

> I share the general frustration of my judicial colleagues around the country at the lack of clarity that features at least in the parts of the NCA with which one is concerned in cases of the kind now before me. A court is forced to go round and round in loops from subsection to subsection, much like a dog chasing its tail.[10]

These ambiguities have lead to a number of conflicting High Court decisions[11] and compelled the National Credit Regulator (NCR) to

6 Ss 86(6) & 86(7)(c).

7 "National Credit Regulator Debt Review Task Team" 2010 http://ncr.org.za (accessed 2011-09-15).

8 Ch 4 is titled "Consumer Credit Policy" and includes provisions on consumer rights, consumer credit information and records, the credit market, over-indebtedness and reckless credit.

9 2010 6 SA 429 (GSJ).

10 434. See also *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) par [2] in which Malan JA noted that the NCA cannot be described as the "best drafted Act of Parliament ever passed", and that there are a number of drafting errors and "untidy expressions" which make the NCA particularly difficult to interpret.

11 See *Standard Bank of SA Ltd v Kruger* 2010 4 SA 635 (GSJ); *SA Taxi Securitisation (Pty) Ltd v Nako* case no 19/2010 (ECB) (unreported); *Wesbank Ltd v Papier* Case no 14256/2010 (WCC) (unreported) in which the courts discuss the credit provider's right to terminate a debt review in terms of s 86(10) after the debt counsellors have set the matter down in the Magistrate's Court in terms of s 86(7)(c).

approach the North Gauteng High court for a declaratory order on certain provisions of the NCA.[12]

Section 2(1) of the NCA states that when interpreting the sections of the NCA effect must be given to the purposes of the NCA. It is thus important to first determine what the intention and purpose of the NCA is.

Section 3 of the NCA sets out three main purposes, namely, to promote and advance the social and economic welfare of South Africans; to promote a fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit market and industry, and to protect consumers.[13]

It is unarguable that the NCA was created for the protection of consumers.[14] However, this is not the sole purpose of the NCA and thus the scale must not be unduly tipped in favour of the consumer, but a balancing of the respective interests should rather be sought.[15] In *Seyffert*,[16] Willis J held that the NCA has various objectives which must be balanced and that the NCA was designed for consumer protection but not to make South Africa a "debtors' paradise".[17]

In *Naidoo v Absa Bank Ltd*[18] Cachalia JA discussed the difference between the wording of section 85 and section 130 of the NCA. He held that section 130 must be interpreted in accordance with that part and chapter in which it appears in the Act. He noted that section 85 is found in the part of the NCA that deals with the alleviation of over-indebtedness through the debt review process.[19] It is submitted that, as with section 130, section 85 must also be interpreted in accordance with the part and chapter in which it appears.

One of the purposes of the NCA is to assist the over-indebted consumer. It is submitted that all provisions, especially those dealing with over-indebtedness, should be interpreted to give effect to this

12 *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP). This judgment was taken on appeal: see *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA).
13 See Otto & Otto *The National Credit Act Explained* (2010) par 4.
14 See Scholtz *et al Guide to the National Credit Act* (loose leaf 2008) par 2 3.
15 In *Taxi Securitisation (Pty) Ltd v Nako* case no 19/2010 (ECB) (unreported) par 35 Kemp JA held that "[t]o interpret the NCA trough the lenses of 'the promotion and protection of consumers'" loses sight of the NCA's other objectives.
16 *FirstRand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ).
17 *FirstRand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ) 434. See *Desert Star Trading 145 (Pty) Ltd v No 11 Flamboyant Edleen CC* 2011 2 SA 266 (SCA) 268 in which the court noted that consumer protection legislation, such as the NCA, seeks to achieve a balance between the interests of the credit provider and the consumer.
18 2010 4 SA 597 (SCA).
19 601–602.

purpose.[20] In doing so the court has to ensure that the consumer's rights are not unduly infringed upon in favour of the credit provider, and *vice versa*. The court should take into consideration the prospective loss of each party should an order be granted or refused.

3 A Closer Look at Section 85

3 1 General

Section 85 of the NCA provides:

> Despite any provision of law or agreement to the contrary, in any Court proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the Court may–
>
> (a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the Court in terms of section 86 (7); or
>
> (b) declare that the consumer is over-indebted, as determined in accordance with the Part, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

Section 85 is found in Part D of Chapter 4 of the NCA. Part D deals specifically with over-indebtedness and reckless credit. There is no limitation placed on section 85 and it thus enjoys a wide application.

3 2 "Despite any provision of law or agreement to the contrary"

Section 85 is applicable to any credit agreement which is subject to the NCA, despite what any other law, agreement or even any other provision of the NCA might state. The court is allowed to act in accordance with section 85 even if legal action has already commenced.[21]

The NCA provides for certain procedures that must be followed prior to debt enforcement. Section 129(1)(a) states that if a consumer is in default the credit provider *may* draw the default to the consumer's attention and propose that the consumer refers the matter to, *inter alia*, a debt counsellor. Although a section 129(1)(a) notice is not obligatory, section 130(1) requires a credit provider to deliver either a section 129(1)(a) or section 86(10)[22] notice to the consumer prior to debt enforcement. Thus, should a consumer be in default the credit provider

20 See *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 6 where Erasmus J held that one of the purposes of the NCA is to "provide for the debt re-organisation of a person who is over-indebted," and that the debt review process was constructed with this in mind.

21 See *Ex Parte Ford* 2009 3 SA 379 (WWC) 381 where Binns-Ward AJ notes that s 85 is wide enough to be applicable in an application for voluntary sequestration and that it is not limited to cases of debt enforcement.

22 The reference in s 130(1) to s 86(9) is wrong and should be to s 86(10). See Scholtz *et al* par 12 5.

is under no obligation to deliver a section 129(1)(a) notice to the consumer, but if the credit provider wishes to enforce the agreement then such a notice becomes compulsory, provided that section 86(10) does not apply.[23]

Section 86(2) of the NCA states that if a credit provider has commenced with steps contemplated in section 129 to enforce an agreement, that agreement will be excluded from the debt review process. There has been much debate regarding the interpretation of section 86(2) and whether an agreement, for which a section 129(1)(a) notice has been sent, will result in that agreement being excluded from the debt review process.[24]

The Supreme Court of Appeal, in *Nedbank Ltd v National Credit Regulator*,[25] has now confirmed that once a section 129(1)(a) notice has been given to the consumer to enforce the agreement, that agreement will be excluded from the debt review.[26] Malan JA held that in the event that the credit agreement is excluded from the debt review by section 86(2), a court, in which the credit agreement is being considered, may still make an order in terms of section 85 by either referring it to a debt counsellor or making an order declaring the consumer over-indebted.[27]

In light of the above judgment, it is submitted that the courts will now be faced with far more section 85 applications. Consumers, who in the past were still able to include those agreements in the debt review, could now be left without a remedy other than to request the court for a referral in terms of section 85. A court may thus be placed in a position whereby the consumer, having responded to the section 129(1)(a) notice, cannot access the remedies provided by the NCA if the court fails to make a referral in terms of section 85.

The wide application of section 85 allows a consumer to request a court to refer the matter to a debt counsellor, or to declare the consumer over-indebted, in an application for summary judgment by the credit provider. It will allow the court to deny the credit provider judgment despite having followed all the requirements as set out in section 130 of the NCA. Section 85 places no limitation on who may bring such a

23 *Nedbank Ltd v The National Credit Regulator* 2011 3 SA 581 (SCA) par 8.
24 See Scholtz *et al* parr 11 3 3 2 & 12 4 12. See Otto & Otto par 44 2.
25 2011 3 SA 581 (SCA).
26 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) par 14.
27 *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) par 11. The effectiveness of the s 129(1)(a) notice will depend on the credit provider's willingness to negotiate prior to taking legal action. The NCA makes no provision for a procedure to be followed once a s 129(1)(a) notice has been sent. The credit provider is thus under no obligation to negotiate with the debt counsellor and may proceed to court if it is unsatisfied with the offer made by the debt counsellor. In reality, given the interpretation of s 86(2), s 129(1)(a) has not amended the *status quo* of pre-litigation procedures prior to the NCA. The NCA places no time restriction on the sending of a s 129(1)(a) notice. Therefore a consumer may be only one day in default before such a notice is sent. See also *Standard Bank of SA Ltd v Hales* 324.

request for referral to the court, but it is clear that it avails itself to the benefit of the consumer and thus it gives effect to the purpose of the NCA in addressing over-indebtedness.[28]

It is submitted that the legislature was aware of the infringement that section 85 will have on the credit provider's contractual right to institute legal action against the consumer. The court's purpose is not to protect the credit provider's interests, but rather to decide whether it will be fair, in the given circumstance, to allow such an infringement.[29]

3 3 "In any Court proceeding in which a credit agreement is being considered"

The wording of section 85 affords it very wide application and is applicable in any court proceeding provided that it is a credit agreement to which the NCA applies. In *Ex Parte Ford*,[30] Binns-Ward AJ noted that the scope of section 85 is wide enough to be applicable in an application for voluntary sequestration and that it is not limited to cases of debt enforcement.[31] Section 85 would thus also be applicable in a hearing following a summary judgment application.

Rule 32(3) of the Uniform Rules of Court provides that upon the hearing for summary judgment the defendant must either provide security to the plaintiff or satisfy the court the he has a *bona fide* defence to the action.[32]

When a consumer raises section 85 in a summary judgment application he is in fact admitting liability to the plaintiff and requesting the court to use its discretion in making an order in terms of section 85. Thus the consumer, in actual fact, does not meet the requirements as set out in Rule 32(3)(b) as he does not raise a defence. In *FirstRand Bank Ltd v Olivier*,[33] Erasmus J notes that in a summary judgment application, the defendant (consumer) raises a section 85 application as a remedy and that, although the application must still be *bona fide* and not a mere delaying tactic, it will be inappropriate to impose the requirements of Rule 32(3)(b) in such a case.[34]

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28 The consumer must address the court as to whether or not he received a s 129(1)(a) notice and whether he has responded thereto. The mere disregard of the notice may reflect negatively on the consumer's good faith. See *FirstRand Bank Ltd v Olivier* 11 and *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D) 324–325.

29 In *FirstRand Bank v Olivier* 2008 JOL 22139 (SE) 11 Erasmus J noted that the NCA encroaches significantly on the credit provider's common law rights and that the court will only allow such an encroachment to the extent that it is justifiable whilst still promoting the purpose of the NCA.

30 2009 3 SA 379 (WWC).

31 *Ex parte Ford* 2009 3 SA 379 (WWC) 381.

32 Rule 32(3)(a) & (b).

33 2008 JOL 22139 (SE).

34 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 16.

In *Standard Bank of SA Ltd v Panayiotts*[35] Masipa J disagreed with Erasmus J in *Olivier*[36] and held that the requirements of Rule 32 cannot be disregarded and that to ignore the requirements of Rule 32 will be grossly unfair towards the credit provider.[37]

As noted above,[38] section 130 requires the credit provider to deliver either a section 129(1)(a) or section 86(10) notice to the consumer prior to debt enforcement. Section 86(10) provides:

> If a consumer is in default under a credit agreement that is being reviewed in terms of this section, the credit provider in respect of that credit agreement may give notice to terminate the review in the prescribed manner to–
>
> (a) the consumer;
>
> (b) the debt counsellor; and
>
> (c) the National Credit Regulator,
>
> at any time at least 60 business days after the date on which the consumer applied for the debt review.

Once a section 86(10) notice has been delivered and the prescribed time has lapsed the credit provider may institute legal action against the consumer in order to enforce the agreement.[39] In such a case section 85 may become applicable in two types of proceedings.

On the one hand, if the credit provider, after termination, approaches the court for the enforcement of the agreement, the consumer, raising section 85, will be able to request the enforcement court to either refer it back to the debt counsellor or to declare the consumer over-indebted and to restructure the consumer's debt obligations in terms of section 87.[40]

On the other hand, if the debt counsellor had since the termination referred the consumer's debt review proposal, which includes the terminated agreement, to the Magistrate's Court in terms of section 86(7)(c), the debt counsellor may request the application court to declare the consumer over-indebted and to restructure the consumer's debt

35 2009 3 SA 363 (W).
36 2008 JOL 22139 (SE).
37 372–373.
38 See par 3.2.
39 S 130(1)(a) provides that the credit provider must wait ten business days after such a notice has been delivered to the consumer before proceeding with enforcement.
40 S 86(11) may also be used in such proceedings. If a credit provider has terminated the debt review in terms of s 86(10) and proceeds to enforce the agreement, s 86(11) allows the court in which the matter is being heard to make an order for the debt review to resume. S 85 provides the court with a wider discretion as it allows the court to declare the consumer over-indebted and restructure the consumer's debt obligations.

obligations in terms of section 87 including the terminated agreement.[41]

It is important to note that section 85 will only be applicable in cases where a credit agreement is being considered. Thus, the agreement being considered must fall within the definition of a credit agreement as defined in section 8[42] of the NCA and not be excluded by section 4.[43]

3 4 "If it is alleged that the consumer under a credit agreement is over-indebted"

In order for section 85 to be applied the consumer must "allege" that he is over-indebted. To allege means to make a statement that is not yet proven. It is thus submitted that the provision does not require a consumer to prove his over-indebtedness but merely to allege it.

However, in *Standard Bank v Panayiotts*, Masipa J held:

> Cleary the mere allegation of over-indebtedness can never be sufficient. The test would be that such over-indebtedness must be established on a balance of probabilities.[44]

Masipa J supported his argument with reference to section 79(1) in which the definition of over-indebtedness is set out. He held that section 79(1) provides that a consumer's over-indebtedness must be determined with reference to "the preponderance of available information at the time a determination is made".

For a consumer to be declared over-indebted he will have to satisfy the court that he is over-indebted in terms of section 79(1). However, it is submitted that section 85 does not require a consumer to prove to the court that he is over-indebted. The court is *not required to declare* the consumer over-indebted before section 85 can be applied.

Section 79(1) provides as follows:

> A consumer is over-indebted if the preponderance of available information at the time a determination is made indicates that the particular consumer is or

41 If the credit provider has already proceeded with legal action, the court hearing the enforcement proceedings may use s 85 to adjourn the matter pending the final decision of the court adjudicating the debt review. See *SA Taxi Securitisation (Pty) Ltd v Ndobela* Case no 9162/2010 (GSJ) (unreported) par 16.

42 S 8 is entitled "Credit Agreements" and gives a closed list of the types of credit agreements to which the NCA applies and their definitions.

43 S 4 is entitled "Application of Act" and provides for agreements that will be excluded from the NCA. See Scholtz *et al* par 4.

44 *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W) 368. See also *FirstRand Bank Ltd v Swarts* Case no 15699/2009 (WCC) (unreported) par 7, where Cleaver J held that the consumer did not place sufficient evidence before the court to prove his over-indebtedness and that merely setting out his income and expenditure is not sufficient. See *BMW Financial Servicers (SA) (Pty) Ltd v Mudaly* 2010 5 SA 618 (KZN) 628–629.

will be[45] unable to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, having regard to that consumer's–

(a) financial means, prospects and obligations; and

(b) probable propensity to satisfy in a timely manner all the obligations under all the credit agreements to which the consumer is a party, as indicated by the consumer's history of debt payments.

Section 78(3) provides for the definition of "financial means, prospects and obligations" and states:

In this Part, 'financial means, prospects and obligations', with respect to a consumer or prospective consumer, includes–

(a) income, or any right to receive income, regardless of the source, frequency or regularity of that income, other than income that the consumer or prospective consumer receive, has a right to receive, or holds in trust for another person;

(b) the financial means, prospects and obligations of any other adult person within the consumer's immediate family or household, to the extent that the consumer, or prospective consumer, and that other person customarily–

(i) shares their respective financial means; and

(ii) mutually bear their respective financial obligations; and

(c) if the consumer has or had a commercial purpose for applying for or entering into a particular credit agreement, the reasonable estimated future revenue flow from that business purpose.

Regulation 24(7) provides factors that need to be considered in order to determine whether or not a consumer is over-indebted. This sub-regulation sets out the basic calculation of over-indebtedness.[46]

Section 79(1) provides the definition of over-indebtedness. In order to declare a consumer over-indebted the requirements as set out in section 79 of the NCA must be met. Section 85 states that if it is "alleged" that the consumer is over indebted the court may make an order in terms of section 85(a) or section 85(b). These two subsections provide for different possible orders and it is important to distinguish between them.

Section 85(a) states that the court can refer the matter to a debt counsellor, with a request that the debt counsellor assesses the consumer's financial position and makes a recommendation to the court. Section 85(b) states that the court may make an order of over-indebtedness and restructure the consumer's debt. Thus, when a court

45 It is submitted that a consumer will also be over-indebted if, at the time when the determination is made, the information available indicates that the consumer will, in the near future, not be able to meet his financial obligations timeously. See Scholtz *et al* parr 11 3 1 & 11 3 2.

46 Reg 24(7) provides that a consumer is over-indebted if his total monthly debt payments exceed the balance derived by deducting his living expenses form his net income. See Scholtz *et al* par 11 3 3 2.

makes a referral in terms of section 85(a) no order of over-indebtedness is made at the time of referral and thus over-indebtedness need not yet be proven.

It must be noted that section 79(1) of the NCA refers to "all the obligations under all the credit agreements to which the consumer is a party", and thus requires a detailed determination having regard to the consumer's full financial position. Section 86 read together with regulation 24 affords a debt counsellor the opportunity to make such a determination.[47]

It is submitted that in case of a referral in terms of section 85(a) the court does not have to make a determination of over-indebtedness, but only needs to refer the matter to a debt counsellor, requesting the debt counsellor to report back to the court with such a determination and recommendation for the restructuring of the consumer's debt. Upon receipt of such a determination and recommendation the court will be able to exercise its discretion informatively.

In *National Credit Regulator v Nedbank Ltd,*[48] Du Plessis J held that one of the debt counsellor's duties in terms of section 86 of the NCA is to determine whether a consumer is over-indebted.[49] The debt counsellor, by referring a matter to court in terms of section 86(7)(c), is fulfilling a statutory obligation and due to his knowledge of the relevant facts should assist the court.[50] Thus, in making a referral to a debt counsellor in terms of section 85(a) the court is able to obtain the assistance of the debt counsellor in making a final order.

Section 85 still allows the court to use its discretion in making a referral in terms of section 85(a). A situation where a court is left without any real power to decide whether or not to make such a referral would lead to absurdities. The requirement of Rule 32(3) must still be adhered to and the consumer will have to satisfy the court that his request is *bona fide*.[51]

In the case of section 85(b) the court can declare the consumer over-indebted and make an order in terms of section 87. Thus, in terms of section 85(b) the court will have to be satisfied that the consumer is indeed over-indebted. In most cases the court will not be able to make an order in terms of section 85(b) if the consumer has not had an

47 See Roestoff *et al* "The Debt Counselling process – Closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* 269–373. Also see Scholtz *et al* par 11 3 3 2 for an overview of the debt review process.
48 2009 6 SA 295 (GNP).
49 301.
50 311 & 313.
51 In *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W) 370 Masipa J held that in a summary judgment rule 32(2) requires a consumer to raise a *bona fide* defence and that the same requirement is also applicable in a request by the consumer in terms of s 85 of the NCA.

opportunity to approach a debt counsellor prior to the summary judgment application.

In *Panayiotts*[52] Masipa J held:

> Having regard to the wording of section 79, such proof must inevitably involve details of *inter alia*, the consumer's financial means, prospects and obligations. Financial means would include not only income and expenses, but also assets and liabilities. Prospects would include prospects of improving the consumer's financial position, such as increases, and even, liquidating assets.[53]

Section 78(3) makes no mention of a consumer's assets and liabilities. There is no indication in the NCA that the consumer has a duty to sell all realisable assets to settle his debts.[54] Debt review is not an application for sequestration and the same principles that apply to sequestration cannot be applied in an application for debt review. However, if a consumer's good faith is placed into question the court may consider the consumer's intention to sell luxury or unnecessary items.

3 5 "The Court may"

In *Olivier*[55] the court held that the use in section 85 of the word "may" indicates that the court is not required or compelled to give an order in terms of section 85 but that it has a discretion to make an order. This discretion allows the court to look at the various aspects of the case before it determines whether or not to make an order in terms of section 85.

It is submitted that if the consumer alleges, or even proves, his over-indebtedness the court will still have to use its discretion in making a referral in terms of section 85(a) or giving an order in terms of section 85(b). In *Hales*[56] Gorven J noted that if the legislature intended to oblige the court to take the steps contemplated in section 85 on proof of over-indebtedness, it would have made it clear.[57] Instead, the allegation of over-indebtedness merely opens the door for the court to use its discretion. It is not a mandatory provision.

When a court is requested to exercise its discretion in favour of one of the parties, the court must give due consideration as to the order being sought and the circumstances that merit such an order. A court cannot base its decision on speculated circumstances or outcomes but rather on

52 2009 3 SA 363 (W) 369.
53 366.
54 S 127 provides that a consumer may surrender the goods under an instalment agreement and that the proceeds of the sale of the goods must be used as payment towards the consumer's outstanding balance on the agreement. S 127 does not compel the consumer to return the goods, but merely allows for the procedure to follow should a consumer wish to do so.
55 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 11–12.
56 *Standard Bank v Hales* 2009 3 SA 315 (D).
57 *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D)321.

the evidence placed before it. In *First National Bank of SA Ltd v Myburgh*[58] Moosa J held that the court's discretion should not be exercised on the basis of speculation, but on the basis of the facts before the court.[59]

For a court to declare a consumer over-indebted and to make an order in terms of section 87, the court must first be satisfied that the consumer is:

(a) over indebted as set out in section 79(1), and

(b) that the restructuring of the consumer's debt will relieve the consumer's over indebtedness without being unreasonable.

A court will not be able to make such an order if the consumer has not already been to a debt counsellor, who has assessed the consumer's over-indebtedness and designed a payment proposal setting out how all of the consumer's credit agreements will be settled.

If, at the time of an application for summary judgment, the consumer has not yet been to a debt counsellor it will be advisable for the court to make a section 85(a) referral to allow the debt counsellor to place detailed facts before the court, thus allowing the court to make an informed decision in using its discretion.

It is submitted that various factors should be considered before the court makes an order in terms of section 85. A court must be satisfied that the consumer who raised section 85 is doing so in good faith and not merely to delay the proceedings. It can be said that the court has to test the consumer's good faith in order to determine whether the court's discretion must be exercised in favour of the consumer.

3 5 1 FirstRand Bank Ltd v Olivier

In *Olivier* the plaintiff (credit provider) issued summons against the defendant (consumer) for payment of the outstanding amount on the consumer's mortgage agreement. At the time of judgment the consumer was living with his parents and renting out the property involved. In the application the consumer indicated that he had been making payments, although not always the full instalment. The consumer also set out a payment plan indicating that he would be able to pay the monthly instalment plus an additional monthly payment of R500.00 towards the arrears. The consumer was able to do so as his parents would be covering the majority of his living expenses.[60] The court refused the consumer's request and granted summary judgment in favour of the credit provider.

In his judgment, Erasmus J firstly considered the reason why the consumer did not respond to the section 129(1)(a) notice. He held that

58 2002 4 SA 176 (C).
59 *First National Bank of SA Ltd v Myburgh* 2002 4 SA 176 (C) 184.
60 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 10.

because the debt review process was fairly new at the time, the court would not consider the consumer's failure to approach a debt counsellor prior to the receipt of the section 129(1)(a) notice, although this consideration would influence the court's discretion in normal circumstances.[61]

Erasmus J noted that once a section 129(1)(a) notice was sent, that agreement will be excluded from the debt review process in terms of section 86(2). The consumer then has two options, either to refer the matter to a debt counsellor to try and resolve the dispute or to wait for the credit provider to enforce legal proceedings and then request the court to declare the consumer over-indebted in terms of section 85.[62]

In this case the consumer did not address the issue of the section 129(1)(a) notice and the court took this failure to mean that the consumer received the notice but failed to respond. Erasmus J held that once the 129(1)(a) notice was received the consumer should have attempted to resolve the dispute prior to approaching the court and that failure to do so placed the consumer in a negative light.[63]

In *Standard Bank v Panayiotts*, Masipa J held that section 86(2) will prevent an agreement with pending legal action from being included in the debt review process, but that the court may nonetheless decide to refer the matter to a debt counsellor. The court must therefore be persuaded to use its discretion in favour of the consumer and the consumer will have to satisfy the court as to the reason why he or she did not approach a debt counsellor prior to litigation. The court will also have to consider whether the consumer wilfully ignored the section 129(1)(a) notice.[64]

3 5 2 Standard Bank v Panayiotts

In *Panayiotts*[65] the plaintiff's (credit provider's) claim was for payment of the outstanding amount in terms of a mortgage agreement. The property involved was not the defendant's (consumer's) main residence. The property was kept for investment purposes and the consumer requested the court to make a referral in terms of section 85 to allow for "breathing room" in order to "catch up" his payments.[66]

Masipa J noted that as the property was not the consumer's residence he would not be greatly prejudiced should it be sold.[67] In the particular case the property was not maintained properly and thus the value of the

61 11–13.
62 13. See also *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA) par 11.
63 *FirstRand Bank Ltd v Olivier* 2008 JOL 22139 (SE) 14–15.
64 *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) 369.
65 *Standard Bank of South Africa Ltd v Panayiotts* 2009 3 SA 363 (W) 369.
66 371 & 375.
67 375.

property was depreciating. Masipa J held that the plaintiff could not be expected to sit by as its security was losing value:

> [I]n the present case the long-term plans and intentions of the defendant to improve the home and make a profit cannot be allowed to rob the plaintiff of what it is legally entitled to – a judgment in its favour when the defendant has clearly shown no defence.[68]

Masipa J held that if the credit provider is likely to be "greatly prejudiced" should the provisions of the NCA be implemented, the court must be hesitant to assist the consumer.[69] It is unclear when a credit provider would be "greatly prejudiced" and when the degree of prejudice will warrant a refusal to grant an order in favour of the consumer. It is submitted that a better approach would be to balance the respective interests of the parties. The NCA contains a number of provisions that limit a credit provider's common-law contractual rights.[70] In dealing with a section 85 application the court must determine the prejudice to the respective parties should the request be granted or refused. What must be kept in mind is that the NCA was enacted mainly for the protection of consumers.[71]

3 5 3 Standard Bank of SA Ltd v Hales

In *Standard Bank of SA Ltd v Hales*[72] the defendants (consumers) were summonsed for the outstanding balance on their mortgage agreement. The property concerned was the consumers' main residence. The consumer raised section 85 during an application for summary judgment and requested the court to make a referral to a debt counsellor in terms of section 85(a).[73] At the time the consumers had been in default on their home loan for more or less 14 months.[74]

Gorven J held that there are two factors that must be present in order for a court make a referral to a debt counsellor:

(a) the proceedings in court must be with regard to a credit agreement; and

(b) the consumer must allege that he is over-indebted.[75]

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68 *Ibid* 375.
69 *Ibid*.
70 Ss 89 & 90 provide a prohibition on the conclusion of certain agreements or the inclusion of certain provisions in a credit agreement. Ss 100–106 place limitations on interest, charges and fees that a credit provider may charge in a credit agreement. In terms of s 130 a credit provider must comply with certain procedural steps before commencing with legal action.
71 In *Absa Bank Ltd v Prochaska* 2009 2 SA 512 (D) 516 Naidu AJ held: "It is abundantly clear, in my view, that the Act has introduced innovative mechanisms and concepts directed more at the protection and in the interest of credit consumers than that of credit providers."
72 2009 3 SA 315 (D).
73 *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D) 317–318.
74 325.
75 319.

If these two factors are present it places a duty on the court to exercise its discretion.

Gorven J highlighted that section 3 of the NCA must be used as a backdrop against which all the provisions of the NCA should be interpreted. Thus, a court must apply its discretion in accordance with the purpose of the NCA. He held that the party that requests such a referral must place as much relevant material before the court as possible in order to persuade the court to use its discretion in his or her favour. The mere submission or even proof of over-indebtedness does not place a mandatory duty on the court to make an order in favour of the consumer and merely opens the door for the court to use its discretion.[76]

Gorven J provided a number of factors that a consumer must mention to enable the court to exercise its discretion in terms of section 85.[77] The consumer must indicate:

(a) how it came about that he defaulted under the agreement;

(b) whether his financial position has changed and what he has done to remedy or minimise the default;

(c) whether he was aware of debt counselling before he received the section 129(1)(a) notice, and if so, why he did not approach a debt counsellor before receiving the notice;

(d) whether he has approached the plaintiff (credit provider) with a proposal to reschedule his debt before summons was issued against him;

(e) how the other credit agreements, to which he is a party, arose and whether those agreements caused or increased the consumer's over-indebtedness; and

(f) how the debt will be repaid as well as the potential for success of the debt rescheduling.

In his judgment, Gorven J addressed the consumers' dismal financial position and held that it would be unlikely that the consumers would be able to settle their debts, and held that:

> it is difficult to see how a debt counsellor could make one of the remaining available recommendations in terms of section 86(7).[78]

The consumers' request for a referral was denied and summary judgment was granted against them.

In the particular case the consumers requested the court to make an order in terms of section 85(a), to defer judgment and provide them with an opportunity to consult with a debt counsellor. Once a debt counsellor had been able to assess the situation, the court would have been able to

76 312–313.
77 324–325.
78 325.

make a determination as to how the debt would be repaid and what the potential for success of the debt rescheduling will be.

It is submitted that Gorven J erred in his assessment of the consumers' potential to repay their debts. As was noted above, the NCA provides the debt counsellor with certain mechanisms to enable him to do a proper over-indebtedness assessment. As part of such assessment the debt counsellor not only considers the consumer's income and credit obligations but also assists the consumer in creating a feasible budget to ensure that unnecessary luxury expenses are eradicated.[79] Regulation 24(7)(c) states that a consumer's minimum living expenses are based upon a budget provided by the consumer and adjusted by the debt counsellor with regard to certain guidelines issued by the National Credit Regulator.

After a detailed assessment has been conducted, the debt counsellor is able to draft a repayment proposal for the consumer, often using specialised computer software. Although the NCA does not require a debt counsellor to send such a payment proposal to the credit provider prior to approaching the Magistrates' Court, in practice this is the most common procedure.[80] The credit provider can then either accept or reject the proposal or, in certain circumstances, send a counter proposal. In this negotiation procedure the credit provider often reduces the interest rates, sometimes to as little as to 0%. Thus, in certain cases, although it may seem hopeless on the face thereof, a suitable repayment plan is created for the consumer enabling him to settle his debts. A court should thus be careful not to draw certain conclusions from the outset.

The court need not be left without discretion, but should ensure that its discretion is not based upon speculative conclusions.

3 5 4 The Right to Housing – Section 26 of the Constitution[81]

Section 26 of the Constitution provides that everyone has the right to have access to adequate housing. When a property, which is the consumer's main residence, is sold in execution it may have an impact on the consumer's access to adequate housing. When a consumer alleges that the granting of the sale in execution will infringe on his right to housing, the consumer must indicate how it will infringe upon this right. A mere allegation of infringement is not sufficient.[82]

79 Haupt *et al* "Debt Counselling Principles and Guidelines" (2008) www.ncr.org.za/ 27–30 (accessed 2011-09-15).

80 Roestoff *et al* 2009 *PER* 272.

81 Constitution of the Republic of South Africa, 1996.

82 See *Standard Bank v Hales* 2009 3 SA 315 (D) 326 in which the court held that the defendants, who raised the possible infringement of their right to adequate housing, failed to indicate how an order of execution will infringe upon this right.

Taking execution against residential property to service debt was dealt with by the Constitutional Court in *Jaftha v Schoeman.*[83] This case involved the attachment of a debtor's residential home for the payment of a fairly small debt. Mokgoro J extensively discussed the interplay between the right to housing and the sale in execution of a residential home. Although this judgment was granted prior to the NCA, certain principles laid down in *Jaftha* are still worth mentioning.[84]

Mokgoro J noted that the legitimacy of a sale in execution must be seen as a balancing process.[85] She held:

> It should not be that the execution is either granted or the creditor does not recover the money owed. Every effort should be made to find creative alternatives which allow for debt recovery but which use execution only as a last resort.[86]

Mokgoro J provided a number of factors that a court might consider before granting a sale in execution:[87]

(a) The amount or size of the debt.

(b) The circumstances in which the debt arose.

(c) The availability of alternatives for the recovery of the debt.

(d) Any attempts made by the debtor to pay off the debt.

(e) The debtor's financial circumstances.

(f) Whether the debtor has a source of income.

(g) Any other relevant factors that may present themselves in the particular case.[88]

It is submitted that the NCA makes such an alternative to sale and execution available through the debt review process. A court should thoroughly consider these alternatives, together with the other factors, before granting an order whereby a consumer's residential home becomes executable.

It is submitted that, in exercising its discretion in a section 85 request, the court should place emphasis on the *bona fides* of the consumer. If a consumer has satisfied the court that the request is not a mere delaying tactic, the court should give the consumer the opportunity to access this remedy.

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83 2005 2 SA 140 (CC). The facts in *Jafta* relate to the sale in execution of a residential home for the payment of an unsecured debt. Mokgoro J noted (par 58) that the circumstances in which the debt was incurred must be taken into consideration and that if the property involved was for the security of a debt that would ordinarily warrant a sale in execution.

84 In *FirstRand Bank Ltd v Maleke* 2010 1 SA 143 (GSJ) 157 Claassen J noted that s 85(a) constitutes an "other alternative" as referred to by Mokgoro J in *Jaftha supra.*

85 *Jafta v Schoeman* 2005 2 SA 140 (CC)158 & 162.

86 162.

87 Ibid.

88 163.

In determining the consumer's good faith, it is submitted that the court can, *inter alia;* consider:

(a) The consumer's financial position before and after default has occurred and what steps the consumer took in order to remedy the default.

(b) The reason for the consumer's default.

(c) Whether the consumer currently has a source of income.

(d) The consumer's payment history for the account concerned as well as other credit agreements to which he is a party.

(e) The consumer's attempt to negotiate with the credit provider before summons was issued as well as after.

(f) The consumer's response to the section 129(1)(a) notice, and whether it was indeed received by the consumer.

The factors to be considered by the court will also depend on whether the court is requested to make a section 85(a) referral to a debt counsellor, or to make an order in terms of section 85(b), declaring the consumer over-indebted and restructuring the consumer's debt obligations.

3 6 The Application of Section 85(a)

Section 85(a) grants the court the power to delay final judgment and request a debt counsellor to first assess the consumer's financial circumstances and present the court with a recommendation for consideration.[89] In a referral in terms of section 85(a) the court would ideally only postpone the matter to a later date to afford the debt counsellor the opportunity to do a proper over-indebtedness assessment[90] and to make a proper recommendation to the court.[91]

The court may then consider the recommendation. If the consumer is not over-indebted the court may proceed in granting summary judgment against the consumer. If the consumer is over-indebted and a proposal has been provided by the debt counsellor, the court may either make an order to restructure the consumer's obligations in terms of section 86(7)(c) or reject the proposal and proceed to grant summary judgment against the consumer.

After the debt counsellor has made a recommendation to the court, the court is able to determine the consumer's ability to settle his debts and may then make an informed judgment.

The wording of section 85(a) does not indicate whether a full formal debt review procedure, in terms of section 86 read with regulation 24, must be followed. Section 85(a) seems to bypass the formal debt review procedures and proceeds to the final stages of the process where the debt

89 In *Standard Bank of SA v Hales* 2009 3 SA 315 (D) 320 the court held that recourse to s 85(a) is a dilatory plea as the debt counsellor is requested to make a recommendation to the court.

90 Reg 24.

91 S 86(7).

counsellor makes a recommendation to the court. As indicated above, there are a series of steps that the debt counsellor has to take in order to be able to make a recommendation. Thus, although a formal debt review process in terms of section 86 might not be required, the debt counsellor must be given sufficient time to finalise the recommendation.

If, after the referral, the consumer should apply to a debt counsellor in the prescribed manner and form to be declared over-indebted,[92] the agreement, which was subject to summary judgment, might be excluded from the debt review in terms of section 86(2). In making a recommendation to the court, the debt counsellor should include the consumer's over-indebtedness assessment, indicating all the consumer's debt obligations, as well as a proposal on how these debt obligations are to be repaid.

Should the court then grant summary judgment against the consumer, the debt counsellor will have to proceed with the debt review process and make a recommendation to the Magistrate's Court in terms of section 86(7)(c), in which the judgment debt is excluded. However, if the court should grant the section 86(7) order in favour of the consumer and restructure the consumer's debt obligations, the process will be completed and the debt counsellor will not need to approach the Magistrate's Court.

In *Panayiotts*,[93] Masipa J held that the consumer failed to indicate to the court what payments would be made towards the credit provider.[94] At the time of summary judgment, the consumer did not have an opportunity to approach a debt counsellor with the specific agreement. Had the court awarded a section 85(a) referral it is submitted that the consumer would have been able to make such a submission to the court.

In *Hales*,[95] Gorven J noted that the consumer has to place a proposal before the court as to how the debt is to be paid, as well as the potential for success under debt review.[96] In this case the consumers requested the court to make a referral in terms of section 85(a). It is submitted that if the court requires the consumer, at time of summary judgment, to place a full recommendation before it, section 85(a) would be of little use. The court should utilise section 85(a) to obtain more comprehensive information regarding the consumer's financial position and then determine whether such a recommendation is feasible.

Section 85(a) states that a debt counsellor must make a recommendation to the "Court". In *Panayiotts*,[97] Masipa J held that "Court" referred to here, is not limited to the Magistrate's Court as it

92 S 86(1).
93 *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W).
94 374.
95 *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D).
96 324.
97 2009 3 SA 363 (W).

placed no limitation on "Court". It accordingly stated that if the High Court refers the matter to a debt counsellor, the recommendation must also be made to the High Court. The court will then, once it has received the recommendation, make an order in terms of section 86(7)(c).

It is submitted that should the case be postponed in a section 85(a) referral, the infringement on the credit provider's contractual right is fairly marginal compared to the possible infringement on the consumer's right to housing. Referring the matter to a debt counsellor does not deny the credit provider his contractual right to payment but only limits the contractual remedy of cancellation.

When determining whether to make a referral to a debt counsellor in terms of section 85(a), the court must avoid considering the prospects of success of the outcome thereof. The court should rather concentrate on the consumer's good faith in making such a request to the court.

In making the referral the court is not required to declare the consumer over-indebted, and thus it is submitted, that in such a case the consumer need not prove over-indebtedness. Only upon the return of the debt counsellor's recommendation will the court have to determine whether the consumer is indeed over-indebted. Section 86(7)(c) states that if the consumer is over-indebted, the debt counsellor can bring a recommendation to the court. At that stage the debt counsellor would have verified the consumer's income and debt obligations (including their respective interest rates, monthly instalments and outstanding balances), and have adjusted the consumer's living expenses to eliminate non-essentials. A far better view of the consumer's financial position would then be revealed.[98]

3 7 Application of Section 85(b)

Unlike section 85(a), section 85(b) allows the court to declare the consumer over-indebted and make an order in terms of section 87 to alleviate the consumer's over-indebtedness. In such a case the consumer will have to prove his over-indebtedness and place before the court a recommendation as to how his debts will be settled. It is likely that such an order will only be possible in a case where a debt counsellor has already had an opportunity to assess the consumer's financial position and is able to set the facts before the court.

If the court decides to make an order in terms of section 85(b) it would in all likelihood also deny the credit provider's application for summary judgment. However, it may be possible for the court to grant summary judgment in favour of the credit provider and make an order in terms of section 87 against the consumer's remaining debt obligations. Evidently

98 As mentioned in par 3 2 above, a s 129(1)(a) notice will exclude an agreement from debt review in terms of s 86(2). If the parties fail to come to a suitable arrangement in terms of s 129(1)(a), s 85(a) will be the only available method of restructuring the agreement in terms of s 86.

the court may also deny the consumer's request entirely and grant summary judgment in favour of the credit provider.

It is submitted that section 85(b) could be raised in proceedings where the credit provider has terminated a consumer's debt review in terms of section 86(10) and proceeded to enforce the agreement. Section 85(b) can be raised as an alternative to or in conjunction with section 86(11). Section 86(11) provides that if a credit agreement has been terminated in terms of section 86(10) and the credit provider has proceeded to enforce the agreement, the Magistrate's Court hearing the matter may make an order that the debt review be resumed.

In theses circumstances section 85(b) provides a more comprehensive order as it allows the court to make a final order for the restructuring of the consumer's debt. Section 86(11) only allows the court to order that the debt review resumes, after which the debt counsellor will have to bring an application to the Magistrate's Court for restructuring the consumer's debt obligations in terms of section 86(7)(c).

4 Concluding Remarks

The NCA has indeed brought with it a new wave of consumer protection. Its predecessor paid no attention to debt alleviation or over-indebtedness and as a result credit providers were left with very few obstacles in enforcing their credit agreements. The legislature saw a need for debt alleviation and introduced debt counselling as a solution to the over-indebtedness problem.

When faced with applying the provisions of the NCA, one must always do so with the purpose of the NCA as the backdrop. Section 85 is a provision that allows the courts to grant a deserving consumer the opportunity to settle their debts and get back on their feet. Section 85 does not pertain to the regulation of the credit industry, but to the protection of consumers. The debt alleviation mechanisms made available by the NCA must be used to achieve their purpose.

Section 85 has very wide application, and as a result places a great responsibility on the court to excise its discretion wisely. The section was not enacted to be used as a delaying tactic for consumers that are evading their debt obligations, but rather for those consumers who have been able to satisfy the court that they are acting in good faith.

The court must ensure that, in applying their discretion, they are not biased, unreasonable or over-cautious. Each case must be assessed on it merits and, as far as possible and reasonable, be decided in favour of the consumer.

Tax characteristics of an ideal holding company location*

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OPSOMMING

Belastingeienskappe van 'n ideale ligging vir 'n houermaatskappy

Die Suid-Afrikaanse regering het in 2008 aangekondig dat hulle van voorneme is om Suid-Afrika te bevorder as 'n gepaste maatskappyjurisdiksie vir beleggings in Afrika in die algemeen en sub-Sahara Afrika in die besonder. Ten einde hierdie doel te bereik behoort die regulatoriese-, ekonomiese- en juridiese-raamwerke geskik te wees vir internasionale belegging. Een van die ekonomiese en juridiese aspekte wat tans hersien word, is die belastingstelsel. Die belastingstelsel mag sommige eienskappe bevat wat nadelig is vir internasionale houermaatskappye en ander wat bevorderlik is vir sulke maatskappye. Hierdie artikel ontleed die belastingeienskappe van 'n ideale houermaatskappybedeling en beklemtoon die spesifieke elemente tot die mate wat dit houermaatskappye beïnvloed en wat sal verseker dat Suid Afrika 'n ideale ligging vir houermaatskappye word. Hierdie is hoofsaaklik 'n gunstige kapitaalwinsbelastingbedeling, lae inkomstebelasting, geen of lae belasting op dividende, eensydige vermyding van dubbelbelasting, 'n gunstige belastingverdrag netwerk, die afwesigheid van beheerde buitelandse maatskappy wetgewing en 'n liberale dun kapitalisasie- en oordragprys bedeling. Sekere belasting eienskappe soos 'n eensydige vermyding van dubbelbelasting in die vorm van 'n korting vir buitelandse belasting betaal, deelnemende vrystelling en 'n oorvloed van dubbelbelasting verdrae trek beleggings suksesvol aan in die vorm van houermaatskappye na 'n land met sulke eienskappe. In teenstelling hiermee het eienskappe soos buitelandse beheerde maatskappy wetgewing en streng oordragprys bepalings en streng dun kapitalisasie bepalings die teenoorgestelde uitwerking. Selfs in gevalle waar die bepalings nie op houermaatskappye van toepassing is nie mag die blote teenwoordigheid van bogenoemde bepalings steeds buitelandse beleggers afskrik.

1 Introduction

Recent years have witnessed a heightened appetite by numerous countries to attract investment to, and through, their shores in the form of holding companies. At the forefront of this development are countries such as Belgium, Denmark, Luxembourg, Mauritius, the Netherlands, Singapore and the United Kingdom. With the announcement in the 2010 Budget review, South Africa has recently joined this fray.[1]

* This article is an adapted version of part of the research done and submitted by the author in part fulfillment of the requirements for the degree LLD at the University of Pretoria.

1 National Treasury *Budget Review* (2010) 78–79.

The South African National Treasury announced that it intends to create a business orientated environment that will promote South Africa as a gateway to investment into Africa.[2] In pursuance of this goal, the National Treasury is reviewing the South African corporate and business framework as well as exchange control and corporate tax laws, to determine if the corporate, business, legal and tax environment could stifle the ability of South Africa to serve as a base through which investors could access investment opportunities in Africa.[3]

2 Background

Holding company investment takes various forms depending on the particular needs of the investor.[4] For example, a holding company can be created in a group as an international holding company to control the companies in the group; as an intellectual property holding company to hold and manage intellectual property rights; as a international headquarter company where multinational groups of companies have significant economic interests in a region which is distant from its head office to oversee and co-ordinate the group's business interests in a particular region; or as an intermediary holding company to acquire, manage and sell investments in group companies, mainly its subsidiaries and in general to provide transactional and organisational flexibility in a group of companies.[5]

As a general matter these holding companies are interposed between the ultimate shareholder company and operating companies. They are thus holding companies and subsidiaries at the same time. They are also set up in the jurisdiction other than that of the ultimate investor.

Once an investor has determined that the business structure of his or her investments require the establishment of a holding company of any form, the investor engages in identifying a jurisdiction with the infrastructure that would optimally enable the attainment of such objectives. Infrastructure presents itself in these characteristics, both tax and non-tax, of the particular jurisdiction.[6]

The tax regime that applies in a specific location is generally an important factor for determining the efficiency of a holding company and usually plays a role as far as a decision on the jurisdiction where the holding company should be established is concerned. However, non-tax

2 National Treasury *Budget Review* 78–79.
3 See National Treasury *Budget Review* 78–79. See also Lermer "2010 Budget Attracts SA Based Headquarter Companies" *Moneyweb* available at http://www.moneyweb.co.za/mw/view/mw/en/page302588?oid=347864&sn=2009%20Detail (accessed 2010-04-01).
4 Legwaila "Intermediary Holding Companies and Group Taxation" 2010 *De Jure* 308 313–314.
5 See Legwaila 2010 *De Jure* 308 313–315.
6 See Easson *Tax Incentives for Foreign Direct Investment* (2004) 17.

factors cannot be undermined as they are key to the success of the investment that is undertaken.

This article outlines the characteristics of an ideal location for the conducting of holding company functions. The article does not deal specifically with any of the variations of the holding companies, but rather it analyses the common characteristics that need to be demonstrated by the potential holding company jurisdiction. This article mainly focuses on the tax characteristics. However, at the outset it briefly canvasses non-tax characteristics that are required of an aspiring potential jurisdiction.

This article analyses the tax characteristics of an ideal holding company regime and the analysis is not limited to the characteristics that would suit any specific form of a holding company. Most forms of holding companies would require and benefit from the same tax attributes as those in an ideal tax jurisdiction. While this article is occasioned by the introduction by the South African government of the headquarter company regime, focusing on characteristics suitable for holding companies in general, makes this article of great use to a wide range of circumstances where specific holding companies are set up. This article also observes the specific aspects of South African tax laws that would ensure that South Africa becomes an ideal holding company location.

3 Non-Tax Characteristics of a Holding Company Jurisdiction

A holding company requires infrastructure that is conducive to the performance of its operations and the achievement of its goals. Factors that affect the choice of location, in other words locational determinants, will differ from one holding company to another, depending on the objectives of the investment. The more important non-tax factors include: economic and political stability; adequate physical, business, accounting and legal infrastructure; the absence (or limited presence) of bureaucratic obstacles; adequate communication channels; the ability to repatriate profits freely; an effective banking system; and the availability of an adequate dispute resolution mechanism.[7]

The social, economic and political stability and risk within different countries are major considerations in the decision-making especially where the need for the raising of finance is important.[8] A factor that supplements the social, economic and political stability is the

7 See Udal & Cinnamon "How to select a Jurisdiction for Your Holding Company" 2004 *International Tax Review* 18 available at http://proquest.umi.com/pqdweb?did = 789908371&Fmt = 3&clientId = 27625&RQT = 309&VName = PQD (accessed 2010-05-19).

8 Olivier & Honiball *International Tax – A South African Perspective* (2008) 304.

functionality of the country's legal system and rule of law. Thus, not only should the legal system be suitable for transacting but it should also be possible for legal subjects to enforce their legal rights. Alternative dispute resolution as a legal process is normally an expedient and cheap alternative to the often lengthy legal processes. Where available, it too should be reliable.[9]

The country's government should also respect the rule of law and ideally have an enshrined constitution that protects the rights of the country's subjects. As Olivier and Honiball[10] observe:

> … a combination of operational business activities with an intermediary holding company in a single legal structure could expose an operational company's assets and investments to commercial risks. Stable laws and ease of compliance could assist in offsetting such risks.

The commercial language of the host country is also important. It is important that the language used is the same as the language of the investor (or at least a common language such as English or French). The importance of this factor is illustrated by the loss of popularity of the Danish holding company structure due to the requirement that compliance and reporting documentation had to be in Danish.[11] Linked to the prevailing commercial language, are reliable communication channels such as telecommunication, fax and email, without which the performance of various roles would be impaired.[12]

As holding companies mainly deal with control and management (including investment management) and the discharging of such services requires a few highly skilled people in the areas of law, financing and financing structures, economics, accounting and auditing, most holding companies do not necessarily require large numbers of employees to be stationed in the host country.

4 Tax Characteristics of a Holding Company Jurisdiction

An ideal or beneficial holding company jurisdiction depends on the specific characteristics of that jurisdiction. The degree of flexibility required by a multinational group of companies is also paramount when

9 See further on the factors that make a jurisdiction suitable for investment Cinnamon "Tasty Regimes Tempt Holding Companies" 1999 *International Tax Review* 9 9–11.

10 Olivier & Honiball 305. See also Rohatgi *Basic International Taxation* (2002) 239; Udal & Cinnamon 18.

11 Olivier & Honiball 305.

12 See Cussons & Bojkovic "Where do I hold my company?" 1998 *Accountancy* 123 124–125.

juxtaposed with such a jurisdiction. The critical characteristics that must be met by a potential jurisdiction are discussed below.[13]

4 1 A Favourable Capital Gains Tax Regime

Capital gains tax subjects gains realised on the disposal of capital assets to tax. Given that holding companies hold the shares of the companies within the group, it is very important for the potential holding company jurisdiction to have a tax system that is lenient in respect of the taxation of capital gains. The burdensomeness or otherwise of a tax system on capital depends not only on the rate of tax charged on capital. To a very large extent it depends on the rules for determining the acquisition price of assets, realisation and recognition rules and rules for determining gain or loss on disposal.[14]

The contours of the concept of capital gains and losses vary considerably from country to country. This concept also plays a different role in different systems. Generally it refers to a non-recurring gain which is not part of the normal stream of income involved in a business or investment.[15]

4 1 1 Determining the Acquisition Price

Acquisition price[16] is generally the consideration given for, and ancillary to, the creation or acquisition of an asset.[17] Most jurisdictions follow this pattern, thus resulting in the definitions or classifications of base cost being manifold. Acquisition costs could extend to the costs of insuring the asset, cost of remuneration of advisors or consultants involved in the acquisition of the asset, costs of moving the asset, cost of any improvement or enhancement of the asset during the acquisition, etcetera. The broader the coverage of expenditure included in the definition of base cost, the more favourable the taxation of capital.

4 1 2 Timing and Event for Realisation of Gain or Loss

The second important aspect is the event giving rise to the realisation of gain or loss. Capital gains, unlike revenue gains, are generally not realised on accrual or receipt but on the disposal of the asset or the cessation of ownership of the asset.[18] "In its ordinary meaning, disposal

13 See further on a summary of the essential characteristics, *Netherlands: Dutch Holding Companies*, on http://www.lowtax.net/lowtax/html/offon/netherlands/nethold.html (accessed 2010-05-21).

14 See Burns and Krever "Taxation of Income from Business and Investment" in *Tax Law Design and Drafting* (ed Thuronyi) (1998) 646.

15 Ault & Arnold *Comparative Income Taxation: A Structural Analysis* (1997) 194.

16 Acquisition price is also referred to as "base cost", "basis", "cost price", "book value" or "cost base".

17 See par 20 Sch 8 Income Tax Act 58 of 1962. See also Burns & Krever *Tax Law Design and Drafting* 648.

18 Whiteman *et al Whiteman on Capital Gains Tax* (1980) 23.

covers all situations in which the ownership of the asset changes."[19] Not only does it cover voluntary alienation of assets. It also covers, ordinarily or per deeming provisions, redemption, forfeiture, expiry, cancellation, renunciation, surrender, loss, destruction and abandonment.[20]

Some systems provide for the disposal rules when the assets or shareholders of a company exit the tax system. Others provide also for a disposal when the residence of a company is changed.[21] These are major considerations for a holding company, as some or all of its assets may be itinerant. If the disposal events are vast, numerous and broad, the chances of business actions being taxable increase and this presents a disadvantage to the jurisdiction being considered for the location of a holding company regime.

4 1 3 Amount Included in Calculation of Taxable Capital Gains

The amount that is included in the calculation of taxable capital gains is the proceeds of the disposal less the base cost. This includes the market value of any asset given (or given in part) in return for the asset. Where the asset is disposed of for no consideration or a consideration that is less than the base cost, the seller would be in a capital loss situation.[22]

These losses can beset off against all income or only against capital gains. It benefits the investors more where the losses are not ring-fenced as they can be set off immediately against the income as opposed to being deferred until the next capital gains event in which a gain is realised. The problem is exacerbated by the fact that most countries do not adjust tax losses for inflation, therefore eroding their value through the passing of time.

4 1 4 Disposals Between Connected Persons

Connected persons[23] may choose to transfer assets *inter partes* to achieve various objectives, including minimising the recognition of gain to defer taxes, inflating gains to absorb losses that were carried forward, value shifting to transfer gains to a lower bracket or exempt taxpayer,

19 Burns & Krever 647; see also Boidman & Ducharme *Taxation in Canada, Implications for Foreign Investment* (1985).
20 See Burns & Krever 647.
21 Burns & Krever 647.
22 Whiteman *Whiteman on Capital Gains Tax* (1988) 27.
23 Connected person is a defined term in the South African tax legislation (see the definition of "connected person" in s 1 Income Tax Act 58 of 1962). In other jurisdictions, reference is made to "related party" and "associated person". The definition differs from country to country and from situation to situation, mainly depending on the purpose of the definition and the context in which it is used. Generally, such definitions include blood relatives, lineal descendants and ancestors, members of the same partnership, and a company, its controlling shareholders and other companies in the same group of companies. See International Bureau of Fiscal Documentation (IBFD) *International Tax Glossary* (2005) definition of "connected person".

etc.[24] Non-arms-length transactions are mostly subject to deeming provisions. The person disposing of the asset is deemed to have received a consideration equal to the market value of the asset at the time of the disposal. At the same time, the amount is treated as the base cost of the asset for the person acquiring the asset.[25] As holding companies are generally members of a group of companies, tax-free intra-group transfers are essential for the carrying out of the functions of the holding company.

4 1 5 Roll-Over Provisions

Roll-over provisions are rules that regulate the non-recognition of the disposal of an asset in the year that the asset was disposed of.[26] This applies both to actual and deemed disposals. The tax system treats the disposal of the asset as if it was disposed of at cost or base cost and the acquirer to have acquired it for a consideration equal to the original cost.[27]

Three main situations where roll-over provisions are relevant for holding companies are where–

(1) the tax status of an asset changes, for example where an asset acquired as a business asset or an item of inventory is subsequently held as an investment asset or *vice versa*.[28]

(2) an asset is disposed of with an intention to trigger a loss to countenance the gain made in respect of other assets that are disposed of, the tax systems often deny the loss recognition and impose a roll-over treatment.[29]

(3) an asset is disposed of involuntarily and a replacement asset is acquired, non-recognition rules apply.[30]

As the saying goes, "tax deferred is tax saved", so investors are likely to be attracted to countries where there is an abundance of roll-over provisions.

4 1 6 Capital Gains Tax Rate

Generally, capital gains are given preferential treatment in tax.[31] The rates are normally lower than the rates of income tax. Capital tax rates are usually the first issue addressed when the suitability of a jurisdiction to host a holding company is being considered. In effect the rate should not be that important because the effective rate is decisively affected by

24 Burns & Krever 651.
25 *Idem*.
26 See *IBFD International Tax Glossary* definition of "roll-over relief". See also http://www.ftomasek.com/RickKreverDraft.html (accessed 2010-04-28).
27 Burns & Krever 652.
28 *Idem*.
29 *Ibid* 653–654.
30 *Ibid* 654.
31 See Whiteman 27.

the rules outlined above. In addition to the aforesaid, they can, as is the case in South Africa, be further determined by usage of an inclusion rate.[32] This method includes a certain percentage of the gain in the normal taxable income of the taxpayer and the amount is taxed at the normal tax rate applicable to that taxpayer.[33]

4 1 7 South African Capital Gains Tax

For South African purposes capital gains tax is levied at the disposal of a capital asset.[34] Disposal is widely defined, and broadly covers transfers which result in change of ownership of an asset.[35] Certain events are deemed to be disposals where they would otherwise not be disposals due to the change of ownership not being readily determinable.[36] For companies capital gains are taxed at 50% of the corporate income tax rate, i.e. 14%.[37] This is a low rate as opposed to countries which tax capital gains at the same rate as normal income such as the Netherlands,[38] United Kingdom[39] and United States of America.[40] As a result the South African capital gains tax provisions do not adversely affect South Africa's suitability to host holding companies.

4 2 Low Income Taxes

Income tax is the most important source of direct taxation for almost all countries. It is also referred to as normal tax and generally caters for all income, other than that specifically provided for, like donations tax, estate duty and capital gains tax. As a result, a discussion on income tax in this context cannot be about the lack thereof, as that would be superficial. It is limited to the rate of tax and the chances of reducing the effective tax payable.

Some countries levy income tax on their residents and others on the income earned from a source within that country. Generally, the residence-based systems enjoy a broader tax base than the source-based ones.[41] Therefore, most countries change their systems in favour of the residence basis. This move is not very favourable for holding companies, as the holding company could be taxed on its capital gains made from countries other than its country of residence in which its subsidiaries are

32 In terms of par 10 Sch 8 Income Tax Act 58 of 1962.
33 *Idem*.
34 See s 26A read with par 3 Sch 8 Income Tax Act 58 of 1962.
35 See definition of "disposal" in par 1 Sch 8 read with par 11 Sch 8 Income Tax Act 58 of 1962.
36 See par 12 Sch 8 Income Tax Act 58 of 1962.
37 See par 10 Sch 8 Income Tax Act 58 of 1962.
38 Lambooij & Peelen "The Netherlands Holding Company – Past and Present" 2006 *Bulletin for International Taxation* 335 par 4.1; Ernst & Young *The 2011 Worldwide Corporate Tax Guide* (2011) 769.
39 Ernst & Young 1178–1179.
40 Ernst & Young 1227.
41 Organisation for Economic Co-operation and Development *Taxation and Electronic Commerce: Implementing the Ottawa Taxation Framework* (2001) 144.

located. However, a double tax treaty between the host country and the country of the subsidiaries may significantly influence the countries' right to tax.[42]

The effective income tax rate can be reduced by exemptions, deductions and allowances. It can also be reduced by tax incentives that a country may use to attract investors. Such incentives can be general, such as tax holidays, investment allowances, tax credits, timing differences, tax rate reductions or incentives based on administrative discretion.[43]

4 2 1 South African Corporate Income Tax Rate

The South African corporate tax rate is 28%. This tax rate is low compared to the United States at 35%,[44] Australia at 30%,[45] equal to the United Kingdom[46] and higher than other countries such as China at 25%[47] and Brazil at 15%.[48] Based on the varying tax rates both on the high and low side of the South African corporate tax rate, it is submitted that the 28% corporate tax rate is a neutral item for purposes of attracting foreign investment in the form of holding companies.

4 3 No or Low Tax on Dividends

The measure of a company's success is the amount of dividends that that company distributes to its shareholders alongside the appreciation of the value of the company (in the form of retained earnings that translate into the increase in the value of the shares). Each company's ultimate objective is to make enough profit and to pass on that profit to its shareholders as a dividend, unless such amounts are reinvested in the company.[49] The company, at best, would like the value of its undistributed profits to translate into the amount of dividends received by its shareholders without, or with the least, liability for tax. A low tax on dividends is an overarching statement that encapsulates both a numerically low amount of tax payable thereon or it can refer to a thin dividend tax base.[50]

42 See the discussion in paragraph 4.5 below.
43 Incentives can also be special-purpose based such as those dedicated to famine relief, infrastructure development, employment creation, technology transfer and export promotion.
44 Ernst & Young 1225.
45 *Ibid* 50.
46 *Ibid* 1177.
47 *Ibid* 197.
48 *Ibid* 133.
49 Baker *Dividend and Dividend Policy* (2009) 3;
50 Schreiber & Stroik *All About Dividend Investing: The Easy Way To Get Started* (2005) 5–12.

4 3 1 Numerically Low Amount of Tax on Dividends

This favourable type of low tax on dividends, which again can be represented by either a low percentage[51] or a numerical division of a unit of currency,[52] is frequently used to apply to dividends generally or specific forms of dividends, e.g. where a participation preference is granted. It also gives the impression that tax jurisdictions have attractive tax regimes, as the low percentage is at the forefront of the information on taxation of dividends.[53]

4 3 2 Thin Dividend Tax Base

The effective dividend tax rate can be low, though not represented by the tax rate applicable thereto, but by the amounts that are included in the base of dividends. This may be by way of restrictive dividend definition, fewer or no inclusions in the definition of dividends, exceptions, exemptions etcetera. Some jurisdictions have broader dividend tax bases covering most distributions by companies while others have considerably limited bases. The South African secondary tax on companies system[54] on the one hand and the Canadian dividend tax system,[55] on the other, represent such extremes.

4 3 4 No or Low Withholding Tax on Dividends

As with the low tax on dividends, a determination of a withholding tax is mainly informed by the nature of amounts that constitute a dividend and the numerical rate attached to that withholding. A withholding tax is normally not an underlying tax. The terminology hinges on a two-step construction in terms of which the dividend tax is determined and a withholding obligation is imposed on the company declaring the dividend to a non-resident to withhold that amount of the tax.[56] Therefore, a withholding tax is an administrative intervention. It is common on dividends declared to non-residents, as the tax authorities would otherwise not have the legal power or jurisdiction to collect the tax payable on dividends.[57]

The amount withheld is determined by national legislation but often reduced by treaties.[58] As a result the investor would prefer a jurisdiction where there is either low or no withholding tax – or, where there is a high rate of withholding, it is in a country that has a good treaty network which includes treaty relief against the withholding. Alternatively, the

51 For example 2 %.
52 For example 2 cents in each Rand.
53 Further on the need for impression of the country's ability to host holding companies see Legwaila "Taxation of Holding Companies in South Africa" 2011 *SA Merc LJ* 1.
54 See ss 64B–64R Income Tax Act 58 of 1962.
55 *Canadian Master Tax Guide* (2008) par 6030; Ernst & Young 169.
56 See IBFD *International Tax Glossary* definition of "withholding tax".
57 *Idem*.
58 See Olivier & Honiball 359–361.

group's income distribution track could require only a treaty between the host country and the ultimate holding company's country that relieves the declaration of a dividend out of the holding company from taxation.[59]

4 3 5 South African Taxation of Dividends

Currently, South Africa taxes companies on declaration of dividends. The tax, referred to as secondary tax on companies ("STC"), is levied on the company declaring dividends and is calculated with reference to the amount of dividends declared.[60] The STC rate is 10%.[61] With effect from 2012, the STC will be replaced by a dividends tax system in terms of which the tax will be on the shareholder receiving the dividend. The rate will remain unchanged at 10%.[62] The dividends tax rate of 10% is good for holding companies as compared to higher rates of dividends tax in other countries such as the United States at 30%[63] and the Netherlands at 15%.[64] Furthermore qualifying dividends declared by South African headquarter companies are exempt from South African tax on dividends.[65] This implies that holding companies that qualify as headquarter companies will benefit from this exemption.

4 5 A Favourable Tax Treaty Network

A favourable network of tax treaties which limit withholding taxes in general levied on payments by and to other investment countries is one of the features that make a country suitable to host a holding company.[66]

Treaties have the advantage of promoting international trade and investment by preventing double taxation through assignment of taxing rights via tax exemption or credits and through agreements on maximum withholding tax and thus reducing the overall tax burden.[67] Loncarevic[68] states that:

> [o]n the other hand restrictions on tax avoidance and tax evasion, anti-treaty shopping rules, as well as exchange of information between tax administrators may have negative effects on international movement of

59 *Idem*.
60 The tax is levied in terms of s 64B Income Tax Act 58 of 1962.
61 S 64B(2) Income Tax Act 58 of 1962.
62 The tax is levied in terms of s 64B–64R Income Tax Act 58 of 1962.
63 See Ernst & Young 1225.
64 *Ibid* 767.
65 See s 10(10(k)(ii) Income Tax Act 58 of 1962.
66 See Udal & Cinnamon 21.
67 Loncarevic *Tax Treaty Policy and Development* (2005) 19. See Vogel *Klaus Vogel on Double Taxation Conventions* (1997) 1130. See also Ault & Arnold 385–403.
68 Loncarevic 20.

goods, services, persons and capital since these measures reduce possibilities of taxpayers to avoid taxes through transfer pricing,[69] treaty shopping,[70] etc.

It is not only the number of the treaties that is important. Perhaps even more important is the content of the treaty. As Vanhaute[71] states:

> In deciding on a suitable jurisdiction for the location of a holding company, the availability of a treaty network, and moreover the scope of such network and its specific features are, of course, as important as in any other international tax planning scheme. In this respect, the relevant factors to be considered are:
>
> - the scope of the tax treaty network (number of treaties, with which countries, etc.);
> - the attractiveness of these treaties in terms of accessibility, and the average level of withholding tax on interest, dividend and royalty income which may accrue to the holding; and
> - the impact of certain limitation of benefits (LOB) clauses.[72]

Investors looking to invest could limit their exposure to dividend withholding tax and capital gains tax by placing a holding company in a jurisdiction which has a double tax arrangement that limits dividend withholding tax and tax on capital gains.[73] While the prevention of double taxation is the main purpose of double tax agreements, they are also not intended to facilitate tax avoidance and evasion.[74]

Double tax agreements avoid double taxation by using the exemption or credits methods as well as by awarding some taxing rights exclusively to one country. The methods vary according to the negotiations between the countries. The Organisaton for Economic Co-operation and

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69 Transfer pricing is an area of law and economics that is concerned with ensuring that prices charged between associated enterprises for the transfer of goods and services are not used to avoid tax by shifting profits to a low tax jurisdiction. See IBFD *International Tax Glossary* definition of "transfer pricing". See further on transfer pricing the discussion of transfer pricing in paragraph 4 8 1 below.

70 Treaty shopping refers to a situation where a person who is not entitled to the benefits of a tax treaty makes use of another person in order to indirectly obtain treaty benefits that are not available directly. See IBFD *International Tax Glossary* definition of "treaty shopping".

71 Vanhaute *Belgium in International Tax Planning* (2008) 157.

72 A "limitation of benefits clause" is a treaty provision that limits benefits to entities that have a certain minimum level of local ownership, deny benefits to entities which benefit from a privileged tax regime or which are not subject to tax in respect of the income in question, or which pay on more than a certain proportion of the income in tax deductible form (see IBFD *International Tax Glossary* definition of "Limitation on benefits provision")

73 Nelson "China: How to Prepare for Implementing Rules" 2007 *International Tax Review* 1 http://www.internationaltaxreview.com/?Page = 10&PUBID = 35&ISS = 24353&SID = 697470&SM = &SearchStr = %22intermediary%20holding%20company%22 (accessed 2010-06-13).

74 Such prevention of tax avoidance and evasion is achieved by the exchange of information provisions in the Double Tax Agreements. See Van Weeghel *The Improper Use of Tax Treaties* (1998).

Development Model Convention and the United Nations Model Convention, as guides, outline both methods.

4 5 1 South African Tax Treaty Network

South Africa has more than 70 tax treaties and is in the process of entering into treaties with more countries. Furthermore, some of the treaties currently in force are being renegotiated.[75] This is fairly considerable tax treaty network covering most developing countries from which investment in the form of holding companies can be expected.

4 6 Unilateral Avoidance of Double Taxation

Some countries have systems of unilateral avoidance of double taxation. In these systems the countries independently provide tax relief to income that was taxed in a source country or give credit for taxes incurred in those countries in respect of the same income.[76] This is a system that investors also look at in determining the suitability of a holding company host jurisdiction.[77] Where a country has adequate unilateral double tax avoidance provisions the purpose of the double tax agreement would be to supplement such provisions. As Loncarevic[78] states,

> [a] tax treaty supplements the unilateral double tax relief provisions in the respective treaty partner countries' domestic law and clarifies the taxation position of income flows between them.

Unilateral double tax avoidance measures fail to provide investors with the sense of certainty that taxpayers need for investment as countries can and do amend or cancel them unilaterally. The certainty provided by treaties is effective in attracting foreign investors, as treaties reassure investors in advance as to how they will be taxed on their offshore profits.[79] Countries generally hesitate to violate their treaty obligations and would not want to be seen to abandon their original treaty undertakings by suggesting amendments.[80] A source of guarantee and certainty to investors which is also a downside of treaties from a tax policy point of view is that treaties take long to amend as the amendment process requires bilateral negotiations between the treaty partners.

75 See http://www.sars.co.za/home.asp?pid = 3919 (accessed 2011-10-17).
76 Vogel 1174.
77 See Udal & Cinnamon 18.
78 Loncarevic 19.
79 Loncarevic 22.
80 Testimony of Barbara Angus, *US Department of Treasury before the Senate Committee on Foreign Relations on Pending Income Tax Agreements*, 24 September 2004, http://www.treas.gov/press/releases/js1952.htm (accessed 2011-10-25).

4 6 1 The South African Unilateral Avoidance of Double Taxation

South Africa provides unilateral double tax avoidance in the form of a tax credit for taxes payable to any sphere of government outside South Africa on income sourced outside South Africa.[81] A deduction is allowed for taxes paid to spheres of government of foreign countries where the income is sourced or deemed to be sourced in South Africa.[82] The tax credit provision has been extended to apply to management and other fees.[83] These provisions are a positive attribute in the South African tax system for holding companies.

4 7 The Absence of Controlled Foreign Company Legislation

Countries generally tax both residents and non-residents on the domestic-source income derived from their tax jurisdiction.[84] Some countries tax their residents on their worldwide income irrespective of the source. Other countries tax residents on their worldwide income and non-residents on income that is sourced domestically. Countries that tax on a residence basis supplement their taxing authorities by subjecting their residents to tax on income made by foreign corporations in which residents hold substantial shares. These systems tax the income of a controlled foreign company (CFC) as if it were earned by the CFC's resident shareholders.

Tax systems define CFCs for their domestic purposes. These definitions differ from country to country. The main difference relates to the shareholding by the resident and connected persons in the foreign company. However, a CFC can broadly be described as a foreign company over which its resident shareholders have sufficient influence to determine when to pay the dividends, and therefore can use such influence in the foreign company to defer the declaration of dividends, thereby deferring the tax thereon.[85]

The effect of the CFC rules on the shareholders is considerable. Under the normal tax rules a shareholder cannot be taxed on his or her underlying share of the profits of a company until it is distributed to him or her as dividends. Without remedial legislation domestic tax on foreign-

81 S 6*quat* Income Tax Act 58 of 1962.
82 S 6*quat*(1C) Income Tax Act 58 of 1962
83 S 6*quin* Income Tax Act 58 of 1962.
84 This could be varied by the provisions of a double taxation agreement. See Vogel "Worldwide vs Source Taxation of Income – A Review and Re-evaluation of Arguments (Part I)" 1998 *Intertax* 219. See also Forst "The Continuing Vitality of Source-Based Taxation in the Electronic Age" 1997 *Tax Notes International* 1455; Udal & Cinnamon 20.
85 Rohatgi 305.

source income can easily be deferred or postponed by establishing a foreign corporation to receive the income.[86]

The absence of CFC legislation is therefore one of the characteristics that would render a jurisdiction an ideal one for hosting a holding company.[87] It is therefore important for prospective investors to examine the main features and application of CFC legislation in potential jurisdictions to determine the extent to which the CFC legislation is applicable. What follows is an outline of the main features to consider in CFC legislation.

4 7 1 Definition of Controlled Foreign Ccompany

In jurisdictions where CFC provisions are applicable, the provisions would be legislated to become part of law. The CFC provisions never apply as part of the common law of any country. In such tax law sources, the operation of CFC provisions begins with the definition of CFC. The defining characteristics of CFCs are their residence in the foreign country and the control of the CFC by resident shareholders.[88]

The determining holding requirement in the CFC definitions differs significantly. Some countries do not base it on the issue of control. In these countries the determination is based on the ownership interest.[89] Where a person's voting interest does not accurately reflect the shareholder's economic interest in the company, control may be determined based on "market value circumstance".[90] To avoid obvious tax avoidance schemes, control generally includes indirect control and/or ownership.

The important deciding factor is the amount of control or interest in the foreign company that makes it a CFC. Here too the range is broad. While in most countries a minimum of 50%[91] is required, some

86 Rohatgi 305 states: "The CFC rules counter the deferral of taxation in such companies. Under its rules, the income earned by a CFC is attributed on a current basis to the shareholders on a pro rata basis even when not distributed to them."

87 See Legwaila "Tax Reasons for Establishing a Headquarter Company" 2011 *Obiter* 129.

88 See Arnold & McIntyre 90.

89 France, Portugal and Denmark are examples of this. See Arnold & McIntyre 90.

90 In New Zealand, market value circumstance is heavily relied on where the shareholder interests are to be determined. Market value circumstance exists where a person's voting interest does not accurately reflect the shareholder's economic interest and the shareholder's percentage ownership is determined by reference to both voting interests and the market value interests held in the company. It takes into account the existence of debentures, shares, options and other arrangements which may affect the balance of interests within the company to such an extent that a simple examination of voting power may be misleading. Lindsay *New Zealand Master Tax Guide* (2008) par 16:170.

91 In France the percentage holding required is 50%.

countries go as low as 25%.[92] This holding can be through one resident or more, either connected or unconnected persons. These constructive ownership rules are designed to prevent taxpayers from avoiding the CFC rules by fragmenting the ownership of the shares among connected persons.[93] In some countries, the CFC control requirement is satisfied if control is concentrated in a small number of resident shareholders.[94]

It is submitted that investors would be more attracted to a jurisdiction where the holding in a foreign company needs to be high (for example 60%) for a company to be a CFC, where widely held foreign companies are treated differently from companies held by connected residents, where the minimum participation exemption for attribution is high and where the income is only attributable to persons holding a certain higher amount of shares. For holding company purposes the more limited the application of CFC legislation, the more the flexibility to structure the holding of the underlying investments with, for example, its ultimate holding company.

4 7 2 Computation of Attributable Income

It is also essential for the investors to know what constitutes attributable income in the potential jurisdiction as compared to other jurisdictions. The income is generally attributed to the resident shareholders and computed in accordance with domestic tax rules and in domestic currency.[95] In determining attributable income, two different approaches are adopted. Some countries adopt the entity approach while others adopt the transactional approach.

(a) The Entity Approach

The entity approach looks at the fact that a foreign company is a CFC. Once that is determined the income of that entity is attributable to the resident shareholders irrespective of the source of that income or the nature of the transaction that the company would have entered into to generate that income. This approach entails an all-or-nothing inclusion mechanism.[96] According to Arnold and McIntyre:[97]

> [i]f a CFC does not qualify for any of the exemptions, all its income is attributable to its domestic shareholders. If, however, the CFC is exempt, none of its income, even passive income, is attributable to its domestic shareholders.

92 The required percentage holding in Portugal is 21.5% and in Denmark is 25% (see Ernst & Young 276, 900).
93 Where the holding requirement refers to connected or related persons the required holding per person is generally low.
94 For example, Australia (s 340 Income Tax Assessment Act 1936), Canada (s 112 Income Tax Act) and New Zealand (s EX1(1) New Zealand Income Tax Act 2004) require that for a foreign corporation to be a controlled foreign corporation five or fewer residents should control such a corporation.
95 Arnold & McIntyre 96.
96 There are, however, exceptions to the general rule.
97 Arnold & McIntyre 94.

The entity approach attributes the net income of the CFC. This is so because attribution of the gross income would not take into account the cost of making business in the country where the CFC is resident. The residence country would then generally grant foreign tax relief.

(b) The Transactional Approach

The transactional approach, on the other hand, attributes only certain kinds of "tainted income" to the resident shareholders. "Under the transactional approach, each transaction entered into by a CFC must be analysed to determine if it produces tainted or other income."[98] Tainted income consists of passive investment income (dividends, rent, royalties, interest and capital gains) and base company income (income mainly derived from offshore transactions between the CFC and connected persons in relation to that CFC).[99] Only amounts that constitute tainted income would be attributable to the shareholders of the CFC and therefore be taxable.

4 7 3 Attributable Amount

The amount attributed to the shareholder is usually the proportion of the shareholder's shareholding in relation to the entire shareholding in the CFC. Thus, in this calculation, it is the shareholder's interest in the distribution that determines the proportion attributable to that shareholder. Any diversion from this general principle would be distorting the concept of attribution and its adverse implications would most definitely discourage investors from choosing such a jurisdiction as suitable for a holding company.

Countries may adopt a hybrid approach in which they would, for example, use the transactional approach but grant an exemption to a CFC whose tainted income is less than a specified percentage of its total income.[100]

It is submitted that whether the investor prefers a transactional or entity approach jurisdiction, depends largely on the nature of the underlying investments that the operating companies engage in. For a holding company whose operating subsidiaries' business is market-orientated, for example in the manufacturing sector, the undertaking would qualify for the genuine business activities exemption.

Where the jurisdiction ignores the underlying activities of the operating subsidiaries and only considers the activities of the holding company, it is submitted that the entity approach could be prejudicial. The transactional approach would also be prejudicial, as all the activities of the holding company would generally fall short of genuine business

98 *Idem*.
99 *Idem*. See also *IBFD International Tax Glossary* definition of "base company".
100 Arnold & McIntyre 94.

activities that give rise to active income.[101] The transactional approach would also be appropriate in certain of these activities, though in the previous example some income which could be ancillary to the business of the CFC may fall in the tainted income classification.

4 7 4 Exemptions

Exemptions play a significant relieving role in the taxation of CFCs. The most common exemptions are the *de minimis*, genuine business activities and distribution exemptions.

(a) *De Minimis* Exemption

The *de minimis* exemption applies to the proportion of the tainted income in relation to the total income of the CFC. It exempts tainted income of a certain percentage to the extent that it is deemed to be negligible. This applies both to transactional and hybrid approaches. However, often the tainted income is excluded from the exemption with the end result that the genuine business would be exempt but still attribute the tainted income.[102]

The amounts and values to which the *de minimis* rule applies differ. In some cases they are expressed in percentages and in others in amounts or both. For example, the Canadian *de minimis* exemption is available only if the tainted income of the CFC is CAN $5,000 or less. The Australian exemption, on the other hand, applies if the tainted income of the CFC does not exceed the lesser of AUS $50 000 and 5% of gross income.[103] The South African exemption applies to the extent that tainted income does not exceed 10% of the income and capital gains of the CFC.[104]

(b) Genuine Business Activities Exemption

This exemption basically recognises that, while CFC legislation is basically intended to curb tax avoidance by relocating the tax residence of an entity, there are certain circumstances under which genuine business activities are carried out in a different jurisdiction without an intention to avoid the tax. This exemption is granted under both the entity and transactional approaches. It is generally granted if the CFC is engaged in certain defined businesses, has a substantial presence in the foreign country and more than a certain percentage of its income is derived from sources in the foreign country or from transactions with unrelated parties.[105]

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101 *Idem*.
102 For this provision in the South African system see proviso to s 9D(9)(b) Income Tax Act 58 of 1962.
103 Arnold & McIntyre 97.
104 See s 9D(9)(b)(iii) Income Tax Act 58 of 1962.
105 Arnold & McIntyre 96–97.

Income that normally does not qualify for this exemption is income that cannot be attributed to the genuine business (i.e. mobile business income) and income arising from transactions where the possibility of price manipulation exists.[106]

(c) Distribution Exemption

This is perhaps the least used exemption due to its vulnerability to abuse. In terms of this exemption CFCs that distribute their income to shareholders who are subject to domestic tax are exempt. This is normally coupled with a requirement that the distribution be made within a certain period from the end of the tax year. In the UK the exemption applies if 50% or more of the available profits of the CFC are distributed within 18 months of the year end.[107]

4 7 5 South African CFC Legislation

The South African CFC legislation provides for the taxation of CFC income in the hands of the CFC's shareholders subject to exemptions, most notable of which is the genuine business activities exemption.[108] The system follows a transactional approach. Furthermore, the CFC legislation has been relaxed in line with the intention to increase South Africa's suitability to host headquarter companies. The CFC income is not attributable to South African residents that qualify as headquarter companies.[109] As a result, the CFC legislation would not apply to holding companies that qualify as headquarter companies. However, the mere presence of CFC legislation may deter investors from setting up holding companies in South Africa as CFC legislation is notoriously complex.

4 8 Thin Capitalisation and Transfer Pricing Rules

Very often, the purpose of a holding company includes acquiring, managing and/or selling investments in domestic and/or foreign companies.[110] These transactions happen between the holding company and its related parties or non-related parties. A holding company generally funds the formation or operations of its subsidiaries and is in turn also funded by its holding company.[111]

Thin capitalisation rules regulate the taxation of amounts arising out of or incurred as a result of the international funding of related companies. Transfer pricing rules determine the taxation of amounts

106 See Olivier & Honiball at 373–375. Also see Legwaila 'The Business Establishment Exemption' December 2004 *De Rebus* 42 42–43.
107 Arnold & McIntyre 97.
108 See s 9D Income Tax Act 58 of 1962.
109 S 9D(2) Income Tax Act 58 of 1962.
110 See Legwaila 2010 *De Jure* 308 314–315.
111 Legwaila 2010 *De Jure* 308 313–315.

arising out of transactions between related parties at an international level.[112]

4 8 1 Transfer Pricing

Transfer pricing is an area of economics and tax law that is concerned with ensuring that prices charged between related parties or associated enterprises for the transfer of property, goods and services are not manipulated.[113]

The purpose of a multinational group setting the price at a transfer rate as opposed to a market rate would normally be to shift the tax losses to a high taxing jurisdiction and the profits to a low-tax jurisdiction or a jurisdiction with special tax features like tax holidays, or other industry-specific incentives.[114] As Vann[115] states:

> [t]he prices charged within the group for goods or services provided and the financing methods used between the members of the group simply serve as a means of moving funds around the group and do not in a commercial sense create profits for the group.

Transfer pricing rules generally provide that where goods or services are supplied or rendered in terms of a cross-border transaction between connected persons at a price that does not represent an arm's length consideration, an adjustment would be made on the pricing to reflect such arm's length.[116] Normally penalties are levied on amounts so adjusted.

(a) Cross-Border Transactions

This is an agreement between a resident and a non-resident. It also covers agreements between two non-residents for the supply of goods or services in the country, and agreements between residents for the supply of goods or services outside the country.[117]

(b) Connected Persons

The concept of connected persons seeks to cover affiliated or related persons. These are persons who can transact with each other at any

112 Vann "International Aspects of Income Tax" in *Tax Law Design and Drafting* (ed Thuronyi) (1998) 781. In some countries, for example the United Kingdom, transfer pricing rules apply even to transactions entered into between related parties within the domestic sphere. This application is not adopted by many countries due to the fact that there would not be any depletion of the tax base, as the ultimate income would still be taxable in the particular country.

113 Vann 781.

114 See Olivier & Honiball 399.

115 Vann 781.

116 See OECD *Model Tax Convention on Income and on Capital* (2008) - Commentary on Art 9 Par 1.

117 Vann 781–784.

consideration without adversely affecting the interest of their ultimate shareholders. Vann[118] confirms that:

> [f]or the group as a whole, all that matters at the end of the day is the after-tax profit of the group rather than of its individual members.

Different jurisdictions use different yardsticks to determine to whom the transfer pricing rules apply. Certain countries apply it to company groups, which are also in turn differently defined. Others apply it to companies held at a certain percentage lower than what would generally qualify as a group. A higher amount of holding relaxes the rules and restricts application thereof.

(c) Arm's Length

Transfer pricing applies the so-called arm's length principle as a generally recognised method to attribute profits made by related enterprises to enterprises operating in different countries.[119] The arm's length standard is met if the company sets its transfer prices in its dealings with its related persons so that those prices are the same as prices used in comparable dealings with unrelated persons.[120]

Countries can either use the arm's length method or the formulary apportionment method.[121] However the arm's length method is accepted by almost all countries as it is theoretically correct because it most closely approximates the operation of the open market.[122]

Investors naturally prefer countries where the more flexible system of choice by taxpayers of the arm's length methods apply. A jurisdiction is even more attractive where it provides for advance pricing agreements in terms of which the taxpayer agrees with the revenue authorities regarding the transfer pricing method to be used by the taxpayer in the future.[123]

4 8 2 Thin Capitalisation

Thin capitalisation is the practice of excessively funding a related party, being a branch or subsidiary, with excessive interest-bearing loans (debt)

118 Vann 781.

119 The attribution applies both to enterprises and parts or divisions of those enterprises. See Hamaekers "Arm's Length – How Long?" in *International and Comparative Taxation, Essays in Honour of Klaus Vogel, Series on International Taxation* (ed Raad) (2002) 29.

120 Rolfe *International Transfer Pricing* (1998) 6–23; Arnold & McIntyre 60.

121 Olivier & Honiball 405.

122 Hamaekers 38. Arnold and McIntyre 61–65. The following methods are used to determine whether a price is at arm's length or not: (a) Comparable Uncontrolled Price ("CUP") Method; (b) the Resale Price Method; (c) the Cost Plus Method; (d) Profit-Split Method; and (e) Transactional Net Margin Method (TNMM).

123 See Sawyer "Advance Pricing Agreements: A Primer and Summary of Developments in Australia and New Zealand" (2004) *Bulletin for International Fiscal Documentation* 556 556–565.

from related parties rather than with share capital or equity.[124] Thin capitalisation rules are intended to combat tax avoidance by the relocation of interest from one jurisdiction to another. The relocation is normally made from a high to a low-tax jurisdiction, with a deduction being claimed as an allowance in the high jurisdiction country. Often the interest is subject to a reduced tax rate as a result of the application of tax treaties.[125]

The application of thin capitalisation rules denies the deduction of the excessive part of the interest in the hands of the debtor.[126] This makes the thin capitalisation rules an aspect of the tax jurisdiction that needs proper consideration with regard to planning the location of the holding company, as the holding company is often responsible for the formation of operating companies or specific operations in such companies.

Thin capitalisation rules apply to loans by non-residents who own a substantial share of the borrowing company. The level of share ownership varies from 15% to 100% in the resident company.[127] This interest can either be held directly or indirectly through another resident or non-resident company. Countries differ in the way the denial of interest deduction is structured. Some countries use the ratios of loan capital to share capital beyond which interest deductions are denied (debt-equity rules) and others limit interest deductions by reference to a proportion of the income of the taxpayer (earning-stripping rules). The former is more common.[128]

Where the excessive interest deduction is disallowed, the excessive interest can either be treated as a dividend or be carried forward and deducted in subsequent years.[129] The methods and ease with which one gets caught by these rules as well as the consequences attached to excessive interest contribute to the suitability of a country as a holding company jurisdiction.[130]

4 8 3 South African Transfer Pricing and Thin Capitalisation Provisions

The South African tax law contains transfer pricing and thin capitalisation provisions. These provisions apply largely in line with the rules provided

124 Vann 785.
125 See Arnold & McIntyre 83.
126 Vann 785–786.
127 Arnold & McIntyre 85.
128 Among the countries using the debt-equity rules the ratios differ. The common range is between 1.5:1 and 3:1. The rules also provide for an application to the revenue authorities to allow a higher ratio. With the earnings-stripping rules, the rules are more permissive for financial institutions whose businesses consist in borrowing and lending and that typically operate at much higher debt levels than other businesses. Vann 785.
129 Arnold & McIntyre 86.
130 See Udal & Cinnamon 21.

above.[131] In addition, the transfer pricing and thin capitalisation provisions do not apply to financial assistance granted by a headquarter company to any foreign company.[132] Furthermore the provisions do not apply to financial assistance provided to a headquarter company if the headquarter company in turn provides that financial assistance to a foreign company in which the headquarter company holds at least 20% of the equity.[133] Transfer pricing and thin capitalisation provisions are essential in a tax system to combat tax avoidance. The South African transfer pricing and thin capitalisation rules ensure that tax avoidance is curbed, but at the same time ensure that genuine transactions in general and specifically involving headquarter companies are not adversely affected by the provisions.

5 Conclusion

The non-tax characteristics of a country are key in determining whether the country is ideal for locating a holding company. However, tax characteristics also play a major role in this regard. Specifically, a tax on dividends is one of the major reasons why companies have huge accumulated profits on their books. A tax system with low or zero tax on dividends alleviates the concern of repatriating the income from the underlying investments of dividends. The double tax agreement network of the potential host country and the contents of double tax agreements are crucial to the suitability of the jurisdiction. This is so because double tax agreements play a major role in exempting the dividends from tax or at the very least reducing the dividend tax rate applicable.

The taxation of capital gains can deplete the growth of the company and the group in general. Where there is a tax, the rate at which the gains are taxed is an essential aspect whose effect needs to be adequately assessed. Equally essential, however, is the rules for calculating the acquisition cost, determining the tax event, providing deferral opportunities and governing transactions between related parties.

The design of the CFC regime as an anti-avoidance measure results in CFC legislation containing strict provisions as opposed to instances where CFC legislation is seen as merely a taxing provision. This affects the imputation of the underlying investments to the shareholders of such underlying investments. The extent of the application of these CFC provisions is also of great importance. For example, as a result of the stringent UK CFC rules, a number of companies have moved out of the UK."[134]

131 See s 31 Income Tax Act 58 of 1962.
132 See s 31(4)(b) Income Tax Act 58 of 1962.
133 See s 31(4)(a) Income Tax Act 58 of 1962.
134 See http://www.strategicrisk.co.uk/story.asp?storycode=380661 (accessed 2011-11-03); Oguttu *Curbing Offshore Tax Avoidance: The Case of South African Companies and Trusts* (LLD dissertation 2007 UNISA) 271–273.

CFC regimes that apply the transactional approach are more favourable than those applying the entity approach. However, tax authorities find the entity approach administratively less burdensome to apply and police while unscrupulous taxpayers would prefer the transactional approach, as it is easier to manipulate. Available exemptions from the CFC regime reduce its ambit. While taxpayers structure their activities to qualify for the genuine business activities exemption, passive income earners find it difficult to satisfy the stringent requirements.

A jurisdiction with the above features favourable to conducting the business activities of a holding company would attract various other forms of investment. Such a jurisdiction would have the ability to manipulate and redirect the investment strategies of many investors. Whether it is intended and designed to do so or not, such a jurisdiction would pose a serious threat to the tax bases of other countries not offering the same preferred tax and administrative treatment to investors.

With reference to the South African tax instruments that have a bearing on the conduct of the business of holding companies, it is clear that the corporate tax rate, dividends tax rules, capital gains tax regime and transfer pricing provisions are not adverse to the hosting of holding companies. The presence of CFC legislation, though not necessarily adverse and based on the favourable transactional approach, may have the effect of deterring possible investment due to the notorious complications of CFC provisions internationally. The South African tax laws are adjusted in line with the intention by government to create a suitable regulatory environment for headquarter companies. Such an environment will, to a large extent be suitable for holding companies in general.

The institutionalisation of community service and community service learning at South African tertiary institutions: with specific reference to the role of university law clinics*

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OPSOMMING

Die institusionalisering van gemeenskapsdiens en gemeenskapsdiensleer aan Suid-Afrikaanse tersiêre instellings: met bepaalde verwysing na die rol van universiteitsregsklinieke

Met die institusionalisering van samelewingsdiens-[1] en diensleer aan Suid-Afrikaanse tersiêre instellings, is dit nodig om die rol van Suid-Afrikaanse universiteitsregsklinieke in die lig daarvan te ondersoek. Die artikel ondersoek die omskrywings van gemeenskapsdiens- en diensleer en kom tot die gevolgtrekking dat ten spyte van die feit dat gemeenskapsdiens- en diensleer, en kliniese regsonderrig baie gemeen het, elkeen 'n afsonderlike onderrigmetodologie is. Die tradisionele "werklike kliënt"-model van kliniese regsonderrig wat aan die meeste universiteitsregsklinieke gevolg word, voldoen egter nie per definisie aan óf gemeenskapsdiens- óf gemeenskapsdiensleer vereistes nie. Die artikel wys op die verskille, maar ook die ooreenkomste tussen die drie onderrigmetodologië. Dit beklemtoon die omskrewe vereistes by suiwer gemeenskapsdiens- en diensleer programme, naamlik die van gemeenskapsvennootskappe en die vereiste van wederkerige leer en -onderrig. Ten einde institusionele ondersteuning te verkry is 'n heroorweging van die tradisionele rol van universiteitsregsklinieke nodig om vas te stel of ware gemeenskapsdiens- en diensleer modules deur universiteitsregsklinieke akkommodeer kan word. Die artikel kom tot die gevolgtrekking dat hulle ideaal geposisioneer is vir hierdie doel, en demonstreer dit aan die hand van 'n gemeenskapsdiensleerprogram wat inkorporeer is in die module bewysreg. Die artikel kom tot die gevolgtrekking dat die insluiting van ware gemeenskapsdiens- en diensleer modules aanvullend tot kliniese regsonderrigprogramme institusionele geldelike steun kan lok tot voordeel van die operasionele kostes van universiteitsregsklinieke.

* This article is based on a Masters dissertation submitted at the University of the Free State – Bloemfontein by Inez Bezuidenhout under the study guidance of Prof Neels Swanepoel.

1 The University of the Free State, choose in Afrikaans the expression "samelewingsdiens" over "gemeenskapsdiens" because the former is more inclusive. See de Beer "Samelewingsdiensleer in hoër onderwys: Afrikaans vir nie moedertaalsprekers" 2010 *Tydskrif vir Taalonderrig* 24.

1 Introduction

When community service and community service learning was institutionalised at the University of the Free State, in particular after its policy document on the matter was published,[2] the eyes of the Faculty of Law turned to the University of the Free State Law Clinic. "No problem", the general response of the Faculty was, "we have been busy with community service and community service learning since the inception of our law clinic". It therefore came to pass that at this institution the Department of Procedural Law and Evidence, under whose supervision the University of the Free State law clinic functions, was charged to include as many as possible community service- and service learning programmes in the modules that it presents towards the LLB degree, including a subject offered over all four years of study towards the LLB degree, called "Legal Practice". Compulsory attendance of the law clinic in the fourth year of the LLB under Legal Practice 4 is required. Our existing clinical training programme as part of Legal Practice 4 was presented to the university's director of community service learning as, so we thought, a model of community service and community service learning.[3] Her response was less than favourable, because the clinical programme, albeit part of the academic module of Legal Practice 4, did not meet the institutional requirements of either a true community service- or community service learning programme. The reasons for this response will become clear below.[4] This article investigates the positioning or possible re-positioning of university law clinics within South African faculties/schools of law. It does so particularly in the light of the claim of most South African universities that their three pillars of being rests on teaching and learning, research and community engagement or community service. We use our experiences at the University of the Free State as model in our investigation. The main thrust of the article is to articulate the meaning of "community service"and of "community service learning" in order to establish whether the more "traditional" role of University law clinics in South Africa can accommodate the additional charge of including community service and community service learning programmes within its existing modules. We further undertake this investigation against the backdrop of the general challenges university law clinics face, namely financial sustainability, huge student numbers and limited student training time in

2 http://www.ufs.ac.za (accessed 2012-08-14).

3 Literature on community service and service learning refers to "academic" community service- and service learning. See for example Eyler "Reflection: Linking Service and Learning-Linking students and Communities" 2002 *J of Social Issues* 517.

4 See Netshandama "Community development as an approach to community engagement in rural-based higher education institutions in South Africa" 2010 *SAJHE* 342. The author points out the interchangeable, but incorrect, use of terminology in regards to various learning and teaching methodologies.

the academic year.[5] We submit that it is in the interest, (also financial interest) of South African university law clinics to meet institutional requirements, so as to attract financial support from universities' central budget, from which operational costs of clinics may be supplemented.

2 The "Traditional" Role, Model and Programmes of University Law Clinics

University law clinics in South Africa, but also elsewhere, have moved from a stage in their development which one may refer to as the "validation phase".[6] Faculties and schools of law, during this phase were to be convinced of the value that university law clinics, through their clinical law programmes, could add to the LLB curriculum and were prompted to make a financial commitment to the sustainability of the law clinics.[7] Whether the financial commitment has been made, differs from university to university; suffice to say that most South African university law clinics depend substantially on external funding of in

5 See Swanepoel *et al* "Integrating theory and practice in the LLB curriculum: some reflections" 2008 *JJS* 104. See further Ankersen *et al* "Applying Clinical Legal Education to Community Smart Growth: The University of Florida Conservation Clinic" in Partnerships for Smart Growth-University-Community Collaboration for Better Public Places (eds Wiewel *et al*) (1984) 68 who wrote: "Universities run on semesters; the real world does not. This poses a fundamental methodological dilemma for all live client clinics, particularly in environmental litigation, which is often complex and driven by events and dockets that are out of the clinician's control. While courts and even opposing parties are frequently willing to work within the parameters of clinics, cases can lie dormant, explode in the middle of final exams, and otherwise frustrate the efforts of clinicians to assure quality experience". It has been our experience that generally clients at university law clinics, as with clients in normal legal practices, require their (student) lawyers to be regularly available. This simply is not always possible with students in a clinical legal education programme at university law clinics.

6 See Amsterdam "Clinical Legal Education – a 21st century approach" 1984 *J of Legal Ed* 612 who writes on the predominant criticism of legal education generally at the end of the 20th century. On the potential contribution of clinical legal education programmes in legal education, see Bloch "The case for clinical scholarship" 2004 *J for Clinical Legal Ed* 7. Bloch dispels the perceptions held by many clinicians and others, that because of the practical nature of the work of clinicians, it does not involve "clinical scholarship". For the predominant debates on legal education generally in the 20th century, see Church "Reflections on legal education" 1988 *THRHR* 153. For the Australian perspectives in regard to introducing clinical legal education, see Campbell "Blueprint for a clinical program" 1991 *J of Professional Legal Ed* 121. For the American experience, see Condlin "Clinical Education in the Seventies: an appraisal of the Decade" 1983 *J of Legal Ed* 604. He writes: "In the early years clinical courses were few in number and marginal to the law school curriculum. Traditional faculty opinion was suspicious or negative, resources were patched together from 'soft' sources, and people who directed these programs worked in obscurity and alone". For the UK experience with clinical legal education, particularly its goals, see Duncan "Ethical practice and clinical legal education" 2005 *J of Clinical Legal Ed* 7.

7 On the role of law clinics in the LLB curriculum, see Vawda "Learning from experience: the art and science of clinical law" 2004 *JJS* 123.

particular, the Department of Justice and Constitutional Development, the Attorneys' Fidelity Fund and the Association of University Legal Aid Institutions Trust.

The context and purpose within which South African University law clinics were established have been well recorded in literature.[8] It is sufficient to state that generally university law clinics were established for the purpose of providing free legal services to the indigent community whilst at the same time exposing law students to legal practice and so training them to acquire legal skills and values. (Of course, external funders set their own objectives with funding of university law clinics, with the result that many clinics have established objectives that are much broader than just stated.)

The broader academic motivation for establishing University law clinics (at the outset) was the quest to provide some form of community service, whilst for the benefit of law students, to narrow the gap between legal theory and legal practice.[9] In the process of establishing university law clinics, the education and or training that law students receive became broadly known as "clinical legal education", offered in "clinical programmes".[10] The major models used in clinical legal education programmes have been identified as (a) the externship model, (b) the simulation model[11] and (c) the in house "real client" model.[12] Most South African law clinics employ the latter model with the inclusion of simulation features such as for example in mock consultations and trials and the simulated drafting of letters, pleadings and motions. The specific current course content of clinical legal programmes including practical legal training at South African faculties and schools of law is contained in a student handbook authored by a number of clinicians in 2006.[13] The

8 See for example, Bezuidenhout *The symbiotic integration of theory and practice: a sui generis approach* (LLM dissertation 2010 UFS); Steenhuisen *Die doelstellings van kliniese onderrig aan 'n regsfakulteit* (LLM dissertation 1998 RAU); De Klerk "University Law Clinics in South Africa" 2006 *SALJ* 929; De Klerk, "Integrating clinical education into the law degree: thoughts on an alternative model" 2006 *De Jure* 244; De Klerk & Mahomed "Specialisation at a university law clinic: the Wits experience" 2009 *De Jure* 306; Du Plessis "Access to justice outside the conventional mould: creating a model for alternative clinical legal training" 2007 JJS 44; Haupt "Some aspects regarding the origin, development and present position of the University of Pretoria Law Clinic" 2006 *De Jure* 229.

9 Mahomed "United in our challenges – should the model used in clinical legal education be reviewed" 2008 JJS 53.

10 Barnisher "The clinical method of legal instruction: its theory and implementation" 1979 *J of Legal Ed* 67, provides an excellent indication of the clinical method of teaching, especially in terms of the "live client" model of teaching.

11 Bezdek "The Cuny program: interaction of doctrine, practice and theory in the preparation of lawyers" 2009 *J of Professional Legal Ed* 59 on the simulation model of education.

12 Mahomed 2008 *JJS* 55. See also Amsterdam 1984 *J of Legal Ed* 616 on the method of clinical legal instruction.

13 De Klerk *et al* Clinical Law in South Africa (2006).

externship model has generally found limited application in clinical legal education programmes in South Africa.

Against this backdrop the investigation of positioning University law clinics to deliver particularly community service learning programmes will proceed.

3 Community Service Defined

Furco[14] defines "community service" as:

> the engagement of students in activities that primarily focus on the service provided as well as the benefits the service activities have on the recipients.

The definition of Bender is similar.[15]

According to the University of the Free State Community Service Policy Document,[16] "community service" is defined as:

> [e]mploying the scholarly expertise and resources of the UFS to render mutually beneficial services [[17]] to communities [[18]] within a context of reciprocal engagement [[19]] and collaborative partnerships.

In this definition "reciprocity of engagement and collaborative partnerships" are introduced. The deduction is simply that the legal services provided by law clinics, (according to the traditional role and model of law clinics), did not meet our institution's criteria for and

14 www.FloridaCompact.org (accessed 2011-08-04). This definition does not pertain only to law but includes a generic definition which can be applied to all academic programmes.

15 Bender *et al* "Service learning in the curriculum. A resource for higher education institutions" Council of Higher Education (2006) 22.

16 http://www.ufs.ac.za (accessed 2011-08-04).

17 In terms of the same policy "service" is defined as "… in the context of social transformation" ... "service" at a higher education institution can be defined as a response to social accountability and aimed at addressing communal challenges through the key functions of teaching and research in close co-operation with local communities and the service sector in a spirit of mutuality and reciprocity. On the one hand this encompasses making available the institution's intellectual competence and infrastructure to improve service delivery. On the other hand, it is a focused modification and contextualisation of what is taught, learnt and researched.

18 In terms of the same policy document "community", " ... refers to specific, collective interest groups, conjoined in their search for sustainable solutions to development challenges, that participate or could potentially participate as partners in the similarly inclined community service activities of the UFS, contributing substantially to the mutual search for sustainable solutions to jointly identified challenges and service needs through the utilisation of the full range of resources at their disposal."

19 In terms of the same policy document, "engagement" is defined as " ... continuously negotiated collaborations and partnerships between the UFS and the interest groups that it interacts with, aimed at building and exchanging the knowledge, skills, expertise and resources required to develop and sustain society."

definition of community service prompting the consideration of including additional community service learning features to it as is discussed below. Our arguments at the time that our clinical legal education programmes included "partnerships" such as with our funders, and with the purpose of providing community service in the form of free legal services to members of the indigent public were unconvincing in the light of definitional requirements.

4 Community Service Learning Defined

"Community service learning" may be defined as a form of:

> experiential education where learning occurs through a cycle of action and reflection as students work with others through a process of applying what they are learning to community problems and, at the same time, reflecting upon their experience as they seek to achieve real objectives for the community and deeper understanding and skills for themselves.[20]

Service learning has further been defined as a curriculum approach that integrates learning with community service.[21] According to Lategan the general characteristics of service learning enables a student to gain experience of the meeting of the needs in the community; it incorporates reflection and academic learning and it contributes to students' interest in and understanding of community life.[22]

The University of the Free State Community Service and Service Learning policy defines community service learning as:[23]

> an educational approach involving curriculum-based, credit-bearing learning experiences in which students (a) participate in contextualised, well-structured and organised service activities aimed at addressing identified service needs in a community, and (b) reflect on the service experiences in order to gain a deeper understanding of the linkage between curriculum content and community dynamics, as well as achieve personal growth and a sense of social responsibility. It requires a collaborative partnership context that enhances mutual, reciprocal teaching and learning among all members

20 Mouton *et al* "Service learning in South Africa: lessons learnt through systematic evaluation" 2005 *Acta Academica* 116 118.

21 Mouton *et al* 2005 *Acta Academica* 116 118.

22 See also Lategan 2005 *Acta Academica* 99 100. According to Sherman "Teaching grassroots democracy through service-learning: lessons from the collaborative teaching/lawyering method of clinical legal education" 1999 *Mich J of Community Service Learning* 82: "If a lawyer's problem solving is merely an instance of human problem solving, then we must not think about the collaborative teaching/lawyering method of clinical legal education merely as a good way to educate 'law student' problem-solvers, or even 'pre-law student' problem-solvers. Rather, we must think of it [as] a good way to educate citizen problem solvers, using a method that ultimately empowers both the helper and the helped". Naidoo & Devnarian "Service learning: connecting higher education and civil society-are we meeting the challenge?" 2009 *SAJHE* 935; De Beer 2010 *Tydskrif vir Taalonderrig* 27.

23 http://www.ufs.ac.za (accessed 2011-08-04). See also Swanepoel *et al* 2008 *JJS* 107.

> of the partnership (lecturers and students, members of the communities and representatives of the service sector).

5 Reciprocity of Teaching and Learning

A feature of community service learning that South African academics, in particular South African clinicians, may be less familiar with and which distinguishes it from community service, is the feature and importance of "reciprocity of teaching and learning".[24] Both provider and recipient of community service are to "learn" and to "improve" in terms of this feature of community service learning. According to Breyfogle,[25] the feature of reciprocity of learning is so important because:

> it avoids the traditionally paternalistic, one-way approach to service in which one person or group has resources which they share 'charitably' or 'voluntarily' with a person or group that lacks resources.

For others,[26] the major objective of community service learning is to transform communities for the better. It implies that the process should culminate in the transformation of both the student and the community to a state that is better than the *status quo.* According to Berle,[27] the "civic purposes" of higher education has substantially risen and there is no doubt that service learning programmes develop amongst other things, "civic skills" and builds "career related skills and knowledge". It is this feature of service learning that prompted the University of the Free State law clinic to re-conceptualise its clinical legal education programme so as to include community service and community service learning programmes in existing modules as is described below. Before we do that, it is opportune to look at the commonalities and difference between community service and community service learning and to juxtapose that with clinical legal education.

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24 Breyfogle "Towards a new framework of 'server' and 'served': de(and re)constructing reciprocity in service-learning" 2006 *Int J of Teaching & Learning in Higher Ed* 27. See also Furco www.FloridaCompact.org (accessed 2011-08-04).

25 2006 *Int J of Legal Ed* 27.

26 Kravetz "Transforming communities: the role of service learning in a community studies course" 2006 *Int J of Teaching & Learning in Higher Ed* 1 1–49.

27 "Incremental Integration: a successful service learning strategy*"* 2006 *Int J of Teaching & Learning in Higher Ed* 43. On the "mutual learning" that community service programmes offer, see Maistry & Ramdhani "Managing tensions in a service-learning programme: some reflections" 2010 *SAJHE* 561.

6 Commonalities and Differences Between Community Service and Community Service Learning.

From the discussion so far, the following may be highlighted as commonalities and differences between community service and community service learning. To us it was useful to measure our existing clinical legal education programme against this backdrop.

Firstly, a true community service- and community service learning programme ought to depart from the premise that students are to identify the needs of the community as opposed to simply enforcing their skills and knowledge upon a community.[28] Secondly, after providing a service to the community the student should be guided through a process of internal evaluation and reflection regarding the extent of the service he offered, what he learnt from providing said service and to reflect on the gaps in his current skills level and also, value framework. The student should then be able to link the service he offered to the theoretical content of his training and gain a deeper appreciation for the society in which he will ultimately practice. (This feature of community service learning is shared with clinical legal education where post-service reflection of the service rendered to the client is all important.)[29] Thirdly, the ideal approach to both community service and community service learning requires the establishment of a partnership between the

28 In this regard, a clear comparison can be drawn between community service learning and street law programmes that developed in South Africa in 1985. According to McQuoid-Mason "Access to justice and the role of law schools in developing countries: some lessons from South Africa: pre 1970 until 1990: Part 1" 2004 *JJS* 2004 a street law programme is "… a programme designed to train law students and others to make lay people, usually school children, aware of their legal rights and where to obtain legal assistance. It helps people to understand how the law works, how it can protect them, what kind of legal problems they should be aware of, and how they can resolve these problems ... the programme encourages tolerance by making participants argue and experience opposing viewpoints … [Law students] have an opportunity to assist in community development and capacity building." See also McQuoid-Mason & Lotz "Using street law to teach social justice to law students in South Africa" 2005 *Human Rights & Non-State Actors* 47. See also Church "Reflections on legal education" 1988 *THRHR* 154; Swanepoel *et al* 2008 *JJS* 108.

29 Dunlap *et al* "Reflection-in-action: designing new clinical teacher training by using lessons learned from new clinicians" 2004 *Clinical LR* 50. We submit that reflection in clinical legal education programmes is more specifically focussed on (a) the legal service rendered, (b) the strategies adopted to serve the legal needs of the client and (c) the expected outcomes of the service. In the clinical legal education reflection paradigm, the values that are hoped to be instilled are also career centred such as the need for professionalism and taking professional responsibility for the client's legal problem. As valuable as this may be from a legal educational perspective, it remains somewhat limited to specific career preparation only. The reflection that accompanies service learning modules aims to achieve the development of civic responsibility and defining the law student's role and value framework

University (that includes the student) and the community representative which allows for a needs- and outcomes analysis. Fourthly, community service tends to be a distinct activity and initiative of the higher education institution in which the community as a whole plays no part. Lastly, service learning is fully integrated into the curriculum and follows upon a process of consultation between the higher education institution and members of the community culminating in a collaborative agreement where both "partners" equally own the project and benefit from it through reciprocity of learning.[30] Service learning is not an outreach activity but rather an integral part of the Higher Education curriculum.

7 Community Service and Community Service Learning and its Juxtaposition with Clinical Legal Education

It is clear that despite a number of commonalities between community service- and community service learning programmes on the one hand and clinical legal education in the traditional manner practiced by South African law clinics on the other hand, the latter is neither community service nor service learning per academic definition. It is clear that service learning, per definition, requires structured collaborative partnerships which are not a characteristic of clinical legal education. A further distinction between clinical legal education and service learning is, as mentioned, reciprocity of learning and teaching. Reciprocity of learning and teaching is not an essential element of clinical legal education.

This is not to disregard the importance of clinical legal education programmes and the significant impact it has had on access to justice for people that otherwise would not have had the benefit of it. It is further submitted that clinical legal education programmes have significantly contributed to the practical legal training and exposure of students. We do however submit that University law clinics are ideally placed to assume the responsibility to include community service- and community service learning programmes in existing theoretical modules on behalf of faculties and South African schools of law. A few reasons are: Firstly, all three models are teaching methodologies. In this regard clinical legal educators are trained to teach law outside the traditional methodologies. Secondly, clinical legal education programmes are well acquainted with post-service or service learning reflection as a major feature of clinical education programmes that similarly features strongly in community service learning programmes.[31] Thirdly and mainly brought about by the

within the community that he/she will ultimately serve. It is therefore broader in its outcomes vision towards inculcating skills and values than clinical legal education.

30 Bender *et al* (2006) 22.

31 Duncan 2005 *J of Clinical Legal Ed* 9.

objectives of external funders, most University law clinics have established strong links with non-governmental and civic organisations. Within this network, partners in community service- or service learning programmes may be more readably found. Fourthly, all three teaching methodologies aim at instilling life skills and values, in particular civic responsibility. We have noted,[32] that community service learning results in the establishment of skills and values that are broader than those established by clinical legal education. Lastly, and in particular faced by our own peculiar challenges at the University of the Free State law clinic, namely financial sustainability of the traditional live-client model of clinical training, large student numbers and constraints of student training time available during the academic year, we regarded one or two true community services programmes as part of theoretical modules a viable option of legal education that will similarly meet the requirements that have been set for clinical legal education. Below we discuss the inclusion of a true community service learning programme into an existing module of the law of evidence.

8 Inclusion of Community Service Learning in the Module Law of Evidence.

8 1 Intake of Students

The module law of evidence is a 16-credit-bearing semester course at the Faculty of Law at the University of the Free State. Formative assessment is conducted through two traditional tests during the semester, and the completion of one semester research and writing assignment. Summative assessment is through one examination at the end of the semester. During 2010, students in the course were given the choice to either complete the writing and research assignment or complete a community service learning programme under the auspices of our law clinic. We regarded this as a pilot project, and therefore we decided to limit the student intake. Students had to apply for placement by way of each submitting a *curriculum vitae*, study record and particularly, short motivation why the student should be included in the programme. From the applications, 20 students were accepted into this community service learning programme.[33] It is worth mentioning that the module law of evidence is presented in both Afrikaans and English, and one of the aims of the programme was to divide the students into groups incorporating heterogeneous cultural and linguistic backgrounds.

32 n 29.

33 On an instructional guide to expectations of community and service partners in regards to community service learning, see Naidoo & Devnarain 2009 *SAJHE* 937.

8 2 Identification of Community Partner(s)

Prior to this initiative, the University of the Free State law clinic established links with a particular foster home in Bloemfontein that accommodates boys of different ages. The majority of these boys had been subjected to some form of domestic violence and resultantly had been placed in foster care, whilst awaiting children's court hearings on their future placement. Some of these boys further needed to testify as victims of sexual abuse or as witnesses in such incidents and were still awaiting the pending trials. It was clear from the initial needs analyses that most of the boys were subjected to substantial emotional stress, particularly in that most of the incidents occurred at their familial homes. It needs to be mentioned that it was through the case intake at the law clinic that the substantial incidence of domestic violence cases was identified as a particular societal ill that needed to be addressed in our particular community.[34] Prior to the pilot project, our students in 2009 had engaged in community engagement programmes to the particular foster home where on occasion the boys were treated with outings, games, refreshments and short educational presentations on topical law issues.

8 3 Preparation for Entering into a Partnership with the Community

The selected students received an initial orientation on the outcomes, the scope and purpose of community service learning. This discussion was scheduled as part of the lecture component for law of evidence students. During the discussion the students were specifically familiarised with the idea of reciprocity of learning, community partners, reflection and the compilation of portfolios of learning. It was also expected of students to provide a clear description of the community needs; how the needs would be addressed and more specifically; how the curriculum content of the host module links up with the community service project. Students were further invited to attend a meeting between the governors of the foster home, and clinic staff to discuss and identify a need within the foster home that would in particular meet the reciprocity of learning objective of true community service learning. The general background of the children and the structure and governance of the foster home was explained by the governors and the requirements of a structured community service learning programme explained by clinic staff. It was expected of students who partook to complete a pre-implementation questionnaire as part of reflecting on their intended services. Such a questionnaire can be devised by the responsible lecturer and tailored according to individual needs and circumstances. We employed a questionnaire which was drafted by the university's directorate of community service learning. The main thrust of this questionnaire is to

34 On "pre-field" preparation for a community service learning programme, see Naidoo & Devnarain 2009 *SAJHE* 937.

provide a reflection tool on how an individual student relates to community engagement, as well as his/her views in regards to participation in a community service project. The pre-implementation questionnaire forms part of the portfolio of learning which is handed in and assessed at the end of the semester. At the end of the semester a post reflection questionnaire is completed by students and a valuable pre/post comparison of experiences is done.

8 4 Needs Analysis

It is expected of students and/or the community service learning coordinator in any community service learning project to conduct pre-service interviews with the community partner. The purpose of this needs analysis is to ascertain what specific needs should be addressed with the intended project. The students had to set up consultations with the community partner and assess in which way the community could benefit from a specific project. It was further expected of the students to link these expectations to the module content of law of evidence and specifically how the project could assist students with the theoretical grounding of the module content. The respective groups of students had to document these initial processes, which were to form part of the portfolios of learning to be submitted at the end of the projects. It became apparent that a great need existed to familiarise the boys in the foster home with the trial process in a criminal court. The community partner also expressed the need to learn more about the different role players in a criminal trial. The students had to propose practical ways in which these needs could be addressed.

8 5 Conceptualisation of the Service Delivery

The students systematically began to prepare for the projects. The different groups attended the local magistrate's court and conducted informal discussions with various role players at the court. From the documented evidence in the portfolios of learning the students then conducted basic research on topical issues pertaining to these projects. Some of these issues can be summarised as follows: the different role players in the court; the basic principles of the law of evidence; the course of a trial; the calling of witnesses; and specifically the preparation of children who need to provide evidence in a case. The different groups of students then divided themselves into different roles and wrote a play to mimic the process of a trial. The one group of students used an adapted version of the fable "Snow White and the Seven Dwarfs" to illustrate the various ways in which evidence can be given in a court. It was further expected of the students to compile a budget with the estimated cost for the execution of the project. These budgets had to be submitted for approval to the faculty's service learning coordinator and the head of department.

8 6 Agreement with Community Partner

It is a formal requirement of the University of the Free State that co-operative agreements should be concluded with community partners. These agreements are entered into between a representative of the faculty of law and the specific module as discussed, and the governing body of the foster home.

8 7 Execution

The participating students arranged that the various plays be recorded on DVD. In these DVDs, as previously indicated, the students themselves performed the roles of the court participants with a background commentator explaining the whole court process. These DVDs were then handed over to the foster home and viewed by the boys during a "movie-night".

8 8 Assessment

Apart from the reflection sheets, and the portfolios of learning that will be discussed below, it is significant to mention that the house mother at the foster home reported on the service learning experience based on the feedback received from the boys. The most positive comment received was that the projects benefitted the boys in that they were better equipped and prepared for court appearances. Another positive response was that the projects contributed in eliminating the fears and anxiety normally associated with testifying in a trial.

From the Faculty's point of view the projects culminated in a presentation to the staff of the Faculty of Law. The projects were received positively and colleagues commented on the methodology employed to link community engagement with the curriculum content.

The students were assessed formatively (as previously mentioned) on the execution of the project and the portfolios of learning were used as evidence in the formative assessment process. Students were instructed to open and keep reflection sheets. These sheets formed part of the portfolios of learning reflecting each student's individual experience. The ultimate aim with the reflection activities was to document experiences, and in particular, the mode and quality of their assistance to the foster home.[35] The students were also required to attend and participate in regular debriefing sessions with clinic staff, which served to address logistical challenges, group dynamics and planning needs.

9 Conclusion

It is clear that there are many commonalities between the various forms of what may conveniently be styled "interactive learning" methodologies. From an educational perspective however the goals of each of the different methodologies are distinct and focus is often placed

on the practical component of each of the methodologies that were mentioned instead of on the educational core and value on which they are founded. It is when the educational core and value of these methodologies are examined that the commonalities between the methodologies become more clear and the similarities with the traditional clinical legal education methodology become obvious.

It is further apparent that an ideal clinical legal education programme can incorporate practical training, community service and ideally, community service learning. Although ideal, it is not a fundamental requirement of a successful university law clinic to be purely focused on "live-client" interaction to receive broad institutional support. Where university law clinics face financial constraints, particularly in appointing sufficient supervising staff to supervise sufficient client intake, (for purposes of student activity on cases) the "live-client" requirement may be substituted or complemented with community service learning programmes for the purposes of attracting institutional support.

Community service learning programmes therefore present an opportunity for some South African University law clinics that are challenged by a lack of funding to expose students to society albeit in a different way, in a manner which instils values and skills required to produce well rounded law graduates.

With reference to our pilot community service programme in 2010 we have learned valuable lessons. It is essential that the community partner co-defines the service that needs to be delivered. As for student input and enthusiasm it was vitally important that most of our participating students reflected that they felt they were, with the boys of the foster home, "owners" of the service they provided. Generic skills (such as interacting with the public sector, conceptualisation of ideas and formulating that in writing, budgeting, research and public address and confidence) were listed by our students as beneficial to themselves. Values, such as civic awareness and responsiveness to the needs of the

35 Eyler "Planning for Effective Reflection: The Reflection Map" 2002 *JSI* 523 writes on effective reflection, in which is included (a) individual reflection, (b) reflection with classmates, and (c) reflection with community partner. Reflection on community service and service learning ideally ought to be a continuous process including pre-reflection, reflection during the programme and reflection after the programme. Naidoo & Devnarian 2009 *SAJHE* 938 state: "Reflection serves as a useful tool in attaining meaning from one's service experience. The most common methods of documenting one's experiences are through journals and service learning portfolios. Reflection is a process which is regarded as an integral part of service learning in that it: decreases stereotyping; transforms experience into genuine learning about individual values and goals and, about larger social issues; challenges students to connect service activities to course objectives, and, develop critical thinking and problem solving skills".

less privileged were inculcated in our students.[36] Best of all was the general summary of our students' experience, "that it felt good to have helped". University law clinics are ideally positioned to implement service learning programmes.

Finally, our University's Directorate of Community Service Learning was satisfied after our 2010 report prompting a successful application for funds for the 2011 cycle, some of which could be gainfully utilised for the operational costs of our law clinic!

36 Kriegler "Domain knowledge and the teaching of creative legal problem solving' 2004 *Clinical LR* 149. The author in relation to the teaching of legal problem solving differentiates between "domain knowledge", such as derived from doctrinal courses and "tacit knowledge", not covered by the former, but an integral part of clinical legal education. We submit that the value of all three teaching methodologies described in this article, conveys this "tacit knowledge" required in "creative problem solving".

Legal issues associated with the use of do not resuscitate orders in US schools

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OPSOMMING

Regsvraagstukke verbonde aan geenbybringopdragte in VSA skole

Geenbybringopdragte (GBO) in die Verenigde State is in die algemeen aanwysings wat voorberei word deur geneeshere op versoek van ouers om lewensondersteuningsdienste te beëindig of af te skaal op grond van 'n mediese diagnose dat 'n kind 'n terminale toestand bereik het waar hy of sy nie meer self besluite kan neem nie en geen mediese vooruitsig op herstel van 'n komateuse of vegetatiewe toestand het nie. Sulke GBOs bring egter belangrike vraagstukke na vore aangaande die gesag van ouers en mediese praktisyns om besluite namens kinders te neem wat dikwels nie in 'n geestes- of liggaamstoestand is om die aard van 'n GBO te verstaan nie, die reg op lewe van 'n kind ten spyte van sy of haar aftakelende of terminale toestand en die verantwoordelikhede van skoolpersoneel om 'n GBO uit te voer wat tot groter gestremdheid of die dood van 'n leerling kan lei. Regsgedinge rakende GBOs het hoofsaaklik gefokus op minderjarige kinders binne hospitaalverband, hoewel mediese en verpleegkundige publikasies heelwat advies aangaande noodhulp by skole bevat. Meeste van hierdie publikasies spreek egter lewensgevaarlike noodgevalle vir leerlinge in die algemene milieu van beperking van aanspreeklikheid aan, met beperkte klem op die voortdurende en deurlopende behoeftes van gestremde leerlinge. Regsgedinge rakende GBOs en minderjaringes het nie vraagstukke rondom leerlinge met afsonderlike onderrigplanne ingevolge die *Individuals with Disabilities Education Act* (*IDEA*) aangespreek nie. Die gesag van ouers om besluite aangaande GBOs in hospitale te neem word afgestomp en ontlont in die skoolomgewing waar ouers met gestremde kinders slegs een deel van die besluitnemingsproses rakende hulle kinders is. Die belangrike onderskeid is die mate waartoe 'n versoek vir nuwe verwante dienste of plasings ingevolge *IDEA* om 'n kind se onderrig te verbeter, gelykstel kan word met 'n GBO wat in wese kan neerkom op 'n versoek om 'n kind te laat sterf. Kan 'n GBO vir 'n leerling wat gestrem is geregverdig word wanneer die doel van *IDEA* en die afsonderlike onderrigplanne daarop gerig is om toe te sien dat gestremde leerlinge doelwitte en mikpunte ingevolge *IDEA* het wat sinvolle prestasievergelyking met leerlinge sonder gestremdhede moontlik maak, maar steeds die aard van hulle gestremdhede in aanmerking neem? Die doel van hierdie artikel is om sommige beleidsoorwegings rakende die gepastheid van GBOs in skoolverband te ondersoek, veral in soverre dit gestremde kinders raak.

1 Introduction

Do not resuscitate (DNR) orders[1] generally are directives prepared by physicians at the request of parents to cease or deescalate life-supporting services based on a medical diagnosis that a child has reached a terminal condition where they can no longer make decisions for themselves and have no medical probability of recovering from their comatose or vegetative state. Such DNR orders, however, raise critical issues about the authority of parents and medical professionals to make decisions for children who often are not in a mental or physical state to comprehend the nature of the DNR order,[2] the rights of children to continued life despite their debilitating or terminal conditions,[3] and the responsibilities of school personnel to implement a DNR order that may result in greater impairment or death for a student.[4] Litigation involving DNR orders has almost invariably focused on minor children in medical settings[5] although medical and nursing publications have provided considerable advice concerning emergency care in schools. However, most of these publications tend to address life-threatening medical emergencies to students in general in the context of limiting liability, with limited focus

1 DNR "is the usual acronym for a physician's directive that cardiopulmonary resuscitation not be used in the event of a cardiac or respiratory event." Constante "DNR in the School Setting: Determining Policy and Procedures" in *Legal Issues in School Health Services* (eds Schwab & Gelfman) (2001) 417. DNR orders are sometimes, perhaps more accurately, referred to as Do Not Attempt Resuscitation (DNAR) orders, but DNR will be used in this paper since it is more widely recognised. *See* Hazinski *et al* "AHA Scientific Statement, Response to Cardiac Arrest and Selected Life-Threatening Medical Emergencies" 2004 *Circulation* 278 280.

2 See *DK v Cabinet for Health and Family Services* 221 SW 3d 382 (holding that, while the Cabinet was authorised to act as a child's health decision maker where temporary custody had been granted to social services for the neglected and abused child, a DNR Order was not appropriate where the parents' rights had not been terminated).

3 See *Belcher v Charleston Area Medical Center* 422 SE 2d 827 (holding that 17-year-old with muscular dystrophy who suffered breathing failure and for whom a physician had issued a DNR Order, at direction of his parents, to not reintubate or resuscitate their son and who died following a cardiac failure where no resuscitation or intubation occurred, the parents were entitled to go to trial on wrongful death and medical malpractice claims as to whether their son was a "mature minor" whose opinion should have been sought prior to issuance of the DNR Order).

4 See Pohlman & Schwab "Managing Risks in Professional and Clinical Performance Dilemmas: Part I" 2000 *J of School Nursing* 46 (commenting that a school district policy may "dictate a nursing action (or omission of an action) that appears to conflict with legal or ethical standards of practice or, more specifically, may bring harm to a student.").

5 See *JN v Superior Ct* 67 Cal Rptr 3d 384 (court refused to issue a DNR order for 11-month-old child with severe head trauma even though supported by child's attorney and hospital bioethics consultation team where child had not been adjudged dependent; however, the court held that hospital doctors could remove intubation tube for breathing where a petition for dependency had been filed and the court in approving the order to remove the tube had balanced the interests of the child with those of the parents who opposed both removal of the intubation tube and the issuance of a DNR order).

on the continuing and persistent needs of disabled students.[6] The purpose of this article will be to examine some of the policy issues connected to the appropriateness of DNR orders in school settings, especially as they impact students with disabilities.

2 Nursing Issues Concerning Care for Students

Students can have a variety of medical needs that could include chronic or other disabling conditions that qualify a student as disabled, as well as injuries not necessarily connected with disabilities but needing emergency medical care. For schools to have on-site emergency equipment and trained personnel to address any emergency situation is vital whether or not the student being serviced is a student with a disability. Thus, in the broadest application, assuring that student medical needs will be addressed applies as much to the football player[7] with a concussion[8] or a student with an injury from having tripped and fallen on the playground[9] as it does to students with persistent, chronic,

6 See *eg AHA Scientific Statement* 284 where the recommendations for risk reduction focus on safe equipment, instruction, and supervision, factors that are important in assessing tort liability for students in general, with limited attention to the role of parent input as to the disabling conditions of students with allergies or asthma that qualify them as students with disabilities.

7 See *Hammond v Board of Education of Carroll County* 639 A 2d 223 (finding no negligence liability as a result of internal injuries to female student who had sued successfully to participate on football team where the combination of her knowledge of the sport and the safety instructions of the coach were sufficient to amount to assumption of risk).

8 The risk of certain kinds of injuries, such as concussion, has resulted in state statutes specifying the terms under which students suspected of having a concussion can continue to participate. See Revised Code of Washington §28A.600.485 (3) & (4) where a student "suspected of sustaining a concussion or head injury in a practice or game shall be removed from competition at that time" and cannot return until after having been "evaluated by a licensed health care provider trained in the evaluation and management of concussion and receives written clearance to return to play from that health care provider".

9 See *Bellinger v Ballston Spa Central School District* 871 NYS 2d 432 (where plaintiff's daughter, a fifth grader at Wood Road Intermediate School in the Village of Ballston Spa, Saratoga County, was playing one-hand touch football at recess when she and a fellow teammate, both running toward the same opponent, collided on the field, resulting in the teammate's head hitting plaintiff's daughter in the mouth, knocking out three of her teeth and fracturing a fourth, the school had no liability for negligence where, even if playground supervision was inadequate at the time a fifth grade, female student was injured while playing one-hand touch football at recess, such negligent supervision was not a proximate cause of the student's injuries, there was no history of disciplinary problems or rough play among any of the children involved, and the collision at issue was spontaneous and accidental.

debilitating, or disabling conditions that demand regular attention.[10] Among the chronic health conditions that can qualify a student as disabled can include, but are not limited to "asthma, diabetes, allergies, genetic disorders, immunological disorders, cancer, orthopedic disorders, neuromotor disorders, and mental disorders."[11] These kinds of conditions represent for school personnel the kind of "increased risk for a chronic physical, developmental, behavioral, or emotional condition … [that] requires health and related services of a type or amount beyond that required by children generally."[12]

Providing for the physical and emotional well-being of students in general in school settings can involve the collaboration of a number of school personnel, but certain functions by virtue of state law will be considered to be the prerogative of the school nurse. The role of the school nurse in the school setting is a complex one. Nurses are subject to the conditions of their state licensing laws, referred to as state nurse practice statutes, which explicate the qualifications needed for nursing practice,[13] the tasks that may be provided by a licensed nurse,[14] the tasks that can be delegated to unlicensed assistive personnel (UAP)[15] and the conditions under which such delegation can occur.[16] As a result of these licensing conditions, the school nurse's legal, professional and ethical duties will be different from those of other licensed professionals who manage the school (such as teachers, counselors, and administrators) and, where the creation of individualised health care

10 See *Hilts v Board of Education of Gloversville Enlarged School District* 857 NYS 2d 292 (triable issue existed as to whether school nurse, who had helped student injured on playground from nurse's office to school door, had released her hold on the girl too soon so she could walk from the school door to her mother's car, resulting in the girl falling and injuring her ankle; the issue for the court was properly phrased as whether the nurse had assumed a duty to hold on to the girl until in the car).

11 National Association of School Nurses (NASN) *School Nursing Services Role in Health Care* (2009) 1.

12 NASN *School Nursing Management of Students with Chronic Health Conditions* (2006) 1, quoting from Newacheck et al *An Epidemiological Profile of Children with Special Health Care Needs*," 1998 *Pediatrics* 117 117.

13 See Ohio Revised Code §4723.01 (defining the "practice of nursing as a registered nurse and the nursing regimen").

14 See Ohio Revised Code §4723.151 (practices prohibited for licensed nurses), §4723.17 (permitted practices and prohibitions for licensed practical nurses).

15 See Ohio Administrative Code §§4723-13-02 & 4723-13-039 (setting limits on delegation of nursing functions). See also *Moye v Special Sch Dist No 6 South St Paul* 23 IDELE 229 (where parents did not want their child removed from the classroom so the school nurse could suction their child's tracheotomy tube and wanted a UAP to perform the function in the classroom so their child would not miss the class, a federal district court held that under the state's nurse practice act the nurse delegate [UAP] could not be required to perform the function).

16 Schwab & Gelfman (eds) *Legal Issues in School Health Services: A Resource for School Administrators, School Attorneys, School Nurses* (2001) 55-79.

plans (IHP)[17] and emergency care plans (ECP)[18] are necessary, the school nurse may be the only appropriate person under state law who can design them and manage their implementation.

For students with disabilities who have individualised education plans (IEPs)[19] under the Individuals with Disabilities Education Act (IDEA)[20] or section 504 plans pursuant to the Rehabilitation Act of 1973,[21] the IHP or the ECP can become part of those plans. The IHP or ECP can be incorporated into an IEP or added as an addendum with specific outcomes to academic goals. The integration of an IHP or ECP into a section 504 plan is less complex and, in the case of an IHP, can either be the foundation for a 504 plan or serve as the 504 plan itself.[22]

3 Nursing and medical statements on DNR orders

The need for direction by public schools in addressing the connection between the presence of severely disabled students and the desire by parents and medical personnel to design appropriate DNR orders has prompted policy states by medical organisations. The National Association of School Nurses Policy Statement on DNR has recommended the following:

> It is the position of the National Association of School Nurses that DNR orders for a student must be evaluated on an individual basis at the local level, according to state and local laws. The local board of education should refer this matter to school district legal counsel for guidance. Each student involved should have an Individualised Health Care Plan (IHCP) and an Emergency Plan developed by the professional school nurse with involvement from the parents, administrators, physicians, teachers, and, when appropriate, the student. The IHCP needs to include a written Do Not Resuscitate from the

17 NASN *Position Statement: Individualised Healthcare Plans (IHP)* (2008) "The IHP is a written document that outlines the provision of student healthcare services intended to achieve specific student outcomes. … The need for an IHP is based on required nursing care, not educational entitlement such as special education or Section 504 of the Rehabilitation Act of 1973."

18 NASN (2006) 3. The ECP is the outcome of the IHP and is a step-by-step set or procedures directed to non-nursing personnel who may have to respond to emergency situations in schools or at school activities.

19 IEPs are discussed later in this article but, basically they are "a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of [IDEA]." 20 USC §1401(a)(14).

20 IDEA is the federal statute, first enacted in 1975 as the Education for All Children Handicapped Act (EHA) and identifying the public school district's responsibilities to find, evaluate, and provide appropriate services and placements for children with disabilities. See 20 USC §1400 *et seq*.

21 A nondiscrimination act, section 504 requires accommodations for students who are prevented from achieving a major life activity because of their disability, even if the child does not qualify for special education under the IDEA. See 29 USC §794.

22 NASN *Issue Brief: School Health Services Role in Health Care–Section 504 of the Rehabilitation Act of 1973* (2005).

> parent(s) as well as the physician's written Do Not Resuscitate order. In some states, the IHCP may need to include a court order to honor the DNR order. The plan should be reviewed at least annually. The IHCP also should state the procedure to taken in case of respiratory or cardiac arrest.[23]

The American Academy of Pediatrics Commission on School Health and Committee on Bioethics (*AAP Statement*), in its policy statement on "Do Not Resuscitate Orders in Schools",[24] approaches the use of DNR orders with a best-interest-of-the-child-analysis. While the best interest of the child may, ostensibly, be the focus of a DNR order, the interests of the child are often identical to or reflective of the interests of the parents. Thus, where resuscitative efforts "would cause physical pain and emotional suffering" for the child, where "the likelihood of resuscitation is small, … [and where] [t]he experience for the child could be frightening and uncomfortable and provide no anticipated benefit, such as returning a child to a quality of life previously acceptable to the child and/or the family, … these children and their families may not wish the experience of treatment in an intensive care unit that would not affect the underlying medical problems."[25] On the other hand, schools have interests as well in addressing the needs of students whose unique requirements or fragile condition present difficult challenges. The *AAP Statement* notes that, from the schools' interests in the best interests of the child continuum, the interests of the schools may differ significantly from those of the parents, especially where school personnel are "medically untrained" and may not "feel bound to respond to an easily reversible condition, such as a mucous plug in a child with a tracheotomy tube."[26] In addition, medically untrained personnel may have concerns about encountering "circumstances not anticipated by a DNR order, such as when a child chokes on food or is injured."[27] Driven very much by concerns about liability, the American Academy of Physicians (AAP) has proposed the following recommendations:

> (a) The AAP recommends that pediatricians and parents of children at increased risk of dying in school who desire a DNR order meet with school officials – including nursing personnel, teachers, administrators, and EMS personnel, and, when appropriate, the child. Individuals involved ideally will reach an agreement about the goals of in-school medical interventions and

23 NASN *Do Not Resuscitate* (2004).

24 American Academy of Pediatrics Committee on School Health and Committee on Bioethics *Do Not Resuscitate Orders* 2000 *Pediatrics* 878-879 (hereinafter referred to as *AAP*).

25 *Idem* 878.

26 *Ibid.*

27 *Idem* see *Mitchell v Special Joint Agreement School District No 208* 897 NE 2d 352 (finding no liability as to a mentally impaired special education student who, even though the classroom teacher and classroom aide knew that the student had, in the past, stuffed food into his mouth and swallowed it without chewing, grabbed a nearby cupcake, while the aide was watching him and backing up to a nearby sink and choked on it suffering serious brain damage; despite the history of past occurrences, the court found in this case that "school staff [had] maintained close supervision over [the student], evincing concern for his safety").

> the best means to implement those goals. Concerted efforts to accommodate all points of view will help avoid confrontation and possible litigation.
>
> (b) Pediatricians need to assist parents and schools to review, as needed when warranted by a change in the child's condition, but at least every 6 months, plans for in-school care.
>
> (c) Pediatricians need to review the plan with the board of education and its legal counsel. Pediatricians and all other parties involved are encouraged to be realistic and flexible and to make room for negotiation and compromise.
>
> (d) Pediatricians and their chapter and district members should work with local and state authorities responsible for EMS policies affecting out-of-hospital DNR orders to develop rational procedures and legal understanding about what can be done that respects the rights and interests of dying children.
>
> (e) Pediatricians should work with local school systems and parent–teacher organisations to develop age-appropriate educational programs about death and dying.[28]

Both policies are vague and general and neither is prescriptive. Both suggest that DNR orders would apply to school settings but neither addresses the threshold issue as to whether a DNR order for a disabled student with an IEP would be compatible with the purposes of the IDEA. Both statements reflect that designing a DNR order is a process that needs to include a wide range of persons, such as parents, administrators, school nurses, physicians, school board attorneys, and teachers and perhaps students as well, "when appropriate." [29] Despite this variety of different, and perhaps differing, interests, courts tend to defer to the interests of parents in determining the necessity for, and appropriateness of, a DNR order.[30] While the evidence of physicians is necessary to determine whether the withholding of medical services is justified by a person's medical condition, courts will generally defer to "the essential and traditional respect for family" and will not intervene to contradict the decision of "a loving family, willing and able to assess what

28 *Ibid* 879
29 *Ibid* NASN (2008).
30 See *Parham v JR* 442 US 584 (in a challenge by children sent to mental health facilities with parent permission, the Supreme Court observed that "parents retain a substantial, if not the dominant, role in the decision … [t]he traditional assumption that parents act in the best interest of their children should apply"). For a broad based, international discussion of the best interests of children and their parents, see Mawdsley & Visser "The Best Interest of the Child and the Right of Parents to Make Decisions for Their Children: Comparing the United States and South Africa" 2007 *Int J of Ed Reform* 344; Cumming, Mawdsley & De Waal "The 'Best Interests of the Child, Parents' Rights and Educational Decision-making for Children: A Comparative Analysis of Interpretation in the United States of America, South Africa and Australia" 2006 *Australia and New Zealand J of Law and Ed* 43.

the patient would have decided as to his or her treatment."[31] However, even the combined consent of physicians and parent permission may not be sufficient to make a DNR order enforceable in a school setting for a disabled student with an IEP were the order is considered contrary to the purposes of the IDEA. Beyond these issues of best interest and the purpose of the IDEA, though, the *AAP Statement*'s recommendation for instructional lessons on death and dying is worrisome. Such lessons may have the potential to create, among the population of both disabled and non-disabled students in a classroom that it purports to help, the opposite result by generating anguish, confusion, and uncertainty. Thus, for example, how would the school design and develop a curriculum on death and dying appropriate to seven-year-olds where one or more sets of parents, in effect, by approving a DNR order in the school, has chosen to allow a child in their classroom to die? How would a seven-year-old child (or, more properly, almost any age child in a school) assimilate the legal notion of best interest of the child without distressing over how that concept might be applied to them by their own parents?

4 Applying a DNR to a School Setting

Only one reported case has addressed the issue of a DNR order in a school. While the case involved only a state trial court decision and thus has limited precedential value, it does lay out in dramatic fashion relevant issues related to DNR orders. In *ABC School v Mr and Mrs M*,[32] a public school that serviced disabled children, sought both injunctive and declaratory relief to support its refusal to honor a DNR order secured by a child's parents. The child at issue in this case, a four-year-old girl with severe mental and physically disabilities, was transported to and from the ABC School five days a week where she stayed for approximately four hours each day, receiving physical, occupational, and speech therapies. During the preceding year, the child's medical condition had deteriorated significantly, following an apneic spell when the child had ceased breathing and during which the school nurse had administered care while the child was transported to a hospital in an ambulance. After consultation with the parents, a physician prepared the following DNR that provided, in relevant part:

> should Minor M have a cardio respiratory arrest, she may receive oxygen, suction and stimulation. She should receive rectal valium if she appears to be having a prolonged seizure. Minor M should not receive cardiopulmonary resuscitation, intubation, defibrillation, or cardiac medications. Invasive procedures such as arterial or venous puncture should only be done after approval of her parents.

Should Minor M have an apneic spell at school, she should receive oxygen, suction and stimulation. If she responds to this, her parents

31 *In re Fiori* 673 A 2d 905 913 (upholding removing life support treatment for an adult patient in a vegetative state).

32 1997 WL 34594167.

should be contacted and she can be transported home. If she does not respond, she should be transported by ambulance to the local hospital.

The ABC School posited three reasons for refusing to honor this DNR order:

> (1) The school had in place "Preservation of Life Policy" requiring "[t]eachers of the ABC School classes [to] provide whatever means are available to them to preserve and protect a child's life in the event of a crisis."[33]
>
> (2) Prior to the child's enrollment in the school, the parents had been notified of the Policy and had stated that no DNR was in effect.
>
> (3) The school nurse at ABC School claimed that enforcing the DNR would violate the professional ethics of her and other staff members and would place an undue burden on the nurse because she would not have the ability to confer with other medical personnel concerning Minor M.

In dismissing the school's first two reasons, the trial court rejected the claim of detrimental reliance by the school, finding that "the possibility that a change in circumstance could give rise to DNR order was not so remote that ABC School was not apprised of the possibility."[34] With regard to the third reason, the court noted that "[a]n order prohibiting CPR and medication [did] not require consultation with other medical personnel,"[35] and in any case, because of the child's fragile condition, the denial of certain life saving measures (such as CPR), was "in the best interests of Minor M."[36] In addition, the court dispensed with the school's ethical claim that had been based on the Supreme Judicial Court of Massachusetts'[37] decision in *Brophy v New England Sinai Hospital*[38] where the supreme court had upheld the ethical claim of physicians who could not be required to disconnect a person in a vegetative state from life-support systems. In parsing *Brophy*, the trial court in *ABC School* noted that *Brophy* dealt with requiring physicians "to take *active measures* which are contrary to their view of their ethical duty toward their patient,"[39] while, in *ABC School*, the staff was "being asked to refrain from giving unwanted and potentially harmful medical treatment to Minor M."[40]

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33 *Idem* *1.
34 *Idem* *3.
35 *Ibid.*
36 *Idem* *2.
37 This is the title of the highest court in the State of Massachusetts, usually referred to as a Supreme Court in other states.
38 497 NE 2d 626 (holding that court could not compel physicians to act contrary to their ethical views and remove or clamp the G-tube of a patient in a vegetative state, but the patient's wife could remove the patient to another hospital where the physicians were willing to perform that function).
39 *Idem* 639 (emphasis in original).
40 *ABC School* 1997 WL 34594167 *3.

ABC School made one further abortive effort to minimise the impact of the court's support for the DNR order by their actions by seeking a declaratory judgment that their actions be shielded under the state's qualified immunity statute which provided in part that:

> No collaborative school teacher ... or other ... collaborative employee who, in good faith, renders emergency first aid or transportation to a student who has become injured or incapacitated ... shall be liable in a suit for damages as a result of his acts or omissions either for such first aid or as a result of providing such emergency transportation to a place of safety ...[41]

The court in *ABC School*, in denying the school's request, reasoned that to grant the declaratory judgment "would vitiate the DNR order and essentially constitute an end-run around this court's denial of the request for injunctive relief."[42]

While only of limited precedential value, *ABC School* is, nonetheless, a window into one court's approach to parent actions allegedly taken in the best interest of their child and the court's response to the school nurse's concern about her professional ethics responsibilities. Worth noting is that the DNR order in *ABC School* was fairly complex and, in essence, had three separate categories for school personnel (primarily the school nurse) to understand and apply: those measures prohibited at all times (CPR, intubation, defibrillation); those measures permitted at all times (oxygen, suctioning, stimulation); and, those measures permitted only with parent consent (arterial or venous puncture). While the ABC School was fortunate to have its own full-time nurse, delegation of responsibilities to UAPs with the attendant concerns about their training and supervision would still raise professional ethics issues for the school nurse. The *ABC School* trial court's refusal to permit the use of qualified immunity for school personnel in implementing a DNR order raises the unpleasant possibility that actions taken by school personnel contrary to the DNR order could state a prima facie case of negligence, and perhaps even gross negligence in states that require that standard for liability.[43] Since the ABC School had only students with disabilities, we are left to speculate how a classroom population of both typical and disabled students might have affected the various interests of the parties were one of the disabled students to appear with a DNR order. Would the school be expected to have assigned a one-on-one aide to the DNR order student so as to make certain that none of the prohibited services are provided, while the prescribed ones are attended to? If the aide has not been assigned, or, if assigned, is not available during an episodic event, what

41 Mass Gen Laws Annot §55A. This statute grants exemption from civil liability for school personnel's contact with "sick, injured or incapacitated pupils" in areas of "emergency first aid or transportation" as long as the personnel have acted in "good faith".

42 *ABC School* 1997 WL 34594167 *3.

43 See *Mitchell* 897 NE 2d 354-55 (while failure of school to have a behavioral intervention plan [BIP] constituted a violation of the IDEA by not providing FAPE, it did not constitute negligence where the school personnel's monitoring the student satisfied the tort liability standard for supervision).

would be the school's expectations for the regular classroom teacher with regard to the other students? What preparation, if any, has been given to preparing the other students who may well be watching a friend suffer and die for failure to use special equipment, such as a defibrillator, which the students know is readily available?

5 The DNR and the IDEA

To the extent that students in a school need a DNR order, they may already have an individualised education program (IEP)[44] under the Individuals with Disabilities Education Act (IDEA),[45] or at the very least, a 504 plan under the Rehabilitation Act of 1973.[46] However, while IEPs and section 504 plans are designed to enable a child to receive some educational benefit[47] or an accommodation to permit achievement of a major life function, a DNR order, one can argue, is at odds with this purpose. Although a DNR order may fit within what the NASNPS refers to an Individualised Health Care Plan (IHCP),[48] the notion that a child is to be denied a medical service or procedure will, to the extent that the

44 An IEP "means a written statement for each child with a disability that is developed, reviewed, and revised in accordance with section 1414(d) of [IDEA]." 20 USC §1401(a)(14). An IEP is a comprehensive document prepared by specified school personnel plus a parent or guardian that contains the following: "a statement of the child's present levels of academic achievement and functional performance;" "a statement of measurable annual goals, including academic and functional goals"; "a description of how the child's progress toward meeting the annual goals … will be measured and when periodic reports on the progress the child is making toward meeting the annual goals (such as through the use of quarterly or other periodic reports, concurrent with the issuance of report cards) will be provided;" "a statement of the special education and related services and supplementary aids and services, based on peer-reviewed research to the extent practicable, to be provided to the child, or on behalf of the child, and a statement of the program modifications or supports for school personnel that will be provided;" "an explanation of the extent, if any, to which the child will not participate with nondisabled children in the regular class and in [described] activities;" "a statement of any individual appropriate accommodations that are necessary to measure the academic achievement and functional performance of the child on State and districtwide assessments;" and, "beginning not later than the first IEP to be in effect when the child is 16, and updated annually thereafter, … appropriate measurable postsecondary goals [and] … transition services (including courses of study) needed to assist the child in reaching those goals". 20 USC §§1414(d)(1)(A)(i)(I),(II),(III),(IV),(V),(VI),(VII),VIII).

45 The IDEA is a comprehensive federal statute identifying the rights and remedies for students determined to be in need of special education. 20 USC §1400 *et seq*.

46 29 USC §794.

47 *Board of Educ v Rowley* 458 US 176 200 (sets floor for compliance with the IDEA that a child is to receive "some educational benefit"). See *Timothy W Rochester Sch Dist N 5* 875 F 2d 954 (holding that a severely disabled child did not have to demonstrate that he could benefit educationally from special education in order to be eligible for that education).

48 NASN (2004).

student's health seriously deteriorates or the student dies, have the effect of denying all educational benefits to that child.

The U.S. Supreme Court, in *Irving Independent School District v Tatro*[49] and *Cedar Rapids Community School District v Garrett F*,[50] held that the provision of nursing services to severely impaired students was not prohibited under the IDEA's "medical services" exemption[51] of "related services."[52] In *Garrett F*, a student who at the age of four had his spinal cord severed in a motorcycle accident and "who control[led] his motorised wheelchair through use of a puff and suck straw, … operate[d] a computer with a device that responds to head movements, [and] breathe[d] only with external aids, usually an electric ventilator,"[53] needed assistance with:

> urinary bladder catheterisation once a day, the suctioning of his tracheotomy tube as needed, but at least once every six hours, with food and drink at lunchtime, in getting into a reclining position for five minutes of each hour, and ambu bagging occasionally as needed when the ventilator is checked for proper functioning. [In addition] [h]e also need[ed] assistance from someone familiar with his ventilator in the event there [was] a malfunction or electrical problem, and someone who [could] perform emergency procedures in the event he experience[d] autonomic hyperreflexia.[54]

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49 468 US 883 (holding that requiring school to provide eight-year-old child born with *spina bifida* with clean intermittent catheterisation [CIC] so that she could attend special education classes did not violate the state's Nurse Practices Act since the CIC could be done by a trained lay person).

50 526 US 66 (holding that school providing one-on-one nursing services for severely disabled student constituted related services and did not fall within IDEA's medical exemption).

51 The IDEA exempts from the definition of "related services" those "medical services" that are other than for "diagnostic and evaluation purposes" and "a medical device that is surgically implanted, or the replacement of such device." 20 USC §1401(26) (A), (B).

52 20 USC 1401(26)(A).
The term "related services" means transportation, and such developmental, corrective, and other supportive services (including speech-language pathology and audiology services, interpreting services, psychological services, physical and occupational therapy, recreation, including therapeutic recreation, social work services, school nurse services designed to enable a child with a disability to receive a free appropriate public education as described in the individualised education program of the child, counseling services, including rehabilitation counseling, orientation and mobility services, and medical services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a child with a disability to benefit from special education, and includes the early identification and assessment of disabling conditions in children.

53 *Garrett F* 526 US 68 n 2.

54 *Idem* n 3.
Autonomic hyperreflexia is an uncontrolled visceral reaction to anxiety or a full bladder. Blood pressure increases, heart rate increases, and flushing and sweating may occur. Garret [had] not experienced autonomic hyperreflexia frequently [during the litigation], and [when it had occurred it had] usually

Once *Tatro* and *Garrett F* determined that even comprehensive and life-saving services could be required of school districts under the IDEA to assure students a free and appropriate public education (FAPE), the discussion, arguably, escalated from state issues such as licensing standards to compliance with federal standards as reflected in the IDEA. The Court decisions in *Tatro* and *Garrett F* skirted the first concern without addressing the second. In *Tatro,* the Attorney General of Texas had determined that the state's Nursing Practice Act permitted a nurse to provide a CIC without the supervision of a physician as long as the physician had issued a medical prescription,[55] thus bringing CIC within the IDEA's definition of related services that had to be provided by school districts.[56] Although the Iowa Board of Nursing in *Garrett F* had:

> provided a declaratory ruling that the care required by Garret could not be delegated at school to a nonlicensed practitioner [and that] care [could] not be delegated from a registered nurse (RN) to a licensed practical nurse (LPN) unless an RN is in the same building at all times,[57]

the effect was that a school district was required to provide the related services, even though the district would be required to hire a more expensive registered nurse. In effect, the nature of the person providing the services was viewed as a matter of finances[58] and the IDEA did not permit the diminution or avoidance of related services because of cost.[59]

6 Policy Considerations

Since the IDEA is a federal statute, determining what role, if any, the Supremacy Clause[60] would have on conflicts between the IDEA's mandate to provide related services in order for students to participate

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54 been alleviated by catheterisation. He [had] not ever experienced autonomic hyperreflexia at school. Garret is capable of communicating his needs orally or in another fashion so long as he has not been rendered unable to do so by an extended lack of oxygen.

55 See Tex Atty Gen *Opinion H-1295* (1978-12-19) ("Professional nurses may also administer medications and treatments on a physician's prescription ... without any statutory requirement of direct supervision by the physician.")

56 *Tatro v State of Tex* 516 F Supp 968 976 (observing that "with only minimal additional training a professional nurse should be more than capable of performing CIC").

57 *Garrett F* United States Supreme Court Petitioner's Brief. Appellate Brief *7.

58 In *Garrett F* the school district had been expending $9500 of its own funds annually to pay for an educational assistant to aid the student with his computer and academic courses, but the hiring of a nurse to address the medical needs would require an additional expenditure of $20,000 to $30,000 per year.

59 See *Garrett F* 526 US 71 (while not addressing the issue of cost on its merits, the Supreme Court, nonetheless, appeared to cite with approval the Administrative Law Judge's (ALJ) determination on the merits that "[he had]found no legal authority for establishing a cost-based test for determining what related services are required by the statute").

60 US Const art VI Cl 2 ("This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the

in education and decisions by school teachers, school nurses or school administrators to limit or prohibit services under a DNR order is difficult to assess.[61] To the extent that a state imposes a higher standard of proof (clear and convincing) on a section 1983 claim that is commensurate with its burden of proof standard for state tort claims, the a new trial is required using the lower section 1983 standard of preponderance of the evidence.[62] In the absence of any reported law cases testing the constitutional or statutory viability of a DNR order with regard to public schools, one can only speculate as to the outcome.

Because schools deal with populations rather than just individuals, the design and implementation of DNR orders need to be viewed differently than it would in hospitals or other medical facilities. The landmark case from Maine in 1994 involving the interaction between a school and a parent's DNR order for a 12-year-old multiply disabled child resulted in the public school refusing to follow the DNR order but the school did prepare an individual resuscitation plan (IRP) designed by the student's multidisciplinary team that put in place procedures to be followed in case of emergencies. In essence, the IRP became part of the child's IEP and was reviewable annually. The Office of Civil Rights (OCR) of the US Department of Education concluded that the school's replacement of the IRP for the parent's DNR order was not discriminatory.[63]

In reported cases involving minor children in medical and other care facilities, courts have tended to defer to parents' decisions. Litigation has not always involved a formal DNR order but courts have addressed

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supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding").

61 The Supremacy Clause has been interpreted as declaring that "[a] state statute is void to the extent that it actually conflicts with a valid federal statute". *Edgar v Mite Corporation* 457 US 624 631. In effect, this means that a state law will be found to violate the supremacy clause when either of two conditions exists: (1) Compliance with both federal and state law is impossible, or (2) "... state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress ..." *Dow Chemical Co v Exxon Corp* 139 F 3d 1470 1473.

62 See *Shaw v Leatherberry* 706 NW 2d 299. For a discussion of the Supremacy Clause as it applies to education see Fung "Pushing the Envelope on Higher Education: How States Have Coped with Federal Legislation Limiting Postsecondary Education Benefits to Undocumented Students" 2007 *Whittier J of Child & Family Advocacy* 415 (lamenting that while states are required under the Equal Protection Clause to provide elementary and secondary education to most illegal aliens, post-secondary institutions are preempted under the Supremacy Clause from providing such education because of federal prohibitions); Nappen "The Privacy Advantages of Homeschooling" 2005 *Chapman LR* 73 (discussing how the US Patriot Act [Pub L No 107-56, 115 Stat 272 (2001)] preempts library privacy by allowing government access to library circulation records listing books checked out by patrons, or records of internet use and prohibits the library from disclosing the existence of a warrant or the fact that records were produced, not even to the patron).

63 *Lewiston (Me) Public Schools* 21 IDELR 83.

factual situations involving deteriorating health conditions that are the predicate to seeking a DNR order. In the seminal case, *In re Quinlan*,[64] the Supreme Court of New Jersey observed that the right to refuse medical treatment is part of a person's constitutional right to privacy.[65] In *In re LHR*,[66] the Supreme Court of Georgia, in a case that did not involve a DNR order, upheld the right of parents to remove life support equipment from their terminally ill minor child existing in chronic vegetative state with no hope of development of cognitive function. Eight years after *LHR*, the Supreme Court of Georgia, in *In re Doe*,[67] addressed a dispute between physicians wanting either a DNR order or permission to deescalate treatment to a minor child and the parents who opposed both deescalation and a DNR order, emphasising:

> that the right to refuse treatment or indeed to terminate treatment may be exercised by the parents or legal guardian of the infant after diagnosis that the infant is terminally ill with no hope of recovery and that the infant exists in a chronic vegetative state with no reasonable possibility of attaining cognitive function.[68]

While refusing to "mandate a single, static formula for deciding when deescalation of medical treatment may be appropriate,"[69] the state supreme court in *Doe* found that "medical decision-making for incompetent patients is most often best left to the patient's family (or other designated proxy) and the medical community."[70] However, the court noted that the corollary of its position concerning the rights of parents was that the hospital could not deescalate the child's treatment as long as both parents opposed deescalation. Likewise, the hospital could not have secured a DNR order if the parents opposed it. However, parents could consent to deescalation or a DNR order only if both agreed.[71] More recently, the Supreme Court of Maine, in *In re Mathew W*,[72] held, that, as to the effort of the Department of Health and Human Services (DHHS) to issue a DNR order for a child less than one year old,

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64 355 A 2d 647, *cert denied*; *Garger v NJ* 429 US 922 (finding that the right to refuse medical treatment is a constitutional right based on a person's right to privacy and a person who is incompetent does not lose this right to privacy, and, moreover "the individual's right to privacy grows as the degree of bodily invasion increases and the prognosis dims").

65 The US Constitution contains no express right to privacy, but exists "in the penumbra of specific guarantees of the Bill of Rights 'formed by emanations from those guarantees that help give them life and substance.'" *Griswold v Conn* 381 US 479 484. However, state constitutions frequently have provisions that are broad enough to include privacy. See eg NJ Const Art I par 1("All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness").

66 321 SE 2d 716.

67 418 SE 2d 3.

68 *Idem* 5.

69 *Idem* 6.

70 *Ibid.*

71 *Idem* 6-7.

72 903 A 2d 333.

> due process requires that parents be afforded the same procedural protections before approval of a DNR for their child as they are afforded prior to the termination of their parental rights.[73]

Attaching the due process rights of parents to oppose the DHHS's DNR order to the constitutionally protected rights of parents "to direct the care and upbringing of their children,"[74] the Supreme Court of Maine noted that the:

> [e]xercise of a DNR [by the DHHS] over the parents' objections not only infringe[d] upon the fundamental rights of parenthood, but could have the effect of conclusively preventing parents from raising their child or ever again exercising their fundamental rights.[75]

As a result of cases like *LHR* and *Doe,* state legislatures have intervened and established protocols for addressing DNR orders and issues attendant to the implementation of a DNR. Some of these state statutes are incredibly complex[76] and address not only such matters as the definitions of various debilitating conditions,[77] the authority of physicians,[78] and the criteria for creating and implementing a DNR order,[79] but also such matters as whether a DNR order is a suicide[80] and

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73 *Idem* 337.

74 *Ibid* citing *Troxel v Granville* 530 US 57 66 (where the US Supreme Court invalidated a state statute granting visitation rights to grandchildren even where the visitation occurred over the objections of parents who had lawful custody, reasoning that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." The US Supreme Court has had a long tradition of protecting, under the liberty clause of the Fourteenth Amendment, the right of parents to make decisions for their children). See *Meyer v Nebraska* 262 US 390 399 (invalidating criminal conviction of religious school teacher instructing in other than the English language, finding that the state statute requiring instruction only in English violated "the right of parents to 'establish a home and bring up children' and 'to control the education of their own'"); *Pierce v Society of Sisters* 268 US 510 534-535 (invalidating state statute requiring all children to be taught in public schools, holding that the "liberty of parents and guardians" includes the right "to direct the upbringing and education of children under their control"); *Wisconsin v Yoder* 406 US 205 232 (in reversing truancy convictions of two Amish parents for refusing to send their children to school until age 16, the Supreme Court observed that "[t]he history and culture of Western civilisation reflect a strong tradition of parental concern for the nurture and upbringing of their children [and] [t]his primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition").

75 *In re Matthew* 903 A 2d 337.

76 See Ohio Rev Code §§2133.02-2135.12.

77 Ohio Rev Code §2133.01 (defining "hydration", "incompetent", "life-sustaining treatment", "permanently unconscious state" and "terminal condition").

78 Ohio Rev Code § 2133.03.

79 Ohio Rev Code §§2133.21 (DNR identification, DNR order, DNR protocol, CPR); 2133.08 (descending order of priority for withholding or withdrawing life sustaining treatment).

80 Ohio Rev Code § 2133.12 (DNR is not a suicide).

how DNR orderss issued in other states are to be enforced.[81] However, while the statutes identify those persons who can make decisions to withhold or withdraw life-saving treatment, nothing is said regarding a minor child who has an IEP.[82]

In terms of school compliance with DNR orders, one author has suggested that "many state and local educational systems do not comply with DNR orders directly, but summon Emergency Medical Services who are authorised to honor such orders."[83] In effect, schools choose to pass the decision of whether to comply with a DNR order to someone else.

At the present time, the advice in policy statements concerning schools and DNR orders from medical organisations such as those mentioned earlier in this article from nursing and medical organisations appear undergirded by concerns about claims for tort liability. Arguably, the administering of emergency care, such as cardio-pulmonary resuscitation (CPR), in violation of an existing DNR order could arguably place school personnel at risk of state law assault and battery claims, as well as possible liability under a constitutional tort theory.[84] However, somewhat troublesome is the notion that enforcement of a DNR order in a classroom should be assessed solely by a tort standard. Thus, to follow through with this line of reasoning, if enforcing a DNR order in a classroom does not rise to the level of a tort standard, such as outrageous conduct required for intentional infliction of emotional distress,[85] the DNR order should be enforced. While acceptable ethical conduct may, in fact, be defined as anything which does not violate a legal standard, at what point should we consider the population of students in the classroom in determining that definition? Assuming that a DNR order is enforceable as to a student with disabilities who is in a classroom with

81 Ohio Rev Code § 2133.14.

82 See Ohio Rev Code § 2133.08.

83 Constante, *DNR in the School Setting* at 422.

84 See eg in a non-DNR case, *Davis v Carter* 555 F 3d 979 (where, while coaches had acted with deliberate indifference by not permitting football players sufficient water during a summer practice, the conduct was not so conscience shocking so as to generate liability under intentional infliction of emotional distress or the constitutional tort of violating a student's bodily integrity). But see *Neal v Fulton County Board of Education* 229 F 3d 1069 (where a coach hitting a player with a weight lock that caused the student's eye to pop out of its socket met the conscience shocking standard); *Patrick v Great Valley School District* 296 Fed Appx 258 (coach permitting two wrestlers to practice where weight difference exceeded 90 pounds might constitute conscience shocking conduct as to the coach but not as to the school board that had no custom or practice of allowing such conduct).

85 Constante *DNR in the School Setting* 429. The author suggests that a student might suffer "extreme emotional harm" resulting from witnessing a student receiving emergency treatment against that student's wishes, but such an approach assumes that a DNR Order can be treated simply as a zero-sum game that views emergency treatment as equal to no emergency treatment, without having to consider student responses. One can argue, though, that because schools deal with populations of students, the decisions to treat or not treat are not equal and the attempt to consider them as such affects significantly our perspective of the value of human life.

typical students, how does such lawfulness help us answer the seven-year-old student's questions, "why did the school not try to help Billy?" or "why did Mary's parents want to let her die?" Indeed, if one of more students in the class know how to administer CPR and is watching his or her friend experiencing loss of breathing, how will the teacher respond to the question, "why can't I help Billy?"

The very fact that, "on any given day, as much as 20% of the combined U.S. adult and child populations can be found in schools"[86] is a powerful inducement to institute appropriate strategies for reducing the risk of injuries. What is missing from this strategic discussion and the policy statements is how, or whether, DNR orders have a place for fragile students with severe disabilities, whose IEPs are designed under the IDEA to assure that they experience meaningful educational benefit in mainstreamed settings with students without disabilities. The very purpose of the IDEA and its IEPs is to assure that disabled students have goals and objectives under the IDEA that permit a meaningful performance comparable to students without disabilities but still commensurate with the nature of their disability. In effect, one could argue that treating students with disabilities the same as student without disabilities, in terms of compliance with a DNR order, would not qualify as discrimination under section 504 or the ADA.[87] In essence, just as a school is not likely to refuse to provide emergency, life-saving treatment to the football player with a concussion who is highly unlikely to have a DNR order, one can argue that so also should the school not be expected to refuse emergency care to the student with disabilities and an IEP simply because that student's parents have secured a DNR order prohibiting such treatment.

7 Implications and Conclusion

The litigation involving DNR orders and minors has not addressed the issues relating to students who have IEPs. The authority that parents have

86 *AHA Scientific Statement* 288.

87 Emergency cases where a DNR Order might be in place for a student without an IEP, or section 504 plan, are difficult to construct, but see *Knapp v Northwestern University* 101 F 3d 473 (where the Seventh Circuit rejected the disability discrimination claim of a university student whom Northwestern refused to permit to practice or play with the team, although the student continued to receive an athletic scholarship, because the student had experienced sudden cardiac death while playing high school basketball. Even assuming that the student could have secured injunctive relief requiring that the university permit him to practice with the team and a DNR Order prohibiting the university from using life-saving treatment were he to experience sudden cardiac stoppage during a game or practice, one is hard pressed not to think that the university personnel would have not have attempted some form of emergency treatment. Worth noting is that the university's decision was not altered even though doctors, while plaintiff was still in high school, had inserted an internal cardioverter-defibrillator in his abdomen, a device that detects heart arrhythmia and delivers a shock to convert the abnormal heart rhythm back to normal).

in making decisions about DNR orders in hospital settings is blunted and defused in school settings where parents of children with disabilities are only one part of the decision making process for their children. Where parents come to their child's IEP meeting with a DNR order prepared by their physician, should the school district be entitled to reject the order, as they might do for new related services of different placements? The important difference is how can one equate a request for new related services or placements in order to enhance the child's educational benefits with a DNR order request that may, effectively, be a request to allow a child to die? The legal viability a DNR presents a cascade of other issues. If parents pursue a school's rejection of the DNR order through the administrative due process and judicial reviews, would the result of this process result in a DNR order simply be superimposed on a student's IEP? If an IEP team opposes a parent's DNR order and refuses to include it in an IEP (assuming that such discretion is permissible), would the school be required to reimburse the parent for their cost in placing the child in a medical facility that will adhere to the DNR? In the absence of congressional amendment to the IDEA that expressly authorises the DNR order as part of the special education process, should the IDEA's purpose in including children with special needs in the regular academic setting be viewed as the systemic antithesis of a DNR order designed to be implemented in a school?

A comparison between formal debt administration and debt review – the pros and cons of these measures and suggestions for law reform (Part 1)

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OPSOMMING

'n Vergelyking tussen formele skuldadministrasie en skuldhersiening – die voor- en nadele van hierdie maatreëls en voorstelle vir regshervorming

Ongeveer 'n dekade gelede het die Departement van Justisie en Konstitusionele Ontwikkeling, na aanleiding van klagtes deur verbruikers oor die misbruik van die administrasieprosedure, 'n projek ter hervorming van hierdie prosedure van stapel gestuur. Hierdie projek is egter opgeskort vanweë 'n onafhanklike inisiatief van die Departement Handel en Nywerheid om verbruikerswetgewing, wat in 2007 op die Nasionale Kredietwet 34 van 2005[1] uitgeloop het, te hervorm. Ongelukkig het die wetgewer met die invoering van die skuldhersieningsprosedure ingevolge die Nasionale Kredietwet 34 van 2005 'n gulde geleentheid laat verbygaan om die reg insake skuldverligtingsmaatreëls behoorlik en volledig te hersien. Daarbenewens het die wetgewer ook nie die verhouding tussen skuldhersiening en ander bestaande skuldverligtingsmaatreëls, in die besonder administrasiebevele, behoorlik oorweeg nie. Die doel van hierdie eerste gedeelte van die artikel is dus om administrasie ingevolge die Wet op Landdroshowe 32 van 1944 en skuldhersiening ingevolge die Nasionale Kredietwet 34 van 2005 te ontleed en sodoende sekere positiewe en negatiewe aspekte rakende hierdie twee prosedures te identifiseer. In die tweede gedeelte van die artikel word 'n vergelyking tussen administrasie en skuldhersiening gedoen en voorstelle ter regshervorming gemaak. Die skrywers doen aan die hand dat Suid-Afrika 'n volledige hersiening van sy huidige skuldherskeduleringsmaatreëls benodig en dat die wetgewer vir een enkele maatreël wat op alle skuldherskeduleringsgevalle van toepassing is, voorsiening moet maak. Na aanleiding van die vergelyking tussen administrasie en skuldhersiening belig die skrywers die hoofpunte wat die wetgewer na hul mening in ag moet neem wanneer so 'n nuwe prosedure ontwerp word.

1 'n Nie-amptelike vertaling van die Nasionale Kredietwet 34 van 2005 is beskikbaar by www.vra.co.za/index.php?option = com_content&view = category&layout = blog&id = 3&Itemid = 3 (red).

1 Introduction

In a consumer credit-driven society like ours, over-indebtedness of money lenders will always manifest itself. At present it is also fair to say that the financial situation of many South Africans is dire.[2]

With this in mind, it always remains a question as to how a specific legal system responds and how it should respond to the problem of over-indebtedness by providing debt relief measures that a consumer debtor may use in order to address his or her debt situation.

For the purposes of this article it is important to note that consumer debtors may use an informal creditor work-out that may amount to a voluntary debt rearrangement that is based on the contractual principle of consent. It is clear that some creditors will not be prepared to cooperate in such a voluntary system. The question then arises as to what formal procedures are provided for by the law. In terms of section 74 of the Magistrates' Courts Act[3] (MCA) consumer debtors may apply to a magistrate's court for an administration order that would, if successful, in effect compel the creditors to accept a rearrangement of their debts.

Where the debtor is insolvent he or she may apply for the ultimate debt relief measure in terms of the Insolvency Act,[4] namely, voluntary surrender[5] that would bring about a *concursus creditorum* and eventually a rehabilitation of the insolvent debtor. From the debtor's point of view rehabilitation will usually discharge unpaid pre-sequestration debt,[6] but the applicant-debtor must, amongst other requirements, also prove an advantage for creditors[7] before he or she will succeed with such an application. Sequestration is thus not readily available as a debt relief measure and it remains a drastic procedure.

It is well documented that the administration order procedure has been subject to bad press for many years and that the Department of Justice and Constitutional Development, following complaints by

2 Since June 2007 there has been an on-going deterioration of the number of consumers in "good standing". At the end of December 2011, credit bureaux had records of 19.34 million credit active consumers, of whom 8.93 million had "impaired credit records". Thus, at present only 53.8% of credit-active consumers are in "good standing". A consumer is regarded to be in "good standing" where he or she has not missed more than 1 or 2 instalments and his or her record does not reflect a judgment or administration order or any "adverse listings" such as accounts which has been "handed over" and/or "written off"' – National Credit Regulator *Credit Bureaux Monitor* Fourth Quarter (Dec 2011) – available at www.ncr.org.za.

3 32 of 1944 (hereafter the MCA). For sake of being complete, the possibility of a repayment plan following an offer by a debtor ito ss 57 & 58 MCA must also be noted, but these procedures are not discussed for the purposes of this article.

4 24 of 1936.

5 Ss 3–7 Insolvency Act 24 of 1936 (hereafter IA).

6 See s 129(1)(b) IA.

7 See ss 6, 10 & 12 IA.

consumers regarding the abuse of the administration order and related debt relief procedures, initially introduced a reform project regarding this procedure.[8] However, this project was suspended in view of an independent initiative by the Department of Trade and Industry to reform consumer legislation that culminated in the promulgation of the National Credit Act[9] (NCA), which is of full force and effect as from June 2007. The NCA deals with a wide range of issues regarding the regulation of credit agreements as defined in the NCA and, amongst other matters, purports to protect consumers against unfair business practices regarding consumer credit.

The preamble to the NCA states that the NCA must:

> promote a fair and non-discriminatory marketplace for access to consumer credit and for that purpose to provide for the general regulation of consumer credit and improved standards of consumer information; to promote black economic empowerment and ownership within the consumer credit industry; to prohibit certain unfair credit and credit-marketing practices; to promote responsible credit granting and use and for that purpose to prohibit reckless credit granting; *to provide for debt re-organisation in cases of over-indebtedness*;[10] to regulate credit information; to provide for registration of credit bureaux, credit providers and debt counselling services, to establish national norms and standards relating to consumer credit; to promote a consistent enforcement framework relating to consumer credit; to establish the National Credit Regulator and the National Consumer Tribunal, to repeal the Usury Act, 1968, and the Credit Agreements Act, 1980 and to provide for related incidental matters.

In order to deal with over-indebtedness as such, the NCA introduced debt review as a formal procedure that could be used by over-indebted consumers to bring about a debt rearrangement regarding credit agreements regulated by the NCA.[11]

However, in spite of initiatives and arguments in favour of a comprehensive review of debt relief measures, the legislature did not follow such an approach when it introduced the procedure of debt review.[12] Its relationship with other existing debt relief measures, in

8 For more detail see Boraine "Some thoughts on the reform of administration orders and related issues" 2003 *De Jure* 217.

9 34 of 2005 (hereafter the NCA). For a discussion of the NCA, see in general Otto & Otto *The National Credit Act Explained* (2010).

10 Own emphasis. See also s 3(g) NCA providing for the "addressing and preventing of over-indebtedness of consumers, and providing mechanisms for resolving over-indebtedness based on the principle of satisfaction by the consumer of all responsible financial obligations" as one of the purposes of the NCA.

11 See ss 86–88 NCA.

12 See further as background Roestoff *'n Kritiese evaluasie van skuldverligtingsmaatreëls vir individue in die Suid-Afrikaanse insolvensiereg* (LLD thesis UP 2002); Roestoff & Jacobs "Statutêre akkoord voor likwidasie: 'n toereikende skuldenaarremedie?" 1997 *De Jure* 189; Boraine 2003 *De Jure* 217.

particular administration orders in terms of section 74 of the MCA was, it is submitted, also not considered properly.

The aim of this article is thus to compare administration with debt review with a view to identify certain positive and negative aspects pertaining to these two procedures and to consider problem areas regarding the co-existence of these two procedures in South African legal practice. Within the ambit of this pertinent discussion, some suggestions are made regarding law reform.[13]

2 Administration Orders in Terms of the MCA

2 1 General

The administration order procedure, which has been described as a modified form of insolvency proceedings[14] provides debt relief for natural person debtors whose debts amount to not more than R50 000.[15]

13 Although the South African Law Reform Commission proposed another alternative formal debt relief measure in the form of a pre-liquidation composition, this process is not discussed as such for the purposes of this article, since the focus is on possible reform measures for debt administration and debt review, being the current procedures to be used for debt restructuring. See iro the Law Commission's proposal, *Report on the Review of the Law of Insolvency* (Project 63) Vol 1 (Explanatory Memorandum) and Vol 2 (Draft Bill) (February 2000) schedule 4. This proposal has also been included in the latest version of the Insolvency Bill contained in a working document of the Department of Justice dated 2010-06-30 – see clause 118 of the unofficial working copy, on file with the authors. In this document it is envisaged that the proposed measure be included in the proposed unified Insolvency Act and not in the MCA. The proposed measure is supposed to afford debt relief to debtors who are unable to show an advantage to creditors and are therefore excluded from the liquidation process (2000 Explanatory Memorandum 5). Where the composition is not accepted by the required majority of creditors, the court must, ito the latest proposal, declare that the proceedings have ceased and that the debtor is in the position that he was in prior to the commencement thereof. Alternatively the court must determine whether or not s 74 can be applied to the debtor and, if so, apply the provisions accordingly and within the discretion of the presiding officer (cl 118(22)(a) & (b)).

14 See *Madari v Cassim* 1950 2 SA 35 (D) 38; *Barlow's (Eastern Province) Ltd v Bouwer* 1950 4 SA 385 (E) 393; *Volkskas Bank v Pietersen* 1993 1 SA 312 (C) 315; *Weiner NO v Broekhuysen* 2003 4 SA 301 (SCA) 305; *Fortuin v Various Creditors* 2004 2 SA 570 (C) 573; *Ex Parte August* 2004 3 SA 268 (W) 271; *African Bank Ltd v Weiner* 2004 6 SA 570 (C) 575 (hereafter *African Bank v Weiner* (C)).

15 See s 74(1)(b) MCA. The amount is determined by the Minister from time to time. See GN R1411 in *GG* 19435 of 1998-10-30 for the current provision. The order will not be invalid if the amount at some point in time exceeded the R50,000 limit – see s 74(2) MCA and *Di Mata v Firstrand Bank Ltd* 2002 6 SA 506 (W). The full amount of the judgment obtained and not merely the monthly instalment ito an emoluments attachment order should be included when determining what the total amount of all the debtor's debt due ito s 74(1)(b) MCA is – *Jacobs v African Bank Bpk* 2006 5 SA 21 (T) 24, 25 & 27.

Administration orders are best suited to deal with relatively small estates where the costs of sequestration would exhaust the estate. However, administration proceedings offer limited facilities for the investigation of a debtor's affairs and it may therefore be unsuitable where the debtor's affairs are complex.[16]

In principle the procedure provides for a rescheduling of a debtor's debt without sequestrating the debtor's estate. In terms of an administration order a court will assist the debtor by appointing an administrator to take control of the debtor's financial affairs and to manage the payment of debts due to creditors. The debtor has an obligation to make regular payments to the administrator.[17] The administrator, after deducting necessary expenses and a specified remuneration determined by tariff, will in turn make a regular distribution out of such received payments to all creditors.[18]

2 2 Application for an Administration Order

Administration appears to be a viable debt relief measure for debtors who have a regular income and whose debt burden does not exceed R50 000 – a debt situation which is therefore deemed to be reasonably manageable. In terms of section 74(1) of the MCA a debtor may obtain an administration order from the court of the district in which he or she resides, carries on business or is employed, where:

(a) the debtor is unable to pay the amount of any judgment obtained against him or her in court; or

(b) the debtor has insufficient funds or assets at hand to meet his or her financial obligations, even where no judgment has as yet been granted.

Additionally, in terms of section 65I of the MCA,[19] an administration order may also be granted in favour of a judgment debtor during a section 65 *in camera* inquiry into the debtor's financial position. The application for an administration order enjoys preference and the court will suspend the section 65 *in camera* hearing until the application for an administration order has been disposed of.

16 See Harms *Civil Procedure in Magistrates' Courts* (2011 update) par 48.2.

17 Should the debtor fail to make the payments as required by the administration order, the provisions of ss 65A–65L MCA shall *mutatis mutandis* apply. Where the court has in addition to the administration order authorised the issue of an emoluments attachment or a garnishee order and has suspended such authorisation conditionally and the debtor fails to comply with the conditions, the administrator may lodge a certificate to this effect with the clerk of the court and the clerk must thereupon issue the emoluments attachment order or garnishee order – cf s 74I(2) & (3) MCA.

18 See ss 74L & 74J MCA.

19 See s 74(1) MCA.

The procedure for applying for an administration order is based on an application[20] together with a prescribed statement of affairs[21] in which the debtor affirms on oath that the names of the creditors and the amounts owed to them and all other statements or declarations made in the statement are true.[22] The application is lodged with the clerk of the magistrate's court where the debtor resides or carries on business or is employed,[23] and is delivered personally or by registered post to the creditors at least three calendar days before the hearing.[24] The clerk of the court must, in accordance with the Act, assist an illiterate debtor in preparing the application.[25] In practice it is usual for an attorney to assist the debtor in preparing the application.

The true basis for the application is the fact that the debtor is unable to pay his or her debts as they become due. The amount of the outstanding debt coupled with the period it will take to pay it off is, according to case law,[26] not a factor, or not the only factor[27] to be taken into account when the court considers an application for administration. Section 74 of the MCA does not require that there should be a benefit to creditors[28] and the fact that creditors may have to wait many years for their money should therefore not play a decisive role in adjudicating an application for administration.[29] Moreover, section 74 does not make provision for any period within which any debt has to be paid and there is thus no basis in law for the inference that the legislator intended a

20 See Annex 1 Form 44 Magistrates' Courts Rules (hereafter MCR).

21 Ss 74A(1) and (2) MCA. For the sake of convenience Annex 1 Form 45 MCR may be used to set out all the required particulars. Form 45 may also be used where the application is made in terms of s 65I(2) MCA. The required particulars are briefly, the name and address of the debtor's employer; a list of the debtor's assets; the debtor's trade or occupation and income; a list of debtor's and his dependants' living expenses; a list of creditors and amounts owing to them; rights of security which creditors may have; full particulars of goods purchased under a credit agreement ito the NCA; mortgage bonds on immovable property; assets purchased under a written agreement other than a credit agreement ito the NCA; particulars iro previous administration orders; particulars iro the persons dependent on the debtor and particulars iro instalments which the debtor offers to pay towards settlement of his or her debts. Prescription with regard to any debt mentioned in the statement of affairs is interrupted on the date on which such statement is lodged, or where the debt is not mentioned in the statement, on the date when the claim is lodged with the court or the administrator – s 74V(1) MCA. Ito s 74V(2) MCA a debt cannot become prescribed until at least one year has elapsed since the date on which and administration order ceases to be of force and effect.

22 S 74A(3) MCA.

23 S 74(1)(b) MCA.

24 S 74A(5) MCA.

25 S 74A(4) MCA.

26 *Ex Parte August supra* 273.

27 See *Fortuin v Various Creditors supra* 575.

28 *Ex Parte August supra* 272. It is also not a pre-requisite for the granting of an administration order that the debtor should not be the cause of his or her own financial embarrassment – *Ex Parte August supra* 271.

29 *Ex Parte August supra* 272; *Fortuin v Various Creditors supra* 575.

reasonable time,[30] or a certain time[31] within which a debtor should be assisted to get out of his or her financial embarrassment.

2 3 Hearing of Application for Administration

The application is heard before a magistrate in a so-called section 65 court and in the presence of the debtor or an appointed legal representative, as well as creditors and their respective legal representatives.[32] All the debts listed in the statement of affairs are deemed to be proved, subject to any amendments the court may make, except where a creditor objects to a listed debt or the court rejects or requires the debt to be substantiated by evidence.[33] Similarly, when the debtor objects to a creditor's claim, the court will require the creditor to prove the claim.[34] The court, or any creditor or legal representative may question the debtor with regard to his or her assets and liabilities, present and future income (including the income of a spouse), standard of living and possibilities of economising and any other relevant matter.[35] It is to be noted that this is a limited enquiry that may take place, but the application is clearly *sui generis* in that it allows oral argument. If it appears to the court that any debt is a matter of contention between the debtor and creditor or between the creditor and any other creditor, the court may, upon inquiry into the objection, allow or reject the debt or a part thereof.[36]

2 4 Contents of Administration Order

The contents of an administration order take a prescribed form and must set out that the debtor's estate has been placed under administration, that an administrator has been appointed, and the amount that the debtor is obliged to pay.[37]

The order must specifically state a weekly or monthly amount to be paid over to the administrator by the debtor.[38] In terms of section 74C(2) of the MCA this amount is calculated by taking into account the

30 *Ex Parte August supra* 272. But see *African Bank Ltd v Weiner* (C) *supra* 575 where Griesel J observed that "it was never the intention of the Legislature that a debtor should be bound up in an administration order indefinitely, where there is no reasonable prospect of such order being discharged within a reasonable period of time. On the contrary, I am of the view that the mechanism of an administration order is intended to provide a debtor with a relatively short *moratorium* to assist in the payment of his or her debts in full and to ward off legal action and execution proceedings during such period".

31 *Fortuin v Various Creditors supra* 575.

32 S 74B(1) MCA.

33 S 74B(1)(b) MCA.

34 S 74B(1)(c) MCA.

35 S 74B(1)(e) MCA.

36 S 74B(2) MCA.

37 The content is regulated by s 74C MCA and the form by Annex 1 Form 51 MCR.

38 S 74C(1)(a) MCA.

difference between the future income of the debtor and the sum of the debtor's and his dependants' "necessary expenses",[39] certain prescribed "periodical payments"[40] which the debtor is obliged to make and other payment obligations due *in futuro*.[41]

In futuro debts, being debts that become due and payable in the future,[42] are clearly excluded from the administration order[43] and the court will exclude a certain amount of money from the weekly or monthly payments made to the administrator for the purpose of allowing the debtor to make periodical payments in terms of a credit instalment agreement or existing maintenance or mortgage bond obligations.[44]

Where the administration order provides for the payment of instalments out of future income, the court shall authorise the issue of an emoluments attachment or garnishee order to facilitate payments by the debtor.[45]

The order may stipulate such conditions as the court may deem fit with regard to security, preservation or disposal of assets, realisation of movables subject to hypothec, or otherwise.[46] It may also authorise the administrator to realise some of the assets of the debtor for the purpose of distributing the proceeds among creditors, but no assets subject to any credit agreement in terms of the NCA may so be realised without the written permission of the seller.[47] Where the court authorises the administrator to realise any asset, it may amend the payments to be made in terms of the administration order accordingly.[48] Hence, in contrast with debt review in terms of the NCA, administration in terms of the MCA may be regarded as a hybrid form of debt relief as it provides for the possibility that assets may be liquidated in addition to a rescheduling of debts.

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39 S 74C(2)(a) MCA. When determining the "necessary expenses" ito s 74C(2)(a) MCA the income of the debtor's spouse may be taken into account. Where the debtor is married in community of property it may also be taken into account in determining the debtor's income – s 74C(3) MCA.

40 They are periodical payments which the debtor is obliged to make under a credit agreement ito the NCA or a mortgage bond or other written agreement for the purchase of an asset and periodical payments to be made ito an existing maintenance order – s 74C(2)(b)–(d) MCA.

41 See s 74C(2)(e) MCA.

42 Eg interest which has yet to accrue on a debt – *Fortuin v Various Creditors supra* 574.

43 See s 74C(2)(b)–(e) MCA.

44 The court may, however, in its discretion and in certain prescribed circumstances refuse to take into consideration the periodical payments with regard to a credit agreement or mortgage bond, eg where the goods ito the credit agreement are not exempt from execution ito s 67 MCA or where the court is not of the opinion that it is desirable to safeguard mortgaged property – see s 74C(2)(b) & (d) MCA.

45 S 74D MCA.

46 S 74(1)(b) MCA and see also s 74C(1)(b) MCA iro aspects which may be specified in the administration order.

47 See s 74C(1)(b)(i) and also s 74K(1) and (2) MCA.

48 S 74K(4).

2 5 Execution of Administration Order by Administrator

The court must appoint an administrator to give effect to the order.[49] The court exercises an independent discretion when appointing an administrator, but any person may in principle be appointed as an administrator and there are no prescribed qualifications for an administrator as such.[50] Under given circumstances a government official may also be appointed as administrator. The appointment becomes effective only when the administrator receives a copy of the order or, where he or she is required to give security, after he or she has given such security.[51] Security must be given where the administrator is not a legal practitioner or an officer of the court.[52] The giving of security by the administrator to the satisfaction of the court is meant to serve as a guarantee for moneys received and paid into the trust account of the administrator, but the practices surrounding the giving of such security is sometimes doubted.[53]

The clerk of the court is required to provide the debtor and the administrator with a copy of the administration order whereupon the administrator must send a copy by registered post to each creditor who proved a debt or was mentioned by the debtor in the statement of affairs.[54]

The administrator has a host of statutory duties[55] but the main duty is to draw up a list of creditors and to distribute moneys collected from the

49 If such a person is to be relieved of his or her appointment, it is the court, and not the appointed administrator, that must sanction it and the new appointment or substitution should also be done by the court – *Stander v Erasmus* 2011 2 SA 320 (GNP) 324. The court in *Stander* also referred to the practice of appointed administrators establishing juristic persons through which files under administration are administered without the approval of the court. According to the court this practice raises serious concerns as the said juristic persons have not been appointed by the court and if payments are received by persons not appointed by the court the interests of the debtors and creditors will be compromised.

50 See *Oosthuizen v Landdros, Senekal* 2003 4 SA 450 (O).

51 S 74E(1) MCA.

52 S 74E(3) MCA.

53 See Boraine 2003 *De Jure* 231.

54 S 74F(1) & (2) MCA.

55 See eg s 74J MCA. Ito s 74M MCA the administrator is obliged, upon payment of the fees prescribed in the rules, to furnish any creditor on request by him or her with information regarding the progress made iro the administration. The administrator must also furnish any person applying therefore with a copy of the application ito s 74 MCA and a statement of affairs ito s 74A(1) or 65I(2) MCA or with a list of creditors or distribution account ito s 74G(1) or 74J MCA. Within the ambit of his or her duties, the administrator may in terms of section 74J(2) MCA where any debt or the balance thereof, amounts to less than R10 pay it in full if such a payment will facilitate the distribution of funds in his or her possession. Out of the moneys received, the administrator may also pay any urgent or extraordinary medical, dental or hospital expenses incurred by the debtor after the date of the administration order – s 74J(4) MCA.

debtor amongst them.[56] In terms of section 74J of the MCA the administrator must,[57] subject to section 74L,[58] distribute such payments *pro rata* among the creditors at least once every three months. Claims that enjoy preference under insolvency law must be paid out in the prescribed order of preference.[59]

The list of creditors is lodged with the clerk and is open for inspection by creditors during office hours. A creditor may object to the list and must do so within 15 days[60] of having received a copy of the administration order.[61]

Where a particular creditor wishes to prove a debt before the completion of an administration order and which is unlikely to be included in the order, a claim must be lodged with the administrator. The administrator in turn notifies the debtor of the additional claim. Where the debtor admits the claim, and subject to the right of any other creditor who have not received notice of the claim to object to the debt, the administrator will lodge a notice with the clerk, adding the creditor's claim to the list.[62] Where the debtor denies the claim, the administrator must notify the creditor. The creditor may then approach the court for a hearing on the disputed claim. The court may refuse the claim or allow it in part or in whole. Alternatively the court may also require that the claim be supported by evidence, or postpone the hearing on such conditions as it may deem fit. Where the claim is allowed by the court, it is added to the list.[63]

A creditor who has sold and delivered goods to a debtor under a credit agreement in terms of the NCA before the administration order was granted and who becomes entitled to demand immediate payment of the outstanding purchase price will, after he has notified the administrator that he elects to do so, obtain a hypothec over the goods in terms of which the outstanding amount will be secured. However, any term of the agreement with regard to the creditor's right of termination of the agreement or with regard to his right to return the goods shall not in consequence of the debtor's non-compliance with the agreement be enforceable.[64] In terms of section 74G(8) of the MCA the court may order that the seller take possession of the goods and sell them by public auction, or, if the seller, buyer and administrator so agree, to sell them by private treaty. The creditor must then pay to the administrator the

56 See s 74G, H & J MCA; Annex I Forms 47–50 MCR.
57 Deviation is only allowed in two circumstances: where the creditors all agree, or where the court otherwise orders – s 74J(1) MCA and *Weiner v Broekhuysen supra* 309.
58 Providing for a deduction of the remuneration and expenses of the administrator.
59 S 74J(3) MCA.
60 R 48(2) MCR.
61 See s 74G(1) & (10) MCA.
62 S 74G(2) & (3) MCA.
63 S 74G(4)–(6) MCA.
64 S 74G(7) MCA.

amount of the proceeds of the sale in excess of the amount of his debt and the costs connected with the sale, or, if the net proceeds of the sale are insufficient to pay his debt in full, he may lodge a claim for the outstanding balance for inclusion in the list of creditors.[65]

Where a person becomes a creditor after the granting of an administration order, or where a person sold and delivered goods to the debtor under a credit agreement in terms of the NCA after the granting of the order[66] such a person may lodge a claim with the administrator, whereafter the administrator shall inform the debtor of the new claim.[67] The debtor may then either accept or deny the claim,[68] Where the debtor admits the claim or where he denies the claim and the court allows the claim, the debt will be added to the list in terms of section 74G(1),[69] but the creditor will not be entitled to a dividend in terms of the administration order until all other creditors who were creditors on the date of granting of the order have been paid in full.[70]

2 6 Cost of Administration

As part of his or her duties, the administrator must pay the cost of the application for the administration order as a first claim against the moneys received by him or her, unless the court orders otherwise.[71]

The administrator is entitled to be reimbursed for expenses and remuneration[72] but such costs may not exceed 12,5% of the total amount of moneys received as part of the administration order.[73] Such expenses and remuneration are subject to taxation by the clerk of the court and subject to review by any judicial officer.[74] In order to provide for unforeseen costs that the administrator may incur when the debtor defaults on the payments to be made in terms of the administration order, or disappears, the administrator may retain a maximum of 25% of the amount collected, but such an amount in the possession of the

65 S 74G(9) MCA.
66 In such a case the provisions of s 74G(7)–(9) MCA explained above also apply. The creditor wishing to demand immediate payment will thus obtain a hypothec over the goods sold ito the credit agreement and may approach the court for an order authorising him to attach and sell the goods.
67 S 74H(1) & (4) MCA.
68 S 74H(2)–(4) MCA.
69 The procedure ito 74G(3), (4), (5) & (6) MCA explained above applies.
70 S 75H(2)–(4) MCA.
71 S 74O MCA.
72 S 74L(1)(a) MCA.
73 S 74L(2) MCA; and see *Weiner v Broekhuysen supra* 312 *et seq* and *African Bank Ltd v Weiner* 2005 4 SA 363 (SCA) 369 (hereafter *African Bank v Weiner* (SCA)). Prior to these judgments, many administrators assumed free reign as regards the cost and remuneration they charged for managing an administration – see Boraine 2003 *De Jure* 217 231 and 233. Where a state official is appointed as an administrator, the remuneration accrues to the state – r 48(5) MCR.
74 S 74L(2) MCA.

administrator may at no stage exceed R600.[75] In such an event the administrator may for instance instruct an attorney to follow up and to collect the due and payable amounts from the defaulting debtor. Such collection will be subject to the normal rules and fees relating to debt collection.

2 7 Other Consequences of Administration Order

Although the estate of a person under administration may still be sequestrated in terms of section 74R of the MCA, section 74P prevents individual creditors from continuing with their individual remedies against the debtor or his property after the administration order has been granted.[76] However, remedies with regard to any mortgage bond or any debt in terms of section 74B(3)[77] are not restricted by an administration order. The court may also grant leave to institute enforcement proceedings.[78] Where proceedings have already been instituted against a debtor in respect of any debt[79] the court must, upon receiving notice of the administration order, suspend such proceedings. However, the court may grant costs already incurred by the creditor, which may also be added to the judgment debt.[80]

In terms of section 74S of the MCA, a debtor who incurs additional debts during the currency of an administration order and does not disclose the existence of the order commits an offence. Additionally, the court may upon application by any interested person, set aside the administration order.[81]

2 8 Suspension, Amendment, Rescission and Lapsing of Administration Order

The court under whose supervision an administration order is being executed, may upon application by the debtor or any interested party re-open the proceedings and call upon the debtor to appear for such further examination as the court may deem fit. The court may then on good

75 S 74L(1)(b) MCA read with r 48(4) MCR. The 12.5% cap ito s 74L(2) MCA does not cover the "costs" ito s 74L(1)(b) MCA and they can be recovered separately – see *African Bank v Weiner* (SCA) 371 and 378.
76 S 74P(1) MCA.
77 Ie a debt which has been rejected ito s 74B(2) MCA. Such creditor may, notwithstanding the provisions of s 74P MCA, institute proceedings or proceed with an action already instituted iro such debt – s 74B(3) MCA. If judgment is obtained the amount of the judgment debt shall be added to the list of debts – s 74B(4) MCA.
78 S 74P(1) MCA.
79 Except a debt due under a mortgage bond or a debt ito s 74B(3) MCA.
80 S 74P(2) MCA.
81 S 74S(1) MCA.

cause shown suspend,[82] amend[83] or rescind the administration order.[84] Upon an application for rescission the court may, *inter alia*, if it appears that the debtor is unable to pay any instalment, suspend the order for such a period and on such condition as the court deems fit. The court may also amend the instalments to be paid and make the necessary amendments to any emoluments attachment order or garnishee order issued so as to ensure payment in terms of the administration order.[85]

As soon as the costs of the administration and all the listed creditors have been paid in full, the administrator must lodge a certificate indicating payment in full with the clerk of the court and send copies of the certificate to the creditors, whereupon the administration order lapses.[86]

2 9 General Remarks

The administration procedure brings about a limited *concursus creditorum*[87] in the sense that creditors are in principle prevented from continuing with their individual debt enforcement remedies and they receive repayment of the debt on an equal basis in the form of distributions made to them by the administrator. However, the debtor must still repay the full amount of the claims plus costs and interest.[88] The repayment period is not limited and there is no provision for a discharge of any portion of the debt as is the case with sequestration followed by rehabilitation. It thus frequently happens that the administration order allows the debt to balloon and may theoretically keep the debtor in debt and "locked into" the process indefinitely.[89] As a result, debtors often default in terms of the order and it can therefore not be viewed as a lasting debt relief measure.

In view of the monetary cap of R50 000, debtors who owe more than this amount are also excluded from this remedy. However, despite shortcomings and problems associated with administration it must be conceded that it may offer some relief in given circumstances. However, if the monetary cap was higher it could also have included those who are currently excluded from the relief offered by rehabilitation following sequestration since they cannot prove an advantage to creditors as

82 When the court suspends the order, it may impose such conditions as it may deem just and reasonable – s 74Q(1) MCA.
83 An administration order may also be amended at the request of the administrator in writing and with the written consent of the debtor – s 74Q(2) MCA.
84 S 74Q MCA and Annex I Form 52A MCR.
85 S 74Q(3)(b) MCA.
86 S 74U MCA.
87 See *Madari v Cassim supra* 38; *Ex Parte Fortuin v Various Creditors supra* 574; *Ex Parte August supra* 272.
88 See s 74U MCA discussed above.
89 See Boraine 2003 D*e Jure* 217 249; Greig "Administration orders as shark nets" 2000 *SALJ* 622.

required by the Insolvency Act.[90] Within this context the effect of debt review in terms of the NCA will next be considered.

3 Debt Review in Terms of the NCA

3 1 General

The NCA attempts to address the problem of over-indebtedness by providing a procedure in terms of which a debtor's credit agreement debt may be reviewed by a debt counsellor[91] with a view to possibly obtaining debt relief by means of a consensual or court ordered debt restructuring.[92] At the outset it is important to note that these debt relief measures apply only to credit agreement debt[93] entered into by natural persons.[94] In the process of debt review the debt counsellor is also tasked with investigating whether credit was granted recklessly.[95] During the period in which a debt review is being conducted, the consumer is protected by a moratorium on enforcement by the credit provider of the rights under the credit agreement.[96] Once a consensual debt re-arrangement agreement has been filed as a consent order or the court, in the absence of a consensual agreement, grants a court-ordered rearrangement, enforcement of the credit provider's rights under the credit agreement is further stayed pending compliance by the debtor with the rearrangement agreement or restructuring order.[97] Where credit has been granted recklessly, debt relief is afforded in the form of completely or partially setting aside the relevant reckless credit agreement or suspending it or by suspending that particular credit agreement and restructuring the debtor's obligations under any other credit agreements.[98] It should further be noted that a debtor can access the process voluntarily in accordance with section 86 but that section 85 of the NCA also provides that a court has the discretion to refer a credit agreement for debt review in instances where legal proceedings have already commenced.[99]

3 2 Debt Counsellor

The NCA has specifically created the office of the debt counsellor, being the designated person to offer and conduct the service of debt counselling (also referred to as "debt review"). In accordance with the

90 24 of 1936.
91 See s 86(1) NCA.
92 See ss 86(7), 86(8) & 87 NCA.
93 See s 8 read with s 1 NCA for the definitions of the different credit agreements ito the NCA. See also Otto & Otto 17 *et seq* for a discussion of the scope of application of the NCA.
94 See s 6 read with s 78(1) NCA.
95 See s 86(6)(b) NCA.
96 S 88(3) NCA.
97 S 88(3)(b)(ii) NCA.
98 S 83 NCA.
99 See par 3 3 3 below.

regulations to the NCA, a debt counsellor should be a neutral person[100] and it is required that debt counsellors be registered with the National Credit Regulator (NCR) for purposes of efficient regulation.[101]

During the debt review process the debt counsellor is obliged to review the debtor's credit agreements in order to determine whether the debtor is over-indebted and, if so required, whether reckless credit was extended.[102] The debt counsellor does not receive and distribute payments on behalf of the debtor as such function is assigned to independent Payment Distribution Agents (PDAs).[103] No provision is made in the NCA for the debt counsellor to realise the debtor's assets or to make such a recommendation to court. However, when the debt counsellor has to determine whether the consumer is over-indebted in terms of section 79(1) of the NCA, he or she should take into consideration the consumer's "financial means, prospects and obligations".[104] In *Standard Bank of South Africa Ltd v Panayiotts*[105] it was held that "financial means" also includes assets and liabilities and that "prospects" includes prospects of improving the consumer's financial position, such as increases and liquidation of assets. In the case of credit agreements which involve goods as the subject matter of the agreement, the consumer's financial means and prospects must therefore include the prospect of selling the goods in order to reduce the consumer's indebtedness.[106] It would therefore appear that our courts will probably not be willing to allow consumers to include a credit agreement in the eventual re-arrangement order and to retain the subject matter of the agreement if it is of the opinion that such goods are luxurious and unnecessary for the maintenance of the consumer and his or her dependants.[107] It is submitted that the court will in such a case be obliged to reject the proposal.[108]

3 3 Debt Review Process

Debt review in the wide sense encompasses two distinct stages. The first stage takes place before the debt counsellor, when the review of the debtor's credit agreements is conducted and a determination with regard to over-indebtedness and reckless credit is made. The second stage occurs when a voluntary repayment plan is filed at court as a consent

100 R 1 Regulations made ito the NCA (GN R 489 of 2006-05-31) (hereafter CR).
101 For the registration requirements in respect of debt counsellors see reg 44 and 45 CR.
102 S 86(6) NCA.
103 See Van Zyl in Scholtz (ed) *Guide to the National Credit Act* (2008) par 5 2 5.
104 S 79(1)(a) NCA.
105 2009 3 SA 363 (W) par 47.
106 *Standard Bank v Panayiotts supra* par 77.
107 In this regard compare iro the administration order procedure s 74C(2)(b) and (d) MCA.
108 See s 87(1)(a) NCA and the discussion in par 4 7 3 below. The magistrate's court is a creature of statute and is limited to exercise the powers ito s 87 NCA. The court will therefore not be entitled to order that the relevant credit agreement be excluded from the debt re-arrangement order.

order in terms of section 138 of the NCA or the court is approached to restructure the debtor's credit agreement debt.

3 3 1 Process Before Debt Counsellor

Section 86 of the NCA read with regulation 24 provides detail on the debt review process before the debt counsellor.[109] The regulations to the NCA define "debt counselling" as "performing the functions contemplated in section 86 of the Act".[110]

In accordance with section 86 a consumer may apply to a debt counsellor to have the consumer declared over-indebted. It should be pointed out that the word "declared" is unfortunate, as the debt counsellor has no powers to actually declare a consumer over-indebted: this is a power that only a court can exercise.[111]

With regard to agreements where the credit provider has already proceeded to take steps in order to enforce the agreement,[112] the Supreme Court of Appeal in *Nedbank Ltd v National Credit Regulator*[113] has recently held that the provisions of section 86(2)[114] would bar the consumer from including that specific agreement in the debt review procedure as soon as a section 129(1)(a) notice[115] has been delivered in respect of that specific agreement.[116] The court indicated that in such event the specific credit agreement in respect of which the section 129(1)(a) notice was delivered can not be subjected to debt review but a comprehensive debt review may still proceed in respect of the debtor's other credit agreement debt in respect of which a section 129(1)(a) notice had not yet been delivered.[117]

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109 See Van Heerden in Scholtz ch 11 and 14 for a detailed discussion of the debt review process.

110 R 1 CR.

111 See s 85 NCA, as discussed hereinafter.

112 See s 86(2) NCA.

113 2011 3 SA 581 (SCA) 590 par 9.

114 S 86(2) NCA provides that an application for debt review may not be made iro a particular credit agreement if, at the time of the application the credit provider under that credit agreement has proceeded to take the steps contemplated in s 129 NCA to enforce that agreement.

115 The s 129(1)(a) NCA notice is a letter which a credit provider must send to a defaulting consumer before such credit provider may commence legal proceedings to enforce the agreement.

116 Commentators interpret s 86(2) NCA differently. See eg Boraine & Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005" 2008 *De Jure* 1 9 n186; Van Loggerenberg, Dicker & Malan "Aspects of debt enforcement under the National Credit Act" (Jan/Feb 2008) *De Rebus* 40; Roestoff *et al* "The debt counselling process – closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* 247 260; Coetzee *The impact of the NCA on civil procedural aspects relating to debt enforcement* (LLM dissertation, UP (2010)) 86. For a detailed discussion of s 86(2) NCA and its interrelation with s 129 NCA, see Van Heerden in Scholtz par 11 3 3 2.

117 *Nedbank v National Credit Regulator supra* par 14.

The application for debt review entails that a completed Form 16 is submitted to the debt counsellor.[118] In addition, all the documents specified in Form 16 must be submitted to the debt counsellor and the debt counsellors prescribed fee of R50.00 must be paid.[119]

After the application for debt review is received by the debt counsellor, he or she must provide the consumer with proof of receipt of the application and deliver a completed Form 17.1 to all credit providers listed in the application and to every registered credit bureau within five business days after receiving the application.[120] The debt counsellor must verify the information as provided by requesting documentary proof from the consumer, contacting the relevant credit provider or employer or any other method of verification.[121]

The consumer who applies for debt review as well as each credit provider listed in the application for debt review has distinct obligations to:[122]

(a) comply with any reasonable requests by the debt counsellor to facilitate the evaluation of the consumer's state of indebtedness and the prospects for responsible debt re-arrangement, and

(b) participate in good faith[123] in the review and in any negotiations designed to result in responsible debt rearrangement.

Where a credit provider fails to provide a debt counsellor with corrected information within five business days after verification is requested, the debt counsellor may accept the information provided by the consumer as being correct.[124]

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118 R 24(1)(a) & (b) CR. Alternatively, the following information must be provided to the debt counsellor: (a) Personal details, including name, initials, surname, identity number or passport number and date of birth, postal address, physical address and contact details. (b) All income, inclusive of employment income and other sources of income to be specified by the debtor. (c) Monthly expenses, inclusive of but not limited to taxes, unemployment insurance, pension, medical aid, insurance, court orders and others to be specified by the debtor. (d) List of all debts (not only credit agreement debt) disclosing monthly commitment, total balance outstanding, original amount and amount in arrears (if applicable) inclusive of but not limited to home loans, furniture retail, clothing retail, personal loans, credit card, overdraft, educational loans, business loans, car finances and leases, sureties signed and others to be specified by the debtor. (e) Living expenses, inclusive of but not limited to groceries. The aforesaid information must be accompanied by a declaration and undertaking to commit to the debt restructuring, a consent that a credit bureau check may be done and a confirmation that the information is true and correct – r 24(1)(b)(vi)–(viii) CR.

119 S 86(3) NCA read with r 24(1)(c) and (d) CR.

120 S 86(4) NCA and r 24(2)–24(5) CR.

121 R 24(3) CR.

122 S 86(5)(a) and (b) NCA.

123 For a discussion of the good faith requirement see *Mercedes Benz Financial Services South Africa (Pty) Ltd v Dunga* 2011 1 SA 374 (WCC).

124 R 24(4) CR.

Within thirty business days after receiving an application for debt review, a debt counsellor is obliged to determine whether the consumer appears to be over-indebted and, if the consumer seeks a declaration of reckless credit, whether any of the consumer's credit agreements appear to be reckless.[125]

After completion of the assessment the debt counsellor must submit a Form 17.2 to all the affected credit providers and all registered credit bureaux within five business days.[126]

3 3 2 Determination

The assessment by the debt counsellor may lead to the conclusion that:[127]

(a) the consumer is not over-indebted, or

(b) the consumer is not over-indebted, but is nevertheless experiencing, or likely to experience, difficulty satisfying all the consumer's obligations under credit agreements in a timely manner; or

(c) the consumer is over-indebted.

3 3 2 1 *Determination that Consumer is not Over-Indebted*

If the debt counsellor reasonably concludes that the consumer is not over-indebted, the counsellor must reject the application for debt review.[128] In such instance the consumer, with leave of the magistrate's court, may in terms of section 86(9) apply directly to the magistrate's court for a debt restructuring order contemplated in section 86(7)(c). Such application must be submitted to court on Form 18 within 20 business days after the debt counsellor has provided the consumer with a letter of rejection.[129] The opinion of a debt counsellor as to whether a consumer is over-indebted is thus not decisive and a consumer who differs in opinion on this aspect from a debt counsellor is able to approach a court for a final authoritative determination on the issue.

3 3 2 2 *Debtor not yet Over-Indebted but Likely to Experience Problems*

In this instance the debt counsellor may recommend that the consumer and the respective credit providers voluntarily consider and agree on a plan of debt re-arrangement.[130] If the consumer and each credit provider concerned accept the proposal, the debt counsellor must record the proposal in the form of an order, and if is consented to by the consumer

125 S 86(6) NCA read with r 24(6) CR.
126 R 24(10) CR.
127 S 86(7) NCA.
128 S 86(7)(a) NCA. This is the situation even if the debt counsellor has concluded that a particular credit agreement was reckless at the time it was entered into. The debt counsellor must provide the consumer with a letter of rejection, containing the information prescribed by r 25 CR.
129 R 26 CR.
130 S 86(7)(b) NCA.

and each credit provider concerned, file it as a section 138 consent order.[131]

If no such agreement can be reached the debt counsellor must refer the matter to the magistrate's court with the recommendation regarding debt-restructuring.[132] The magistrate's court must then conduct a hearing and may exercise the powers contained in section 87 of the NCA.[133]

It should be noted that it is only in this specific instance that the NCA provides explicitly for the parties to voluntarily agree on a debt repayment plan which can then, if all credit providers agree, be filed at court as a section 138 consent order. Where a consumer is found to be over-indebted and the debt counsellor approaches the relevant credit providers with suggestions for purposes of reaching a voluntary debt repayment agreement, such negotiations are not statutorily mandated and are viewed as ordinary settlement negotiations outside the ambit of the NCA.[134]

3 3 2 3 *Consumer is Over-Indebted*

In this instance the debt counsellor may issue a proposal recommending that the magistrate's court make an order rearranging the consumer's (credit agreement) obligations and/or declaring one or more of the consumer's credit agreements reckless as set out in section 86(7)(c) discussed hereinafter.[135]

3 3 3 Court Ordered Debt Rearrangement

Section 87 of the NCA provides that in those instances where a consumer approaches a court after his application for debt review has been rejected, or in those instances where a debt counsellor refers a recommendation that a debtor be declared over-indebted to court, the magistrate's court is obliged to conduct a hearing.[136]

Having regard to the proposal and information before it and the consumer's financial means, prospects and obligations, the court may then:

(a) reject the recommendation or application as the case may be; or

(b) make an order declaring any credit agreement to be reckless and an order contemplated in section 82(2) or (3); or

(c) an order re-arranging the consumer's obligations in any manner contemplated in section 86(7)(c)(ii); or

131 S 86(8)(a) NCA.
132 S 86(8)(b) NCA.
133 See the discussion in par 3 3 3 below.
134 See *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP) 317 (hereafter *National Credit Regulator v Nedbank* (GNP)).
135 S 86(7)(c) NCA.
136 S 87(1) NCA.

(d) both orders contemplated above relating to reckless credit and debt rearrangement.[137]

The methods of restructuring or rearranging of the consumer's obligations that may be employed by the court are:[138]

(a) extending the period of the agreement and reducing the amount of each payment due accordingly;

(b) postponing during a specified period the dates on which payments are due under the agreement;

(c) extending the period of the agreement and postponing during a specified period the dates on which payments are due under the agreement; or

(d) recalculating the consumer's obligations because of contraventions of Part A (unlawful agreements and provisions) or B (disclosure, form and effect) of Chapter 5 or Part A (collection and repayment practices) of Chapter 6.

It thus appears that a court is not empowered by section 86(7)(c)(ii)(aa) to (cc) of the NCA to write off interest.[139] The power of the court to recalculate the consumer's obligations in accordance with section 86(7)(c)(ii)(dd) may, however, have the effect of reducing the amount owed.

Consumers may also raise the issue of over-indebtedness in court after a credit provider has taken steps to enforce a credit agreement in respect of which the consumer is in default. Section 85 provides that despite any provision of law or agreement to the contrary, in any proceedings in which a credit agreement is being considered, if it is alleged that the consumer under a credit agreement is over-indebted, the court may:

(a) refer the matter directly to a debt counsellor with a request that the debt counsellor evaluate the consumer's circumstances and make a recommendation to the court in terms of section 86(7); or

(b) declare that the consumer is over-indebted, as determined in accordance with Part D of Chapter 4 of the NCA, and make any order contemplated in section 87 to relieve the consumer's over-indebtedness.

3 3 4 Termination of Debt Review

No provision is made for the automatic lapsing of debt review proceedings. Consequently, it can only be terminated in accordance with the provisions of section 86(10) of the NCA which provides that if a consumer is in default under a credit agreement that is being reviewed in terms of section 86, the credit provider in respect of that agreement

137 S 87(1) NCA.
138 S 86(7)(c)(ii)(aa)–(dd) NCA.
139 Van Heerden in Scholtz par 11. See further *SA Taxi Securitisation (Pty) Ltd v Lennard* 2012 2 SA 456 (ECG).

may give notice to terminate the review in the prescribed manner.[140] Such notice must be given to the consumer, the debt counsellor and the NCR at any time at least 60 business days after the date on which the consumer applied for the debt review.

A number of divergent decisions were recently given on the question as to whether a debt review can be terminated once a debt counsellor (having made a determination that a consumer is indeed over-indebted) has referred the matter to a magistrate's court, but before the matter is heard by the court in terms of section 87.[141] The Supreme Court of Appeal finally clarified the issue in *Collett v Firstrand Bank Ltd.*[142] It was held that a referral of a debt review to the magistrate's court does not bar a credit provider from terminating the debt review. A credit provider may therefore terminate the process in respect of a specific agreement as soon as 60 business days have lapsed, irrespective of whether the matter is pending in court.[143]

However, this does not necessarily mean that the debtor will not have a further opportunity at debt review in the same matter. The reason is that section 86(11) of the NCA provides that if a credit provider who has given notice to terminate a debt review as aforesaid, proceeds to enforce that agreement in terms of Part C of Chapter 6 of the NCA, the magistrate's court hearing the matter may order that the debt review resume on any conditions the court considers to be just in the circumstances. It has been held that the appropriate court to approach for a resumption order in terms of section 86(11) is the enforcement court and that section 86(11) should be read to refer to both high courts and magistrates' courts.[144] Case law also makes it clear that a lack of good faith cooperation in the debt review process is a factor to be considered during an application for a resumption order in terms of section 86(11) of the NCA.[145]

3 3 5 Clearance Certificate

A debt counsellor must issue a clearance certificate in Form 19 if the consumer has fully satisfied all the debt obligations under every credit agreement that was subject to the debt rearrangement order or agreement in accordance with that order or agreement.[146]

140 No form has as yet been prescribed in the regulations to the NCA.
141 See Van Heerden & Coetzee "Perspectives on the termination of debt review in terms of section 86(10) of the National Credit Act 34 of 2005" 2011 *PER* 37 for a discussion of cases decided prior to *Collett v Firstrand Bank Ltd* 2011 4 SA 508 (SCA). See also Van Heerden & Coetzee "Wesbank v Deon Winston Papier and the National Credit Regulator" 2011 *De Jure* 463.
142 Par 6 and 14.
143 *Ibid.*
144 *Idem* par 17.
145 *Ibid.* See also *Mercedes Benz v Dunga supra.*
146 R 27 CR.

3 3 6 Effect of (Pending) Debt Review, Debt Rearrangement Order or Debt Rearrangement Agreement

3 3 6 1 *Effect on Consumer*

A consumer who has filed an application for debt review in terms of section 86(1) of the NCA or who has alleged in court that he or she is over-indebted, is prohibited from incurring any further charges under a credit facility or entering into any further credit agreement with any credit provider.[147] This prohibition applies until:

(a) the debt counsellor rejects the application and the prescribed time period for direct filing in terms of section 86(9) has expired without the consumer having so applied;[148]

(b) the court has determined that the consumer is not over-indebted, or has rejected a debt counsellor's proposal or the consumer's application;[149] or

(c) a court having made an order or the consumer and the credit providers having made an agreement re-arranging the consumer's obligations; all the consumer's obligations under the credit agreements as re-arranged are fulfilled unless the consumer fulfilled the obligations by way of a consolidation agreement.[150]

It is thus possible that a consumer may effectively be removed from the credit market for a considerable period of time. If a consumer applies for or enters into a credit agreement contrary to this section, the provisions of Part D of Chapter 4[151] of the NCA will never apply to that agreement.[152] The implication of this provision appears to be that a consumer who, it is submitted, on own initiative enters into such an agreement will not be able to raise the issues of over-indebtedness or reckless credit and will thus not be able to access the debt relief measures afforded in respect thereof.

3 3 6 2 *Effect on Credit Provider*

Debt review of the consumer's credit agreement obligations as well as the subsequent debt re-arrangement order or agreement filed as a section 138 consent order have severe implications for a credit provider. Subject to section 86(9) and (10), a credit provider who receives notice of court proceedings contemplated in section 83 or 85 or notice in terms of section 86(4)(b)(i) of the NCA, may not exercise or enforce by litigation or other judicial process any right or security under that credit agreement. This prohibition applies until:[153]

(a) the consumer is in default under the credit agreement, and

147 S 88(1) NCA.
148 S 88(1)(a) NCA.
149 S 88(1)(b) NCA.
150 S 88(1)(c) NCA.
151 Thus, the provisions relating to over-indebtedness and reckless credit.
152 S 88(5) NCA.
153 S 88(3)(a) & (b)(i) & (ii) NCA.

(b) one of the following has occurred:

(i) an event contemplated in section 88(1)(a) to (c) as indicated above; or
(ii) the consumer defaults on any obligations in terms of re-arrangement agreed between the consumer and credit providers or ordered by the court or the Tribunal.

If a credit provider enters into a credit agreement, other than a consolidation agreement[154] contemplated in section 88, with a consumer who has applied for debt re-arrangement and that re-arrangement still subsists, all or part of that new credit agreement may be declared to be reckless credit irrespective of whether the circumstances for reckless credit as set out in section 80 apply.[155] Therefore, it appears that in those instances where the initiative to enter into a credit agreement contrary to the provisions of section 88 emanated from the credit provider, the specific agreement will be deemed to be reckless *per se*.

It should further be noted that it has been held that compulsory sequestration proceedings are not enforcement proceedings as envisaged by section 88(3) of the NCA and thus it will still be open to a creditor to apply for sequestration of a debtor even if the debtor is subject to a debt restructuring order.[156] It has further been held that where a debtor defaults on a debt restructuring order in terms of section 86(7)(c) of the NCA, the creditor may immediately proceed with enforcement.[157]

3 4 General Remarks

Although one of the aims of the NCA is to "to provide debt relief through debt re-organisation in cases of over-indebtedness", this aim is still subject to the principle of "satisfaction by the consumer of *all* responsible financial obligations".[158] The debt review procedure therefore does not offer the consumer the opportunity to obtain a discharge from pre-existing indebtedness. Moreover, no time limit is prescribed in respect of the payment plan and a consumer can be bound to the plan for an excessively long period as opposed to sequestration where definite time periods are set.[159]

154 "Consolidation agreement" is not defined in the NCA.
155 S 88(4) NCA.
156 *Naidoo v ABSA Bank Ltd* 2010 4 SA 597 (SCA). See further the discussion in par 4 10 below.
157 *Firstrand Bank Ltd v Fillis* 2010 6 SA 565 (ECP).
158 See the preamble to the NCA and s 3(g) NCA. In this regard the Supreme Court of Appeal in *Collett v Firstrand Bank Ltd supra* par 10 recently stated that "the purpose of the debt review is not to relieve the consumer of his obligations but to achieve either a voluntary debt re-arrangement or a debt re-arrangement by the Magistrate's Court".
159 In this regard Johnson & Meyerman *Insolvency Systems in South Africa – Strengthening the Regulatory Framework* (a publication produced for review by the United States Agency for International Development for Chemonics International Inc – December 2010) 25 state that the NCA, despite its aim to assist over-indebted consumers, only "perpetuates the over-indebtedness by not providing a simple debtor discharge mechanism".

The debt review procedure places no monetary limitation on the total outstanding debt of the consumer, but the NCA only applies to credit agreements as defined in section 8 and debt that does not qualify as such will thus be excluded from the debt review procedure.[160] Secured credit agreements[161] are included in the review, but the NCA does not provide any preference as to the repayment thereof.

160 These may include delictual claims, clothing accounts, professional services and municipal accounts where no interest is charged.

161 Secured credit agreements would include pawn transactions, instalment agreements, mortgage agreements and secured loans – see s 1 NCA for the definitions of these credit agreements.

Experiencing the South African undergraduate law curriculum

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OPSOMMING

Ervaring van die voorgraadse regskurrikulum in Suid-Afrika

In 1998 is die vierjarige LLB-graad as deel van 'n post-apartheid transformasie-agenda bekendgestel. In 'n studie om die gepastheid van die vierjarige LLB-graad vas te stel, is 'n onderhoud met vier regsgegradueerde, nou praktiserende prokureurs, gevoer. Hierdie vier gegradueerdes was almal in dieselfde jaargroep aan dieselfde, historiese wit, universiteit. Die doel van hierdie deel van die empiriese studie was om insigte in die ondervinding van die voorgraadse leerplan van 'n verteenwoordigende groep gegradueerdes, wat almal die graad in die minimum voorgeskrewe tyd verwerf het, te kry.

Deur 'n fenomenografiese metodologie aan te neem, wat poog om die verskillende persepsies van respondente in verband met 'n sekere ondervinding te ondersoek, in hierdie geval die ondervinding van die voorgraadse leerplan vir regte, het die studie 'n ontleding van sommige wyses waarop die studente op die LLB leerplan gereageer het, ontwikkel. Die kategorieë omskrywings wat uit die gegradueerdes se onderhoude afgelei is, het 'n interessante "oorsig van die kollektiewe denke" van die gegradueerdes tot gevolg gehad: die instrumentele strategis (buitestander); die pragmatiese generalis (in gemaksone) en die omvormde beroepsgeörienteerde (betrokke binnestander). Hierdie drie posisies blyk drie hiërargies-geordende vlakke van ingeskakeldheid met die leerplan te weerspieël.

Die sleutelbeginsels wat die ontwerp van die voorgraadse leerplan sou inlig, naamlik die integrering van vaardighede, uitdruklike onderrig van etiek en die sensitisering van studente vir die praktisering van die reg in 'n diverse, pluralistiese samelewing, is nie effektief geïmplimenteer nie en dit speel 'n rol in die manier wat regstudente die leerplan ervaar. 'n "Kringloop van nadeel" het uit die data te voorskyn gekom as 'n voorstelling van die herhaling van historiese nadeel deur die leerplan. Vir baie "nie-tradisionele" studente, neig hulle status as "buitestanders" – beide in die universiteit en verder wanneer hulle die sfeer van die professionele inkweking binnegaan – tesame met hulle persoonlike geskiedenis en verwagtinge, om hulle sosiale stand na te boots. Die leerplan vir regte neig om bestaande ongelykhede weer op te lewer eerder as om as 'n omvormende middel te dien.

Ten slotte ontwikkel die outeur 'n paar voorstelle vir maniere waarop die ondervinding van die voorgraadse leerplan vir regte in Suid-Afrika 'n omvormende opvoedkundige proses kan word, in plaas daarvan dat dit 'n belemmering bly vir baie studente wat poog om toegang tot die regsberoep te kry.

1 Introduction

In this paper, the experiences and perceptions of law graduates in relation to the experience of the law curriculum at one South African law faculty were analysed as part of a larger study to determine the fitness for purpose of the four year undergraduate LLB degree in South Africa.[1] The term "curriculum" is used in the broadest sense as including the official (written) curriculum, the curriculum as it is implemented in lecture rooms (enacted), the hidden curriculum (or "unstated norms and values communicated to students") and the null curriculum (what is not taught).[2]

A discussion of the three positions that were identified from the data gathered in interviews with six law graduates who are now practising attorneys, will be followed by my analysis of how the experience of the undergraduate law curriculum at one historically white university (HWU) in South Africa replicates the educational and socio-economic backgrounds of the graduates and prevents the experience of the law curriculum from being a transformative education, and thus indirectly operates as an obstacle to many students seeking to gain entry to the legal professions.

2 Background

The undergraduate degree was introduced in 1997, as part of the post-apartheid government's transformation agenda.[3] The objectives of a four year bachelor's degree as the single entry qualification to both branches of the legal profession, attorneys and advocates, was to increase access into the profession for aspiring black lawyers who were underrepresented, by reducing the length of time, and thus the cost incurred in academic studies. It was also intended to diminish the perceived differential status which the previous system of a postgraduate degree for advocates (and many white attorneys) and a shorter undergraduate degree, as the entry requirement for attorneys, perpetuated.

Data elicited from six graduates who experienced the undergraduate LLB are analysed to develop an interpretation of the experiential aspects of the LLB degree. Using a phenomenographic orientation as analytical framework, an "outcome space" was developed. A phenomenographic methodology attempts to explore the differing perceptions of respondents in relation to a particular experience, in this case, the experience of the law curriculum.[4] The research method provided

1 Greenbaum *The Undergraduate Law Curriculum: Fitness for Purpose?* (PhD thesis (2009) UKZN).
2 Barnett & Coate *Engaging the Curriculum in Higher Education* (2005) 33-37.
3 Qualification of Legal Practitioners Amendment Act 78 of 1997.
4 Marton "Phenomenography: Describing Conceptions of the World Around Us" 1981 *Instructional Science* 294.

insights into a range of possible responses to the curriculum, which might be used to inform future curriculum development. Variations in ways of understanding, conceptualising or experiencing the phenomenon emerges from key or critically distinct patterns that arise across transcripts during the data analysis.[5] However, the analysis does not aim to explain "inner psychic processes" but aims, rather, at describing manifestations of forms of thought or ways of functioning which reflect the participants' experienced world.[6]

The graduates were representative of the demographics within the year cohort in which they had studied; thus the respondents were: one white female (Maria), two Indian females (Rani and Fazila), one African female (Busi), one white male (David) and one Indian male (Sandesh).[7] Within the parameters of the selected sample criteria which were: graduates who had completed the degree in the minimum prescribed time, had completed their articles of clerkship and who were now practising attorneys within a prescribed geographical area of the university, no African males were available for participation in the study.[8] This aspect in itself is notable.

The graduates' descriptions of their "experience of curriculum" must be regarded as being influenced by their expressed recollections of personal interactions with individual lecturers on innumerable occasions. Each graduate brought a multiplicity of factors to the learning experience, including a personal history, many background affective influences, previous educational experiences, conceptions of law and of being a professional, and a plethora of socio-economic and motivational pressures that emanate from sources external to their university lives.[9] Inherent personality traits and influences attributable to class, race and gender cannot be excluded from the equation.

In this particular institutional context in which I was a deep "insider-researcher", it is notable that students come from a range of backgrounds, many of which could be seen to be less than ideal in terms of preparedness for and supportiveness of tertiary study.[10] The discipline of Law employs an epistemology that emphasises the acquisition of facts and principles, which students are expected to recall and apply. Subjects are typically taught as discrete units of knowledge, with infrequent attempts made to create links across modules. The contending demands of a curriculum which is heavily committed to covering a significant amount of content, and which at the same time assumes a level of

5 Akerlind "Growing and developing as a university researcher" 2008 *Higher Ed* 242.
6 Uljens *Reflections on Phenomenography: Towards a Methodology?* (eds Dall'Alba & Hasselgren) (1996) 103.
7 Names were changed to conceal the identity of the participants.
8 Data obtained from Faculty cohort records of the university.
9 Vermunt "Relations between student learning patterns and personal and contextual factors and academic performance 2005 *Higher Ed* 205.
10 McLean "Can we relate student conceptions of learning to student academic achievement?" 2001 *Teaching in Higher Ed* 399.

proficiency in English, accompanied by adequate academic reading and writing skills, some framework of knowledge related to commercial concepts, and an ultimate outcome of meeting professional standards, together constitute a matrix of interactions in which there is a complex alignment between the curriculum and those who experience it.

Reflecting back now as legal professionals, the graduates' experiences focussed on varying aspects of curriculum, including their personal motivation for studying law; the way in which they approached the study of law, and their perceptions about the link between theory and skills in the curriculum. The open-ended questions that were used as the basis for the semi-structured interviews had a determining effect on the themes that emerged, since part of the interview schedule was an initial question about each theme: the integration of skills; ethics; and sensitivity to diversity.[11]

3 The Categories of Description

The three categories that emerged from the pool of data are each characterised by a descriptive term:

(a) instrumental strategist

(b) pragmatic generalist

(c) transformed vocationalist.

These characterisations are juxtaposed in phenomenography to determine if any relationship exists among them, and a logical relation is observed that reflects a hierarchical ordering. Each category reflects a progressively deeper level of identification with, and engagement in, the law curriculum. In a comparable Australian study of law students becoming legal professionals, three categories of student engagement were identified in relation to how students study law, based on their conceptions of being a legal professional.[12]

3 1 Outcome Space A (Strategic Instrumentalist): "Learning about other people's lives"

A distinct sense of alienation and being an "outsider" was expressed by the students whose experience of law curriculum could be described as "strategic instrumentalist."

Sandesh explained:

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11 The selection of these three themes was based on the identification of these aspects as key features that were to be integrated into the design of the new LLB degree: McQuoid Mason "Developing the law curriculum to meet the needs of the 21st century legal practitioner: A South African perspective" 2004 *Obiter* 102.

12 Reid, Nagarajan & Dortins "The experience of becoming a legal professional" *Higher Ed R & D* 85.

> During my youth, and growing up, a lot of people were being taken advantage of because of lack of knowledge … not being able to assert themselves in a way that insiders do.

It is as if his background situated him differently from those who are in possession of this "knowledge." He explained that he regarded the degree as providing the student with the necessary discipline "to get somewhere in life." The underlying assumption of a degree as facilitating upward social mobility is clear.

Sandesh also explained:

> … the degree … says to you: you have a powerful degree in your hands; do something with it.

It is as if the degree takes on a life of its own, extraneous or foreign to, outside of the graduate. There is a sense of obligation, a duty to your community and to yourself that demands that you use the knowledge gained. He mentions that law is about "righting wrongs." Sandesh's description conjured up an image of the qualification as an extrinsic object in one's life, exerting control and providing direction, rather than internalised learning that changes the learner's perspective.

In Rani's account of her experience of the law curriculum she often mentioned the disjuncture between her own life world and the world of the law curriculum:

> The cases were not about … did no connect with us ... We were learning about other peoples' lives – you need to have a passion, an interest in other people (Rani).

She used the analogy of it being like "two worlds," in reference to lecturers who focused on high court procedures, making students:

> ... grapple to read judgments by learned judges and constitutional memoranda … things we were never going to see (in practice) (Rani).

Sandesh also mentioned that the curriculum prepared students more for the high courts, when in fact most graduates were likely to become attorneys, who rarely practise in the high courts. He knew of only one student from his year cohort who had become an advocate. Recent data from another South African Law faculty suggests that out of a year cohort of 138 graduates in 2008, approximately 70% entered the law professions: 81 as attorneys, and 12 as advocates.[13] Data from the Law Society of South Africa, Legal Education Division (LSSA-LEAD) statistical report[14] relating to 2006 law graduates identifies that of the 2735 graduates, 1871 registered their articles as candidate attorneys in 2007, i.e. 68% aspired to become attorneys.

13 Communicated in a questionnaire completed by a Law Dean, May, 2009, which the author collated for the CHE-SALDA curriculum project, 2009.

14 National Legal Education Liaison Committee Meeting, Johannesburg (2008-11-07).

Rani mentioned a lecturer who told students that they would never survive in private practice; they should become prosecutors in the public service domain:

> You know, [he] put us into those stereotype boxes and I think because we had the backgrounds ... [that we had] come from, we knew that those people place us in those boxes, that was something we were used to our entire life and the fact that we had made it to varsity meant that that box was not for us. So we understood; it annoyed us – that when someone presumes to say who you are – it would annoy us and frustrate us (Rani).

It is clear that the curriculum that is being enacted here by the (white, male) lecturer aims to reproduce existing social stereotypes. Rani also felt aggrieved that certain skills in the law curriculum which students were assumed to have learned at school, such as debating, were dependent on the type of school and the background of each student. Students coming into higher education from schools in disadvantaged communities would have had no experience of computers, mathematical numeracy and formal debating or public speaking (also often in a language other than their mother tongue).

Sandesh was critical of the "*distance*" between staff and students, saying that the only social or personal contact he had enjoyed with his lecturers was at the Law Students' Ball at the end of his final year. He mentioned how intimidated he and his friends had been to approach staff members. Although faculty equity plans and policies are aimed at increasing the demographic representivity of law academics, in professional faculties, where academics' salaries cannot compete with those outside of higher education, the problem of attracting qualified black professionals is exacerbated, resulting in an unrepresentative staff profile in many law faculties. The transformation of the teaching staff profile has in most faculties at HWUs not advanced much.[15]

The difficulties of experiencing a curriculum in a language that is not one's mother tongue is another perspective on the theme of feeling like an "outsider." This is captured in Busi's vivid description of her sense of alienation as an isiZulu speaker, confronting the challenge of every reading task:

> You know also coming from Zulu schools, every paragraph that I read, I had to go to a dictionary to look up the words. It would take me forever just to complete one particular task, and by the time I have looked at the dictionary for the fourth time, I have forgotten what it said in the first paragraph … The thing that pulled me back was the language – it pulled me back badly.

15 Information disclosed by Deputy Dean at an HWU Faculty Staff Meeting, June 2009.

3 2 Understandings of the Curriculum: LLB Degree a Qualification that Equips One to Earn a Living and Therefore Should be Practice-Oriented

Rani made the following comments:

> Most of the students that come through these doors are not wealthy students who can afford tuition (paid for) by parents … they afford tuition by student loans, by the bank, or via many family … they want to come and be taught ... so that when they leave they can earn money, get a job …

From the outset, Busi too made the point that becoming a lawyer was a means of earning a living: "I thought of law, to be honest as more about making money than justice".

Sandesh mentioned at three different points, how he was hoping "to go somewhere in life" with his law degree. He emphasised that his LLB experience was of an overtly academic focus in the curriculum that failed to prepare graduates adequately for professional practice:

> It was a very theoretical degree; the curriculum was too theoretical, unrelated to the demands of practice; a lot of courses I did have no relevance to practising. I think the problem is … it is still too academically based.

These comments all reflect an approach to studying law that has at its core an instrumental functionality. It is viewed as a professional qualification that ensures the employability of a graduate as its ultimate purpose and goal. This critique of the failure of the curriculum to provide adequate exposure to practical legal skills was expressed in varying degrees by most of the participants, including those whose motivation for studying law and whose approach to learning law were different from the views of these three participants. These comments resonate powerfully with the discourse of globalisation and the high-skills agenda, mentioned in government policy relating to higher education.[16] For those who had been disadvantaged by a poor apartheid education and socio-economic barriers, widening access to higher education had a particular meaning: obtaining a degree as a guarantee of employability and upward social mobility.[17]

3 3 Approaches to Learning Law: "Doing the swotting thing" and Not Knowing How to Learn

In the approaches to learning, a steady increase in the learners' levels of self-confidence was discerned across the three categories that were identified from the data. Unfamiliarity, or lack of self-confidence in the

16 Ntshoe "National plan for higher education in South Africa: A programme for equity and redress or global competition and managerialism?" 2002 *SAJHE* 1 1-5.

17 Scott, Yeld & *Hendry Higher Education Monitor: A Case for Improving Teaching and Learning in South African Higher Education* (2007) 10.

strategic instrumentalist category resulted in the need to adopt surface learning strategies, involving memorisation and repetition.

Rani recounted how she memorised material:

> … learning questions from past papers, "swotting", learning by heart to regurgitate law, because I am a swotting person.

Fazila commented: "it was mostly memory work; 80% of it was." Being passive learners, expecting lecturers "to feed it to you", "to transfer knowledge" echoes the expectations of a transmission teaching style that is not uncommon in the discipline of law.[18]

Sandesh told how he was able to negotiate his way successfully through his degree by adopting a strategic (surface) approach, memorising answers to questions for the previous five years' examination papers. The type of assessments experienced by law students often signals that this approach is what is required. The nature of assessments, and particularly the assessment of skills in law schools, clearly conveys to students which knowledge is most valued within a discipline.[19] The data from this category reflect an instrumental approach to learning that is teacher-centred and premised upon an unbalanced relationship between learner and teacher. The expectation is that legal knowledge is transmitted by experts to waiting recipients.[20] This acquisitive notion of learning is often the norm in secondary schools where there is a lack of resources, unsatisfactory pupil-teacher ratios, dominant cultural views related to acceptance of authority, and teaching styles that rely on rote-learning as a substitute for knowledge-construction in the classroom.

Shulman, describing the "signature pedagogies" of various disciplines, explains that the importance of such a "signature pedagogy" for law students is that it signals "how knowledge is analysed, criticised, accepted, or discarded" within the discipline.[21] Shulman argues that the pervasive and routine way in which legal education is presented (large lectures, controlled by an authoritative lecturer who poses questions which students are expected to answer by means of coherent claims that can be substantiated) provides a familiar context to which law students become accustomed. This "routine" avoids unfamiliarity, and in its very predictability it facilitates engaging with increasingly complex cognitive material in an incremental way. It also serves the purpose of inducting students into acceptable modes of legal thinking and argumentation.[22] This pedagogical style is the type of teaching practice that is widely enacted in South African law faculties. It has a particularly deleterious

18 Shulman "Signature pedagogies in the professions" 2005 (Summer) *Daedalus* 51 52-59.
19 O'Brien & Littrich "Using assessment practice to evaluate the legal skills curriculum" 2008 *J of Univ Teaching and Learning Practice* 61 76.
20 Ramsden *Learning to Teach in Higher Education* 3 ed (2003) 14.
21 Shulman 2005 *Daedalus* 51 .
22 Shulman 2005 *Daedalus* 51 52.

impact on students who lack confidence and are not first-language English speakers. For students from disadvantaged schools where fluency in English is not common, responding to teachers in a critical or argumentative way, in English, is a challenge in itself, and for many students is also likely to be not a culturally acceptable mode of interaction.[23]

Rani and Busi both mentioned how they did not know "how to learn, how to study" at university. Busi explained:

> You are not prepared: it's difficult understanding and managing your time and yourself – it's easy to get lost.

Rani described how she and her friends had to teach themselves how to study at university because they fared so poorly at first, despite having been high achievers at their schools.

It was clear that some students arrive at university unprepared for independent learning and deficient in the metacognitive awareness necessary for successful post-school study. Underpreparedness of first-year students entering higher education is a national problem that has been regularly identified in the literature on higher education in South Africa.[24] In the diagnostic section on "indicators of the need for systemic change" in the *Higher Education Monitor* the authors identify as a structural obstacle the lack of effective articulation between consecutive phases of education such as transition from school to university, suggesting that appropriate support is essential to ensure continuity and tackle poor output and retention rates.[25]

Boughey comments that reading in university disciplines and fields is qualitatively different to many other kinds of reading because it involves the reader in taking up positions in relation to the text – positions that derive from the values and attitudes within that discipline as to what counts as valued knowledge, and how that knowledge can be known.[26] She argues that only discipline experts can assist students to appreciate "the ways of reading and writing which underpin knowledge production in their own fields", as a starting point for facilitating learning in a discipline.[27]

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23 Ngwenya "Integrating language awareness with critical language skills: A legal English experience" 2006 *SA Linguistics & Applied Language Studies* 24.

24 Scott, Yeld & Hendry 9.

25 Scott, Yeld & Hendry 21.

26 Boughey "South Africa: University students can't read?" *University World News* http://www.universityworldnews.com/article.php?story = 20090827173247724&mode (accessed 2009-11-16).

27 Boughey 4.

3 4 Reason for Studying Law: Making Money

In the strategic instrumentalist category, the contradictory tensions or dual discourses in higher education of efficiency and equity were mirrored in the graduates' apparently conflicting reasons for studying law: making money or transforming society.

There was a sense of urgency about becoming qualified to earn a living, becoming sufficiently skilled to "make money," tempered by an awareness that lawyers may effect change in a transforming society. Sandesh commented that more often than not, "people" enter this business (of law) seeing it as a means to make money, based on what they perceive as glamorous and exciting representations of lawyers in the media. He admitted that he thought he would be driving an expensive sports model vehicle two years after his graduation; in reality, this was not the case. He described how he had imagined legal practice as "glamorous" with a large support staff, and had seen himself "playing golf every day" – expectations that bear no resemblance to his current lifestyle.

Busi's primary aspiration was "to make money." She frequently alluded to the perceived financial rewards, but concedes that "it is a long journey" to become a partner, requiring you to meet fee targets for several years before a promotion is considered. She commented that her first salary had been "half of my Mom's salary – and my Mom is a nurse." She now concedes: "there is no money in law!"

3 5 Conceptions of Theory/Skills Dichotomy: Practical and Appropriate Skills Lacking

In the strategic instrumentalist category, a clear dichotomy between academic (theoretical) learning at university and professional (practical) skills was perceived as the major shortcoming in the LLB curriculum. Strong views that theoretical subjects unrelated to practice should be removed from the curriculum, were expressed.

Sandesh explained:

> The problem is we learn so much theory and you ask anybody: it is just a matter of swotting and regurgitating.

The obstacle presented by the need for fluency in English for a legal professional is a critical feature of the "hidden" curriculum that is only marginally addressed within the formal curriculum and in ways that do not develop essential language skills that are expected and required by employers. Even for first-language English speakers, the intimidating experience of appearing in court creates anxiety because it has to be learned quickly "on the job." Maria expressed a concern (echoed by David and Sandesh) that these rudimentary oral "lawyering" skills were not explicitly included in their university curriculum:

> Trial skills are lacking: standing up before a magistrate and appearing; knowing how to address the magistrate; knowing how to put forward the argument in a logical manner. Your opponent will reply to your argument. You have to know to write it down and rebut it and you have to know to pick up and think quickly and you are not taught that.

Maria added that "it depends on your firm: how much guidance and support you get helping to teach you professional skills." She explained that while some firms may teach you and take you to many trials before you have to "do it yourself", other firms do not.

The traditional view of academics that these aspects of professional skills training are best taught by professionals does not take into account the uneven quality of professional training that occurs in different firms.

3 6 Conceptions About Ethics: A Personal Issue

Strategic instrumentalist participants stated that ethics had not been incorporated into the law curriculum in their undergraduate degree but had been learned during their period of articles of clerkship. They had studied the Law Society Code of Ethics at the Practical Legal Training School in order to pass the professional attorneys' admission examinations. All agreed that ethics form an important component of being a professional, but they are a "personal issue."

The need to introduce a pervasive thread of ethics education throughout the law curriculum has been persuasively argued by various academics in the United States, in England, and in Australia, but it seems that these arguments have not yet borne fruit in law curricula.[28] Robertson proposes that the focus in law curricula should be much wider than teaching students the codes of professional conduct: curricula should coherently incorporate a more pervasive emphasis on the requisite ethical and moral values for production of lawyers with integrity, honesty and the good of the society as a guiding interest in their professional behaviour.[29]

3 7 Sensitivity to Diversity in the Curriculum: Stereotypes and Theoretical Learning

Rani conveyed an opinion that staff members were insensitive to diversity in their selection of materials and their stereotyping of students, as well as being "unapproachable." She acknowledged that attempts to encourage students to engage with others from different cultures had been made at first-year level, but that the students themselves tended to thwart and undermine those intentions by preferring to mix with familiar

28 Rhode *In the Interests of Justice: Reforming the Legal Profession* (2000); Webb "Ethics for lawyers or ethics for citizens? New directions for legal education" 1998 *J of Law & Soc* 134 150; Robertson "Providing ethics learning opportunities throughout the legal curriculum" 2009 *Legal Ethics* 59 59-75.

29 Robertson 2009 *Legal Ethics* 59 65.

friends. She also mentioned how some students manipulated their membership of tutorial groups to avoid attending classes taught by tutors who were from a different race group.

Busi's experience of the module Legal Diversity mentioned how it had been interesting as theory, but:

> ... it wasn't so much about teaching you what happens if you get a client from a different ethnic group and how you deal with that. No. Everything was theory.

Sensitising students to living in a diverse or pluralistic society was identified by the Deans of Law in 1997 as one of the guiding principles that should inform the development of law curricula.[30] This emphasis reflected the national educational policy discourse of transformation and diversity in post-apartheid South Africa. According to *White Paper 3: A Programme for the Transformation of Higher Education*, transformation "requires that all existing practices, institutions and values are viewed anew and rethought in terms of their fitness for the new era."[31] With this in mind, modules ought to have been developed to heighten students' awareness of the constitutional imperatives regarding equality and diversity. In many Law faculties, the fact that the new constitution and the effect of the Bill of Rights automatically filtered through into many substantive law modules, was thought to be an adequate response to addressing diversity issues. This allowed faculties to avoid addressing issues of diversity, racism and social justice explicitly with students. This disjuncture between the formal knowledge taught in the curriculum (constitutional jurisprudence) and the everyday interactions in classrooms has been noted in the *Report of the Ministerial Committee on Transformation, Social Cohesion and Elimination of Discrimination in Public Higher Education Institutions* (2008), as a disjuncture between official policies on transformation and lived practices in classrooms, staff rooms and residences.[32]

It seems that there has been a shift towards interpreting diversity as embracing or accommodating, or engaging differences, which requires not only "diversity as curricular content" but also developing capacities for "engaging differences."[33] Initiatives tend to be fragmented and dependent on individual faculties as there is an absence of a holistic theoretical framework to guide initiatives, and no unified view on

30 Iya "The legal system and legal education in Southern Africa: Past influences and current challenges" 2001 Journal of Legal Education 356; McQuoid-Mason 2004 *Obiter* 101.

31 Department of Education 1997 par 1 1.

32 *Ministerial Report on Transformation in Public Higher Education Institutions* (2008).

33 Schneider "From Diversity to Engaging Difference: A Framework for the Higher Education Curriculum" in *Knowledge, Identity and Curriculum Transformation in Africa* (eds Cloete *et al*)(1997) 128.

whether evolutionary change or managed change is preferable.[34] The Ministerial Committee on Transformation reported that:

> the transformation of what is taught and learnt in institutions constitutes one of the most difficult challenges this sector is facing. In light of this, it is recommended that institutions initiate an overall macro review of their undergraduate and postgraduate curricula, so as to assess their appropriateness and relevance in terms of the social, ethical, political and technical skills and competencies embedded in them. This should be done in the context of post-apartheid South Africa and its location in Africa and the world. In short, does the curriculum prepare young people for their role in South Africa and the world in the context of the challenges peculiar to the 21st century?

4 Outcome Space B (Pragmatic Generalist): "Law is Just a Tool"

In contrast to the strategic instrumentalist perspective, the pragmatic generalist position reflected a comfortable ease, a sense of finding a comfort zone where the student's sense of self prevailed over the surrounding milieu. The law degree was seen as "empowering", giving the student control over his/her destiny. David, a white student, described how he became more and more confident about asking lecturers to explain if he was not following what was being discussed:

> I would ask questions and say: "... go over it again please." Everyone in the lecture was saying: "don't ask him questions!" Ja, and I mean I actually stopped caring that everyone else said that. I mean I didn't disrupt the lectures but if I didn't understand something and I would need clarity on it, I would ask.

David recalled the way many students remained silent during lectures, yet at the tutorials it was clear that the entire class had not understood much about the topic.

In this pragmatic generalist category, the student saw the learning as an acquired body of knowledge to be utilised in different contexts as an adaptable, generalist tool. There is neither the sense of urgency to become skilled in order to earn a living, nor the passion for changing oneself to become a professional:

> [Law] is just a tool ... we use the law as a tool to get certain results to assist people and use the tool, so to speak, in different ways ... whatever I do must be a general degree to have if I want to go into business or do anything and that's where the whole empowerment thing comes from.

This approach echoes one of the strong arguments raised by the South African Law Deans' Association (SALDA) in resisting the teaching of

34 Cross "Institutionalising campus diversity in Southern African higher education: Review of diversity scholarship and diversity education" 2004 *Higher Ed* 396.

vocational legal skills throughout the law degree. Their view is that the LLB degree provides a solid foundational education for many careers.[35] Students who wish to continue in the law professions will undergo further specific vocational education during their articles of clerkship or pupilage. In a statement SALDA explained:

> (i) SALDA believes that universities should remain true to their core function, which is to provide relevant legal education to students who can then use such an education in a variety of ways, the practice of law being a significant but not exclusive field of activity.[36]

The sub-text in this viewpoint seems to be enhancing the marketability of the qualification.

4 1 The LLB Degree Provides a Generalist Education; It Fosters a Particular Approach to Thinking and Understanding

Within this category of description, the experience of curriculum was regarded as the acquisition of "ways of thinking."

David commented:

> We use the law as a tool to get certain results, to assist people and use the tool, in different ways. Varsity is not a practice place, it is an academic place. You are getting a knowledge base; you have a way of thinking, a way of learning.

Maria, too, referred to a "way of thinking" when she mentioned that "[y]ou have to find things, so it develops your mind to think in a certain way ... ways of thinking".

The pragmatic generalist approach to learning law through the curriculum reflected a self-confidence that enabled a more active engagement in and control over learning:

> Students blame lecturers for not preparing them for exams or marking in a particular way, instead of taking responsibility for their own learning, questioning ... you have all the resources at university; you need to make it work for you; it's no one else's fault, other than your own.

These comments from David reflect the confidence that emanates from a student who is familiar with independent learning styles. He admitted to "cramming before exams," but explained that it was easier to understand and (then) memorise than to learn "parrot fashion." His attitude reflects that as a white male he is in a comfort zone where his voice is heard and he feels able to question, to challenge and to successfully negotiate the hidden curriculum, or the tacit rules, because

35 *SALDA Position paper on Legal Education* (2008-08-25).
36 *SALDA Position Paper on Legal Education* (2008-08-25).

of his familiarity with the language of the lecturers, and the discourse of the institution, as well as his educational background.

4 2 Learning Skills in a Contextualised Setting

Conceptions about the dichotomy between theory and skills were viewed by the pragmatic generalist category as providing a "skeleton" or "framework" of principles and concepts, the theory that is "quite academic." An adequate separation of academic skills, from university education, and practical lawyering skills, acquired once graduates are "working" in professional practice was regarded as acceptable:

> [University] is not an institution for gaining practical experience; practical skills in the real world are completely different to what you learned at university; how you negotiate with people, what you say when you get to court – you pick these up very quickly (David).

This model works well provided the candidate attorney receives adequate exposure to working with an experienced practitioner, in an environment where there is time to learn by watching.

4 3 Ethics: "A very blurry thing"

Graduates in the pragmatic generalist group recalled learning a little about ethics towards the end of the degree: about attorneys being struck off the roll, but as David commented, "quite what the bounds of ethics are for an attorney, well…it's a very blurry thing".

4 4 "Understanding where others are coming from"

Engagement with students from different backgrounds who had different perspectives on most topics, is the overriding recollection of being aware of diversity in the pragmatic generalist position. A positive view of the "vigorous arguments" with students from other cultural groups, according to David, was that you began to understand "where others were coming from," which has been helpful to him in dealing with clients from different race groups.

5 Outcome Space C (Transformed Vocationalist): "Giving it my all"

The third category of description was the transformed vocationalist perspective. The term "vocation" is adapted from Dewey (1916) and encompasses the "full range of wider social and political connotations of "vocation," to avoid viewing a vocation as a trade or specific job.[37] Views expressed by participants in this category represented a serious

37 Johnstone "Liberal ideals and vocational aims in university legal education" 1999 *Web J of Current Legal Issues* http://webjcli.ncl.ac.uk/1999/issue3/johnstone3.html (accessed 2009-10-08).

commitment to, and a personal focus on becoming a law professional; there was a sense of changing as a person. Expressions like "making sacrifices," "I really think I gave it my all," "taking it so seriously," "it was really, really hard work," all suggest putting in effort and an acceptance of the rigorous academic endeavour required to achieve this goal.

5 1 A Law Degree Represents the Fulfilment of a Personal Vocation

Maria spoke with fondness of her experience of the curriculum:

> I really love studying and I loved the law degree at university and all that work that I had put into it, I couldn't throw my files of notes away. Your personality changes a bit.

Similar comments from Fazila convey her "passion" for law that shaped her experience of the curriculum:

> It is basically something that I wouldn't give up … You have to have a passion as well. You must. It must be something that you actually want to do. I believe in that strongly because when you have a passion about something you tend to work harder and you tend to enjoy what you are doing. You put your heart and soul in it because you enjoy what you do, which is important.

The "passion" for their vocation and an expectation of what it entails are critical indicators of total engagement of the person, which combines more than knowledge and skills in practising their profession.

5 2 Learning Independently and Reflectively

In this category the approaches to learning law were expressed as an awareness of being reflective about learning. New ways of thinking about law as a discipline and taking pleasure in developing intellectual skills were a notable feature. Maria explained in the following terms:

> I used to take notes and go home and work with the textbook to think about it, absorb it; I loved the law degree at university … you learn a way to think; reading cases develops your mind, challenges you; you need to reflect on your understanding; you teach yourself. I would read work over and take time to absorb it.

This resonates with Boulton-Lewis's view that the more complex the students' conceptions of learning are, the more likely it is that they are "associated with more sophisticated reasons for study and study strategies."[38]

The curriculum can be seen as empowering students to develop their professional identity. Independent learning and taking personal responsibility for their construction of knowledge is a defining characteristic in this category.

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38 Boulton-Lewis "Tertiary students' knowledge of their own learning and a SOLO taxonomy" 1994 *Higher Ed* 387 392.

5 3 Caring and Helping Others

In this transformed vocationalist category, the graduates expressed an anticipation that their work as lawyers would enable them to help others in a caring way, although their reflections now do not necessarily suggest that this is the case in practice:

> I am type of person where I would like to sit down and listen to your problem and obviously then advise you … I like the interaction (Fazila).

The aspect of helping and caring about people (clients) is a strong motivational factor in this category. Maria commented that she considered herself a "caring type of person who wants to help," but she concedes that she has become somewhat cynical and has learned that she cannot be "an emotional lawyer."

5 4 Theory to Underpin Practical Skills

The theory/practice dichotomy in this category of description was regarded as appreciating the "groundwork" of theoretical or foundational understanding, prior to entering professional practice. Fazila mentioned that the "communication and people skills" learned at university, were important in building self-confidence, as part of a maturation process in becoming a professional.

Although graduates were consistent in their view that more skills as preparation for practice ought to be included in the curriculum, they commented that the "research and thinking skills" for professional practice were acquired through the rigour of academic discipline. Many subjects were viewed as "purely academic" and practical courses were not taken seriously because of the absence of formal or rigorous assessments in those modules.

5 5 Learning the Standards of Professional Conduct Too Late

Graduates' understandings of ethics in the law curriculum in this category reflected a well-defined understanding of ethics as a critical aspect of professionalism. A view was expressed that morals and values are inherent to a person, but the objective professional standards of integrity, knowing what is expected of attorneys by the Law Society of South Africa, ought to be made explicit throughout the degree. Participants recalled having learned what constituted a breach of the ethical codes – and the possible repercussions – after graduation, from the partners in their firms and for the attorneys' admission examinations, but never as students. Graduates were critical of the fact that students were not made aware at an earlier stage in their academic careers of what standards of behaviour are expected of legal professionals.

5 6 Values and Learning Respect Through the "Hidden Curriculum"

In response to the question of how the curriculum prepares graduates in respect of sensitivity to diversity, the prevailing experience of the participants who expressed views in this category was that it had been valuable to mix with people from diverse cultures daily at university: this sustained interaction prepares lawyers for the working world. Maria's view was that the daily interaction within a diverse student body, over a period of four years (the hidden curriculum) was more significant than formal learning.

In the discussion of the three positions identified as constituting the outcomes space of graduates' experiences of the law curriculum, it thus became clear that a hierarchical relationship existed between the three positions, with each category reflecting a more engaged relationship between the graduate and the experience of the law curriculum.

6 Curriculum Replicates Historical Disadvantage

The motif of a circle: a "cycle of disadvantage," emerged from the data as a representation of the replication of historical disadvantage through the curriculum. A pattern of graduates' previous educational experience and socio-economic backgrounds that underscored their approach to learning, their motivation for becoming a lawyer and their conceptions about being a professional became clear from the data. In turn, these factors interacted within the milieu of the law school curriculum, the tacit practices, the hidden curriculum and other obstacles inherent in the institutional and departmental culture, to determine the graduates' training experiences, the professional opportunities and career trajectories of the graduates in the second part of the study.

Criticisms of curricula in higher education often resonate with Heidegger's views that curricula have become "instrumentalised, vocationalised, corporatised and technologised."[39] These trends appear to be in response to increasing pressures on universities from external (government) agencies, couched in the neo-liberal globalisation discourse, aimed at improving quality, throughput, and the acquisition of de-contextualised graduate vocational skills. Ironically, it is this very emphasis in law curricula which seem to subvert the possibility of curriculum as transformative educational experience. The curriculum acts to reproduce existing inequalities rather than serving as a transformative vehicle for students. In order for curricula to have a transformative and lasting effect on graduates, changing learners from students into professionals, they should reflect a concentration not only on epistemological aspects, in the form of the acquisition of knowledge

39 Thomson "Heidegger on ontological education, or: how we become what we are" 2001 *Inquiry* 243 255.

and skills, but also on an ontological component, as imparting an awareness of a way of being or becoming a professional. The ontological focus serves to develop a sense of knowing that is not "exclusively cognitive, but is created, enacted and embodied."[40]

When an ontological component is integrated into professional education programmes, it extends and develops the "ways of being" of a profession, addressing not only the necessary knowledge and skills required – the cognitive, intellectual and practical aspects of professional education – but also the additional dimension of transforming the aspiring professional as a human being.[41] Thomson highlighted the "ontologisation of education" in Heidegger's work as a means of "transforming the self."[42] The motif of the circle is used by Thomson to explain the purpose of transforming the learner through education:

> to bring us full circle back to ourselves, first by turning away from the world in which we are most immediately immersed, then by turning us back to this world in a more reflexive way.[43]

These conceptions of curriculum and its ontologisation connect with the notion of unifying the "three apprenticeships of professional education" identified in the Carnegie Report.[44]

7 Conclusions

The popularity of law as a pathway to social mobility was a notable motivational feature in the data, where several participants (Sandesh, Busi and Rani) referred to their intention to "do well" in life through becoming a professional. As Letseka and Breier note: "graduating has significant financial benefits for the individual concerned."[45] The part that such motivation and market-related influence play in shaping students' conceptions of curriculum are expressed in their expectations of learning "practical skills" that will equip them with the means to secure employment. The looming financial burden of re-paying student loans after graduation serves to bolster many disadvantaged students' existing approaches to learning, which typically focus on surface rote-learning to which they were accustomed in disadvantaged schools where resources and teaching expertise are often less than optimal:

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40 Dall'Alba "Improving teaching: enhancing ways of being university teachers" 2005 *Higher Ed & Development* 361 365.

41 Dall'Alba "Learning professional ways of being" 2009 *Ed Philosophy and Theory* 34.

42 Thomson 453.

43 Thomson 254.

44 Sullivan, Colby, Wegner, Bond & Shulman *Educating Lawyers: Preparation for the Profession of Law* (2007) 3.

45 Letseka & Breier "Student poverty in higher education: the impact of higher education dropout on poverty" in *Education and poverty reduction strategies: issues of policy coherence colloquium proceedings* (ed Maile)(2008) 92.

> A notable theme is the complexity of factors that affect learning. Apart from personal circumstances, these include a range of cognitive factors, including 'learning style' and orientation, and different understandings of purpose and the requirements of the learning process. In South Africa key issues include the nature of prior educational experience as well as the level of achieved performance, and language background in relation to the medium of instruction.[46]

The data thus suggest that students' engagement with curriculum is often founded on strategic ways of "getting through" and not seeking anything more than the qualification at the end. For many aspiring lawyers, their family background and educational history does not prepare them for the experience of becoming a professional: Fazila revealed that her ideas about what it meant to become a lawyer came from popular television images. Thus for many "non-traditional" students, their status as "outsiders" – both within the university and beyond it, once they enter the realm of professional enculturation – along with their personal history and expectations, tends to replicate their social positioning. Identity dissonance amongst "outsider" students in professional degree programmes has been identified as creating a distracting struggle which can lead to academic underperformance by such students.[47] The outsider students' personal identities are at odds with the dominant perception of professional identity in law schools, which privileges middle-class (often male, and in South Africa, white) viewpoints. In order to be successful, students may have to internalise appropriate professional identities that require a suppression of their personal identity and value system.[48] Diverse cultural, religious, language and socio-economic values jostle for acceptance within an historically middle class, white English-speaking, male cultural ethos.

The *Higher Education Monitor of 2007* specifically recommended that in order to address the disparities in the socio-economic and educational backgrounds of the diverse student intake "equity-related educational strategies" will become a key element in contributing to development.[49] Improving formal access to universities without enhancing epistemological access, which in this context implies "more than introducing students to a set of a-cultural, a-social skills and strategies to cope with academic learning and its products", will not be sufficient to improve the success and retention rate of students in higher education. Unless students are explicitly made aware of the conventions and rules

46 Scott, Yeld & Hendry 33.

47 Sommerlad "What are you doing here? You should be working in a hair salon or something: Outsider status and professional socialisation in the solicitors' profession" 2008 *Web J of Current Legal Issues* http://webjcli.ncl.ac.uk/2008/issue2/sommerlad2.html (accessed 2009-07-10); Costello *The Professional Identity Crisis: Race, Class, Gender and Success at Professional Schools* (2005) 8.

48 Sommerlad 8.

49 Scott, Yeld & Hendry 26.

of what counts as academic knowledge, including the use of appropriate academic language, the current inequities will no doubt persist.[50]

In conclusion, a re-visioning of law curricula, incorporating notions of ethics, sensitivity to diversity, and deliberately including materials that are inclusive of all students is recommended. Pedagogical strategies that are facilitative of students' developing metacognitive awareness of their own learning, independent and interactive "deep" learning practices, as well as the teaching of skills to enhance theoretical understandings would all serve to improve legal education in South Africa.

50 Boughey 3.

Nationalisation of mineral rights in South Africa

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OPSOMMING

Nasionalisering van mineraleregte in Suid-Afrika

Die Wet op die Ontwikkeling van Minerale en Petroleum Hulpbronne, Wet 28 van 2002, het grondeienaars van hulle eiendomsreg ten aansien van onontginde minerale en petroleum produkte ontneem en bepaal nou dat minerale en petroleum hulpbronne "die gemeenskaplike erfenis van die hele bevolking van Suid-Afrika" is met die Staat as die bewaarder daarvan. Prospekteer- en mynregte ten aansien van "ongebruikte ou orde regte" en met betrekking tot die oorskakeling van "ou orde prospekteerregte" en "ou orde mynregte" na "nuwe orde" prospekteer en/of mynregte is onderworpe gestel aan ingrypende tydsbeperkings en veeleisende substantiewe voorwaardes wat deur die Minister van Minerale en Energie Aangeleenthede goedgekeur moet word. Terwyl die Staat in die verlede prospekteer- en mynregte gereguleer het, hoofsaaklik met die doel om veiligheid en omgewingsbewaring te bevorder, het die wetgewer nou streng vereistes gestel vir die vergunning van prospekteer en/of mynregte omdat dit eienaar geword het van minerale en petroleum hulpbronne – òf as personifikasie van "die bevolking van Suid-Afrika" òf as 'n openbare trustee van "die erfenis van die hele bevolking van Suid-Afrika".

Artikel 25 van die Grondwet van die Republiek van Suid-Afrika maak 'n onderskeid tussen ontneming van eiendom, wat nie die betaling van vergoeding deur die Staat vereis nie, en onteiening, waarvoor wel vergoeding betaal moet word. Dit word algemeen aanvaar dat onteiening bestaan uit ontneming plus 'n bykomstige element of bykomstige elemente. Daar is twee moontlike faktore wat 'n ontneming in onteiening kan omskep: òf die verkryging van eiendomsreg ten aansien van dit wat ontneem is deur 'n ander entiteit, byvoorbeeld die Staat, òf soos wat in Artikel 25 aangedui word, deur die ontneming van die eienaar se regte in die openbare belang of vir 'n openbare doel. In hierdie artikel word geargumenteer dat die ontneming van minerale en petroleum hulpbronne onder enigeen van die twee persepsies op onteiening neerkom.

1 Introduction

On 1 May 2004, the Mineral and Petroleum Resources Development Act[1] (MPRDA), entered into force. The MPRDA transformed the state of South African mineral law quite considerably. It abolished the existing mineral law, introduced a new system relating to the exploration and

1 28 of 2002.

mining of minerals, and made special provision for the transition from the old to a new order.

South Africa is a mineral rich country and probably a leading mining country in the world as far as the variety and quantity of minerals produced are concerned. Over the years regional legislation was adopted to regulate the exploration and mining of particular categories of minerals. In 1991, the legislature enacted the Minerals Act[2] (MA) to consolidate those laws into a single mineral law regime for the whole country. The MA afforded to the concept of "mineral" a broad meaning to include "any substance, whether in solid, liquid or gaseous form, occurring naturally in or on the earth, in or under water or in tailings and have been formed by or subjected to a geological process, excluding water, but including sand, stone, rock, gravel and clay, as well as soil, other than topsoil."[3] In common parlance, the concept of minerals is confined to substances such as gold, diamonds, coal, chrome, uranium, manganese, platinum and the like. In the common law the owner of land was owner of everything in the land in accordance with the rule *cuius est solum ad caelum et ad inferos* (ownership of land includes everything above the property up into the heavens and below to the centre of the earth). While minerals were not extracted from the land, they formed part of the land and were therefore owned by the owner of the land. Once they were extracted from the land, the minerals became a distinct legal object separate from the land and could consequently become the property of a person other than the landowner.

The concept of "mineral rights" came to be confined in South African law to an entitlement to search for and to mine minerals.[4] Some judgments refer more succinctly to the "right to mine", which has similarly come to denote "the right to prospect and mine for minerals and extract and dispose of them."[5] It is a real right, sometimes referred to as a quasi-servitude,[6] and must therefore be distinguished from the *ius in re sua* (ownership) of the minerals as such. The granting of a right to explore and mine minerals could be obtained in various ways. The owner of the land could apply for a certificate of rights to minerals in respect of the land of which he or she was the owner. Mineral rights could be ceded to a third person through the registration of a notarial deed registered against the title deed of the land, or a certificate could be issued to the third person authorising that third person to explore and to mine the

2 50 of 1991.
3 S 1 MA.
4 See *Minister of Minerals and Energy v Agri South Africa (Centre for Applied Legal Studies as amicus curiae)* Case No 485/11 [2012] ZASCA 93 par 4 (2012-05-31) (hereafter "*Agri South Africa II*") (noting that "mineral rights" under earlier legislation "were held either by the owner of land or, where they had been separated from the land in respect of which the rights were exercised, the holder of a separate right," and that those rights "can for present purposes be referred to generally as mineral rights").
5 *Agri South Africa II* par 99, par 27.
6 *Van Vuren v Registrar of Deeds* 1907 TS 289 295-96; and see *Agri South Africa II* par 25.

minerals. The right granted to the third person could apply in general or only in respect of a particular category of minerals. It was not uncommon in South Africa for landowners to separate their ownership of the land from mineral rights, for example by retaining the mineral rights relating to the land upon the sale of the land.[7]

Where mineral rights vested in a person other than the landowner, that person was "entitled to go upon the property to which they relate to search for minerals, and, if he (the holder) finds any, to sever them and carry them away."[8] Upon separation of the minerals from the land, they became distinct legal objects, and the person with mineral rights would acquire ownership of the minerals separated from the land.

The person who has acquired mineral rights was also entitled to transfer the right to search for and to mine the minerals to a third person. This could be done through (a) a prospecting contract, or (b) a mineral lease agreement. The mineral lease agreement afforded the right for a limited period only. The repository of mineral rights could claim compensation from the third person to whom he or she had transferred the prospecting rights.

One must therefore distinguish between (a) the ownership of minerals and (b) mineral rights in the sense of searching for and extracting minerals from the land. Ownership of minerals that formed part of the land vested in the landowner, and following their extraction from the land vested in the person with mineral rights, which could be the owner of the land or a person other than the land owner.

Since early times, the State has assumed a power to regulate the exploration and mining of minerals. The State's power of regulation must not be confused with the notion of "eminent domain" of English law or the exercise of "police powers" in American law. These concepts are imbedded in remnants of the feudal system under which the Queen or the State assumed ownership of the land and therefore owned mineral and petroleum resources in or on the land. In South African law, the State was not the owner of minerals but merely exercised control over the exploration and mining of minerals. The State, in the exercise of such regulatory powers, was primarily concerned with the maintenance of safety measures and protection of the environment.

The MA made provision (a) for the issuing by the State of a prospecting permit, and (b) for a power of the State to afford the right to mine for minerals. These rights could only be granted to the mineral rights holder, or to a person that had acquired written consent of the mineral rights holder to explore the minerals. A prospecting permit and mining rights were now subject to the granting of such rights by the State.

7 *Idem.*
8 *Idem.*

A prospecting permit could be granted, upon request, by the Department of Mineral and Energy Affairs, and could be afforded to (a) the holder of mineral rights, or (b) a person authorised by a prospecting contract or a mineral lease agreement to search for minerals. A prospecting permit could be issued for a period of 12 months or for a longer specified period and was subject to renewal. Authorisation for mining operations was also administered by the Department of Mineral and Energy Affairs, and could be granted to (a) the holder of mineral rights, or (b) a person authorised to mine the minerals on specified land.

The principles enshrined in the MA were thrown overboard by the MPRDA. Mineral rights as regulated by the MA were discarded. The ownership of minerals that vested in the landowner was abolished. Section 3(1) of the MPRDA now proclaims: "Mineral and petroleum resources are the common heritage of all the people of South Africa and the State is the custodian thereof."

The "old order" rights remained in force for a specified period of time (one to five years) and the holder of those rights must within that period apply for prospecting and mining rights. Prospecting and mining rights are no longer registered in the Deeds Office but in the Registration Office for Mineral and Petroleum Titles in Pretoria. Rights in respect of minerals can only be transferred with the written consent of the Minister of Mineral and Energy Affairs.

The key question to be considered in this survey is whether or not the changes brought about by the MPRDA amounted to expropriation of the "old order" rights of a landowner and/or of the holder of mineral rights. The High Court, North Gauteng decided that it did amount to expropriation.[9] However, the Supreme Court of Appeal begged to differ.[10] The matter is currently pending before the Constitutional Court of South Africa.

2 The Concept of Expropriation

The South African Constitution, somewhat obscurely, makes a distinction between deprivation and expropriation of property.[11] It prohibits arbitrary deprivation of property, and provides that deprivation of property may only occur in terms of a law of general application.[12] Expropriation must also be authorised by a law of general application,

9 *Agri South Africa v Minister of Mineral and Energy* [2011] 3 All SA 296 (GNP) (hereafter "*Agri South Africa I*"); Leon, "Creeping Expropriation of Mining Investments: An African Perspective", 2009 *J of Energy & Natural Resources Law* 597 620-21; Badenhorst & Olivier "Expropriation of 'Unused Old Order Rights' by the MPRDA: You Have Lost It!", 2012 *THRHR* 329.

10 *Agri South Africa II*.

11 S 25(1) & (b) Constitution of the Republic of South Africa, 1996 (hereafter "SA Const").

12 S 25 (1) SA Const.

and must be sanctioned for a public purpose or in the public interest.[13] In the case of expropriation, compensation must be paid to the person whose property is being expropriated, calculated according to principles of justice and equity specified in some detail in the Constitution.[14]

It must be emphasised at the outset that prior to the 1996 Constitution, a distinction between "deprivation" and "expropriation" was not part to the vocabulary of South African property law. Instead, South African property law differentiated between the regulation by public authorities of the entitlements of ownership on the one hand (based in American law on the feudal system and referred to as the exercise of "police powers"), and expropriation (referred to in American law as a "taking") on the other. Legislation compelling farmers to fence off their land,[15] to protect the natural environment,[16] or to prevent the spreading of obnoxious weeds,[17] belong to the first category of property constraints, while depriving an owner of his or her ownership constitutes expropriation.

Much of the confusion that emanated from the MPRDA is attributable to efforts to equate the constitutional provisions of section 25 with the traditional distinction between regulation and expropriation, and more in particular by an assumption that "deprivation" has the same meaning as "regulation". In *Harkson v Lane NO*, Goldstone J thus had this to say:

> The distinction between expropriation (or compulsory acquisition as it is called in some other foreign jurisdictions) which involves acquisition of rights in property by a public authority for a public purpose and the deprivation of rights in property which falls short of compulsory acquisition has long been recognised in our law.[18]

In *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government*, Nkabinde, J explained:

> The purpose of the distinction between expropriation and deprivation by regulating measures is to enable the State to regulate the use of property for public good without the fear of incurring liability to owners of property affected in the course of such regulation.[19]

It must be emphasised that linguistically and otherwise, "deprivation of property" cannot simply be likened to "regulation" of the entitlements of ownership. The literal dictionary meaning of "deprive" is the equivalent

13 S 25(2) SA Const.
14 S 25 (3) & (4) SA Const.
15 Fencing Act 31 of 1963.
16 Environmental Conservation Act 73 of 1989.
17 S 5 Conservation of Agricultural Resources Act 43 of 1983.
18 *Harkson v Lane NO* 1998 1 SA 300 (CC) par 33; see also *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 63 (per Nkabinde J).
19 *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 63; see also *Steinberg v South Peninsula Municipality* 2001 4 SA 1243 (SCA) par 4; Van der Walt *Constitutional Property Law* (2011) 123-25.

of concepts such as dispossess, divest, loss of something enjoyed, strip, expropriate, divest, and "deprivation" is defined as withholding, denial, withdrawal, removal, dispossession, taking away, stripping, expropriation, seizure, confiscation.[20] Needless to say, a basic rule of interpretation requires that words used in a statute should be given their ordinary meaning.

It has come to be commonly accepted that deprivation is a broader concept that includes expropriation.[21] The wording of the Constitution suggests that deprivation of property may be orchestrated for reasons other than a public purpose or in the public interest, provided those reasons are not "arbitrary". A deprivation will be arbitrary "if the law referred to in section 25(1) does not provide sufficient reason for the particular deprivation in question or is procedurally unfair."[22] It would seem that the "sufficient reason" need not necessarily be related to a public purpose or be in the public interest. It is rather surprising that the drafters made the payment of compensation conditional upon the infringement of property rights being substantiated by a public purpose or in the public interest but saw fit to deny the owner compensation in cases where a deprivation by the legislature is prompted by considerations other than a public purpose or the public interest.

Nevertheless, it seems that, based on the language of section 25 of the Constitution, the only substantive difference between a deprivation of property for which compensation need not be paid and a deprivation that amounts to expropriation and which is conditional upon the payment of compensation is the fact that expropriation is authorised by the legislature in the public interest or for a public purpose. It might be noted in passing that the view attributed to some analysts that allegedly distinguished between expropriation and deprivation on the sole basis that the legislature in the one instance promises compensation and in the other not[23] was rightly rejected by the Supreme Court of Appeal: the payment of compensation is a consequence of a deprivation amounting to expropriation and is not part of the substantive definition of expropriation.[24]

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20 See for example *The Oxford Thesaurus of Current English* (1999).

21 *Davies v Minister of Lands, Agriculture and Water Development* 1997 1 SA 228 (ZSC) par 25 (referring to "deprivation which falls short of compulsory acquisition or expropriation"); *Harkson v Lane NO* 1998 1 SA 300 (CC) par 31*; First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service*: *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 57; *Agri South Africa II* par 14.

22 *First National Bank of SA Ltd t/a Wesbank v Commissioner South African Revenue Service*: *First National Bank of SA Ltd t/a Wesbank v Minister of Finance* 2002 4 SA 768 (CC) par 100; see also *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 39.

23 Van der Walt 343-44. It should be noted that the SCA, in attributing this view to Van der Walt, misinterpreted the passages in Van der Walt to which it referred.

24 *Agri South Africa II* par 18.

It is quite commonly assumed that the common law meaning of expropriation includes an element of acquisition of ownership. In *Agri South Africa II*, the Supreme Court of Appeal more or less ignored the language of the Constitution and proceeded on the assumption that "acquisition by or through the expropriating authority is a characteristic of an expropriation in terms of [section] 25(2)."[25] Acquisition by whomso-ever of the property expropriated is not mentioned at all in section 25(2), or elsewhere in the Constitution.[26] The question whether or not the right expropriated must accrue to the State has had a chequered history in South African case law. It has been decided on occasion that expropriation requires acquisition of the expropriated right by the State,[27] but then again that the Constitution permitted an expropriation in the public interest even if the party ultimately acquiring the property was not the State.[28] Gildenhuys defined "expropriation" as:

> the unilateral extinction by state authority of the property rights of a person in relation to a thing, coupled with the unilateral acquisition of property rights in respect of that thing by the state authority or by someone else.[29]

In *Agri South Africa II*, the Supreme Court of Appeal preferred the latter statement of the law.[30]

It might also be noted that although acquisition is commonly proclaimed to be an essential element of expropriation, this has to the best of my knowledge never really been put to the test. I know of no case in which it was decided that the deprivation of a property right was not a matter of expropriation because the right of which the right's holder was dispossessed was not transferred to or acquired by a public authority or someone else. One should also bear in mind that the concept of "deprivation" exclusively denotes the taking away of a right and does not include an element of acquisition.

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25 *Agri South Africa II* par 24, par 18.

26 Gildenhuys *Onteieningsreg* (2001) 8: "Onteiening is die eensydige uitwissing deur die owerheid van die vermoënsregte van 'n person ten aansien van goed, en daarmee saam die eensydige verkryging van vermoënsregte oor daardie goed deur die owerheid of deur iemand anders." See also Badenhorst "Die Vereistes vir 'n Geldige Onteieningskennisgewing" 1989 *THRHR* 130 137, defining expropriation as "the extinction or limitation of a subject's right in respect of a legal object by state authority and the acquisition of a right in respect of a legal object by state authority" ("die beëindiging of beperking van 'n onderdaan se subjektiewe reg ten aansien van 'n resobjek deur die owerheid en die verkryging van 'n subjektiewe reg ten aansien van 'n regsobjek deur die owerheid").

27 *Reflect-All 1025 CC v MEC for Public Transport, Roads and Works, Gauteng Provincial Government* 2009 6 SA 391 (CC) par 64; see also *Harkson v Lane NO* 1998 1 SA 300 (CC) par 33 (referring to expropriation as the "acquisition of rights in property by a public authority").

28 *Offit Farming Enterprises (Pty) Ltd v Goega Development Corporation* 2010 4 SA 242 (SCA) parr 14-18. This statement of the law was not challenged on appeal. See *Offit Farming Enterprises (Pty) Ltd v Goega Development Corporation* 2011 1 SA 293 (CC).

29 Gildenhuys *Onteieningsreg* (2001) 8

30 *Afri South Africa II* par 24, par 16 note 21, par 18.

Since the exact (common-law) meaning of "deprivation" – that is in a sense other than merely the reasonable curtailment of the entitlements of ownership – has come to be clouded in mystery, I would suggest that the constitutional distinction between deprivation and expropriation ought to be scrutinised with reference to the precise wording of Article 25. The only directive provided by the Constitution is that permissible deprivation includes all instances of the taking of property that are not arbitrary, and that those instances of deprivation authorised by legislation of general application for a public purpose or in the public interest must be treated as a matter of expropriation.

3 Deprivation/Expropriation under the MPRDA?

One must distinguish between the impact of the MPRDA on (a) the right of a landowner to mineral and petroleum resources in or on his or her land, and (b) the "mining right" of a landowner or a third person to search for and mine mineral and/or petroleum resources. Litigation in *AgriSA* was almost entirely confined to (b), ie the impact of the MPRDA on prospecting and mining rights. This approach was probably dictated by the facts in the case, since the Plaintiff in the matter was not a landowner but a voluntary association that had received session of prospecting and mining rights.

As to (a) above, it would seem that proclaiming all mineral and petroleum resources to be the common heritage of all the people of South Africa amounted to expropriation – and that, irrespective of the meaning one might prefer to attach to the concept of expropriation. It might be noted in passing that the judgment of the Transvaal Provincial Division of the High Court in *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa* to the effect that mineral rights are not protected by section 25 of the Constitution[31] was clearly wrong.[32] The Court based its decision on the *Certification Case*, where it was decided that in view of international conventions and foreign constitutional law mineral rights cannot be said to be "universally accepted rights" and consequently need not be specified in the constitutional Bill of Rights.[33] Excluding mineral rights from the body of rights and freedoms afforded special protection in the Bill of Rights has absolutely nothing to do with the common-law right of a landowner to everything attached to or in the land.

If one prefers to define expropriation in contradistinction to deprivation with a view to the wording of section 25(1) and (2) of the Constitution, then rendering extinct the ownership of a landowner in

31 *Lebowa Mineral Trust Beneficiaries Forum v President of the Republic of South Africa*, 2002 1 BCLR 23, 27 (T).
32 Van der Walt 426.
33 *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996* 1996 4 SA 744 (CC) par 74.

respect of the mineral and petroleum resources in the land falls squarely within the language of section 25(2). Depriving the landowner of his or her common-law right of ownership of mineral and petroleum resources in the land was clearly intended to serve a public purpose and to be in the public interest within the constitutional meaning of expropriation. According to the Constitution, the public interest for purposes of expropriation "includes the nation's commitment to land reform, and to reforms to bring about equitable access to all South Africa's natural resources,"[34] and the Preamble to the MPRDC reaffirms in almost identical mode "the State's commitment to reform" and a solemn undertaking "to eradicating all forms of discriminatory practices in the mineral and petroleum industries." Nationalisation of the mineral and petroleum resources is therefore verbatim a matter of expropriation within the meaning of section 25(2) of the Constitution.

If, on the other hand, acquisition of the right taken is an element of expropriation as assumed by the Court in *Agri South Africa II*, then the State as custodian of the rights taken will fill the slot. It strikes one as odd that almost no attention was paid in *Agri South Africa* to the new beneficiary of mineral and petroleum resources. According to section 3(1) of the MPRDA, mineral and petroleum resources are proclaimed to be "the common heritage of all the people of South Africa" with the State as "the custodian thereof for the benefit of all South Africans." Proclaiming mineral and petroleum resources to be "the common heritage of all the people of South Africa" with the State as "the custodian thereof for the benefit of all South Africans" is from a legal perspective problematic. "All the people of South Africa" is not a legal subject and can therefore not become the owner of mineral and petroleum resources.[35] It is perhaps fair to conclude that in effect ownership of mineral and petroleum resources has been vested in the State. This could be construed on the basis of the State being the legal personification of the people of South Africa, or alternatively on the State having become the owner of mineral and petroleum resources as a public trustee. One analyst suggested that the MPRDA indeed created a public trust, which would mean that the country's mineral and petroleum resources vest in the State, which then exercises its fiduciary responsibility through regulatory control over the award and execution of prospecting and mining operations.[36] Needless to say, a trustee is owner of the trust property but is under a legal obligation to use the property for the specified trust purpose only. Regarding the State as the new owner of mineral and petroleum resources, either as personification of "all the people of South Africa" or as public trustee "for the benefit of all South

34 S 25(4)(a) SA Const.

35 See Van der Walt 417; Badenhorst & Mostert "Artikel 3(1) en (2) van die *Mineral and Petroleum Resources Development Act* 28 van 2002: "n Herbeskouing" 2007 *TSAR* 469 491.

36 Van der Schyff "Who 'Owns' the Country's Mineral Resources? The Possibility of Incorporating the Public Trust Doctrine through the Mineral and Petroleum Resources Development Act" 2008 *TSAR* 757; Van der Walt 417.

Africans" is also in conformity with a provision where the objects of the MPRDC are said to include "the internationally accepted right of the State to exercise sovereignty over all the minerals and petroleum resources within the Republic."[37] In *Agri South Africa II*, Wallis, JA stated somewhat superficially that the question whether or not the MPRDA introduced into South African law elements of the public trust doctrine "seems to me neither here nor there."[38]

Nor could one argue that the MPRDA converted the mineral and petroleum resources into *res omnium communes* or *res publicae* within the meaning of the South African (Roman-Dutch) common law. *Res omnium communes* and *res publicae* signified particular categories of things that could not be privately owned (*res nullius*) but the use and enjoyment of which were available to all members of the human race or to all members of the public of a particular country (respectively). Converting the right of the State to act as custodian of mineral and petroleum resources by granting mining rights in respect thereof to particular persons or corporations simply does not fit the substance of these common-law concepts.

4 Regulation of Prospecting and Mining Rights

In *Agri South Africa II*, the Supreme Court of Appeal decided in essence (a) that the MPRDA vested in the people of South Africa, with the State as custodian, the mineral rights or the right to mine as defined above,[39] and thereby "encapsulate[d] in non-technical language the notion that the right to mine vests in the State";[40] (b) that the ultimate right to search for and to mine minerals has always been vested in the State, since it was the State that could decide who would be competent to search for and to mine mineral and petroleum resources and was entrusted with the competence to afford a right to do the same to a successful applicant;[41] (c) that the MPRDA did not bring about any change in this regard and that expropriation consequently did not take place.[42] The fallacies of this line of reasoning are twofold:

37 S 2(1) MPRDA.
38 *Agri South Africa II* par 86.
39 See *Agri South Africa II* par 81 (noting that the "right to mine" is "used throughout the judgment as the right to prospect and mine and dispose of the minerals extracted from mining").
40 *Agri South Africa II* par 86.
41 See *Agri South Africa II* par 84, par 48 (noting that "the right to mine was a right that the State asserted for itself and controlled"), par 99 (noting that "in its broad sense ... the right to mine is vested in the State and ... the State either exercises or allocates that right").
42 *Agri South Africa II* par 99.

The MPRDA is absolutely clear in stating explicitly that what is being nationalised is "all the mineral and petroleum resources within the Republic" of South Africa;[43] and:

> The power of the State to exercise control over the exploration and mining of minerals is indeed deeply imbedded in the history of South African law but has in the past been confined to regulating mining operations as an inherent component of state sovereignty: the power of public authority to lay down building restrictions does not make the public authority owner of one's house!

In the new dispensation introduced by the MPRDA this changed fundamentally. The MPRDA afforded to the State, acting through the Minister of Minerals and Energy Affairs, sweeping powers to administer prospecting and mining rights in respect of "the nation's mineral and petroleum resources." It provides:

> As the custodian of the nation's mineral and petroleum resources, the State, acting through the Minister, may –
>
> (a) Grant, issue, refuse, control, administer and manage any reconnaissance permission, prospecting right, permission to remove, mining right, mining permit, retention permit, technical co-operation permit, reconnaissance permit, exploration right and production right; and
>
> (b) In consultation with the Minister of Finance, determine and levy, any fee or consideration payable in terms of any relevant Act of Parliament.[44]

The MPRDA distinguishes between (a) prospecting and mining rights that remained dormant at the time the Act entered into force, commonly referred to as "unused old order rights", and (b) prospecting and mining rights that were actively utilised under the old order regime, referred to as "old order prospecting rights" and "old order mining rights" respectively. In all instances, the MPRDA imposed stringent conditions for the granting of "new order" prospecting and mining rights to holders of unused old order rights and of old order prospecting and mining rights. Those conditions are no longer merely a matter of regulation by a public authority of the entitlements of the repository of a right from which those entitlements derived but are imposed on the holders of "old order" rights *because the State has become the custodian/owner of mineral and petroleum resources*.

The MPRDA accordingly deprived mineral resource owners of their basic right of control which they previously enjoyed.[45] Whereas under the old order regime, the holder of mineral rights was under no obligation to exploit his or her rights and could keep the right indefinitely and sell it at a profit, the holders of unused old order rights are now given one year

43 S 2(a) MPRDA.
44 S 3(2) MPRDA.
45 Leon, "A Fork in the Investor-State Road: South Africa's New Mineral Regulatory Regime Four Years On" 2008 *J of World Trade* 679; and see also Leon 2009 *J of Energy & Natural Resources Law* 597 614.

in which to apply for new order prospecting and/or mining rights;[46] and as noted by Du Plessis J in *Agri South Africa I*, this is not merely a matter of "use it or lose it", the MPRDA instead introduced the principle of "You have lost it. Now apply within a year and if you qualify, you may use it."[47] Although the MPRDA affords to the "holder of an unused old order right ... the exclusive right to apply for a prospecting or a mining right,"[48] the requirements that must be satisfied, outlined in Chapter 4 of the Act, are extremely burdensome.[49] They include the showing of adequate financial resources and technical ability to conduct the proposed mining operations optimally,[50] demonstrating that the mining will not result in unacceptable pollution, ecological degradation or damage to the environment,[51] providing proof that the applicant has provided financially or otherwise for a prescribed social and labour plan,[52] and professing the ability to comply[53] with the relevant provisions of the Mine Health and Safety Act.[54] The Minister is given broad discretionary powers in granting or refusing an application for prospecting or mining rights.[55] One should also bear in mind that most holders of old order rights did not really know whether there were mineral or petroleum resources in the land over which they held those rights and most likely lacked the financial resources to explore the feasibility of and/or to exploit those rights. In *Agri South Africa I*, the High Court decided that the objects of the MPRDA, combined with the above statutory and practical impediments, brought about generalised deprivation of all unused old-order rights;[56] and since this was done through a law of general application enacted for a public purpose and in the public interest, it amounted to expropriation within the meaning of section 25(2) of the Constitution.[57] This reasoning cannot be faulted.

Expropriation is equally evident in the case of "old order prospecting rights" and "old order mining rights". Here, the time limit for converting old order right into new order rights is two years after the entry into force of the MPRDA in the case of old order prospecting rights,[58] and five years in the case of old order mining rights.[59] The Minister must convert an old order prospecting right, provided the applicant satisfies certain

46 It 8(1) Sch II MPRDA.
47 *Agri South Africa I* par 70.
48 It 8(2) Sch II MPRDA.
49 See Leon 2009 *J of Energy & Natural Resources Law* 597 619-21.
50 S 23(1)(b) MPRDA.
51 S 23(1)(d) MPRDA.
52 S 23(1)(e) MPRDA.
53 S 23(1)(f) MPRDA.
54 29 of 1996.
55 Ss 23(3) & 26 MPRDA.
56 *Agri South Africa I* parr 71, 73, 74; see *Holcum (South Africa) (Pty) Ltd v Prudent Investors (Pty) Ltd* Case No 64/109 [2010] ZASCA par 23 (noting, per Hefer, JA, "The new system and the old system of common law mineral rights are mutually exclusive").
57 *Agri South Africa I* parr 83, 87-88.
58 It 6(1) Sch II MPRDA.
59 It 7(1) Sch II MPRDA.

requirements, such as submitting a prescribed list of particulars of the holder of the old order right,[60] an affidavit verifying that the holder of the old order right has conducted prospecting operations before the MPRDA took effect on the area of the land to which the conversion relates and setting out the periods during which such prospecting operations were conducted and the results thereof,[61] an original old order right or a certified copy thereof,[62] and evidence that the applicant has an approved environmental management program in place.[63]

Renewal of old order mining rights are subject to similar conditions,[64] plus a number of more onerous requirements, such as having to submit a prescribed social and labour plan,[65] and an undertaking that the holder will give effect to certain objects of the new order and the manner in which he or she will do so.[66] Holders of old order rights seeking their conversion must also comply with "a broad-based socio-economic Charter that will set the framework, targets and time-table for effecting the entry of historically disadvantaged South Africans into the mining industry, and allow such South Africans to benefit from the exploitation of mining and mineral resources."[67] The Mining Charter requires the transfer of 15 per cent of mining assets or equity to Black Economic Empowerment groups or individuals by 2009, and 26 per cent by 2014.[68] Royalties must be paid to the State in respect of any minerals removed and disposed of during the course of prospecting and mining operations.[69]

It has been noted that "new order rights could generally be described as weaker, more insecure or less comprehensive than their old order counterparts."[70] Particularly noteworthy is the fact that (a) new order rights do not automatically vest in the holder of their preceding old order rights; (b) new order rights are not permanent as were their old order counterparts; (c) new order prospecting and mining rights may not be transferred and encumbered freely as they could under the old order regime; and (d) the relative inherent value of new order rights as

60 It 7(2)(a) Sch II MPRDA.
61 It 6(2)(d) Sch II MPRDA.
62 It 6(2)(i) Sch II MPRDA.
63 It 6(3)(d) Sch II MPRDA.
64 It 7(2) Sch II MPRDA.
65 It 7(2)(f) Sch II MPRDA.
66 It 7(2)(k) Sch II MPRDA.
67 S 100(1)(b) MPRDA.
68 See Leon 2009 *J of Energy & Natural Resources Law* 597 619.
69 Ss 19(2)(g) & 25(2)(g) MPRDA; see the Mineral and Petroleum Resources Royalty Act 28 of 2008 and the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008.
70 Van der Walt 407; see also Badenhorst & Mostert, "Revisiting the Transitional Arrangements of the Mineral and Petroleum Resources Development Act 28 of 2002 in Two Parts. Part I: Nature and Content of Rights Acknowledged by the Revised Transitional Provisions" 2003 *Stell LR* 377 396-99; Badenhorst & Mostert *Mineral and Petroleum Law of South Africa: Commentary and Statutes* (2011) ch 25; Dale *et al South African Mineral and Petroleum Law* (2006) 209-212 Sch II.

measured against their nature and content do not live up to the comparable attributes of the old order rights.[71]

The essence of the matter is, however, that mineral and mining rights were expropriated on the day the MPRDA entered into force,[72] and the granting and extensive regulation of the exercise of prospecting and mining rights is a consequence of the change in ownership of mineral and petroleum resources. The State no longer regulates mining operations in a supervisory capacity, it now imposes restrictive rules and regulations because it has become the owner of mineral and petroleum resources. Its competence under the MPRDA is now comparable to eminent domain in English law and the exercise of police powers in the United States. Further evidence that the power vested in the Minister derives from expropriation of the existing prospecting and mining rights may be derived from the fact that royalties must be paid to the State in respect of minerals removed and disposed of during the course of prospecting or mining operations.[73]

5 Constitutionality of the MPRDA

We have not taken issue with the constitutionality question relating to the MPRDA. Suffice it to say that the Constitution places an obligation on the State to make provision and enforce remedial action programs.[74] The Constitutional Court on several occasions emphasised the need for measures to bring about substantive equality in South Africa,[75] and decided that the MPRDA was enacted "amongst other things to give effect to those constitutional norms."[76] The MPRDA was designed to "make provision for equitable access to and sustainable development of the nation's mineral and petroleum resources,"[77] and re-affirmed "the State's commitment to reform to bring about equitable access to South Africa's mineral and petroleum resources."[78] The objects of the MPRDA include a commitment to "substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from

71 Van der Walt 407-08.
72 Dale *et al* 210-12; *Agri South Africa I* parr 75, 77.
73 Ss 19(2)(g) & 25(2)(g) MPRDA; see also Mineral and Petroleum Resources Royalty Act 28 of 2008 and the Mineral and Petroleum Resources Royalty (Administration) Act 29 of 2008.
74 S 9(2) SA Const (mandating "legislative and other measures designed to protect and advance persons, or categories of persons, disadvantaged by unfair discrimination").
75 *Minister of Finance v Van Heerden* 2004 3 SA BCLR 229 (CC) pars 25-31.
76 *Bengwenyama Minerals (Pty) Ltd v Gemorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC) par 3.
77 Long title MPRDA.
78 Preamble MPRDA.

exploitation of the nation's mineral and petroleum resources."[79] The constitutionality of the MPRDA is therefore beyond dispute.[80]

Constitutionality of the MPRDA does authorise the expropriation of mineral and petroleum resources and/or the prospecting and mining rights relating to mineral and petroleum resources, but this does not mean that those rights can be expropriated without compensation. The MPRDA expressly provides that "[a]ny person who can prove that his or her property has been expropriated in terms of any provision of this Act may claim compensation from the State."[81] It is perhaps also important to note that South Africa on 20 September 1994 – that is within less than five months of the political transition in South Africa – entered into a bilateral investment treaty with the United Kingdom which provided amongst other things:

> Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that party on a non-discriminatory basis and against prompt, adequate and effective compensation.[82]

There are some legislative stupidities in the MPRDA, for example including a definition of "top soil"[83] without any reference to "top soil" elsewhere in the Act. So, too, perhaps, is the drafters' attempt to seek justification for the nationalisation of rights in respect of minerals and petroleum resources in international law directives.

5 1 International-law Dimension

Drafters of the MPRDA based the legitimacy of the Act on "the internationally accepted right of the State to exercise sovereignty over all mineral and petroleum resources within the Republic."[84] The United Nations has indeed repeatedly proclaimed the "inalienable right of all states freely to dispose of their natural wealth and resources in accordance with their national interests" as an inherent aspect of sovereignty,[85] with occasional reminders that developing countries were

79 S 2(c) MPRDA.
80 *Agri South Africa I* par 39; see also Van der Walt 439-40.
81 It 12(1) Sch II MPRDA.
82 Par 5(1) *Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of South Africa for the Promotion and Protection of Investments*, (entered into force on 1994-09-20); Leon 2009 *J of Energy & Natural Resources Law* 597 601-02.
83 S 1 MPRDA.
84 S 2(a) MPRDA.
85 See eg GA Res 626, 7 UN GAOR Supp (No 20) 18; UN Doc A/2361 (1952); GA Res 1515, 15 UN GAOR Supp (No 16) 9; UN Doc A/4684 (1960); GA Res 1803, 17 UN GAOR Supp (No 17) 15; UN Doc A/5217 (1962); GA Res 2158, 21 UN GAOR Supp (No 16) 29; UN Doc A/6316 (1966); GA Res 3016, 27 UN

in need of encouragement "in the proper use and exploitation of their natural wealth and resources."[86] However, the emphasis of international law on the sovereign right of States over their natural resources was debated and decided in the context of colonialism, and more precisely to emphasise that the proper use and exploitation of natural wealth and resources belong to the colonised peoples and not to the colonial powers. In 1967, the General Assembly decided that the "inalienable right" to natural resources and the right to dispose of those resources in territories subject to colonial rule belonged to the peoples of the colonised territories,[87] and stated:

> The colonial Powers which deprive the colonial peoples of the exercise and the full enjoyment of those rights, or which subordinate them to the economic or financial interests of their own nationals or of nationals of other countries, are violating the obligation they have assumed under ... the Charter of the United Nations.[88]

The rules of international law proclaiming the sovereign right of States over natural resources thus applies to conflicts between State A and State B and not to the rights of governments *vis-à-vis* its nationals or persons within its national domain. Those decisions are therefore not applicable in South Africa.

Over time, though, the emphasis of international law relating to natural resources shifted to the right to self-determination of peoples. A people in this context denotes persons united by a common ethnic/cultural, religious, or linguistic extraction – for example, being a member of the Zulu tribe, the Roman Catholic Church, or an Afrikaans speaking community. As early as 1958, the General Assembly, in a Resolution through which the Commission on Permanent Sovereignty over Natural Resources was established,[89] stated that the "permanent sovereignty over natural wealth and resources" of States is "a basic constituent of the right to self-determination."[90]

The same principle is foundational to Article 21(1) of the African Charter on Human and Peoples' Rights which provides:

GAOR Supp (No 30) 48: UN Doc A/8730 (1972); GA Res 3171, 28 UN GAOR Supp (No 30) 52; UN Doc A/9030 (1973); see also Res 88 on *Permanent Sovereignty over Natural Resources* of the Trade and Development Board, UN Doc A/8715, Rev 1 (1972), endorsed by the General Assembly in GA Res 3041, 27 UN GAOR Supp (No. 30) 55; UN Doc A/8730, par 16 (1972).

86 See eg ESC Res 1737, 54 UN ESCOR Supp (No 1) (1973) 1; GA Res 626, 7 UN GAOR Supp (No 20) 18; UN Doc A/2361 (1952) par 3; GA Res 1803, 17 UN GAOR Supp (No 17) 15; UN Doc A/5217 (1962) par 6; GA Res 2158, 21 UN GAOR Supp (No 16) 29; UN Doc A/6316 (1966) par 3.

87 GA Res 2288 par 2, 22 UN GAOR Supp (No 16) 48, UN Doc A/6716 (1967).

88 GA Res 2288 par 3.

89 GA Res 1314, 13 UN GAOR, Supp (No 18) 27, UN Doc A/4090 (1958).

90 See also par 2 *Declaration on the Granting of Independence to Colonial Countries and Peoples* GA Res 1514, 15 UN GAOR Supp (No 16) 66, UN Doc A/4684 (1960); *Declaration on the Right to Development* par 1(2), GA Res 41/128, 41 UN GAOR Supp (No 53) 186, UN Doc A/41/53 (1986); see further GA Res 2288, 22 UN GAOR Supp (No.16) 48, UN Doc A/6716 (1967).

> All peoples shall freely dispose of their wealth and natural resources. This right shall be exercised in the exclusive interest of the people. In no case shall a people be deprived of it.[91]

In the 2001 *Ogoni Decision*, the African Commission on Human and Peoples Rights (ACHPR) traced the historical basis of this provision back to colonialism, "during which the human and material resources of Africa were largely exploited for the benefit of outside powers."[92]

In a recent ground-breaking decision, the ACHPR decided that an indigenous community (the *Endorois*) which was displaced from their ancestral land in Kenya almost half a century ago constituted a distinct people within the meaning of Article 21(1) of the African Charter on Human and Peoples' Rights and that their right to "freely dispose of their wealth and natural resources" has been violated.[93] It is respectfully submitted that the decision of Froneman, J in *Bengwenyama Minerals (Pty) Ltd & Others v Gemorah Resources (Pty) Ltd & Others* was in conformity with the international-law approach by affording preference to an interest in obtaining prospecting rights to an ethnic community that occupied the land where the search for minerals were to be conducted.[94]

6 Concluding Observations

Nationalisation of the mineral and petroleum resources clearly constitutes an instance of expropriation within the meaning of section 25 of the Constitution, since (a) landowners were deprived of their common-law ownership of mineral and petroleum resources; and (b) the deprivation was orchestrated for a public purpose or in the national interest. If acquisition of the right taken is an essential component of expropriation, vesting the ownership in the State, either as the personification of "all the people of South Africa" or as a public trustee of the people's "common heritage", fully satisfies this demand – as was indeed conceded by the Supreme Court of Appeal in *Agri South Africa II*.

State control over prospecting and mining operations under the MPRDA is no longer merely a matter of the State's regulatory powers over the exercise of the entitlements of ownership; it now derives from the fact that the State has become the owner of all mineral and petroleum resources in the land. It is therefore part and parcel of the act of expropriation. Equating the State's newly acquired right of control over

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91 Art 2(1) African Charter on Human and Peoples' Rights OAU Doc CAB/LEG/67/4/Rev 5 (27 June 1981).

92 *Social and Economic Rights Action Centre (SERAC) v Nigeria* (2001) AHRLR 60 (ACHPR 2001) Communication 155/96 15th Annual Report, par 56.

93 *Centre for Minority Rights Development (Kenya) & Minority Rights Group International on behalf of Endorois Welfare Council v Kenya* 2010 *Int Legal Materials* 858; see Beukes, "The Recognition of 'Indigenous Peoples' and the Right as 'a People': An African First" 2010 *SA YB of Int Law* 216.

94 *Bengwenyama Minerals (Pty) Ltd v Gemorah Resources (Pty) Ltd* 2011 3 BCLR 229 (CC).

prospecting and mining operations relating to mineral and petroleum resources to the old order regulatory powers of the State is clearly wrong. The old order regulatory powers of prospecting and mining activities have instead been converted by the MPRA into a substantive, ownership-based, exercise of eminent domain as in English law or of police powers as in American law.

The question whether or not a landowner and/or the repository of old order prospecting and mining rights who have been deprived of their ownership and/or prospecting and mining rights can claim compensation is of course dependent on its own set of rules, taking into account the advent of actual pecuniary losses, the elements listed in Article 25(3) of the Constitution, and the rules of law applicable to the prescription of actions. That is a debate for another occasion and another time. Suffice it to say that the proven presence of minerals or petroleum in or on a plaintiff's property is not an essential component of a claim for compensation, since the mere possession of known or unknown unexplored mineral rights does have an effect on the market value of land and would therefore deserve compensation following the act of expropriation. The holders of old order prospecting or mining rights that have been forfeited due to the acquisition of ownership by the State of mineral and petroleum resources and the strict requirements for converting those old order rights into new order rights are also in principle entitled to compensation, because those newly enacted requirements are part and parcel of the act of expropriation.

And let it not remain unsaid that there is nothing scandalous or reprehensible about expropriation of rights for a public purpose or in the public interest and the payment of compensation by the State to those who have suffered losses in consequences of the act of expropriation. This is in fact the norm that should prevail *prima facie*. Deprivation that does not amount to expropriation should be the exception to the norm and a finding of such deprivation ought to be subjected to stringent scrutiny. By twisting and interpolating legal history and the rules of the common law in order to deny compensation to the holders of old order mining rights, the Supreme Court of Appeal seemed to have had the opposite mind set. Since the MPRDA was enacted for a noble cause, one would have expected a court of law to lean toward a finding of expropriation, as indeed dictated by the provisions of section 25 of the Constitution.

Where does mining stop and manufacturing commence? A critical analysis of section 15A of the Income Tax Act

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OPSOMMING

Waar eindig mynbou en waar begin vervaardigiging? 'n Kritise ontleding van artikel 15A van die Inkomstebelastingwet

Die doel van die artikel was om die resultate van 'n kritiese ontleding gedoen op die duidelikheid sowel as waarde toegevoeg vir belastingpligtiges in die mynbedryf, met die toevoeging van artikel 15A tot die Inkomstebelastingwet, weer te gee. 'n Literatuurstudie is gedoen wat die verskille tussen wat "'n proses van myn" teenoor "'n proses van vervaardig" sou behels, ondersoek het. Die artikel lig voorts die feit uit dat in werklikheid die myn van 'n mineraal en die daaropvolgende vervaardiging van die mineraal in iets nuuts heel dikwels as deel van 'n aaneenlopende proses plaasvind, wat dikwels moeilik onderskeidbaar is van mekaar (soos prominent uitgewys is in die saak van *CSARS v Foskor* [2010] 3 All SA 594 (SCA)). Die literatuurstudie het gefokus op die relevante artikels van die Inkomstebelastingwet, sowel as relevante regspraak, met die hooffokus op CS*ARS v Foskor.* Daar is gevind dat, ten spyte van die toevoeging van artikel 15A tot die Inkomstebelastingwet, ('n artikel wat pertinent toegevoeg is tot die wet as 'n direkte gevolg van die probleme deur die Suid-Afrikaanse Inkomstediens in *CSARS v Foskor* ondervind), is die onderskeid tussen die begrippe "proses van myn" teenoor "proses van vervaardig" steeds onduidelik. Presies wanneer iets "gewin" word as deel van 'n mynproses is steeds onduidelik. Die artikel stel voor dat die term "gewin", wat tans slegs deel vorm van die omskrywing van "mynbou" in artikel 1 van die Inkomstebelastingwet, apart omskryf moet word in artikel 1 van die Inkomstebelastingwet. Hierdie artikel dui dat 'n die toevoeging van 'n omskrywing vir "gewin" 'n wesenlike bydrae sal lewer tot die waarde wat artikel 15A werklik toevoeg, aangesien artikel 15A net van toepassing is op belastingpligtiges wat mynboubedrywighede beoefen. Anders gestel, slegs waar 'n belastingpligtige seker is dat in werklikheid "mynbou" beoefen word, is die toepassing en riglyne verskaf in artikel 15A van die Inkomstebelastingwet, soos deur die wetgewer beoog is, van toepassing op die belastingpligtige. Wanneer dit dus makliker is om te bepaal of die belastingpligtige in werklikheid "mynbou" beoefen, deur "gewin" vir 'n mynbouproses apart te omskryf, sal dit duideliker wees om te bepaal of artikel 15A van die Inkomstebelastingwet op die belastingpligtige van toepassing is.

1 Introduction

The mining industry constitutes a large part of the South African economy, with mining contributing 32 percent of all exports.[1] Mining is therefore a significant industry in South Africa, and any change in fiscal legislation that imposes a change on the calculation of tax in the industry naturally must be carefully analysed.

Trevor Manuel, the former Minister of Finance, made the following statement:

> … recent court decisions may require legislative intervention to preserve the *status quo.* In the first decision, the Tax Court held that mining stockpiles could not be considered to be trading stock. While this decision will be appealed, it may be necessary to amend the Income Tax Act with immediate effect to prevent other taxpayers engaged in mining from taking this position while the appeal is under way.[2]

The above reference to "recent case law" specifically referred to the case of *Commissioner of South African Revenue Services v Foskor.*[3] The "legislative intervention" referred to above materialised in the form of a new section 15A that was introduced into the Income Tax Act[4] (ITA), a section that provides a definition of trading stock specifically applicable to the mining industry. This addition to the ITA was a proactive change from the side of the legislator in order to avoid taxpayers in future experiencing similar problems in distinguishing between a process of mining as opposed to a process of manufacturing, as was experienced in *CSARS v Foskor.*[5]

A mining process, at its very core, is unique and different from, for example, a manufacturing process. Mining differs from manufacturing, as the essence of mining constitutes the removal of a naturally occurring mineral from the soil or ore, and not the manufacturing of a new mineral. It is therefore to be expected that the nature of what would constitute trading stock for a mining industry, as opposed to trading stock for a manufacturing industry, is expected to be different.

In March 2010, section 15A was introduced into the ITA, a section that provides guidance for the classification and treatment of trading stock specifically applicable to the mining industry. Before section 15A was introduced, there was no specific provision that provided for the classification and treatment of trading stock applicable to the mining industry specifically. Rather, the general definition provided in section 1

1 Department of Minerals and Energy (2007) 5.
2 Manual *2009 Budget Speech 2009/2*. Available at http://www.sars.gov.za/?sa's tax system/?budget 2009/2010/budget tax proposals (accessed 2009-04-07).
3 *Commissioner of South African Revenue Services v Foskor* [2010] 3 All SA 594 (SCA).
4 58 of 1962.
5 *Op cit.*

of the ITA, as well as the general section prescribed for the treatment of trading stock for purposes of taxation (in section 22 of the ITA) was applicable to all industries, including mining and manufacturing. Section 1 of the ITA defines trading stock, and then the defined stock is accounted for in terms of section 22 of the ITA for the valuation purposes of taxation (section 22 stipulates the adjustments required for purposes of calculating income tax on year end as well as for the subsequent year of assessment.)

The lack of a specific definition and guidance as to what should be defined as trading stock for the mining industry was highlighted in *CSARS v Foskor*.[6] This case served as a catalyst for the introduction of section 15A into the ITA.

A pure grammatical and literate analysis of section 15A was found to provide for simple and uncomplicated guidance from the side of the legislator to determine what would constitute trading stock of mining operations. The newly inserted section further aligned the treatment and accounting of such stock for purposes of taxation with the very well-established guidelines that already existed for accounting of trading stock in the mining industry. Stated differently, where the subject matter therefore meets the definition of trading stock that forms part of a "mining operation" as stipulated in the new section 15A, the subject matter is then accounted for in terms of the prescribed accounting guidelines established in the General Accepted Accounting Standards (GAAP) and not only in terms of section 22 of the ITA as for non-mining industries. It therefore became crucial to determine whether the subject matter is part of a process of mining, in which case the inserted section 15A of the ITA becomes applicable, as opposed to a "course of manufacturing", in which case, section 1 and section 22 of the ITA remain applicable.

The section 15A definition however, was found not to provide clarity on the exact meaning of when a taxpayer is in fact conducting mining operations. It does not clarify the difference between "course of mining" as opposed to "course of manufacturing". This was found a crucial point for consideration, as well as – in the author's view – an omission from the side of legislator, as section 15A becomes applicable only when a "process of mining" is established.

The research on which this article is based, attempted to critically evaluate the clarity and guidance provided to taxpayers in the mining industry with the distinction between mining and manufacturing in the context of section 15A of the ITA. To achieve this purpose, a literature review was conducted. This article firstly aims to provide broad guidance on the existing concepts of what constitutes a "process of mining" as opposed to a "process of manufacturing". This is followed by an overview of the position of taxpayers in mining industry that relates to the

6 *Op cit.*

classification and consequent treatment of trading stock, prior to 2010, when section 15A was introduced. This is followed by a critical analysis of the inserted section 15A into the ITA, with the focus of determining whether guidance was provided to distinguish between a "process of mining" as opposed to a "process of manufacturing". The article closes with conclusions and recommendations.

2 Difference Between a Process of Mining and a Process of Manufacturing

2 1 Background

One of the main questions that needed to be addressed by the courts in *CSARS v Foskor*,[7] was whether the taxpayer was involved in a "process of mining" or in a "process of manufacturing". The distinction between the mining and manufacturing processes was therefore important, but not easy. It is a common practice to mine more than one mineral at a time as minerals are not contained in neat pockets in the earth that allows the miner to mine only the specific mineral that it wants. A company involved in the platinum industry will, for example, not only mine platinum, but as part of the mining process, palladium, gold, rhodium, osmium, rhenium, iridium and ruthenium may also be extracted from the soil. In all instances, the liberated mineral will be in a very different form from that which it had when it was still in the ore-bearing rock and the processes involved in an attempt to isolate the existing mineral into its purest form can very easily be incorrectly viewed as a process of manufacturing. The nature and complexity of these processes make the distinction between mining and manufacturing problematic. In addition to this, the mining and manufacturing processes are often part of one continuous process.

"Mining operations" and "mining" are defined in section 1 of the ITA. The term "process of manufacture" however, is not defined in the ITA. The following paragraphs aim to provide a general background on the difference between the processes.

2 2 Process (Course) of Mining

Mining and mining operations are defined in section 1 of the ITA as "... every method or process by which any mineral is *won* from the soil or from any substance or constituent thereof" (own emphasis).[8]

An excellent formulation of the essence of the process of mining is contained in *ITC 1455*.[9] In that case, the court described the process of mining in the following way:

7 *Op cit.*
8 S 1 ITA.
9 *ITC 1455* 51 SATC 111

> … it is tempting to compare appellant's operation to the production of gold bullion in a gold mine. The gold ore exists in discreet particles in the rock. The mined rock is crushed and the gold is leached out. The gold ore is then heated and bullion is poured. In ordinary parlance the latter operation will not be referred to as the manufacturing of gold but to the mining of gold.

In the abovementioned example, the gold already existed in the earth, and was merely isolated from the earth, which is considered a mining process.

2 3 Process (Course) of Manufacture

"Process of manufacture" or "manufacturing" is not defined in the ITA. Guidance in the courts regarding what a process of manufacturing would constitute was found in the decided case of *SIR v Safranmark (Pty) Ltd*:[10]

> Process of manufacture is an action or series of actions directed to the production of an object or thing which is different from the materials or components which went into its making [which] appears to have been gradually accepted. The *emphasis* has been laid on the *difference between the original material and the finished product* (own emphasis).

Based on this description of what manufacturing would entail, there is a process (action or series of actions) where the original material used in the process differs from the finished product. The moment this can be verified as true, we are dealing with a manufacturing process and section 15A will no longer be applicable.

For example, in a case where gold particles are mined from the earth, the extraction of the particles from the earth itself does not constitute the creation of a new subject matter – the item originally won in the process was gold, and remained gold as it was only isolated from the earth. Generally speaking, section 15A will be applicable to the classification of the gold in this stage of the process. The moment, however, the extracted gold is processed further to manufacture gold earrings, the earrings (finished product) are substantially different from the original gold extracted from the earth. A process of manufacturing has occurred, the section 15A definition is no longer applicable and one must revert to the section 1 definition and application in terms of section 22 provided in the ITA.

2 4 Domestic Precedent on the Differentiation Between Mining and Manufacturing

The case of *ITC 1455* has been referred to in numerous cases where the distinction between mining and manufacturing had to be made, for example in *CSARS v Foskor*[11] as well as in *Richards Bay Iron &*

10 *SIR v Safranmark (Pty) Ltd* 1982 1 SA 113 (A).
11 *Op cit.*

Titanium.[12] It is therefore considered to be of valuable guidance with reference to establish the point where the mining process ends and the manufacturing process commences. In *ITC 1455*, the main business objective of the company was the manufacture of steel and vanadium products. The appellant was conducting opencast mining for magnetite ore. The magnetite ore was mined at site B. It was also crushed, washed, screened and stockpiled at site B. The magnetite ore was processed at plant A to produce liquid pig iron and vanadium-bearing slag. The appellant admitted to conducting both a manufacturing and a mining enterprise. The Court was therefore required to decide where the mining operations ended and where the manufacturing process commenced. The appellant argued that its mining operations ended at site B. In terms of the ordinary meaning of "mining operations", the Court was therefore satisfied that the operations of the appellant ended at site B.

2 5 Summary on the Distinction Between Mining and Manufacturing

Whether a mineral forms part of a mining process or part of a manufacturing process will depend on commodity being extracted and the level of purity and refinement. Based on local precedent, the following factors may have an impact on where the mining process ends and where the manufacturing process commences:

(a) whether any part of the taxpayer's process is a distinct and separate operation;[13]

(b) whether the entire process is carried on by the same taxpayer;[14]

(c) whether the end product of the process occurs naturally in the earth or whether it exists in another form;[15] and

(d) whether the end product is a result of an industrial process.[16]

The mining process can therefore end either when the mineral is available or accessible to be removed from the earth or when the mineral is in metal or its purest form. A number of factors exist that will influence the cut-off point between mining and manufacturing. Each case, however, will have to be determined on its facts and the type of mineral being mined. Mining operations cover more processes than the mere excavation of the ore from the earth. It includes the procedures necessary to recover or liberate the mineral. Any procedures that are performed after the mineral has been won or that is embarked on for the better utilisation of the mineral would not qualify as a mining process, but may qualify as a process of manufacture.

12 *Commissioner for Inland Revenue v Richards Bay Iron & Titanium (Pty) Ltd and Another* 1996 1 SA 311(A).
13 *Rand Refinery Ltd v Town Council of Germiston* 1929 WLD 63.
14 *Zaaiplaats Tin Mining Co v Union Government* 1945 TPD 42.
15 *ITC 1455* 51 SATC 111.
16 *ITC 1455* 51 SATC 111.

3 Taxation of Trading Stock of the Mining Industry Prior to the Introduction of Section 15A: Background of Section 1 and Section 22 of the ITA

3 1 Background

Prior to the introduction of section 15A into the ITA, if a subject matter met the definition of trading stock as per section 1 of the ITA, the subject matter was considered trading stock and was accounted for income tax purposes in terms of section 22 of the ITA. In cases where the expenditure incurred on the subject matter did not meet the general definition of trading stock, the deduction was allowed as a section 11(a)[17] deduction, and no additional adjustments as prescribed in section 22 of the ITA will be required at the end of the tax year or in the subsequent year of assessment.

Before the introduction of section 15A, the definition of trading stock provided in section 1 of the ITA was applicable to all industries, including taxpayers conducting mining operations. In the latter definition, "trading stock" includes –

> (a) anything –
> (i) produced, manufactured, constructed, assembled, purchased or in any other manner acquired by a taxpayer for the purposes of manufacture, sale or exchange by him or on his behalf, or
> (ii) the proceeds from the disposal of which forms or will form part of his gross income, otherwise than in terms of paragraph (*j*) or (*m*) of the definition of 'gross income', or a recovery or recoupment contemplated in section 8(4) which is included in gross income in terms of paragraph (*n*) of that definition; or
>
> (b) any consumable stores and spare parts acquired by him to be used or consumed in the course of his trade, but does not include a foreign currency option contract and a forward exchange contract as defined in section 24I(1)[18]

This definition of trading stock contains subparagraphs (a) and (b), with paragraph (a) in turn containing subparagraphs (i) and (ii), effectively resulting in a generally accepted and established three-part division of the definition.[19] This definition (with the exclusion of part three that was not included for purposes of this article) is analysed below.

17 ITA.
18 Definition of "trading stock" s 1 ITA.
19 Faber *An analysis of the Tax Implications of ore stockpiling in the mining industry* (LLM dissertation 2008 UP).

3 2 Part 1 of the Section 1 Definition of Trading Stock

The first part of the definition of trading stock, as mentioned above, provides for trading stock to be:

> … anything produced, manufactured, constructed, assembled, purchased or in any other manner acquired by a taxpayer for the purposes of manufacture, sale or exchange by him or on his behalf.[20]

The phrase "or in any other manner acquired", read with the aforementioned extensive list of verbs, interpreted on a grammatical basis, creates a very wide ambit of the method of acquisition of the subject matter if such subject matter is tested against the definition of trading stock. The legislator therefore clearly provided for a wide range of methods of acquisitions of the subject matter.

3 2 1 Reason for Acquisition

Part one of the definition of trading stock provides for the reasons of the taxpayer acquiring the asset. These reasons provided are either to be for manufacturing, selling or exchanging of the acquired subject matter by the taxpayer.

If something is acquired with the intention to sell or to exchange, it would imply that the subject matter will have an independent existence and value as a saleable article, product or commodity.[21] These two terms naturally differ from such cases where something was acquired for purposes of manufacture that imply a change in form and in all likelihood include a conversion into, or form part of, something other than the state in which it was acquired. It would therefore, if acquired for purposes of manufacture, not (yet) be in a saleable form and the attribute of saleable or not saleable would, in any case, be deemed irrelevant. On the other hand, if the item was acquired for purposes of sale or exchange, it should be in a saleable or exchangeable form.

The first part of the definition, if a purely grammatical interpretation is applied, entails something of "inclusiveness". Therefore, for the first part of the definition, both the purpose of the taxpayer for the acquisition of the subject matter, as well as the method of acquisition, need to be considered in the determination of whether an item would constitute trading stock or not.

3 3 Part 2 of the Section 1 Definition of Trading Stock

The second part of the definition of trading stock states that:

> … the proceeds from the disposal of which forms or will form part of his gross income, otherwise than in terms of paragraph (j) or (m) of the definition of 'gross income', or a recovery or recoupment contemplated in section 8(4)

20 Part 1 definition of "trading stock" s 1(a)(i) ITA
21 *CIR v Richards Bay Iron and Titanium* 1996 1 SA 311 (A).

> which is included in gross income in terms of paragraph (n) of that definition.[22]

Except for the exclusions specifically provided for in this part of the definition, the second part read with the "or" of the first part of the definition, provides for a situation where the first part of the definition is not met, the item will still be considered trading stock on the premise that the subject matter is sold and the income derived from the sales transaction is included in the taxpayer's gross income. *CIR v Richards Bay Iron and Titanium*[23] confirmed that the second part of the definition only has the objective requirement that the proceeds from the sale of the subject matter must be included in gross income,[24] for the subject matter to meet the requirement of the second part of the definition of trading stock.

Part two of the definition therefore postulates an objective question that is not dependent on the intention or the possibility to sell the subject matter in future. The only relevant factor for consideration as per this part of the definition is whether the subject matter has been disposed of or not. Once the item is disposed of, the only additional requirement is that the subject matter sold must be revenue in nature (a requirement for the inclusion as per the definition of gross income per section 1 of the ITA). Should the subject matter constitute an asset of a capital nature, the proceeds will not constitute gross income and will thus fall outside the ambit of the second part of the definition.

If the subject matter acquired by the taxpayer meets the definition of trading stock as per section 1 of the ITA, the subsequent treatment of the asset for taxation purposes is in terms of section 22 of the ITA, which is discussed below.

3 4 The Valuation of Trading Stock

The general framework of the ITA, within which the sections of the ITA (including section 22[25] function were described by the courts in *CSARS v Foskor*.[26]

> … the South African system of taxation of income entails determining what the taxpayer's *gross income* was, *subtracting* from it any income which is *exempt from tax*, *subtracting* from the resultant income any *deductions allowed* by the Act, and thereby *arriving at the taxable income*. It is on the latter income that tax is levied[27] (own emphasis).

22 Definition of "trading stock" part 2 s 1 ITA.
23 *Commissioner for Inland Revenue v Richards Bay Iron & Titanium (Pty) Ltd* 1996 1 SA 311(A).
24 *Idem*.
25 S 22 ITA.
26 *Op cit*.
27 *Commissioner of South African Revenue Services v Foskor* [2010] 3 All SA 594 (SCA) par 18.

The general effect on the deduction of expense where trading stock is acquired by the taxpayer and the consequent inclusion of the amount received as a result of the selling of this trading stock or the effect where trading stock acquired during the year was still unsold on year end are described in *CSARS v Foskor*:[28]

> … where a taxpayer is carrying on a trade, any expenditure incurred by him in the acquisition of trading stock is deductible in terms of section 11(a) of the Act because it is expenditure incurred in the production of income and it is not of a capital nature. Income generated by the sale of such stock is of course part of the trader's gross income. Where in his first year of trading a trader has bought, and thereafter sold, all the stock which he acquired during that year, no problem arises. There will be a *perfect correlation* between the *trading income earned* and the *expenditure incurred* in that particular year in purchasing and selling the stocks sold, and the difference between the two sums will give a *true picture* of the result of the year's trading. There will be no stock on hand at the close of the year of which account need be taken (own emphasis).[29]

Section 22 of the ITA therefore provides for the situation where trading stock has been acquired during the year of assessment, and a deduction has been allowed in terms of section 11(a) of the ITA, but where the trading stock was unsold at year end. Section 22 creates provisions for the inclusion of this closing stock at year end effectively in order only to allow the original deduction permitted in terms of section 11(a) to the extent that the stock has actually been sold and accounted for as part of gross income in the year of assessment. Section 22 of the ITA therefore provides for the treatment where expenses are incurred and allows as a deduction in the current year of assessment but the gross income due to a selling transaction is only received and accounted for in gross income in subsequent years, or where stock in trade is used as a manipulation to artificially increase the deduction of an expense incurred just before year end.

Subsequently, government found it necessary to introduce a new definition to be applied in respect of trading stock derived from mining operations. The introduction of section 15A in the ITA resulted from the difficulties experienced with the classification of stockpiles held by the taxpayer in *CSARS v Foskor*.[30]

4 The Problem that Manifested in *CSARS v Foskor*

In the case of *CSARS v Foskor*,[31] one of the main questions posed to the court was the question whether Foskor's activities constituted a process

28 *Op cit.*
29 *Idem.*
30 *Op cit.*
31 *Op cit.*

of mining or a process of manufacturing. This problem posed to the Commissioner served as the catalyst for the introduction of section 15A into the ITA, a section to be applied in respect of trading stock derived from mining operations.

The following paragraphs aim to analyse the background of *CSARS v Foskor.*[32]

4 1 The Background and Facts of *CSARS v Foskor*

The dispute arose as a result of the inclusion of an amount of R203 million in Foskor's taxable income in respect of the year of assessment ended 30 June 1999. The Commissioner contended that the amount represented trading stock (closing stock) in terms of section 22 read with section 1 of the ITA. The matter was heard by the Tax Court in *ITC 1836,*[33] which found in favour of the taxpayer (therefore the R203 million was found not to be included in the gross income of Foskor). The matter was taken on appeal by the Commissioner to the Supreme Court of Appeal (SCA) in *CSARS v Foskor.*[34]

A brief background of the facts of the case is that Foskor acquired the rights to mine base minerals, including phosphates, belonging to the State, during 1952. In 1963, Phalaborwa Mining Company (PMC) obtained the right to mine copper and other base minerals, except phosphorous minerals, over the same areas on which Foskor held its rights. Since the copper and the phosphates were located in the same portion of earth, Foskor and PMC entered into an agreement. In terms of this agreement, PMC extracted the ore from the earth and Foskor bore a portion of the mining costs incurred. The phosphate-bearing rock was allocated and dumped by PMC for Foskor to recover the phosphates. The extensive procedures applied by Foskor resulted in the liberation of the mineral, apatite, from the ore. The Court *a quo* described the process as follows:

> The phosphate-bearing ore is loaded and hauled to a primary crusher and then conveyed to secondary and tertiary crushers for crushing. The crushed material is then conveyed to Rod and Ball Mills for milling to liberate the minerals from the rock;
>
> The pulp containing the materials is then pumped to a flotation plant where the minerals of economic importance are separated by means of three metallurgical separation processes, which is a froth flotation process, a magnetic concentration step and a gravity separation process. During the froth flotation process certain ingredients (reagents) are added to the froth. During this process the minerals that have been released stick to the bubbles. At the end of the process the reagents are removed. The final product from these separation steps are concentrates consisting of phosphates which are

32 *Op cit.*
33 *ITC 1836* 71 SATC 115.
34 *Op cit.*

> then dried, stockpiled and sold to worldwide customers, which use the minerals mainly for the manufacture of fertilisers.[35]

The Commissioner and Foskor agreed to the facts of the case. Despite this agreement, however, there was a discrepancy between the Tax Court in *ITC 1836* and the SCA with regard to the nature of Foskor's activities, as discussed below.

4 2 Nature of Foskor's Activities: Mining or Manufacturing?

Both the Tax Court and the SCA had to determine whether Foskor's activities constituted mining or manufacturing. Since the term "process of manufacture" is not defined, the Tax Court had to look at legal precedents on the matter.

The Tax Court referred to *ITC 1455,* which gives some direction as to the distinction between mining and manufacturing. It was held by the Tax Court:

> … the essence of the aforementioned processes is the extraction or winning of the phosphates, without a different finished product emerging. What is sold to customers is the phosphates originally found in the phosphate-bearing ore, and that no different substance with different qualities has been produced. All that occurs is a process which liberates the mineral particles from the ore and which separates the mineral particles.[36]

The Tax Court concluded:

> In the result it must be held that the phosphates sold by the appellant occur naturally in the earth and the phosphates is not, and cannot be manufactured, just as gold or diamonds cannot be manufactured, but can only be mined.[37]

Once the mineral is extracted, the mining operation ends. Any subsequent process is an industrial process and will have to satisfy the requirements of a process of manufacture as laid down in *SIR v Safranmark*.[38] The Tax Court described the processes by Foskor as:

> … the extraction or winning of the phosphates, without a different finished product emerging. What is sold to customers is the phosphates originally found in the phosphate-bearing ore. All that occurs is a process which liberates the mineral particles from the ore and which separates the mineral.[39]

The mineral was not extracted until Foskor submitted the ore to the extensive processes of crushing, milling, flotation and separation. Once the concentrate had been formed, the mineral was extracted. Furthermore, the chemical composition of the phosphates did not

35 *ITC 1836* 71 SATC 115 118.
36 *Ibid* 122.
37 *Ibid* 122.
38 1982 1 SA 113 (A).
39 *ITC 1836* 71 SATC 115 112.

change as a result of the processes applied to liberate the mineral. The phosphates had the same chemical composition as when it was excavated from the earth. If the chemical composition had changed, this could have been an indication of an industrial or manufacturing process as the item that was produced was not something that can be found in the earth's crust.

In *ITC 1836*, the Tax Court concluded that the taxpayer (Foskor) was carrying on a process of mining and viewed all the processes in dispute as part of the process of extracting the mineral from the earth to render it in its purest form. This decision of the Tax Court was appealed to the SCA.

The SCA disagreed with the conclusion reached by the Tax Court with regard to when the mining process ends and the manufacturing process starts, as was illustrated by the following statement:

> In my view, that *the submission the phosphate minerals* that occur naturally in the earth are contained in what is sold to fertilizer producers worldwide and that the end product *was therefore not manufactured, is too simplistic*. It ignores not only the complexity of the processes to which the ore was subjected but the fact that in the result several minerals are separated and sold independently. It also ignores the fact that before the process referred to the ore is not saleable but that what is produced thereafter has a worldwide market. Put simply, the end products that emerge after the processes referred to above are significantly different from the raw ore[40] (own emphasis).

The SCA found that the taxpayer was carrying on a process of manufacturing. It was of the view that mining operations end when the ore is extracted from the soil. Any processing beyond the extraction of the ore would not form part of the mining process but would constitute mining.

The only legal question that the SCA had to answer was whether or not the phosphate-bearing ore stockpiles were part of a process of manufacture and therefore included in trading stock. In arriving at its conclusion, the Court should have considered the mining tax principles to distinguish the mining and manufacturing processes. The SCA found the foskorite to be part of a process of manufacture. If this approach is to be followed, mining operations will only extend to the excavation process and will end once the rock is severed from the earth. This is a very narrow approach to what would constitute mining operations. Very few minerals are taken from the soil and require no additional procedures to liberate the mineral from the soil and to separate it from other minerals that occur naturally with the particular mineral being mined.

The Court failed to decide the case on the core matter, namely where the mining process ends and where the manufacturing process

40 *Commissioner of South African Revenue Services v Foskor* [2010] 3 All SA 594 (SCA).

commences. The legislator tried to prevent similar problems presenting themselves in future, and introduced section 15A as part of the ITA. It can therefore be said that the problems experienced by the Commissioner in the case of *CSARS v Foskor*[41] served as the catalyst for the introduction of section 15A into the ITA. Section 15A is analysed in the following section of the article.

5 Taxation of Trading Stock of the Mining Industry After the Introduction of Section 15A: A Critical Analysis

Section 15A was introduced into the ITA, and provided a definition of trading stock, specifically applicable to the mining industry of South Africa. It was justified as follows:

> … insertion of section 15A: A recent Tax Court judgment regarding the recognition of mining stockpiles as trading stock has given rise to the concern that taxpayers may attempt to exclude mining stockpiles from trading stock for tax purposes while an appeal against the judgment is underway. The proposed amendment is aimed at ensuring that such mining stockpiles continue to be reflected as trading stock in terms of section 22 of the ITA at a value that is not less than that used for accounting purposes. This accounting treatment of mining stockpiles is intended to maintain the *status quo* based on information supplied by the mining industry.[42]

Section 15A was introduced into the ITA with the Taxation Laws Amendment Act and is formulated as follows (own emphasis):

> Amounts to be taken into account in respect of trading stock *derived from mining operations*
>
> 15A. For the purposes of section 22, trading stock related to mining operations –
>
> *(a)* includes anything that is –
> (i) *won* or in any other manner acquired during the course of mining operations by a taxpayer for the purposes of extraction, processing, separation, refining, beneficiation, manufacture, sale or exchange by the taxpayer or on the taxpayer's behalf; and
> (ii) *taken into account* as inventory in terms of *South African Generally Accepted Accounting Practice*; and
>
> *(b)* must not be valued at an amount less than the amount so taken into account.[43]

The critical words and sections of the abovementioned definition are discussed in the following paragraphs.

41 *Op cit.*
42 Explanatory Memorandum to the Taxation Laws Amendment Bill of 2009 (cl 30).
43 Sec 22 ITA; S 15A ITA.

5 1 ''[a]mounts to be taken into account in respect of trading stock derived from mining operations"[44]

This introductory provision of section 15A implies that, where the subject matter is acquired by any means other than "in the course of mining", the definition of section 15A will not be applicable to the subject matter. This phrase therefore limits the entire section to taxpayers conducting mining operations only.

As was illustrated in the difficulties experienced in *CSARS v Foskor*[45] as well as the discrepancies between the views held by the court *a quo* and the SCA, it was clear that in *CSARS v Foskor*[46] the court did not address the problem to distinguish between a "mining" and a "manufacturing" process. The distinction between these two processes is considered crucial in order to provide a clear and definite "point of access" to the provisions of the newly inserted section 15A. It is submitted that without a clear differentiation as to when mining ends and when manufacturing starts, the objective of the legislator with the introduction of section 15A, being to provide clarity in guidance for taxpayers in the mining industry, cannot be considered achieved since this crucial element that needed clarification was not addressed.

This section therefore provides guidance and clarity on the classification and treatment of trading stock in the mining industry, *provided* that it is in the "course of mining", in other words, the taxpayer must conduct mining operations in order for section 15A to be applicable.

5 1 "won or in any other manner acquired"[47]

Section 15A(a)(i) provides for the methods of acquisition for purposes of the section to be "won or in any other way acquired". The Collins Concise Dictionary defines "win" as "to extract (ore, coal, etc.) from a mine or (metal or other minerals) from ore".

The phrase "in other manner acquired" read together with the word "won" concerning the methods of acquisition for purposes of this definition expresses the notion of "all-inclusiveness" by the legislator, not excluding anything as a result of "method of acquisition"; therefore, acquisition of the subject matter by any possible method would be accepted for the purpose of defining the subject matter for this part of the definition. The term "won" is however not defined for purposes of the ITA. As mentioned earlier in the article, this may prove to be problematic, due to the relative complex nature of the processes involved in the

44 S 22 ITA.
45 *Op cit.*
46 *Op cit.*
47 S 15A(a)(i) ITA.

process of mining that can be easily confused with a process of manufacturing.

5 3 "taken into account as inventory in terms of South African Generally Accepted Accounting Practice"[48]

This provision relates to the consideration of the general accepted accounting treatment of the subject matter to be considered once it is established that section 15A does in fact apply. It is important, to note the conjunction "and", which implies that the first part of the definition (section 15A(a)(i)) needs to be read with section 15A(a)(ii)).

The second part of the definition as per section 15A of the ITA provides for the accounting treatment as prescribed by the General Accepted Accounting practice (GAAP) of the subject matter to drive and determine the classification and treatment for taxation purposes. It is beyond the scope of this article to analyse the detailed provisions for accounting purposes, but the following comments will provide a broad overview of the understanding of the significance of this second part of the section 15A definition.

Section 15A prescribes that the accounting treatment of the subject matter provides the guidance for the classification and treatment for taxation purposes. Therefore, based on the assumption that these stockpiles do in fact meet the criteria of the first part of the definition, the second part then provides for whatever the treatment and classification for accounting purposes are and will be followed for purposes of the tax treatment.

Section 15A(a)(ii) therefore creates a simple and uncomplicated measure to determine the classification for this trading stock, by providing for a similar treatment as has been utilised for accounting. Effectively, this results in a situation where the guidelines and measures that were already available and developed for the classification and measurement of assets for accounting purposes, became applicable and relevant for taxation purposes as well, creating an interdisciplinary (accounting as well as taxation) means for the classification of the subject matter. The formulation of section 15A(a)(ii) provides for valuable guidance on the classification of what would constitute trading stock for the mining industry. The reference to the accounting treatment widens the application of the specific section without creating difficulty where the tax treatment of assets differs from the accounting treatment. The formulation of section 15A(a)(ii) therefore effectively opens this door from a taxation point of view, to access all the established guidelines already existing from an accounting point of view.

48 S 15A(a)(ii) ITA.

6 Conclusion

The aim of this article was to give a critical evaluation of the clarity and guidance provided to taxpayers in the mining industry with the distinction between mining and manufacturing in the context of section 15A of the ITA.

This question was at the heart of the problem experienced by the taxpayer in *CSARS v Foskor*,[49] where the court had to decide whether the taxpayer was busy with a process of mining or with a process of manufacturing. *CSARS v Foskor*[50] served as a catalyst for the introduction of section 15A, in an effort from the side of the legislator to prevent the occurrence of similar problematic situations relating to the distinction between mining and manufacturing as was experienced in *CSARS v Foskor*.[51]

A grammatical analysis of the section 15A definition shows that it provides guidance to the taxpayer in the mining industry as to what would constitute trading stock, as well as the subsequent treatment thereof for taxation purposes, if it is assumed in the first place that the taxpayer is in fact conducting mining operations. The definition however, does not provide clarity on exactly when a taxpayer is in fact conducting mining operations in the "course of mining" (as opposed to "course of manufacturing"). The legislator has missed this most crucial point for consideration in *CSARS v Foskor*.[52] Thus, despite the introduction of section 15A into the ITA, the ITA still remains unclear and is in need of further clarification as to when exactly something is extracted as part of a mining operation.

The term "mining" was analysed as part of this article and is defined in section 1 of the ITA as "… every method or process by which any mineral is *won* from the soil or from any other substance or constituent thereof" (own emphasis). In order to provide more certainty to taxpayers engaged in mining operations, it is suggested that, in addition to this definition of mining, the term "won" should also be defined in section 1 of the ITA. A proposed definition of the term "won" for purposes of mining is as follows:

> A mineral is said to be won when all the necessary processes, including *inter alia* refinement, beneficiation, smelting, separation etc, have been applied to the mineral to render that mineral saleable in an open and general market (generally saleable).

This proposed amendment might provide the intended clarity and certainty to taxpayers conducting mining operations and will lead to certainty as to when the process of mining stops and the process of

49 *Op cit.*
50 *Op cit.*
51 *Op cit.*
52 *Op cit.*

manufacturing commences. A clarification of this concept may provide more certainty as to exactly when section 15A of the ITA becomes applicable.

Aantekeninge/Notes

Die Toepaslikheid (al dan nie) van die Nasionale Kredietwet op rentevrye kontrakte

1 Inleiding

By geleentheid is die toepassingsgebied van die *National Credit Act* (34 van 2005) (hierna die Nasionale Kredietwet) soos volg in 'n neutedop beskryf (Otto & Otto *The National Credit Act Explained* (2010) par 8):

> Broadly speaking, all credit agreements have two things in common: credit that is extended and a charge, fee or interest that is payable or a lower price that applies in the event of early payment. There are exceptions, such as credit guarantees and mortgage agreements, regarding which payment of interest, a charge or a fee is not a prerequisite for the Act's application.

Hierdie samevatting van die wet se strekkingswydte klink of die aangeleentheid heel eenvoudig is, maar die blote feit dat sekere verwere deur die skuldenaar geopper is in die beslissing van *Voltex (Pty) Ltd v Chenleza CC* (2010 5 SA 267 (KZP)), welke verwere afhanklik was van die toepaslikheid van die Nasionale Kredietwet, dui op die teenoorgestelde. Die doel van hierdie aantekening is om die *Voltex*-saak in oënskou te neem en as kapstok te gebruik om die vraag aan te spreek of kredietooreenkomste waar geen rente, heffing of gelde ("interest, charge or fee" in die woorde van die wet) gevorder word nie, onderhewig kan wees aan die Nasionale Kredietwet en wat die implikasies daarvan is, indien wel. Na my beste wete is die vraag nog nie elders in diepte ondersoek nie.

Die Nasionale Kredietwet gebruik nie die begrip "finansieringskoste" soos wat die Woekerwet (73 van 1968) gedoen het nie. Daar is teruggekeer na die geykte woord "rente" wat nie gedefinieer is nie en dus sy gewone betekenis moet dra as synde die vergoeding wat 'n skuldenaar betaal aan 'n skuldeiser wat aan hom geld geleen het of krediet op 'n ander wyse verleen het. (Sien Grové *Gemeenregtelike en Statutêre Beheer oor Woekerrente* (LLD proefskrif 1989 RAU) 11 ev vir die verskillende betekenisse van "rente"). Die wet reguleer nie net die verhaal van rente nie maar ook dié van verskeie ander heffings of gelde. Trouens, die begrip "*charge*" is wyd uitgelê in die regspraak en sluit selfs die koste vir die opstel van 'n dokument (soos 'n kredietooreenkoms) in. Die heffing van so 'n koste sal die wet van toepassing maak op die kontrak omdat dit dan per definisie 'n kredietooreenkoms is (*Carter Trading (Pty) Ltd v Blignaut* 2010 2 SA 46 (ECP). Sien ook *Evans v Smith* 2011 4 SA 472 (WCC)). Om die aangeleentheid eenvoudig te hou sal daar in hierdie bespreking, soos in die titel daarvan, bloot verwys word na "rentevrye kredietooreenkomste" terwyl die leser deurgaans in gedagte

moet hou dat die wet ook van toepassing kan wees waar 'n heffing of geld gevorder word wat nie in wese rente daarstel nie.

Voordat die *Voltex*-saak, en die kwessie van rentevrye kredietooreenkomste as sodanig ontleed word, is dit doelmatig om sekere woordomskrywings in die wet wat in die saak ter sprake was woordeliks weer te gee. Aangesien die wet nie 'n amptelike Afrikaanse teks het nie, word hulle in Engels verskaf.

2 Toepassingsgebied van die Nasionale Kredietwet

Dit is nodig om kortliks die Nasionale Kredietwet se toepassingsgebied weer te gee ten einde die verdere bespreking vir die leser sinvol te maak. Die Nasionale Kredietwet is van toepassing op kredietooreenkomste ("credit agreements"). (Sien vir 'n volledige bespreking van die toepassingsgebied van die wet, Van Zyl "The scope of application of the National Credit Act" in *Guide to the National Credit Act* (red Scholtz) (2008 ff) hfst 4; Otto "Types of credit agreement" in *Guide to the National Credit Act* (red Scholtz) (2008 ff) hfst 8; Boraine & Renke "Some practical and comparative aspects of the cancellation of instalment agreements in terms of the National Credit Act 34 of 2005" 2007 *De Jure* 222 230-235; Renke, Roestoff & Haupt "The National Credit Act: New parameters for the granting of credit in South Africa" 2007 *Obiter* 235; Otto & Otto hfst 3). Dit sal die bespreking wat volg vergemaklik indien die toepassingsgebied grafies geïllustreer word en sal dit terselfdertyd onnodig maak om woordomskrywings weer te gee wat nie van regstreekse belang is vir doeleindes van hierdie aantekening nie. Dit is by geleentheid (Nagel *Kommersiële Reg* (2011) par 20 09) gedoen soos in Tabel 1 uiteengesit.

Soos wat uit artikel 8(1) en die grafiese voorstelling hierbo blyk, kan 'n kredietooreenkoms een van vier vorme aanneem:

(i) 'n Kredietfasiliteit ("credit facility"). Die omskrywing hiervan word hieronder (par 3) woordeliks weergegee.
(ii) 'n Krediettransaksie ("credit transaction"). Hierdie begrip word aanstons nader toegelig.
(iii) 'n Kredietwaarborg ("credit guarantee"). Die omskrywing hiervan word hieronder (par 4) woordeliks weergegee.
(iii) 'n Kombinasie van die voorafgaande drie ooreenkomste.

'n Krediettransaksie het op sy beurt luidens artikel 8(4), en soos aangedui met die grafiese voorstelling in Tabel 1, agt verskyningsvorme. Artikel 8(4) gebruik los en vas die begrippe "agreement" en "transaction." Die agt sub-kategorieë se Engelse ekwivalente is die volgende:

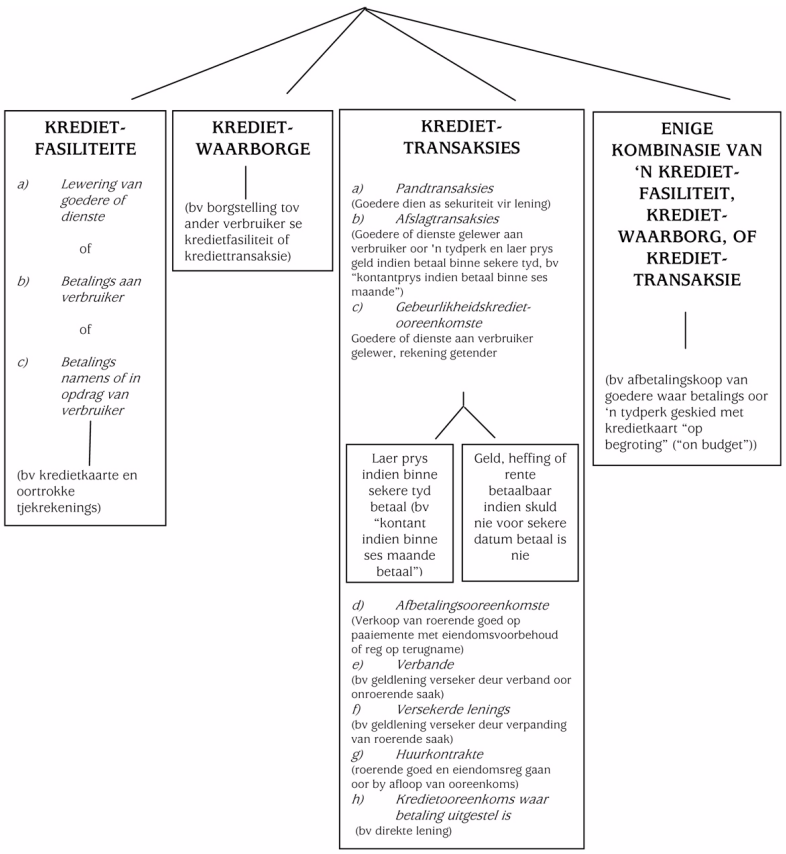
(i) 'n Pandtransaksie ("pawn transaction").
(ii) 'n Afslagtransaksie ("discount transaction").
(iii) 'n Gebeurlikheidskredietooreenkoms ("incidental credit agreement". Die woord "gebeurlikheidskredietooreenkoms" is 'n eie skepping en is die eerste keer gebruik in Nagel Kommersiële Reg (2006) par 20 05).
(iv) 'n Afbetalingsooreenkoms van roerende sake ("instalment agreement").
(v) 'n Verbandooreenkoms ("mortgage agreement"). Die omskrywing hiervan word hieronder (par 4) woordeliks weergegee.

(vi) 'n Versekerde lening ("secured loan"). Die omskrywing hiervan word hieronder (par 4) woordeliks weergegee.
(vii) 'n Huurkontrak van roerende sake ("lease").
(viii) Die uitgebreide kredietooreenkoms. Laasgenoemde word nie so in die wet genoem nie, is weereens 'n eie skepping en het ook nie 'n Engelse naam nie. 'n Mens sou goedskiks daarna kon verwys as "the extended credit agreement". Die omskrywing daarvan sal aanstons (in par 3) verskaf word.

3 Die Uitspraak in *Voltex (Pty) Ltd v Chenleza CC*

Die feite in hierdie saak is eenvoudig, dog belangrik. Die eiser het oor 'n tydperk goedere aan die verweerder verskaf. Op 'n stadium is 'n ooreenkoms gesluit dat die eiser 30 dae tyd het om te betaal vir goedere wat gelewer word. Die kontrak het nie voorsiening gemaak vir die betaling van rente vir die krediet wat op hierdie manier verskaf is nie. Die tweede en derde verweerders het hulle as borge en mede hoofskuldenaars *in solidum* verbind vir die nakoming van die verweerder se verpligtinge. Die eiser het in die geding twee bedrae geëis wat uitstaande was plus 15.5% rente daarop vanaf twee spesifieke

KREDIETOOREENKOMSTE



Tabel 1

datums. Ofskoon dit nie uit die uitspraak blyk waarom die tersaaklike datums gekies is nie, is dit vermoedelik die datums waarop die dagvaardings beteken is. Aangesien die goedere oor 'n tydperk van maande gelewer is, is die datums vir die rente-eis beslis nie gekoppel aan die datums van lewering of die 30 dae krediettydperk nie. Die verweerders het aangevoer dat die kontrak tussen die partye 'n kredietooreenkoms daargestel het wat onderhewig is aan die Nasionale Kredietwet en het verskeie verwere geopper waarop nie ingegaan hoef te word nie. Hierdie verwere (soos bv dat die kredietgewer nie geregistreer was soos wat a 40(1) van die Nasionale Kredietwet vereis nie en dat die kontrak daarom ongeoorloof was kragtens a 89(2)(d)) was afhanklik van die vraag of die wet hoegenaamd op die kontrak van toepassing is.

Madondo R het die kontrak gemeet aan verskeie woordomskrywings in die wet waarbinne die kontrak moontlik kon val. Die regter het tereg nie ingegaan op die definisies wat duidelik nie tersake is nie (par 37 van die uitspraak). Meer spesifiek is die omskrywing van 'n kredietfasiliteit en die uitgebreide kredietooreenkoms ontleed. Ek stem saam dat dit die enigste moontlike kredietooreenkomste is waarbinne die partye se kontrak sou kon val.

'n Kredietfasiliteit ("credit facility") word in artikel 8(3) van die wet omskryf as:

> an agreement, irrespective of its form ... (in terms of which)
> (a) a credit provider undertakes –
> (i) to supply goods or services or to pay an amount or amounts, asdetermined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and
> (ii) either to –
> (aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or
> (bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and
>
> (b) any charge, fee or interest is payable to the credit provider in respect of
> (i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or
> (ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.

Die definisie maak duidelik voorsiening vir kredietooreenkomste soos oortrokke tjekrekeninge en kredietkaartrekeninge. Regter Madondo is korrek wanneer hy die eiser se argument verwerp dat die definisie hiertoe beperk is (par 31). Ope rekeninge vir die verskaffing van goedere, en selfs die lewering van professionele dienste, sou onder die definisie tuisgebring kon word mits rente van meet af aan betaalbaar is (Scholtz par 8 2 2). Indien konsensuele rente eers betaalbaar is en bereken word vanaf die datum dat die ooreengekome krediettydperk verstryk het, en nie van die begin af nie, sal dit 'n gebeurlikheidskredietooreenkoms wees. Indien die partye byvoorbeeld ooreenkom dat die verbruiker die koopprys moet betaal binne 30 dae na lewering en dat rente van dan af begin loop, is dit 'n gebeurlikheidskredietooreenkoms. (Sien vir 'n

volledige bespreking Otto "The Incidental Credit Agreement" 2010 *THRHR* 637; Renke "Aspects of incidental credit in terms of the National Credit Act 34 of 2005" 2011 *THRHR* 464).

Die regter *in casu* maak die opmerking dat "generally, a credit agreement is an agreement for the sale of goods under which the purchase price is payable by instalments" (par 33). Daar is natuurlik talryke voorbeelde van kredietooreenkomste waar paaiemente nie ter sprake is nie. Trouens, verbruikerskredietwetgewing het baie lank terug reeds, in die woorde van 'n Duitse skrywer, beweeg van afbetalingskope tot verbruikerskrediet in die algemeen (Stauder "Vom Abzahlungskauf zum Konsumentenkredit" 1980 *Zeitschrift für Rechtspolitik* 217). Dit is te betwyfel of die regter se opmerking oor paaiementekrediet so wyd bedoel was as wat dit lyk, maar dit kon dalk 'n invloed uitgeoefen het op sy gevolgtrekking waar hy sê (par 33):

> Since the whole amount owed was payable on or before the specified date or period, giving the first defendant thirty (30) days to pay the purchase price, this, in my view, cannot be construed as deferring the first defendant's obligation to pay the purchase price, in the manner provided for in s 8(3)(a)(ii)(aa).

Die woorde in artikel 8(3)(a)(ii)(aa) waarna die hof verwys is deel van die definisie van "kredietfasiliteit" wat hierbo aangehaal is en lui "a credit provider undertakes ... to defer the consumer's obligation to pay any part of the cost of goods or services." Die woorde "any part" kan onmoontlik nie net paaiementbetalings beteken nie. Dit moet in die konteks van die woordomskrywing en gesien teen die agtergrond van die wet as geheel sekerlik betaling van die hele prys, *óf* betaling by wyse van paaiemente, *óf* betaling van 'n gedeelte van die prys insluit. Indien die definisie anders uitgelê word sal gewone kredietkaartooreenkomste waar betalings maandeliks ten volle by wyse van 'n aftrekorder geskied nie daaronder tuisgebring kan word nie. 'n Ander bekende vorm van kredietfasiliteit sal dan ook nie onder die definisie val nie, te wete ooreenkomste tussen vervaardigers en handelaars waarvolgens die handelaar voorrade ontvang en by ooreenkoms drie maande tyd het om daarvoor te betaal terwyl rente vanaf lewering van die voorrade loop.

Die hof beslis verder dat geen state *in casu* gelewer is nie (sien a 8(3)(a)(ii)(bb) van die definisie van kredietfasiliteit) en merk dan op dat dit ook onnodig was aangesien daar geen deposito betaal is nie en, "as a result, there was no balance payable by the first defendant as part of the cost of goods" (par 34). Weer eens meen ek dat "any part of the cost" sowel die hele bedrag uitstaande, as enige verskuldigde paaiemente of gedeeltelike betaling kan insluit. Die betaling van 'n deposito, al dan nie, is in ieder geval irrelevant te meer daar die Nasionale Kredietwet heeltemal weggedoen het met die deposito-vereiste soos wat sy voorgangers (die Wet op Huurkoop 36 van 1942 en die Wet op Kredietooreenkomste 75 van 1980) vereis het.

Bogenoemde gevolgtrekkings lei die hof daartoe om te beslis dat die ooreenkoms tussen die partye nie 'n kredietfasiliteit is nie en dat dit

daarom onnodig is om aandag te skenk aan artikel 8(3)(b). Laasgenoemde sub-artikel, wat aangehaal is in die definisie van kredietfasiliteit hierbo, bepaal dat daar net sprake kan wees van so 'n fasiliteit indien 'n heffing, geld of rente betaalbaar is. Die hof kon op hierdie grond alleen kort en kragtig beslis het dat die kontrak tussen die partye nie 'n kredietfasiliteit is nie.

Die hof ondersoek ten slotte die moontlikheid dat die kontrak 'n uitgebreide kredietooreenkoms is. Die uitgebreide kredietooreenkoms waarna vroeër verwys is as een van die agt sub-kategorieë van 'n krediettransaksie, word in artikel 8(4)(f) van die wet omskryf as:

> any other agreement, other than a credit facility or credit guarantee, in terms of which payment of an amount owed by one person to another is deferred, and any charge, fee or interest is payable to the credit provider in respect of –
> (i) the agreement; or
> (ii) the amount that has been deferred.

Hierdie omskrywing het duidelik ten doel om as opvangnet te dien vir kredietverskaffing in enige vorm wat nóg binne die woordomskrywings van die benoemde ooreenkomste en transaksies val, nóg tuishoort binne die uitdruklike uitsluitings waarvoor die wet voorsiening maak (bv versekeringspolisse en huurkontrakte van onroerende goed; a 8(2)).

Die hof beslis tereg dat die ooreenkoms tussen die partye in die *Voltex*–saak nie 'n uitgebreide kredietooreenkoms daarstel nie aangesien geen heffing, geld of rente betaalbaar is nie (par 39). Die hof wys daarop dat die rente (van 15.5%) wat deur die eiser geëis word 'n eis vir skadevergoeding daarstel, nie op ooreengekom is nie en deur regswerking verhaalbaar is. Hierdie siening word onderskryf.

Aangesien die Nasionale Kredietwet nie op die kontrak van toepassing is nie, en die verweerders se verwere op sekere bepalings in die wet berus het, is die verwere verwerp en die eis toegestaan.

Die eindresultaat in die saak is dus, ondanks my kritiek hierbo, korrek.

4 Woordomskrywings in die Nasionale Kredietwet wat nie Rente Vereis nie

Indien 'n mens die woordomskrywings van die drie hoofkategorieë kredietooreenkomste, sowel as al hulle sub-kategorieë, in artikels 1 en 8 van die Nasionale Kredietwet ontleed, blyk dit dat die betaling van rente, of 'n heffing of gelde telkens 'n integrale deel van die definisies uitmaak, óf daar word vir twee pryse ('n hoër en 'n laer prys) voorsiening gemaak. Die uitsonderings is die omskrywings van 'n verband, verband-ooreenkoms, versekerde lening en kredietwaarborg. Daar ontbreek die gebruiklike frase "interest, charge or fee" volkome.

Die Nasionale Kredietwet omskryf "mortgage" in artikel 1 as "a pledge of immovable property that serves as security for a mortgage agreement". "Mortgage agreement" word omskryf as "a credit agreement that is secured by a pledge of immovable property". Enige voorgraadse student wat sy of haar sout werd is en die kursus Sakereg

voltooi het sal vir jou kan sê dat 'n mens nie 'n onroerende saak kan verpand nie maar 'n mens moet aanvaar die howe sal sinvolle betekenis aan dié klein gedrog van 'n definisie in die Nasionale Kredietwet gee. Indien die gemelde student aan die bokant van jou puntelys lê sal hy of sy selfs kan uitwys dat 'n mens nie die *kredietooreenkoms* sekureer nie, maar wel die verbintenisse wat daaruit voortvloei.

"Secured loan" word deur artikel 1 van die Nasionale Kredietwet omskryf as:

> an agreement, irrespective of its form but not including an instalment agreement, in terms of which a person –
> (a) advances money or grants credit to another, and
> (b) retains, or receives a pledge or cession of the title to any movable property or other thing of value as security for all amounts due under that agreement.

By geleentheid is die opmerking gemaak dat, terwyl die bisarre definisie van 'n verband monsteragtig is, die omskrywing van "secured loan" die poedelprys vat ("takes the booby prize" Otto & Otto par 9 3(f)). "Title" kan net slaan op eiendomsreg en regsteoreties kan eiendomsreg nie verpand of gesedeer word nie. Hoe dit ookal sy, die omskrywing is wyd genoeg om 'n gewone pandkontrak en 'n sessie *in securitatem debiti* in te sluit. (Sien vir 'n volledige bespreking van die omskrywing Otto "Types of credit agreement" in *Guide to the National Credit Act* (red Scholtz) (2008 ff) (red Scholtz) par 8 2 3 6). Renke, Roestoff & Haupt noem 'n notariële verband as nog 'n voorbeeld van 'n regsinstelling wat in gepaste omstandighede onder die definisie tuisgebring kan word (234 n 40).

'n "Credit guarantee" word in artikel 8(5) van die Nasionale Kredietwet soos volg beskryf:

> An agreement, irrespective of its form ... constitutes a credit guarantee if, in terms of that agreement, a person undertakes or promises to satisfy upon demand any obligation of another consumer in terms of a credit facility or a credit transaction to which this Act applies.

Dit is nie so vreemd dat die woorde "charge, fee or interest" hier ontbreek nie. Die definisie sluit myns insiens gewone borgkontrakte in (sien egter die bespreking in Scholtz par 8 2 4; Otto & Otto par 9 4) en rente kom gewoonlik nie daar ter sprake nie; ofskoon 'n kontraksfooi moontlik betaalbaar mag wees. Rente is gewoonlik betaalbaar op die skuld wat ontstaan uit die "onderliggende" kredietooreenkoms wat juis die *causa causans* van die borgstelling is. Dit is belangrik om daarop te let dat die Nasionale Kredietwet net 'n borg op die talryke maniere waarvoor die wet voorsiening maak beskerm indien die borgstelling betrekking het op 'n kredietooreenkoms waarop die wet self van toepassing is. Dit blyk duidelik uit die definisie (sien ook *Standard Bank of SA Ltd v Hunkydory Investments 194 (Pty) Ltd* 2010 1 SA 627 (C)).

5 Relevansie van die Nasionale Kredietwet se Toepassing by Rentevrye Kredietooreenkomste

Die woordomskrywing van 'n verbandooreenkoms en verband ("mortgage agreement" en "mortgage") maak, soos wat uit die woordomskrywing hierbo (par 3) blyk nie voorsiening vir die betaling van rente, of 'n koste of heffing as vereiste vir die toepaslikheid van die Nasionale Kredietwet nie. Rentevrye verbande is nie jou deursneë tipe kredietverskaffing nie, maar dit is ook nie onmoontlik dat dit kan gebeur nie. 'n Persoon mag gretig wees om sy grond te verkoop en die koper mag in staat wees om 80% van die koopprys kontant te betaal. Die partye kom ooreen dat oordrag sal plaasvind en dat die uitstaande 20% verseker word deur 'n verband oor die grond ten gunste van die verkoper. Dit is ook moontlik dat die 80% deur 'n derde party aan die koper geleen word teen sekuriteit van 'n eerste verband ten gunste van die derde party. 'n Tweede verband word dan ten gunste van die verkoper geregistreer. Die koper dra die koste van die verlyding van die verbandooreenkoms en die registrasie van die verband. Hierdie gelde is natuurlik nie vir die kredietgewer-verkoper-verbandhouer se sak bestem nie. Die restant van 20% is terugbetaalbaar, argumentsonthalwe, by wyse van 36 maandelikse paaiemente of in 'n enkele bedrag na drie jaar. Die skuld is nie rentedraend nie. Die verkoper is tevrede, besluit om verveeldheid op te soek, en emigreer na Australië. Volgens die definisie van 'n "mortgage agreement" in die Nasionale Kredietwet is die wet op hierdie kontrak van toepassing. Indien die krediet wat verskaf word (die 20% wat uitstaande is) R500,000 oorskry moet die verbandgewer registreer as kredietverskaffer. Doen hy dit nie sal sy kontrak ongeoorloof wees (a 89(2)(d)) met skrikwekkende gevolge. Hy het reeds sy grond "verloor" deur oordrag en sal dit geensins kan terugeis nie, ongeag wat die kontrak tussen die partye mag bepaal. Boonop sal hy nie die uitstaande bedrag kan opeis nie. Wat meer is, hy sal die geld wat hy reeds ontvang het moet terugbetaal. Omdat die verbruiker in die proses verryk sal wees, sal die plaas aan die staat verbeurd verklaar word. Hierdie verreikende en verregaande gevolge word neergelê deur artikel 89(5) van die Nasionale Kredietwet en is tans die geldende reg totdat die artikel dalk een dag hersien word of ongrondwetlik verklaar word. (Sien vir 'n toepassing van a 89(5) in die praktyk, *Cherangani Trade and Investment 107 (Edms) Bpk v Mason* ongerapporteerd saak no 6712/2008 OPD; en vir 'n volledige bespreking van die aangeleentheid Otto "Die *Par Delictum*-reël en die *National Credit Act*" 2009 *TSAR* 417; Otto *"National Credit Act*, ongeoorloofde ooreenkomste en meevallertjies vir die fiscus" 2010 *TSAR* 161. A 89(5)(c) (die verbeurdverklaringsbepaling) is sedert die beslissing in die *Cherangani*-saak tereg ongrondwetlik verklaar in 'n deurdagte beslissing van Binns-Ward r in *Opperman v Boonzaaier* ongerapporteerd saak no 24887/2010 van 17 April 2012 (WCC). Die bevinding van ongrondwetlikheid moet, by die skrywe hiervan, nog deur die konstitusionele hof bekragtig word. Sien par 48(b) van die beslissing in *Opperman v Boonzaaier supra*).

Indien die krediet wat verskaf word nie R500,000 oorskry nie, hoef die verbandhouer nie as kredietverskaffer te registreer nie (tensy hy ook krediet kragtens ander kredietooreenkomste verskaf het wat al die gesamentlike uitstaande hoofskulde R500,000 laat oorskry (a 40(1)(b)). Die wet geld egter steeds. Dit beteken onder andere dat die kredietverskaffer by die aangaan van die kontrak 'n volledige evaluering moes gedoen het van die koper-verbruiker se kredietwaardigheid en hom nie bloot moes verlaat het op die groot bedrag wat hy reeds ontvang het en die gerusstellende feit van 'n eerste of tweede verband wat netjies in die Aktekantoor geregistreer is nie. Die Nasionale Kredietwet bepaal uitdruklik dat niemand roekelose krediet mag verskaf nie (a 81(3)). Sien vir 'nbespreking van roekelose krediet Van Heerden "Over-indebtedness and reckless credit" in Scholtz (red) *Guide to the National Credit Act* (2008 ff) hfst 11; Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274; Van Heerden "The money or the box: perspectives on reckless credit in terms of the National Credit Act 34 of 2005" 2011 *De Jure* 392. Iedereen wat krediet wil verskaf moet 'n evaluering maak van die verbruiker se begrip en insig ("understanding and appreciation") betreffende sy risiko's en verpligtinge, sy terugbetalingsgeskiedenis en sy huidige finansiële posisie (sy "existing financial means, prospects and obligations" – a 81(2)). Die feit dat die koper 80% van die koopprys daar en dan betaal het maak hom op die oog af kredietwaardig, maar dit is nie waar die storie eindig nie. Hy mag ander laste hê wat by 'n vooraf ondersoek kan aandui dat hy nie in staat sal wees om al sy skulde in die toekoms op die tersaaklike tye af te los nie wat sal beteken dat die krediet wat verleen is neerkom op roekelose krediet omdat hy meteens skuldmatig oorbelas geraak het (a 80(1)(b)(ii)). Maar die saak is eintlik nog meer eenvoudig, en meer droewig vir die verbandhouer-kredietverskaffer. Indien hy geen evaluering van die koper se finansiële posisie, of van sy insig en begrip rakende die transaksie, gedoen het nie, stel dit op sigself roekelose krediet daar *ongeag* wat die uitslag sou gewees het indien hy wel 'n evaluering gedoen het (a 80(1)(a)). Met ander woorde, selfs al blyk dit dat die koper finansieel sterk is, heeltemal in staat is om sy ou skulde en die nuwe een reëlmatig te betaal en volle begrip en insig in die transaksie gehad het, maar hierdie feite is nie voor kredietverlening deur die nodige evaluering vasgestel nie, stel die kredietverlening *per se* roekelose krediet daar. Artikel 80(1)(a) is dus bestrawwend van aard. Die verlening van roekelose krediet hou ernstige gevolge vir die kredietgewer in. Afhangende van die vorm wat die roekelose krediet aanneem kan 'n hof die kontrak vir 'n tydperk opskort, of betalings herskeduleer of selfs die kontrak tersyde stel (a 83).

Selfs al is die kredietgewer geregistreer, of al hoef hy nie te registreer nie omdat hy eenmalig krediet verskaf het wat nie R500,000 oorskry nie (a 40(1)(b)), geld die Nasionale Kredietwet steeds. Dit beteken onder andere dat die verbruiker op enige stadium by 'n skuldraadgewer ("debt counsellor") kan aansoek doen om deur 'n hof skuldmatig oorbelas ("over-indebted") verklaar te word indien sy jas vasdraai met sy terugbetalings. Dit kan gebeur al was die krediet nie aanvanklik roekeloos toegestaan nie. Indien die hof bevind dat die verbruiker

oorbelas is *mag* die hof onder andere sy betalings herskeduleer en gelas dat hy sy skulde oor 'n langer termyn by wyse van kleiner paaiemente betaal (aa 85, 86 en 87). Die wet se bepalings in hierdie verband is nie 'n dooie letter nie en hou die laer- en hoër howe baie besig. (Sien vir 'n bespreking van die regspraak Otto "Die oorbelaste skuldverbruiker: die Nasionale Kredietwet verleen geensins onbeperkte vrydom van skulde nie" 2010 *TSAR* 399. Vgl verder oor "over-indebtedness", die rol van skuldraadgewers, die praktiese aspekte en probleme wat met aansoeke om oorbelasting ervaar word, Van Heerden "Over-indebtedness and reckless credit" in *Guide to the National Credit Act* (red Scholtz) (2008 ff) par 11.3; Du Plessis "The National Credit Act: Debt counselling may prove to be a risky enterprise" 2007 *TRW* 76; Roestoff, Haupt, Coetzee & Erasmus "The debt counselling process: Closing the loopholes in the National Credit Act 34 of 2005" 2009 *PER* 247; Otto & Otto par 30 9; *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP)).

Die woordomskrywing van 'n versekerde lening ("*secured loan*") maak, soos wat uit die woordomskrywing hierbo (par 4) blyk, nie voorsiening vir die betaling van rente, of 'n koste of heffing as vereiste vir die toepaslikheid van die Nasionale Kredietwet nie. Soos by verbande is rentevrye lenings wat verseker is nie die geykte tipe krediet-ooreenkoms nie, maar hulle kom wel voor. Ek ken 'n vermoënde man met 'n goeie hart wat oor jare heen al miljoene rande aan mense geleen het waarvan hy dikwels nie 'n sent teruggekry het nie. Die lenings is soms toegestaan aan mense om hulle te help om 'n klein besigheid te begin, of aan mense wat skielik finansiële rampspoed beleef het. Van hierdie lenings was rentevry en onverseker. Ander was rentevry maar op een of ander wyse wel verseker. Versekering van sulke lenings kan natuurlik op verskeie wyses plaasvind wat hulle binne die woord-omskrywing van "secured loan" kan plaas. Die skuldenaar mag aandele of juwele of 'n versekeringspolis hê wat verpand kan word, of die regte uit hoofde daarvan kan gesedeer word as sekuriteit. Dit is ook moontlik dat 'n notariële verband oor die roerende sake van die besigheid wat met die geleende geld begin is, geregistreer word. So 'n skuldeiser wat geen rente of heffing vra nie, kan hom of haar in dieselfde penarie bevind as 'n verbandhouer indien die verbruiker-geldopnemer later nie die skuld terugbetaal nie. Die kontrak mag eweneens ongeoorloof wees vanweë nie-registrasie van die weldoener, of roekelose krediet daarstel vanweë geen of gebrekkige kredietevaluering. Indien die geld aan iemand geleen word om 'n besigheid te begin vereis die wet boonop dat die kredietgewer, as deel van die evalueringsproses om roekelose krediet te voorkom, stappe moet neem om vas te stel "whether there is a reasonable basis to conclude that any commercial purpose may prove to be successful, if the consumer has such a purpose for applying for that credit agreement" (a 81(2)(b)). In die geval van lenings tussen mense wat op persoonlike vlak aan mekaar bekend is, mekaar vertrou en nie kontrakbreuk en kwaai vriendskap in hulle visier het nie, is dit gewis nie gebruiklik om kredietevaluerings te doen nie. Privaatindividue beskik ook nie altyd oor die kennis om sulke evaluerings te doen nie.

Ek het by die skrywe hiervan nie uit die oog verloor nie dat die Nasionale Kredietwet slegs van toepassing is op 'n kredietooreenkoms indien hy gesluit is "between parties dealing at arm's length" (a 4(1)). Hierdie begrip word verder toegelig in artikel 4(2)(b). Daar word onder andere bepaal dat die volgende afsprake nie neerkom op "dealing at arm's length" nie ((a 4(2)(b)(iv))):

> any other arrangement -
> (aa) in which each party is not independent of the other and consequently does not necessarily strive to obtain the utmost possible advantage out of the transaction; or
> (bb) that is of a type that has been held in law to be between parties who are not dealing at arm's length.

Dit wil vir my voorkom dat die kontrak net buite die wet sal val indien die partye, luidens paragraaf (aa), nie onafhanklik van mekaar is nie *en* ("and consequently") nie noodwendig strewe na die beste moontlike voordele uit die transaksie nie. Wat paragraaf (bb) betref, is die begrip "arm's length" al in die regspraak beskryf. Die hof het in *Commissioner, South African Revenue Service v Woulidge* (2002 1 SA 68 (SCA)) die mening uitgespreek dat 'n (75D):

> notional commercial arm's-length transaction on interest would assume a lender who would insist on payment of the interest he charges and a borrower able to pay that interest.

Aangesien rentevrye lenings tans ter sprake is, is die betekenis wat aan "*arm's length*" in hierdie saak gegee is nie van veel nut nie. Die uitspraak in *Hicklin v Secretary for Inland Revenue* (1980 1 SA 481(A)) is meer ter sake. Die hof moes die woorde "persons dealing at arms' length under a transaction, operation or scheme" in die Inkomstebelastingwet (58 van1962) uitlê en het beslis dat dit beteken "that each party is independent of the other and, in so dealing, will strive to get the utmost possible advantage out of the transaction for himself" (495A). Hierdie gevolgtrekking van die hof kom baie ooreen met die woorde wat in artikel 4(2)(b)(iv)(aa) van die Nasionale Kredietwet gebruik word. Trouens, dit sal my nie verbaas indien die wetsopsteller die woorde in hierdie saak gevind het nie. Die toets in die Nasionale Kredietwet is egter minder streng. Die woorde wat in die wet gebruik word lui, "does not necessarily strive," in teenstelling met "will strive" soos wat beslis is in die *Hicklin*-saak.

In ieder geval mag 'n persoon selfs by 'n rentevrye verbandooreenkoms of by 'n versekerde lening goeie finansiële redes hê om die kontrak aan te gaan, en te streef na die "*utmost possible advantage*", soos byvoorbeeld om van sy grond of ander bate ontslae te raak teen 'n goeie prys, of selfs in slegte tye teen 'n lae prys, selfs al moet hy rente-inkomste in die proses ontbeer. Hy mag ook, waar hy geld uitleen, aandele opneem in die besigheid wat hy die skuldenaar gehelp het om op te rig.

Voorwaar, ongeregistreerde kredietgewers met edele motiewe wat ander mense wil help sonder om self geld daaruit te wil maak, of wat geld

teen 'n lae rentekoers uitleen maar nie 'n behoorlike kredietevaluering doen nie, mag dalk een van Oscar Wilde se siniese opmerkings heel toepaslik vind: "No good deed shall go unpunished." (Prof Steve Cornelius het my aan hierdie uitdrukking bekend gestel. Die enskiklopedie *Wikipedia* dui aan dat die uitdrukking "no good deed goes unpunished" al deur talle mense in boeke, opvoerings, ens gebruik is).

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Capital Versus Revenue: Some Guidance

1 Introduction

For income tax purposes, the distinction between whether an amount or expenditure is of a capital nature or not is decisive. Receipts and accruals of a capital nature do not form part of the gross income definition (the definition in s 1 of the Income Tax Act 58 of 1962 (the ITA) reads: "… in the case of a resident, the total amount in cash or otherwise, received by or accrued to or in favour of such resident … excluding receipts or accruals of a capital nature") and as such are not subject to income tax, but are subject to capital gains tax (CGT) (under par 10 Sch 8 ITA depending on the status of the taxpayer only 25% or 50% of a capital gain is included in the tax net – in the 2012 budget it was proposed that the inclusion rate be increased from 1 April 2012 for individuals to 33,3% and for other taxpayers to 66.6%). Similarly, expenditure of a capital nature is not deductible under the general deduction formula in s 11(a) of the ITA. Amounts that are not of a capital nature will be regarded as income, as no halfway house exists (*Pyott v CIR* 13 SATC 121 126). In light of this statement one would have expected that CGT would be levied on all receipts and accruals falling outside the "gross income" definition, would fall within the CGT net. However, this is not the basis on which capital gains tax is imposed, as CGT is imposed on the disposal of an asset for proceeds more than its base cost. The terms "disposal", "asset", proceeds" and "base cost" are all defined for purposes of the Eighth Schedule.

One would have thought that clarity characterises such a basic principle. However, the most important distinction in the act has proven to be the most elusive. As the act itself does not give any indication as to when an amount or expenditure will generally be of a capital nature, it is left to the courts to define its meaning. Allthough several court cases on the topic do exist, Urquhart "Capital v revenue: Some light in the darkness?" 1979 *Acta Juridica 299* is of the opinion that although "eminent counsel, distinguished judges" had over several years attempted to interpret the phrase, "the subject is still as murky as ever."

In this note an attempt will be made to provide guidance on the nature of an amount received by or accrued to the taxpayer. As the courts

developed separate tests for the nature of expenditure, this will not be discussed here.

2 Tests applied by the Court

2 1 Introduction

The courts do not apply a single test to determine the nature of an amount. An analysis of case law indicates that at least three different tests are applied by the courts.

2 2 Profit-making Scheme

The current leading authority on the nature of an amount is *CIR v Pick-n-Pay Employee Share Purchase Trust* 54 SATC 271. The facts of the case were that a trust was formed to provide shares to company employees. Under the terms of the trust, the trust provided shares to company employees. The trust acquired shares at the market value and from the company and on-sold them, on a continuous basis, to the employees. Although the trust had no intention of making a profit, as it had to sell the shares to the employees at a certain price, it did indeed make a profit. The question the court had to adjudicate upon was whether this profit was of a capital nature. In a three-to-two decision it was held that the profits were of a capital nature (This "profit-making scheme" test was also applied in *CSARS v Wyner* 66 SATC 1).

The majority of the court reached its decision by first asking whether the taxpayer objectively conducted a business and secondly whether it was the objective of the taxpayer to conduct a business. It is clear that the first leg of the question should be objectively determined and the second leg purely subjectively.

The minority was of the view that the test to determine the nature of an amount should be a purely objective test. In other words, on the facts of each case it should be decided whether a business was carried on, and the amount was received in the ordinary course of business – then the amount was not of a capital nature.

It is thus clear that the majority applied a subjective test, whereas the minority applied an objective test. (It is interesting to note that both the majority and the minority were able to refer to previous cases by the Supreme Court of Appeal for their view. (The majority relied on *Natal Estates Ltd v SIR* 37 SATC 193 and *Elandsheuwel Farming (Edms)* 39 SATC 163 whereas the minority relied on *Overseas Trust corporation v CIR* 2 SATC 71 and *Stott v CIR* 3 SATC 253.)

2 3 Fruit Versus Tree Analogy

Where an amount represents income from the disposal of the income-producing asset (ie the tree), the amount is of a capital nature. However, where an amount represents the fruit of the tree, such amount is not of a capital nature. This was made clear in *Visser v CIR* SATC 271 in which it was held at 276 that:

> 'Income' is what 'capital' produces, or is something in the nature of interest or fruit as opposed to principal or tree. This economic distinction is a useful guide in matters of income tax, but its application is very often a matter of great difficulty, for what is principle or tree in the hands of one man may be interest or fruit in the hands of another. Law books in the hands of a lawyer are a capital asset; in the hands of a bookseller they are a trade asset.

Although the principle is clear that the tree represents capital and the fruit revenue, as indicated in the quote it is not always easy to establish when an amount represents the tree and when it represents the fruit. In the context of deductions, this is illustrated by the decision in *BP Southern Africa (Pty) Ltd v CSARS* 69 SATC 79 which dealt with the nature of expenditure. In the lower court it was decided that a payment for the right to operate under a certain name was of a capital nature. However, on appeal the Supreme Court of Appeal was of the opinion that the amount was not of a capital nature as it was more closely connected to the taxpayer's income-earning activities (ie the fruit) than it was to its income-earning structure (ie the tree).

2 4 Fixed Versus Floating Capital

Where an amount is received from the disposal of fixed capital it is regarded as of a capital nature whereas if it is received from the disposal of floating capital, is not of a capital nature. In *CIR v George Forest Timber Co Ltd* 1 SATC 20 23-24 it was held:

> Capital, it should be remembered, may be either fixed or floating. I take the substantial difference to be that floating capital is consumed or disappears in the very process of production, while fixed capital does not; though it produces fresh wealth, it remains intact. The distinction is relative, for even fixed capital, such as machinery, gradually wears away and needs to be renewed. But as pointed out by Mason J in *Stephan v CIR* (1919 WLD at 5) the two phrases have an ascertained meaning in accountancy as well as in economics. Ordinary merchandise in the hands of a trader would be floating capital. Its use involves its disappearance; and the money obtained for it is received as part of the ordinary revenue of the business. It could never have been intended that money received by a merchant in the course, and as the result of his trading, should not form part of his gross income.
> (see also *SBI v Aveling* 40 SATC 1 17.)

2 5 Conclusion on Tests Applied by the Courts

Although over the years several tests have been applied by the courts to determine the nature of an amount, the impression is gained that, in recent years, the "profit-making scheme" test is the test most often applied. Although it is clear that the test is to determine whether a profit-making scheme was carried on, it is not clear that a subjective test has to be applied, and it is not clear which factors are taken into account.

3 Factors to be Taken into Account

Analyses of the relevant cases do not provide much clarity on whether a taxpayer's "object", "motive", "intention", "contemplation" or "*ipse dixit*" will be decisive in determining whether a profit-making scheme was carried on. These words are used interchangeably by the courts

(Broomberg "Capital, Revenue, Intention, Motive and Contemplation" 1998 *Tax Planning* 69). In general terms the word "object" or "intention" refers to what a person does. In a tax context the word often refers to whether a taxpayer has disposed of or kept an asset. The word "motive" on the other hand refers to the reason why a person did something, and the word contemplation refers to whether a person foresees something (ie that he or she will make a profit).

On the one hand it was held in *CIR v Pick-n-Pay Employee Share Purchase Trust* 54 SATC 271 281 that:

> Contemplation is not to be confused with intention … In a tax case one is not concerned with what possibilities, apart from his actual purpose, the taxpayer foresaw and with which he reconciled himself. One is solely concerned with his object, his aim, his actual purpose.

On the other hand, in *SIR v Trust Bank of Africa Ltd* 37 SATC 87 104, with reference to previous case law, it was held that in determining whether a profit-making scheme was carried on is "'… fundamentally a question of intention', in other words, that the intention with which … [assets] were acquired was of the utmost importance, but not necessarily decisive".

From the *Pick-n-Pay* and *Trust Bank* cases it does seems that the word "object" is synonymous with the words "intention" and "purpose" and that the test to determine the nature of an amount depends on whether it was derived as part of a profit-making scheme. It is also clear that the contemplation that a profit would be made is not taken into account. In this regard the word "contemplation" does not carry the same meaning as it does in criminal law. For example, in *Trust Bank* it was held (106) that:

> [i]n an enquiry as to the intention with which a transaction was entered into for purposes of the law of income tax, a court of law is not concerned with the kind of subjective state of mind required for the purposes of criminal law, but rather with the purpose for which the transaction was entered into.
> (See also *CIR v Paul* 1956 (3) SA 335 340-341.)

To determine this one has to establish the object (ie purpose or intention) with which the scheme was entered into. Although no cognisance is taken of the taxpayer's motive, his or her intention may be taken into account. However, a person's intention is not always equal to his or her *ipse dixit*:

> Die rede waarom 'n belastingpligtige se woord nie noodwendig aanvaar word nie, hoef nie te beteken dat sy eerlikheid in twyfel getrek word nie. Mense se bedoelings is dikwels wisselend, ongevorm en ongeformuleer en hul ex post facto getuienis daaroor, hoewel eerlik, is dikwels onbetroubaar of bestaan uit 'n blote rekonstruksie.
> (*Malan v KBI* 1981 2 SA 92 (KPA) 96F-O.)

The fact that a taxpayer's *ipse dixit* is not decisive in determining the nature of an amount was made clear in *CSARS v Heron Heights CC* 64 SATC 433, in which it was held (436) that

> … the intention of the taxpayer … is of great, sometimes decisive, importance … the mere *ipse dixit* of the taxpayer in this regard cannot, in the nature of things, be conclusive; it must be tested against all other relevant considerations.

It is impossible to reconcile the above cases with the more recent decision in *CIR v Smith* 65 SATC 6. Although the *Smith* case does not deal with the nature of a receipt or accrual, in this case the taxpayer's *ipse dixit* was held to be decisive in determining whether he conducted a trade, notwithstanding that the objective factors did not support his *ipse dixit*.

4 Intention

4 1 Multiple intentions

Where a taxpayer has mixed intentions when an asset is acquired, for example he will rent the asset out and receive rental income (which is not of a capital nature), but dispose of it when he receives a good offer (which proceeds will be of a capital nature), the party who bears the onus of proof will lose the case. As section 82 of the Act places the onus on the taxpayer, he or she will always be the losing party.

4 2 Intention of a company.

It is particularly difficult to determine the intention of a *company* as it has "no body to kick and no soul to condemn" (*CIR v Richmond Estate (Pty) Ltd* 1956 1 SA 602 606F.) However, case law does give an indication of the factors to be taken into account.

In *Lace Proprietary Mines v CIR* 9 SATC 349 it was held that the name of the company, its policy, and its activities may be taken into account when the intention of a company is determined. In *SIR v Trust bank of Africa Ltd* 37 SATC 87 it was held (105) that the intention of a company should be determined by "the state of mind or intention of the persons in effective control of the company".

The decision in *Elandsheuwel Farming (Edms) Bpk v SBI* 39 SATC 163 illustrates the dangers in attributing an intention to a company. In this case the majority of the court attributed the intention of new shareholders, who were speculators in their individual capacities, to the company.

4 3 Change of Intention

Although a taxpayer might have obtained an asset to keep it as an investment (ie as capital), it does not follow that when he or she disposes of it, the proceeds will always be of a capital nature. The reason is that a change of intention might have occurred, as was stated in *Natal Estates Ltd v SIR* 1975 4 SA 177 (A) 202-203:

> From the totality of the facts one has to enquire whether it can be said that the owner had crossed the Rubicon and gone over to a business, or embarked upon a scheme, of selling such land for profit, *using the land as his stock-in-trade*.

However, an important caveat was added in *John Bell and Co (Pty) Ltd v SIR* 1976 4 SA 177 (A) where it was held (202-203) that:

> the mere change of intention to dispose of an asset hitherto held as a capital does not *per se* subject the resultant profit to tax. Something more is required in order to metamorphose the character of the asset and to render its proceeds gross income. For example, the taxpayer must already be trading in the same or similar kinds of asset and he then and there starts some trade or business or embarks on some scheme for selling such assets for profit, and, in either case, the asset in question is used as his trade-in-stock.

The prospects of success are generally poor, as it may be as difficult to change from a trader into an investor for tax purposes as it is for a rope to pass through the eye of a needle. However, cases in which this did happen do exist. (See, for example, *CIR v Richmond Estate*s (Pty) Ltd 20 SATC 355; *SIR v Rile Investments (Pty) Ltd* 40 SATC 135; *CSARS v Heron Heights CC* 64 SATC 433).

As intention is a subjective test, it is often very difficult to determine whether a change in intention has transpired. On the one hand it should be remembered that the mere fact that an asset is realised at the highest possible price does not turn an otherwise capital amount into an amount not of a capital nature. In *CIR v Stott* 3 SATC 253 263 it was held that:

> … every person who invested surplus funds in land or stock or any other asset was entitled to realise such asset to the best advantage and to accommodate the asset to the exigencies of the market in which he was selling.

The decisive question is whether the taxpayer crossed the Rubicon in disposing of the asset.

Obviously no general rule can be laid down to determine whether the taxpayer crossed the Rubicon or whether the taxpayer merely realised a capital asset to his or her best advantage. The facts of each case have to be analysed to determine the answer, and in this regard previous case law cannot be decisive. (In *ITC 1299* 42 SATC 45 51 it was made clear that while guidelines enunciated in earlier cases "are useful aids in the process of arriving at a decision, each case falls for its determination on its own facts." Just as it is possible to cross the Rubicon and change a capital asset into stock-in-trade, it is possible to back over the Rubicon and dispose of stock-in-trade as a capital asset.

5 Conclusion

Case law indicates that in the test to determine the nature of an amount received by or accrued to a taxpayer two questions have to be answered in the positive. Firstly, was the taxpayer objectively carrying on a profit-making scheme, and, secondly, was it his or her intention to carry on a profit-making scheme? It is less clear whether in answering the second question the taxpayer's motive, intention or object is take into account. However, it is clear that in this regard the taxpayer's *ipse dixit* is not decisive. It is also clear that the intention with which an asset was obtained will not always be decisive, as a change of intention might have

occurred between the time the asset was obtained and the time it was disposed of. The test to apply to determine whether a change of intention took place is to ask whether on the totality of the facts the taxpayer crossed the Rubicon.

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Ex parte WH
2011 6 SA 514 (GNP)

Discussion of genetic links and monetary payments in South African and foreign surrogate mother agreements with particular reference to the English experience

1 Introduction

1 1 Background and Aim of the Note

The legal requirements pertaining to a surrogate motherhood agreement (SMA) in South Africa are contained in Chapter 19 of the Children's Act (38 of 2005) (CA). On 27 September 2011, Tolmay J and Kollapen J delivered the first available reported judgment that resulted in the confirmation of an SMA: *Ex parte WH* 2011 6 SA 514 (GNP). In a previous judgment – *Ex parte applications for the confirmation of three surrogate motherhood agreements* 2011 6 SA 22 (GSJ) – the agreements were not confirmed by the court, due to lack of evidence (for a discussion of the latter case, see Soni & Carnelley "Surrogate Motherhood Agreements" 2011 (May) *De Rebus* 30-35). However, to date there has been no judgment relating to foreign SMAs involving South African commissioning parents, although such arrangements are not unheard of.

The first aim of this note is firstly to assess the SMA agreement as it crystallised in the judgment of *Ex parte WH*, in light of the two particular statutory requirements: the origin of the gametes (genetic material) used for the artificial fertilisation of the surrogate, and any payments made in connection with the SMA. All the South African legislative provisions relating to surrogacy will not be discussed in detail, as this has been done previously (see Carnelley & Soni "A tale of two mummies. Providing a womb in South Africa: surrogacy, the agreement and the legal rights of the parents within the CA. A brief comparative study with the United Kingdom" 2008 *Speculum Iuris* 36 36-52). The second aim of the note is to discuss the issue of foreign SMAs. This focuses on South African couples entering into an SMA with a foreign surrogate, and the consequences of the agreement thereafter in South Africa.

The comparative legislative provisions in England (and Wales) will be discussed relating to both genetic links and monetary payments, and will be compared to the outcome in *Ex parte WH*. In addition, the comparable English legal principles dealing with foreign surrogacy will also be discussed, in light of numerous recent English court decisions dealing with these issues.

The note will commence with a brief overview of the relevant statutory provisions in both jurisdictions. This is followed by a discussion of the South African case of *Ex parte WH*, specifically the section relevant to the genetic material and payment. The note concludes with a discussion of the payment for foreign surrogate arrangements in both jurisdictions.

The rationale for the comparative jurisdiction used, is because the regulatory framework regarding surrogacy is similar in both countries. Both jurisdictions strictly regulate surrogacy, require a genetic link between the commissioning parents and the child, and prohibit commercial surrogacy through limitation of payments to the surrogate mother. There are, however, some differences: the court order confirming, *inter alia*, the legal parents (holders of parental responsibilities and rights) of the child in South Africa, is obtained prior to the fertilisation of the surrogate; and in England, the parental order is only obtained in court after the child is born. As surrogacy has been regulated in England since 1985, there have been numerous judgments about such arrangements, especially latterly with regard to foreign SMAs. These could provide useful insight for the South African courts, should they be faced with similar issues.

1 2 Relevant Legal Principles in South Africa and England

For purposes of expedience, it is noted that in South Africa, a pre-artificial fertilisation court- confirmed SMA will only be valid, *inter alia*, if the gametes of at least one of the commissioning parents are used for the artificial fertilisation of the surrogate (s 294 CA), and if it is not a commercial SMA. Payments in respect of surrogacy are prohibited, except for specific claims relating to the compensation of expenses, loss of earnings, and insurance cover (s 301(2) CA). However, persons rendering bona fide professional legal and medical services are entitled to reasonable compensation (s 301(3) CA). However, no person may with a view to compensation make known that any person might be willing to enter into an SMA (s 303(2) CA).

In England, SMAs are regulated by the Surrogacy Arrangements Act 1985 (SAA), read with the Human Fertilisation and Embryology Act 2008 (HFEA). The HFEA provides that a commissioning couple (the applicants) can apply for a parental order in respect of a child born as a result of an SMA, where the child was the result of artificial insemination and not carried by one of the applicants, within a specific period after the birth of the child (s 54(1) HFEA). In addition, it is a requirement that the child must be genetically related to at least one of the applicants (s 54(1)(b) HFEA). Furthermore, no money or other benefit, other than for reasonable expenses, may be given or received by either of the applicants for, or in consideration of, the making of the order, the SMA, the handing over of the child to the applicants, or the making of arrangements with a view to the making of the order – unless the court has authorised such payment (s 65(8) HFEA). The SAA specifically prohibits and criminalises commercial surrogacy arrangements (ss 2, 4 SAA).

The rationale for these provisions, effectively limiting surrogacy, is to prevent commercial surrogacy. The aim of the legalisation and regulation is to make it possible for the commissioning couple to have a child genetically linked to either or both of them. Such surrogacy arrangements are legalised as a last possible option for infertile couples, or same-sex persons, to conceive a child genetically linked to either of them (Herring *Family Law* (2004) 344). If there is no genetic connection, there is no need for surrogacy, as adoption could be a viable alternative. It has also been argued that commercial surrogacy arrangements should be avoided for ethical reasons, as it "commodifies" children and treats them as possessions that can be brought and sold (Herring 343). Moreover, commercialisation could lead to poorer women being exploited and forced into surrogacy arrangements for monetary purposes (Herring 343). Whatever the rationale, the principles have been firmly established in the legislation of both jurisdictions.

2 The South African Judgment in *Ex parte WH*

2 1 The Judgment

The stated aim of this particular judgment is "to ensure consistency and develop a uniform practice" with surrogacy-related court applications, and to "determine and provide guidelines on how similar applications should in future be dealt with" (par 9).

The court requested address on four aspects – two of which are relevant to this note. The first of these, is the approach that should be followed where the genetic material used is not that of the parties. Secondly, as the application referred to an agency-introduction of the surrogate mother to the commissioning parents, the court requested additional information about the agency. The additional information required was: an affidavit setting out the procedures followed by the agency in facilitating surrogacy; copies of additional agreements between the commissioning parents and the potential surrogate mother, and/or the agency, as well as between the agency and the surrogate mother; indications as to compensation (and if so, full particulars thereof) paid by the commissioning parents to the agency and/or the surrogate mother, and by the agency to the surrogate mother (parr 10–12 , 24).

(The questions relating to the approach that should be followed when a same-sex couple applies for a surrogacy agreement to be made an order of court, the appropriate steps to be followed, and factors to be considered to determine the best interests of the child, are ignored for the purposes of this note.)

The facts of *Ex parte WH* are straight-forward. The application was brought by a male same-sex couple (the commissioning parents), domiciled in South Africa, and united (presumably) in terms of the Civil Union Act (16 of 2006) (the court uses the word "married" (par 15)). The couple do not have children of their own, and "both being male persons are incapable of having children that are genetically related to them except via the process of surrogacy" (par 16).

The application by the commissioning parents, supplemented by the affidavits of the surrogate mother and her spouse, and coupled with psychological reports, were found to have met the statutory requirements (parr 19–22 as read with the Act). However, there was no information before the court about the origin of the donor-egg, except that it will not be that of the surrogate mother (par 22). The judgment is silent on the identity of the other gamete donor (the sperm donor).

With regards to an exchange of funding, the parties were at pains to convince the court that no money had been or would be paid to the agency, or the surrogate mother, in contravention of the Act (par 18). The evidence presented was that profits of the agency – an online egg donation business – were the sole source of income for the owner of the agency. She gave evidence that she does not charge a fee for surrogacy services, as it is an extension of the core business of the agency (par 25). She noted that there was no agreement between the agency and the prospective surrogate mother, and no payment was promised or paid to the surrogate (par 26). Similarly, there was no payment or promise to pay the agency for the introduction of the commissioning parents to the surrogate mother (par 27).

The payment by the commissioning parents to the surrogate mother was listed: health insurance (R20,400 pa); life insurance (R6,000 pa); and "surrogate various expenditure (transport, maternity clothes, etc)" (R20,000) (par 28). The court registered concern about this last generic amount, as there could be a risk that it may disguise payment of compensation (which is not allowed in terms of the CA). Moreover, the court noted that a detailed list detailing specific expenses should in future be provided to the court, to minimise the possibility of abuse (par 29). The court nonetheless accepted the *bona fides* (and evidence) of the applicants and other witnesses – that no payment was or would be made in contravention of the CA (par 30).

The court confirmed that commercial surrogacy is prohibited in South Africa, and that it is only allowed for altruistic purposes, and with only specific payments being allowed (par 40). The court - under the heading "The surrogate mother and the risk of commercial surrogacy" - notes that agencies facilitating the introduction of surrogate mothers to commissioning parents play an important role, although this role can easily lead to abuse (par 64). The judges continue (par 64):

> One would be naïve not to see how it is possible to develop to the point where 'a womb for hire' could become *de facto* part of surrogacy practice ... It becomes clear that, particularly in countries such as ours with deep socio-economic disparities and the prevalence of poverty, that the possibility of abuse of underprivileged women is a real and ever present danger. Ideally the involvement of agencies should be the subject of regulation and oversight in order to avoid abuse which ordinarily is very difficult to detect from the face of a contract of surrogacy. Commercial surrogacy can quite easily be disguised and payments in contravention of the law can just as easily be included under the guise of legal and legitimate payments.

The court confirmed that any payment outside s 301 of the CA is prohibited, including any facilitation fee (par 65). The court specifically stated that if an agency is involved, there should be added safeguards, including providing additional information to the court. This should include the details of the agency, any payments made, and information about the involvement of the agency, including about the introduction of the surrogate, how the information of the surrogate was obtained, and whether the surrogate received any compensation from the agency or the commissioning parents. This allows the court to exercise its discretion before confirming the agreement (par 67). The court also notes that the application should state where the gametes will come from, without revealing the identity of the donor (par 68).

The court concluded that the parties made out a proper case for the relief they sought, that the parties concluded the SMA for altruistic rather than commercial reasons, that the payments were in line with the legislation, and thus confirmed the SMA (parr 79–80).

2 2 Genetic Link

The first problem with the judgment is that it is not made clear if one of the commissioning parents will actually be a gamete donor as required by s 294 of the CA. In light of the stated aim of the judgment – consistency, uniform practice and provision of guidelines – this is unfortunate, as it ignores one of the basic statutory requirements for a valid SMA. On the one hand, the court requested information about the approach that should be followed where the genetic material used is not that of the parties (par 10). Does this mean there will be no donation by either of the commissioning parents or the surrogate, or is the court referring just to the surrogate mother? This is especially unclear, as the court notes that the application should state where the gametes will come from, without revealing the identity of the donor (par 68). If the donor is a commissioning parent, secrecy of the donor would be irrelevant. However, if one of the commissioning parents is not a gamete-donor, the agreement would be in contravention of the CA and unlawful. On the other hand, the court acknowledges that same-sex couples cannot have children that are genetically related to them, except through the process of surrogacy (parr 16, 36).

It is submitted that the lack of clarity on this very important point is unsatisfactory and regrettable. At best it is an unfortunate omission in the judgment itself; at worst a contravention of the legislation. This would have important consequences. If neither of the commissioning parents is genetically related to the child, the agreement itself would be unlawful, and the child would legally be regarded as the child of the surrogate mother (s 297(2) CA). Her husband would be presumed to be the legal father of the child (*in casu*), unless evidence of the real biological father is presented to court (possibly one of the commissioning parents) – who then may be regarded as a holder of parental responsibilities and rights, depending on the factual situation interpreted in light of s 21 of the CA. This outcome would hardly be what the parties had anticipated when

they entered into the agreement. Clarity and specificity are exactly why the court order should be obtained before fertilisation of the surrogate mother. It is submitted that – where there is no genetic link to the commissioning parents – adoption should be the only viable alternative for the commissioning parents, although the legislative provisions in this regard should be adhered to (ch 16 CA).

In England there has not been a judgment regarding an application for a child born as a result of surrogacy, where one or both of the commissioning parents were not the genetic parent. It is submitted that if such a scenario arose before the court, the court would not make a parenting order, as it would be in contravention of the HFEA (s 54(1)). The consequences in such instances would be that the birth (surrogate) mother would be the legal mother of the child (s 33(1) HFEA), and her spouse the legal father (ss 35 & 42 HFEA) – unless there is evidence of lack of consent (*Re G (Surrogacy: Foreign Domicile)* 2008 1 FLR 1047 parr 31–32). As in South Africa, if there is no genetic link to the commissioning parents, the only option for the commissioning parents would be an adoption order in terms of the relevant legislation (Adoption and Children Act of 2002).

2 3 Payments

The second unsatisfactory aspect of the South African judgment in *Ex parte WH*, relates to the financial aspects of the SMA. As mentioned above, the starting point is that the legislation specifically prohibits commercial surrogacy, subject to three limited exceptions. *In casu,* as mentioned above, the listed payments included health and life insurance as well as a general amount of R20,000 described as "surrogate various expenditure (transport, maternity clothes etc)".

Section 301 of the CA makes provision for the following: (a) compensation for expenses that relate directly to the artificial fertilisation and pregnancy of the surrogate mother, the birth of the child and confirmation of the SMA; (b) loss of earnings suffered by the surrogate as a result of the SMA; and (c) insurance to cover the surrogate mother for anything that may lead to death or disability brought about by the pregnancy. It is submitted that (c) above would cover the health and life insurance paid *in casu*.

The problem lies with the R20,000 "surrogate various expenditure (transport, maternity clothes etc)" payment, that was unfortunately not further described. Despite all the additional warnings voiced by the court, the court itself did not interrogate the breakdown of the amount in more detail – as the court advocated should be done in future cases. This attitude is problematic, and exactly the scenario that the legislature wanted to avoid. It is submitted that in a country where there are substantial levels of poverty, a poor woman may be forced to become a surrogate for this unspecified amount of R20,000.

The use of agencies is also problematic. Can the agency be classified as "persons rendering bona fide professional medical services" that are

entitled to reasonable compensation as set out in s 301(3) of the CA? If so, the agency can charge a fee for the donated egg, just as the gynecologist could charge for the delivery of the baby.

But further to this, can the agency – as an add-on – promote surrogacy along the lines of: "We specialise in egg-donation for which you have to pay, but we will introduce you to a possible surrogate for surrogacy if you need it at no cost"? Section 303 of the CA prohibits certain acts, including that a person may not for compensation in any way make known that a person might possibly be willing to enter into an SMA. Has the agency *in casu* not done exactly that? It did make it known that the potential surrogate mother could be willing to enter into an SMA – for compensation (for the egg donation). It is submitted that this distinction is unconvincing. The provision is after all aimed at prohibiting women from advertising that they are willing to be surrogates and to prohibit agencies from advertising commercial surrogacy services. The court specifically notes that agencies facilitating the introduction of surrogate mothers to commissioning parents play an important role. The court seems to take an approach that does not adhere to the spirit of non-commercialisation in the legislation. In fact, it commended the work of the agencies. Once the connection is made with the agency, especially in the case of male couples, there is, however, nothing preventing the agency bringing commissioning parents and surrogates together – a *de facto* commercial surrogacy arrangement. This scenario may be practical, but nonsensical in light of the legislation. It is submitted that if there is evidence that the aim of the agency from the start was to link the commissioning parent with a surrogate, it would clearly amount to *fraus leges*. It is submitted that it would be naive to presume that a commercial entity aimed at making money, would introduce commissioning parents to surrogates on a permanent basis for free. If the agency is allowed to continue to do what the court sanctioned, the egg donor industry might suddenly have a whole host of surrogacy-related inquiries.

It should also be noted that any contravention of ss 301 or 303 of the CA is a criminal offence (s 305(1)(b) CA).

It is submitted that the court should have done two things regarding payment: postponed the matter until full details of the R20,000 had been submitted; and reiterated the legislative provisions regarding commercial surrogacy. The approach of the court – instead of clarifying issues – muddled clear statutory provisions.

In England, where commercial surrogacy is also prohibited, the court is given a discretion to authorise any expenditure paid outside the legislation, that is more than the reasonable expenses as prescribed by the statute – especially where it is proven to be in the interest of the welfare of the child (see discussion hereunder). This is, however, not automatic, as the court in *In the Matter of C* 2002 FLR 909 refused to make the parental order as a result of payments made in contravention of the (previous) legislation, although the current statute has a similar provision (par 7). In addition, the English legislation makes provision that

non-profit organisations are not regarded as commercial operations, and are allowed to charge a reasonable fee (s 2A-2C) SAA).

It is submitted that the judgment by the South African court, on the issues of a genetic link and payment, is unfortunate. However, if the reality is that egg donor agencies have a role to play, it is suggested that the legislation be amended to give the court a discretion regarding payment, and to make provision for the use of non-profit organisations, as is the case in England.

3 Foreign Surrogacy

McEwen ("So you're having another woman's baby: economics and exploitation in gestational surrogacy" 1999 (32) *Vanderbilt J of Transnational Law* 271 295) commented on the situation in the USA, that the "… growth in the international surrogacy industry will be spurred by poor women in developing counties who will eagerly serve as surrogates for much less than the amount typically paid …". This comment is equally valid for the situation in South Africa and England.

International surrogacy or foreign surrogacy in South Africa, refers to the use of foreign surrogate mothers by South African commissioning parents ("Wombs for Hire" *Carte Blanche* (2011-11-13) available at http://beta.mnet.co.za/carteblanche/Asticle.aspx?Id = 4460&ShowId = 1 (accessed 22 November 2011)). In this instance, a couple contracted a woman from India as a surrogate mother. The surrogates are to receive $6,500–$7,000 for being a surrogate, with a 25% bonus added should the surrogacy result in the birth of twins. The surrogacy was arranged through an agency clinic at a cost of $15,000 (including the amount given to the surrogate). There was no indication as to the genetic relationship between the commissioning parents and the child.

There is no judgment relating to a foreign SMA in South Africa. The questions that immediately arise relate to the legal parenthood of the child. As the SMA has not been confirmed by the court, (as there is no evidence that the SMA adhered to the statutory provisions), the SMA would be invalid in South Africa, and the child would be regarded as the child of the surrogate birth mother (s 297(2) CA). As mentioned above, the legal father could be either the husband/partner of the surrogate mother or the male gamete-donor, if he is one of the commissioning parents and not an anonymous donor (s 40 CA). This scenario also creates additional immigration and citizenship issues (which are disregarded for purposes of this note).

The legal issues arising from a foreign SMA, have been the subject of numerous cases in England, that all followed a particular pattern. In each of these cases, commercial surrogacy is lawful in the countries where the surrogate resided and where the surrogacy occurred: mainly India, the Ukraine, Illinois (USA) and California (USA). In each of these cases, the commissioning parents paid more money to the surrogate mother than was allowed under English legislation (HFEA). Although the country of the surrogate mother (birth country) confers parental status of the child

born as a result of an SMA, to the commissioning parents, English law does not recognise that status, as the SMA does not adhere to the legislative provisions.

In each of the English cases the court made the parental order asked for by the commissioning parents, based on three considerations: one, the *bona fides* of the couple and that there was not an attempt to defraud the authorities (*A v P* 2011 EWHC 1738 (Fam) par 33; *Re IJ (A child)(Foreign Surrogacy Agreement: Parental Order)* 2011 2 FLR 646 par 3; *Re S (Parental Order)* 2010 1 FLR 1156 par 2; *Re X and Y (Foreign Surrogacy)* 2009 2 WLR 1274 parr 2, 21); two, the fact that the payments were not so excessive as to have "overborne the will of the surrogate mother" or to be an affront to public policy (*A v P* 2011 EWHC 1738 (Fam) par 33; *Re S (Parental Order)* 2010 1 FLR 1156 p 2; *Re X and Y (Foreign Surrogacy)* 2009 2 WLR 1274 par 22); and three, the welfare of the child demanded the order because the child's welfare is regarded as the paramount consideration (*A v P* 2011 EWHC 1738 (Fam) par 16; *Re IJ (A child)(Foreign Surrogacy Agreement: Parental Order)* 2011 2 FLR 646 par 7; *Re S (Parental Order)* 2010 1 FLR 1156 1; *Re X and Y (Foreign Surrogacy)* 2009 2 WLR 1274 23; *Re L (A Child)(Parental Order: Foreign Surrogacy)* 2011 1 FLR 1523 par 9).

In all these matters the courts granted retrospective approval of the sums paid (see *inter alia Re IJ (A child)* par 6).

The court in *Re L (A Child)(Parental Order: Foreign Surrogacy)* 2011 1 FLR 1523 weighed the public policy considerations against the welfare of the child, and noted that "only in the clearest case of abuse of public policy that the court will be able to withhold an order if otherwise welfare considerations support its making" (par 10). The court continued and stated that if the desire is to control commercial surrogacy, the controls need to operate before the court process which takes place after the child had been born (*ibid*).

The court in *Re X and Y (Foreign Surrogacy)* 2009 1 FLR 733, however warned (par 29) that:

> … the present law … might encourage the less scrupulous to take advantage of the more vulnerable, unmarried surrogate mothers and to be less than frank in the arrangements that surround foreign surrogacy arrangements.

Hedley J, in the court in *S (Parental Order)*, warned that the public policy issues raised were the following (2):

> (a) ensuring that commercial surrogacy agreements were not used to circumvent childcare laws in the United Kingdom so as to result in the approval of arrangements in favour of people who would not have been approved as parents in the UK; (b) ensuring that the court was not involved in anything that appeared effectively to be payment for the buying of children overseas; and (c) ensuring that sums of money which looked modest in themselves were not in fact of such substance as to overbear the will of the surrogate.

Gamble ("Crossing the line: the legal and ethical problems of foreign surrogacy" 2009 *Reproductive BioMedicine Online* 151 151–152) argues

that the English approach to foreign surrogacy is untenable in light of the problems experienced by the parties, the importance of the welfare of the children, and the fact that the courts, in weighing up the welfare of the children, grant parental orders as a matter of course. This practice effectively ratifies the commercial surrogacy arrangement as the court *ex post facto* legalises the payments made in contravention of the legislation (See also Lovell-Hoare "Family: handle with care" 2011 *New LJ* 797 797–798; Herring "Family: whose baby is it anyway" 2011 *New LJ* 195; Bednall "Family: distant relatives" 2011 *New LJ* 1433 1433–1434).

The experiences of the English courts seem to indicate that the ban on commercial surrogacy is fraught with possible abuses, resulting in the legislation being side-stepped by the courts. This is possible, as the courts have the discretion to ratify the excess payments for the SMA retrospectively. This power is, however, not given to the South African courts. If the payments are disclosed to a court in South Africa, and these amounts violate the legislation, the South African court would have no option but to refuse confirmation of the SMA, resulting in the forced abandonment of the SMA. The South African courts cannot rely on the argument about the best interests of the child (similar to the child welfare argument of English law), as the child had not yet been conceived. From a public policy perspective, it may, however, be wise to heed the warning of Hedley J in the case of *S (Parental Order)* quoted above.

4 Conclusion

The issue of surrogacy is relatively new in South Africa, and the court in this instance, has had little opportunity to test the various provisions. It is unfortunate that the judgment in *Ex parte WH* is inadequate. There is no doubt that it is a statutory requirement that one of the commissioning parents has to be genetically related to the child. This should have been expressly stated in the judgment. With regard to the payments, the court should have heeded its own *caveat* and demanded additional information to ensure adherence to the legislation.

With regard to foreign surrogacy, the scenarios and pitfalls experienced in England should sound an early warning - that the actual practice is far removed from the expectations of the legislature.

What is required in South Africa, is either a re-drafting of the legislation, or an enforcement of the existing provisions. What should be avoided is the seeming judicial-toleration of contraventions of the legislation as a result of lack of rigor in scrutinising the court documents, or worst still, deliberately maintaining a blind-eye thereto.

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Kasper v Andrè Kemp Boerdery CC
2012 SA 20 (WKK)

Middellike aanspreeklikheid – nalatige veroorsaking van vermoënskade deur werknemer – gevolge van afwyking deur werknemer van werkgewersopdrag – toepassing van standaardtoets

1 Inleiding

Wat middellike aanspreeklikheid in die deliktereg betref, doem daar deesdae so gereeld soos klokslag gerapporteerde beslissings op. Die gordyn het so pas gesak oor die laaste toneel (mag mens van harte hoop) van die sage betreffende die middellike aanspreeklikheid van die staat vir opsetsdelikte wat polisiebeamptes in die loop van en selfs buite hul ampsverhouding pleeg (sien bv *F v Minister of Safety and Security* 2010 1 SA 606 (WKK); *Minister of Safety and Security v F* 2011 3 SA 487 (HHA); *F v Minister of Safety and Security* 2012 1 SA 536 (KH); sien Neethling en Potgieter *Litnet Akademies* Jaargang 9(2) http://www.litnet.co.za./Article/deliktuele-staatsaanspreeklikheid-weens-polisieverkragting (besoek 2012-09-09) vir die mees onlangse oorsig van akademiese literatuur in hierdie verband). In die pas vermelde "polisiegevalle" het die strydpunt deurentyd daarom gewentel of 'n polisiebeampte wat 'n onregmatige daad direk in stryd met sy ampspligte – en trouens opsetlik – gepleeg het, steeds by die begaan van die gewraakte daad in die loop van sy diens opgetree het vir doeleindes van beoordeling van sy werkgewer, die staat, se moontlike middellike aanspreeklikheid teenoor die delikslagoffer. Die onderhawige geval, waarin die moontlike middellike aanspreeklikheid van 'n werkgewer ingevolge 'n normale dienskontrak weens die optrede van sy werknemer die tema van die beslissing uitmaak, val vierkantig binne die rykwydte van die vermelde uitsprake – die enigste verskil is dat die werknemer in hierdie geval nalatig, en nie opsetlik nie, opgetree het. Dit maak die onderhawige geval in 'n mate eenvoudiger beregbaar as die pas vermelde polisiegevalle, waarin die aanwesigheid van opset aan die kant van die delikspleger-werknemer die aangeleentheid erg vertroebel het (vgl bv Loubser en Midgley *Deliktereg in Suid-Afrika* (2009) 393 oor die besondere problematiek van dusdanige gevalle) en waarin die element van staatsaanspreeklikheid ingevolge artikel 1 van die Wet op Staatsaanspreeklikheid 20 van 1957 op die koop toe te berde gebring is (wat 'n merkwaardige minderheidsuitspraak in die uitspraak van regter Froneman in die konstitusionele hof in die saak van *K v Minister of Safety and Security* 2005 6 SA 419 (CC) tot gevolg gehad het (sien 557H-575B van daardie uitspraak), waarin die tradisionele grondslag van staatsaanspreeklikheid selfs bevraagteken is).

Die algemene vereistes vir 'n werkgewer se middellike aanspreeklikheid op grond van 'n werknemer se onregmatige daad is reeds goed gevestig en sien soos volg daaruit: (a) Daar moet ten tyde van

deliksspleging 'n diensverhouding tussen die delikspleger en sy or haar werkgewer bestaan; (b) die werknemer moet 'n onregmatige daad gepleeg het; en (c) die werknemer moet tydens pleging van die delik in die loop en binne die perke van die diensbetrekking opgetree het (Loubser en Midgley 383 ev; Neethling en Potgieter *Neethling-Potgieter-Visser Deliktereg* (2010) 387-392); Van der Walt en Midgley *Principles of Delict* (2005) 36-38). Dit blyk duidelik dat die toepassing van die laaste vereiste oor die laaste paar jaar die grootste oorsaak van probleme was. Soos aanstons aangetoon sal word, bied die onderhawige feitestel 'n goeie voorbeeld van 'n sogenaamde "afwykingsgeval" ("deviation case": sien bv regter Mogoeng se verwysing na hierdie tipe geval in die konstitusionele hof se uitspraak in die *F*-saak hierbo 547H ev). Die vraag wat in sodanige geval opduik, is of die afwyking aan die kant van die delikspleger-werknemer van sodanige aard was dat hy of sy hom of haar daardeur heeltemal losgemaak het van die betrokke diensverhouding. Indien die vraag ontkennend beantwoord sou word, dui dit op die bestaan van die werkgewer se middellike aanspreeklikheid; daarenteen sal 'n bevestigende antwoord daartoe aanleiding gee dat die delikspleger sy of haar werkgewer nie aanspreeklik gestel het nie, eenvoudig omdat hy of sy dan nie in die loop van diens 'n onregmatige daad gepleeg het nie.

Ten einde die vraag of die betrokke delik binne of buite werksverband gepleeg is, te beantwoord, pas ons howe deurlopend die sogenaamde "standaardtoets" toe (sien Neethling en Potgieter *Deliktereg* 389; Loubser en Midgley 390). Die algemeen aanvaarde fundamentele formulering van hierdie toets in die uitspraak van *Minister of Police v Rabie* 1986 1 SA 117 (A) 134D-F kom daarop neer dat 'n werkgewer slegs aanspreeklikheid vir die delik van 'n werknemer kan ontkom indien die werknemer die *subjektiewe* bedoeling gehad het om uitsluitlik sy of haar eie belange na te streef en die gewraakte delik in *objektiewe* sin hoegenaamd geen verband met sy of haar werksverpligtinge vertoon nie. Wat die tweede oftewel objektiewe been van hierdie toets betref, formuleer regter Jansen dit op 'n wyse wat meer daarop toegespits is om aan te dui wanneer middellike aanspreeklikheid wel sal volg:

> On the other hand, if there is a sufficiently close link between the servant's acts for his own interests and purposes and the business of his master, the master may yet be liable. This is an objective test.

Daar sal vervolgens besin word in hoe 'n mate die uitspraak van regter Gamble die tradisionele benadering rakende die toepassing van die standaardtoets volg.

2 Feite en Uitspraak

Nadat die verweerder (V) 'n groot hoeveelheid struike en ander onkruid op 'n stuk grond wat hy vir saaidoeleindes wou benut, met 'n landbou-implement laat losskoffel het, is dit net daar gelaat om uit te droog, nadat dit in netjiese hope gepak is. Daarna moes een van sy plaaswerkers (P) dit op 'n sleepwa laai en in 'n donga gaan gooi. Hierdeur wou V twee vlieë met een slag doodslaan: van die los plantreste ontslae raak en

gronderosie teenwerk. Die dag waarop P die droë plantmateriaal na die donga wou laat aanry, was hy nie self op sy plaas teenwoordig nie. Nieteenstaande V se opdrag aan P oor die plek waar en die wyse waarop hy die vuilgoed moes weggooi, het P besluit om die weg van minste weerstand te volg. Ongeag die feit dat dit 'n uiters droë jaar in die omgewing (die Langkloof) was, daar 'n wind van ongeveer 30 km/h gewaai het en die dagtemperatuur in die omgewing van 35° was (later sou blyk dat die Suid-Afrikaanse Weerdiens vir daardie dag 'n "rooi kode"-brandgevaarwaarskuwing vir die gebied uitgereik het), het P die eerste netjies gepakte hopie struikafval aan die brand gesteek. Die feitelik onmiddellike katastrofiese gevolg was dat die hoop takke binne 'n ommesientjie in 'n geweldige konflagrasie opgevlam het en soos blits – met die geluid van 'n rammelende vragmotor (23G) – na nabygeleë plase versprei het, waar daar uiteindelik groot skade aangerig is. Drie dae later het die brand weer opgevlam en daar is verdere skade veroorsaak.

In die rondgaande hof op George het regter Saldanha bevind dat P se gewraakte handeling nalatig was (23H) en na 'n oorsig van relevante regspraak tot die volgende beslissing gekom (aangehaal deur regter Gamble 29D-E):

> The burning of plant material on a farm in such circumstances when viewed objectively cannot be regarded as a deviation of his employment to such an extent and degree (albeit to ease his own burden) that his employer is not to be held responsible for such actions. I am of the view that [P's] actions in setting the plant material alight was clearly carried out within the cause (sic) and scope of his employment with the defendant.

Die hof het dus, wat die meriete van die eiser se vordering betref, ten gunste van die eiser beslis, dog aan die verweerder verlof tot appèl toegestaan (22D-E). In appèl onderskryf die volle hof, by monde van regter Gamble (met wie regters Erasmus en Ndita saamstem), hierdie bevinding deur te beslis dat mens in die onderhawige geval te doen het met 'n "'improper mode' of the discharge of one's contract of employment" (29H), wat die geval dus kenmerk as een waar P die delik in die uitvoering van sy werksverpligtinge gepleeg het. Derhalwe misluk die verweerder se appèl. Enkele bykomende regspunte wat vir die huidige bespreking van mindere belang is, word ook ten gunste van die eiser (respondent) beslis.

3 Kritiese Evaluering

3 1 Inleiding

Die enigste kwessies waarin toepassing van deliksbeginsels uitdruklik aan die orde gekom het, sien soos volg daaruit: (a) Die vraag of P die brand nalatig gestig het; en (b) of P in die loop van sy diens opgetree het toe hy die aanvanklike brand gestig het. Die hof se afhandeling van die vrae: (c) of die verweerder aanspreeklikheid erken het; (d) of daar 'n behoorlike sessie van vorderinge aan die eiser plaasgevind het: (e) of daar 'n kousale verband tussen die volle brandskade waarvoor die eiser vorderinge ingestel het en die aanvanklike brandstigtingshandeling van P bestaan het; (f) of die vermoede van nalatigheid wat in artikel 34 van

die Nasionale Wet op Veld- en Bosbrande 101 van 1998 geskep word enigsins toepaslik is; en (g) of die verhoorhof se kondonering van die eiser se laat amendement van sy besonderhede van eis geregverdig was (22F-J, 33J ev) is vir doeleindes van hierdie bespreking irrelevant.

Die hooftema van die onderhawige hofbeslissing is beslis die onderwerp wat in (b) te berde gebring word. Alle ander aangeleenthede is van mindere belang in 'n bespreking van hierdie aard, óf vanweë die kursoriese wyse waarop die hof daarmee omgegaan het, óf omrede sodanige kwessies nie die materiële deliktereg in die besonder raak nie.

3 2 Die Nalatigheidsvraag

Die feitestel bied 'n pragtige voorbeeld, veral vir onderrigdoeleindes, vir toepassing van die voorsienbaarheidsbeen van die geykte tweeledige *diligens paterfamilias*-toets vir nalatigheid ingevolge die klassieke formulering daarvan in die *locus classicus* van *Kruger v Coetzee* 1966 2 SA 428 (A) 430E-F, waar appèlregter Holmes bepaal het dat "*culpa arises*" indien 'n redelike persoon in die skoene van die onregmatige dader die veroorsaakte nadeel redelikerwys sou voorsien het en, indien wel, redelike stappe sou doen om die nadeel te voorkom – welke voorkomende stappe die dader versuim het om te doen.

Die Holmes-formulering van die nalatigheidstoets word allerweë as gesaghebbend aanvaar en is sedert 1966 waarskynlik al in honderde uitsprake letterlik aangehaal, verduidelik en toegepas, ofskoon daar al soms suggesties vir die wysiging daarvan was (sien bv *Mukheiber v Raath* 1999 3 SA 1065 (HHA) 1077E-F; *Sea Harvest Corporation (Pty) Ltd v Duncan Dock Cold Storage (Pty) Ltd* 2000 1 SA 827 (HHA) 839I-J; Scott "The definition of negligence revisited: Three recent judgments of the Supreme Court of Appeal" 2000 *De Jure* 358), asook blatante foutiewe weergawes daarvan voorkom (waarvan die mees resente te vinde is in *Butise v City of Johannesburg* 2011 6 SA 196 (GSJ) 199F-G waar regter Mokgoatlheng verward geraak het tussen die dader en die *diligens paterfamilias* deur te vra of die *diligens paterfamilias* (in plaas van die dader) versuim het om die redelike stappe te doen wat die *diligens paterfamilias* sou gedoen het).

Daar word aan die hand gedoen dat die redelike persoon in P se skoene die brand wat ontstaan het beslis as 'n redelike moontlikheid sou voorsien het (voldoening aan die "voorsienbaarheidsbeen" van die nalatigheidstoets) en beslis ook stappe sou gedoen het om dit te voorkom – eenvoudig deur nie die vuur aan te steek, soos P in die omstandighede gedoen het nie (voldoening aan die voorkombaarheidsbeen van die toets). Die feit dat die toepassing van die geykte nalatigheidstoets in die onderhawige geval so eenvoudig is, verklaar waarskynlik waarom regter Gamble dit nie *eo nomine* toegepas het nie. Hy het dit hoogs waarskynlik in sy onderbewussyn gedoen en – wat meer is – dalk ook die skim van *res ipsa loquitur* in sy gedagtes rondgedra toe hy tot die volgende eenvoudige feitelike gevolgtrekking aangaande nalatigheid gekom het:

> To start a fire in such circumstances was inadvisable, to say the least. To do so without any fire-fighting equipment or personnel at hand was grossly negligent, if not reckless.

3 3 Middellike Aanspreeklikheid

Die hof maak ten eerste daarvan gewag dat V nóg self teenwoordig was toe die brand op sy plaas begin het, nóg enige opdrag gegee het dat die droë plantafval verbrand moet word (24B). Die beklemtoning van hierdie feite is onteenseglik om aan te dui dat dit hier nie om V se moontlike persoonlike deliktuele aanspreeklikheid gaan nie, dog om sy middellike aanspreeklikheid. Ofskoon die tweede deel van hierdie stelling by die eerste oogopslag daarop mag dui dat middellike aanspreeklikheid ook nie 'n opsie is nie – juis omdat P direk teenstrydig met sy werkgewer se duidelike opdragte opgetree het – stel regter Gamble dit sonder meer duidelik dat die fundamentele vraag daarin geleë is of P tydens sy gewraakte optrede in die loop van sy diens opgetree het (24C). Die res van sy uitspraak onder hierdie hoof wy hy aan 'n chronologiese oorsig en evaluasie van bepaalde Suid-Afrikaanse regspraak oor hierdie besondere aangeleentheid. Die impak van die relevante beslissings word vervolgens onder die loep geneem.

Die eerste gewysde wat aan die beurt kom, is *Mkize v Martens* 1914 AD 382, die eerste beslissing van die destyds nuutgestigte appèlafdeling van die hooggeregshof waarin daar uitdruklik aandag geskenk is aan 'n geval waar 'n werknemer brandskade veroorsaak het sonder dat die werkgewer 'n uitdruklike opdrag gegee het dat daar 'n vuur aangesteek moet word (sien oa Wicke *Respondeat Superior – Haftung für Verrichtungsgehilfen in römischen, römisch-holländischen, englischen und südafrikanischen Recht* (2000) 334). *In casu* het twee jong seuns wat die verweerder tydens sy transportryery bygestaan het, nie streng volgens instruksies opgetree nie. Hul werkgewer het hulle opdrag gegee om alleen met sy wa verder te trek, dan later uit te span en vir hom te wag terwyl hy op eie houtjie na verlore vee gaan soek het. Omdat hy nie dadelik nadat hulle uitgespan het, teruggekeer het nie, het hulle uit eie beweging besluit om solank hul middagete op 'n vuurtjie voor te berei. Ongelukkig was hulle onagsaam en het die vuur versprei en skade aan omliggende eiendom aangerig. Die eienaar van een van die omliggende plase was op grondslag van die werkgewer-verweerder se middellike aanspreeklikheid aanvanklik in die landdroshof suksesvol met sy skadevergoedingsvordering vir £34 12s, om daarna 'n appèl na sowel die volle provinsiale regbank as die destydse appèlafdeling van die hooggeregshof af te weer. In die hof van hoogste beroep het nie minder nie as vier swaargewigte (te wete hoofregter De Villiers, appèlregters Innes en Solomon, asook waarnemende appèlregter De Villiers) die hele gemeenregtelike posisie rakende die twispunt in besonderhede uitgepluis en uiteindelik beslis dat:

> in cooking their meal in the prevailing circumstances, the employees were 'engaged about their master's affairs and were acting in the course of their employment'

(393; *Kasper*-saak 24I; sien ook WE Scott *Middellike Aanspreeklikheid in die Suid-Afrikaanse Reg* (1983) 177-180 ev wat veel kritiek teen besondere aspekte van die beslissing uitspreek, maar hom tog met die uiteindelike uitspraak versoen).

Vervolgens verwys regter Gamble (25A-B) bloot na 'n enkele aanhaling van appèlregter Wessels in *Estate van der Byl v Swanepoel* 1927 AD 141 147 waarin die volgende kwytgeraak word (my beklemtoning):

> [T]his court in applying the general principle that a master is liable for the torts of his servant acting within the scope of his employment has taken the extended view of the master's liability to third parties than the narrower one which would confine his liability strictly to acts done within the instructions or necessarily incidental thereto.

Ofskoon regter Gamble die feite van die saak nie vermeld nie, vertoon hulle 'n besondere gelykenis met die feite in die saak onder bespreking en word hulle derhalwe bondig weergegee: Die appellant, V, die eienaar van 'n vloot taxi's, het 'n vergunning gehad om in Gordonsbaai bedrywig te wees, dog nie in die Strand nie. Hy het sy taxibestuurders uitdruklik verbied om passasiers binne die gebied van die Strand te vervoer. G, een van V se bestuurders, het in stryd met hierdie verbod wel 'n passasier vervoer en nalatig met die perdekar van S gebots. S het in die landdroshof met 'n skadevergoedingseis geslaag en V se appèlle in sowel die Kaapse hooggeregshof as in die appèlhof het misluk. Appèlregter Kotzé se gevolgtrekking (154) rakende die appellant se betoog dat G, deur verontagsaming van sy uitdruklike bevel, nie in die loop van sy diens opgetree het toe hy die gewraakte handeling gepleeg het nie, verteenwoordig 'n mooi toepassing van die algemene stelling van appèlregter Wessels wat hierbo aangehaal is:

> The private instruction to the driver of the car to confine his driving of the car to the route between the two points mentioned … forms no essential part of the main duty of the driver. It is a mere modus or manner in which he is to carry out that duty. When the driver of the car disobeyed the instruction, he was still engaged on his master's business, for he was clearly not acting for some purpose or business of his own outside the scope of his duty.

Dit blyk duidelik dat hierdie uitspraak die riglyne wat in *Mkize v Martens* neergelê is, navolg.

Vervolgens beroep die hof hom (25B-F) op die welbekende beslissing van *Feldman (Pty) Ltd v Mall* 1945 AD 733 en verklaar dat daardie beslissing:

> gave rise to the so-called 'deviation principle' in which the employee who disobeyed an employer's instructions could still attract vicarious liability for the employer
> (25C; sien ook die verwysing deur regter Mogoeng na hierdie saak as "*a pivotal common-law authority*" rakende sogenaamde "afwykingsgevalle" ("*deviation cases*") in *F v Minister of Safety and Security* 548A).

Wat hierdie soort geval onderskei van dié wat in die voorafgaande gewysdes ter sprake was, is dat dit hier daarom gaan dat die werknemer sy diensverpligtinge in die wind slaan juis met die doel om sy of haar eie

belange te bevorder (sien bv WE Scott 147 ev). Weereens word die feite van hierdie saak nie deur regter Gamble aan die orde gestel nie. Dit verskil in 'n belangrike opsig van die feite van die saak onder bespreking, waarin die werknemer nie ongehoorsaam was ten einde sy eie persoonlike belange te dien nie, dog uitsluitlik om sy werkgewer se belange te dien (weliswaar op 'n wyse wat vir die werknemer moeite moes bespaar), maar gesien teen die breë agtergrond van die ontwikkeling van middellike aanspreeklikheid in ons reg, sal 'n bondige weergawe daarvan nie onvanpas wees nie: B, F se werknemer, het in opdrag van F met F se afleweringsvoertuig pakkies gaan aflewer. Na afhandeling van sy taak moes hy die voertuig dadelik terugbesorg. Ongehoorsaam aan hierdie opdrag het B egter besluit om van sy roete af te wyk en vriende te besoek, waar hy na 'n heerlike gefuif smoordronk terugbestuur het en in 'n ongeluk betrokke geraak het, waarin 'n broodwinner deur sy nalatige optrede gedood is. Volgens die meerderheidsuitspraak het B, nie eens tydens hierdie "frolic of his own" (welke bekende terminologie van die Engelse beslissing in *Joel v Morrison* (1834) 6 C & P 501 503 afkomstig is – sien hoofregter watermeyer se bespreking 744 ev) sy werkgewer se belange geheel en al in die steek gelaat nie, aangesien hy deurentyd die beheer van sy werkgewer se voertuig namens hom behou het. Toepassing van die sogenaamde "Salmond-toets", (destyds geformuleer in die Engelse handbook *Salmond on Torts* (9de uitg) par 37 – sien 743 van hoofregter Watermeyer se uitspraak) waarop die hof hom onder andere ook uitdruklik beroep het, het in hierdie beslissing 'n belangrike rol gespeel. (Dit lui soos volg: "A master … is liable even for the acts which he has not authorised provided they are so connected with which he has authorised that they may rightly be regarded as modes – though improper modes – of doing them. … On the other hand, if the unauthorised and unlawful act of the servant is not so connected with the authorised act as to be a mode of doing it but is an independent act, the master is not responsible.) B het derhalwe nooit opgehou het om in die loop van sy diens op te tree nie – ofskoon sy optrede ver tekort geskiet het van wat mens van 'n normale, pligsgetroue werknemer sou verwag – wat verklaar waarom F middellik aanspreeklik gehou is vir die dood van die broodwinner. Regter Gamble bedien hom (25C-E) van 'n *dictum* van hoofregter Watermeyer (736), wat minder konsentreer op die "frolic of his own", as op die ongehoorsame wyse waarop die werknemer opgetree het – waardeur die *Feldman*-beslissing meer op die onderhawige tipe geval van toepassing gemaak word. Die volgende sin dra hierdie gedagte voldoende uit (25D):

> Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the 'means' – by which the end is to be attained.

Nadat regter Gamble hierdie *dictum* van hoofregter Watermeyer uit die *Feldman*-saak aangehaal het – waarin daar oudergewoonte na die werkgewer as "master" en die wergnemer as "servant" verwys word – merk hy terloops op (25F) dat die:

> rather paternalistic language used by the courts in the earlier cases is no doubt somewhat jarring in the ears of contemporary employment law practitioners.

Dat mens in hierdie opsig egter nie te fyngevoelig (oormatig polities korrek) moet wees nie, en verder ook geensins onder die hopelose wanindruk moet verkeer dat ons apartheidsverlede enigsins vir dié geykte terminologie blameer moet word nie, blyk daaruit dat die heel jongste uitgawe van die hoogaangeskrewe Engelse standaardhandboek van Rogers, te wete die agtiende uitgawe van *Winfield and Jolowicz on Tort* (2010) (948 ev), steeds afwisselend na "employer", "master, "employee" en "servant" verwys.

Die hof verwys daarna (25G-26E) na die saak van *South African Railways and Harbours v Marais* 1950 4 SA 610 (A) as voorbeeld van 'n uitspraak waarin die kern van die problematiek rakende afwykingsgevalle grondig verduidelik word. In daardie geval het die eggenote van broodwinner M die spoorweë middellik aangespreek op grond daarvan dat 'n masjinis wat 'n trein laat ontspoor het, daardeur M se dood op nalatige wyse veroorsaak het. Die ietwat bisarre feite het soos volg daar uitgesien: M, 'n treinpassasier, is deur die masjinis genooi om by hom in die lokomotief aan te sluit, waar dié twee saam met die stoker toe begin brandewyn drink het. Die feit dat die trein later ontspoor het, was direk aan die masjinis se nalatige optrede te wyte. Volgens die eiseres het die masjinis te alle tye in die loop van sy diens opgetree, ongeag die feit dat die spoorwegadministrasie in amptelike kennisgewings aan alle spoorwegpersoneel 'n streng verbod geplaas het op die vervoer van passasiers in 'n lokomotief (tensy skriftelike toestemming vooraf daarvoor verkry is – wat nie *in casu* die geval was nie). Ofskoon die afhanklike in die verhoorhof geslaag het, is die spoorweë se appèl gehandhaaf, omdat hoofregter Watermeyer soos volg 'n kunsmatig enge interpretasie aan die begrip "in die loop van diens" toegedig het (619, my beklemtoning):

> *The work entrusted to the driver was to drive the engine and he had to do it in such a manner as not to injure anyone by negligence in driving it. It was not the work of the administration to transport passengers on the engine and if the driver chose to do so he was acting outside the scope of his employment.* It cannot be said that transporting a passenger on the engine was a negligent manner of driving the engine: it had nothing to do with engine driving.

Daar kan met stelligheid verklaar word dat dit in die lig van die heel nuutste gesag hoogs onwaarskynlik is dat daar tans tot sodanige beslissing geraak sal word, nieteenstaande die feit dat die hoogste hof van appèl dit minder as tien jaar gelede nog in *Bezuidenhout NO v Eskom* 2003 3 SA 83 (HHA) met goedkeuring toegepas het (sien waarnemende appèlregter Heher se uitgebreide kritiese verwysing na kritiek teen die *Marais*-saak: 88J-89C). Roederer en Grant (2003 *Annual Survey* 297 341) moet gelyk gegee word waar hulle die benadering wat die hof in hierdie geval gevolg het, soos volg verklaar, te wete dat:

> it is not enough to show that the delict arose within the scope of his employment but that the duty breached was one that arose within the scope of the employment.

Daar word aan die hand gedoen dat die relatief karige aandag wat regter Gamble in die onderhawige geval aan die *Bezuidenhout*-saak verleen (26F-G, bloot ter opheldering van een aspek van die *Marais*-saak) ondersteuning bied aan die uitgangspunt aan die begin van hierdie paragraaf.

Ewe skielik vermeld die hof (26H) dat gevalle waar 'n werkgewer 'n uitdruklike verbod op sekere handelinge van sy werknemers geplaas het, 'n bron van talle probleme is, aangesien sodanige verbod nie noodwendig beteken dat daar geen middellike werkgewers-aanspreeklikheid sal wees indien 'n werknemer in stryd daarmee sou optree en nadeel aanrig nie. Dit val vreemd op dat hierdie stelling gemaak word juis nadat die *Marais*-saak, wat *per se* oor werknemersoptrede in stryd met 'n duidelike, skriftelike verbod gehandel het, bespreek is. Hierdie stelling vorm egter eerder die aanloop tot 'n evaluering (26I-28A) van 'n meer onlangse saak, *Mogamat v Centre Guards CC* [2004] 1 All SA 221 (C), waarin regter Griesel 'n uitspraak gelewer het wat die billikheidsgevoel bevredig. Die feite van hierdie saak was soos volg: 'n Veiligheidswag in diens van die verweerder, wat in 'n winkelsentrum aan diens was, het op nalatige wyse vir M, 'n lid van die publiek, met 'n vuurwapen verwond. Teen M se vordering op grondslag van middellike aanspreeklikheid het die verweerder aangevoer dat die wag nie in die loop van sy diens opgetree het nie, aangesien sy dienskontrak hom uitdruklik verbied het om 'n vuurwapen te dra. Nadat regter Griesel hom op die *Feldman*-saak, asook die uitspraak in *Minister of Police v Rabie* (sien afdeling 1 hierbo, waar die klassieke formulering van die standaardtoets wat in hierdie uitspraak geformuleer is, weergegee word) beroep het, het hy, voordat hy ten gunste van die eiser beslis het, die volgende onderskeid getref, wat na my mening 'n blote verklaring verskaf indien mens kop of stert sou wou uitmaak van die talle sake (waarvan maar enkeles in die onderhawige uitspraak te berde gebring word) waarin die howe geworstel het met die uitleg en toepassing van die "in die loop van diens"-vereiste (227, aangehaal deur regter Gamble 27G-H):

> The standard question remains: was the employer engaged in the affairs of the employer at the time the delict was committed? … In answering this question in the context of forbidden acts, an important distinction is drawn between a prohibition which limits the sphere of employment, on the one hand, and one which only deals with conduct within the sphere of employment, on the other. The general rule is that an employee who disregards a prohibition which limits the sphere of his employment is not acting in the course of his employment, but an employee who disregards a prohibition which only deals with his conduct within the sphere of his employment is not acting outside the course of his employment.

Hieruit sou mens eenvoudig kon aflei dat sake soos dié van *Marais* en *Bezuidenhout* ressorteer onder die eerste groep waarvan hier gewag gemaak word, terwyl *Mkize*, *Feldman*, *Rabie* en *Mogamat* – asook die

beslissing onder bespreking (sien 29F-G) – verteenwoordigend van die tweede groep is. Die vraag wat egter nie duidelik aangespreek word nie, is hoe daar presies vasgestel moet word onder watter van die twee groepe 'n bepaalde verbod val. Na my mening bestaan daar ongelukkig geen eenvoudige formule nie en is regter Griesel se klassifiseringsoefening weinig meer as die skepping van 'n struktuur wat slegs vir 'n *ex post facto*-evaluering aangewend kan word. As sodanig baat slegs die akademiese ondersoeker; die regspraktisyn wat sy kliënt met die oog op moontlike toekomstige regstappe van raad moet bedien, gaan nie werklik prakties daarby baat vind nie.

Hoogs verblydend uit 'n akademiese oogpunt, is dat regter Gamble hierdie aspek van sy uitspraak afsluit met die verklarende samevatting deur Neethling en Potgieter *Deliktereg* 390 (verbasingwekkend word daar uit die stokou vierde Engelse uitgawe uit 2002 aangehaal; gelukkig is die nuutste uitgawe op hierdie punt steeds identies) van die standaardtoets:

> Die werkgewer kan middellike aanspreeklikheid gevolglik slegs ontkom indien die werknemer nie alleen, subjektief gesien, uitsluitlik sy eie belange nagestreef het nie, maar ook, objektief beskou, hom geheel en al van sy dienskontraktuele verpligtinge losgemaak het.

Dit is veral vir studente van standaardhandboeke gerusstellend om in die regspraak bewys te vind dat hulle nie blote "*professorenreg*" uit hul handboeke leer nie, maar die ware Jakob wat deur die howe verkondig word.

Die laaste uitspraak waarna die hof verwys, is dié van die konstitusionele hof in die *K v Minister of Safety and Security* 2005 6 SA 419 (KH) (wat in die heel resente uitspraak van die konstitusionele hof uitvoerig heroorweeg en uiteindelik goedgekeur is; sien oa die nbronne waarna in afdeling 1 hierbo verwys word), waarin die werknemers se gewraakte opsetlike positiewe gedraginge hoegenaamd geen verband met hul werksverpligtinge vertoon het nie (polisiebeamptes op diens wat 'n vrou verkrag het), dog hul versuim om hul grondwetlike en ander verpligtinge as polisiebeamptes na te kom, grootliks daartoe bygedra het dat die staat middellik aanspreeklik gehou is. Vir "normale" werknemersgevalle, soos die onderhawige, lê die waarde van regter O'Regan se uitspraak in die konstitusionele hof juis in die verdiepende uitleg wat daar aan die *tweede been* van die standaardtoets (soos in *Rabie* geformuleer) gegee word. Regter Gamble haal uitvoerig in hierdie opsig uit daardie beslissing (28D-I) aan, waarvan die kern die volgende is:

> This question [nl die 'objective element', oftewel tweede been van die standaardtoets] does not raise purely factual questions, but mixed questions of fact and law. The questions of law it raises relate to what is 'sufficiently close' to give rise to vicarious liability. It is in answering this question that a court should consider the need to give effect to the spirit, purport and objects of the Bill of Rights [par [32] van *K*].
>
> …

> [The objective element] requires a court when applying it to articulate its reasoning for its conclusions as to whether there is a sufficient connection between the wrongful conduct and the employment or not. Thus developed, by the explicit recognition of the normative content of the objective stage of the test, its application should not offend the Bill of Rights or be at odds with our constitutional order [par [44] van *K*].

Die hof bevind uitdruklik dat die uitspraak van die verhoorhof ten gunste van die eiser in ooreenstemming met die uiteensetting van die konstitusionele hof in die *K*-saak is (29F). Daar word in oorweging gegee dat dit streng gesproke nie eens nodig was om 'n beroep op die *K*-beslissing te doen nie en dat aanwending van die geykte toets, soos in die *Rabie*-saak geformuleer, die knoop finaal ten gunste van die eiser (respondent) sou deurhak, aangesien die onderhawige saak nie gebuk gegaan het onder oorwegings van 'n grondwetlike aard nie. Andersyds is dit seker maar net realisties om te aanvaar dat die betrokke regsgebied van nou af oorheers sal word deur die *K*- en *F*-beslissing, waarin die hoogste hof in die land sy stem finaal oor hierdie aspek van middellike werkgewersaanspreeklikheid laat hoor het. Daar is al die afleiding gemaak dat die onlangse uitbreiding van middellike werkgewers-aanspreeklikheid, bepaaldelik in die sfeer waar grondwetlike regte deur 'n werknemer aangetas is, die posisie van 'n werkgewer soos die Suid-Afrikaanse Polisiediens laat neig na dié van 'n versekeraar vir die delikte van werknemers (Scott 2011 *TSAR* 146-147). Mens kan verwag dat hierdie tendens in die toekoms nog tot veel debat aanleiding sal gee.

3 Slot

Hierdie feitestel bied 'n voorbeeld van 'n geval waar die onregmatige optrede van 'n werknemer nie 'n uitvloeisel is van die uitdruklike of stilswyende toestemming van die werkgewer om die gewraakte aktiwiteit te verrig nie. In sodanige geval behoort die werkgewer sonder meer middellik aanspreeklik te wees (WE Scott 136). Vir hierdie tipe geval is dit dus prakties wenslik om die een of ander formule daar te stel ter vasstelling van die feit of die werknemer die eiser se gelede nadeel in die loop van sy of haar diens veroorsaak het. Soos hierbo (afdeling 3 3) verduidelik, het regter Griesel in die *Mogamat*-beslissing vir die geval waar daar 'n verbodsbepaling van die werkgewer teen die gewraakte optrede bestaan, die tweeledige onderskeid getref tussen die geval waar die verbod die terrein van die werknemer se diens beperk, en dié waar dit bloot op die werknemer se optrede tydens die uitvoering van diensverpligtinge betrekking het. Soos aangedui is daar nie veel praktiese meriete in die onderskeid te vinde nie.

Die geskiedenis van middellike aanspreeklikheidsgevalle in ons regspraak openbaar ook tot dusver geen algemeen aanvaarbare formule waarvolgens mens *ex ante* met 'n redelike mate van stelligheid sou kon vasstel of 'n werknemer-deliksspleger in die loop van sy of haar diens opgetree het nie. Al wat gedoen kan word, is om algemene tendense uit te wys – soos wel in die *Mogamat*-saak, wat in die onderhawige geval met goedkeuring aangehaal is, gedoen is – ten einde *ex post facto* te verklaar waarom daar in 'n bepaalde geval middellike aanspreeklikheid is, terwyl

daar in 'n ander geval geen sodanige aanspreeklikheid bestaan nie. 'n Goeie voorbeeld van hierdie tipe oefening vind mens in WE Scott se handboek, waar daar byvoorbeeld soos volg gesistematiseer word: (a) Waar daar werkgewerstoestemming was (136); (b) waar sodanige toestemming ontbreek (136-140); (c) optrede van werknemer in eie belang met of sonder toestemming (140 ev), welke afdeling onderverdeel word in: (i) verbode handelinge (141-144); (ii) "frolic and detour"-gevalle (144-160); (iii) die gebruik van 'n werkgewer se voertuig vir eie doeleindes (160-167); (iv) die gebruik van waskamers, ruskamers en ander geriewe (167-170); (v) die oplaai van passasiers (170-176); (vi) brandskade deur werknemers veroorsaak (176-186); (vii) reise na werk (186-190); (viii) reise vanaf werk (190-193); en, les bes, (ix) laster, belediging en aanranding deur werknemers. Veral die onderafdelings wat onder (c) vermeld word, laat dit duidelik blyk dat WE Scott se indeling nie werklik op 'n beginselgrondslag onderneem is nie, dog as 'n bruikbare uiteensetting vir die praktyk beplan is – gesien die kasuïstiese indelings vanaf veral (c)(iii) en verder.

Ofskoon daar na my oordeel geen onfeilbare towerformule bestaan waarvolgens werknemersoptredes as vallende in of buite die loop van diens tipeer kan word nie, word daar aan die hand gedoen dat die volgende breë skematiese indeling wel oorhoofs 'n *prima facie* aanduiding in hierdie opsig kan verskaf: (a) Waar die werknemer met uitdruklike of stilswyende werkgewerstoestemming optree (beslis optrede in loop van diens); (b) waar daar geen werkgewersinstruksie bestaan nie en die werknemer uitsluitlik ten doel het om sy of haar taak te verrig (normaalweg optrede in loop van diens); (c) waar die werknemer teen die instruksie van die werkgewer optree, maar steeds ten doel het om slegs sy of haar taak te verrig – soos in die onderhawige saak (normaalweg optrede in die loop van diens); (d) waar die werknemer subjektief sy of haar eie belange, sowel as die werkgewer se belange dien – 'n "frolic of his own" – gekombineer met uitoefening van ampspligte (normaalweg optrede in loop van diens); (e) waar die werknemer subjektief uitsluitlik sy of haar eie belange dien sonder dat sy of haar handeling met die besondere diensverhouding in verband gebring kan word (normaalweg optrede nie in loop van diens nie); (f) waar die werknemer subjektief uitsluitlik sy of haar eie belange dien, dog 'n verband wel met sy of haar diensbetrekking bestaan, hetsy die gewraakte optrede opsetlik, dan wel nalatig geskied het (normaalweg optrede in loop van diens). Indien hierdie kategorieë egter met 'n oop gemoed beoordeel word, blyk dit dat sorgvuldige oorweging en toepassing van die tweede stadium van die standaardtoets – soos verfyn in die beslissing van regter O'Regan in die uitspraak van die konstitusionele hof in die *K*-saak en waarna daar selfs nou as die sogenaamde "*K*-toets" verwys word (sien 550D ev van die uitspraak van die konstitusionele hof in die *F*-saak) – waarskynlik die enigste "sekere" metode is om gevalle van hierdie aard te bereg. Daar bestaan derhalwe geen eenvoudige kortpad nie.

Indien die feitestel in die onderhawige saak teen die agtergrond van ons uitgebreide regspraak en in die lig van die ontwikkelde standaardtoets beoordeel word, vind ek dit werklik merkwaardig dat hierdie geval uiteindelik tot by 'n uitspraak van 'n volle hoë hof gevorder het. Daar word ter oorweging voorgehou dat dit selfs in die lig van die "oorspronklike" standaardtoets van die pre-*K* tydperk uit die staanspoor klinkklaar was dat die appèl tot mislukking gedoem was.

Hierdie beslissing het egter besliste waarde vir die onderrigproses: delikteregstudente kan dit met vrug raadpleeg in samehang met hul handboeke, wat normaalweg nie so 'n omvattende oorsig van die regspraak bevat as wat hierin gebied word nie.

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Santam Limited v Dial Direct Limited and Joe Public (Pty) Ltd
Unreported Western Cape High Court case number 13278/11 (WCC)

Intellectual property law: Copyright and ASA implications of an insurance television commercial

1 Introduction

The dispute in *Santam Limited v Dial Direct Limited and Joe Public (Pty) Ltd* (unreported Western Cape High Court case number 13278/11), ended via a settlement, and judgment was given without any reasons being provided. Nevertheless, the facts raise a number of interesting questions, some of which are considered below. The facts were that Santam had a television advertisement produced (described in the court papers as "the Real McCoy" – available at http://www.youtube.com/watch?v=5JJWdpKATP0 (accessed 2011-12-10)). Sir Ben Kingsley is shown walking on the beach, talking about how consumers should discern between insurance companies, and in the end four look-alike men are shown. Dial Direct, a competitor of Santam, produced a commercial in response (available at http://www.alonberman.com/dial-directs-take-on-sanlams-ben-kingsley-ad (accessed 2011-12-10)). This commercial depicted an entity with a hand as the upper "body", walking on a beach, saying "yada yada"', and at the end four similar entities appear. The words "less yada yada, more ching ching" then appear on the screen. In the applicant's founding affidavit the similarities were said to be, more in particular, that both advertisements had the same backdrop; the "persons" involved had the same dress style; the

composition, grading and camera angles of the shots in the adverts are virtually identical; and similar music and lighting is used to create the same mood (par 24).

Santam brought an urgent application for relief on the following bases. Firstly, that the copyright in the *Real McCoy* advertisement, said to be a cinematograph film ("film"), was infringed by the production of the *Yada Yada* advertisement. Secondly, that the Dial Direct advertisement amounted to disparagement. Relief on both grounds was granted and an interim order made on 4 July 2011. The focus of this discussion is the application of the facts to the provisions of the Copyright Act (98 of 1978), as well as those of the Advertising Standards Authority (ASA) (available at http://www.asasa.org.za/ (accessed 2011-12-19)).

2 The Copyright Act

2 1 Protecting the *Real McCoy* Commercial *qua* Cinematograph Film

The basis of the court's order in this regard was the definition of "cinematograph film" in section 1 of the Copyright Act, as well as section 8 (exclusive rights) read with section 23(1) (primary infringement through the performance of an exclusive activity). Of specific interest is section 8(1)(a), which renders the reproduction of a film an act of infringement. Was the *Real McCoy* commercial reproduced however? *Can* one, *a priori*, reproduce a film except by mechanical means? What is the position where no physical copying takes place, but film B is, in all material respects, hardly distinguishable, for want of a better term, from film A, that was created earlier? Does this still amount to copying? It is possible, on the one hand, to focus on the result of an action, not the nature thereof. One can take as an example the situation where a poem is not copied mechanically, by way of a photocopy machine for instance, but reproduced by writing it down. The copyright is still being infringed, even though the particular format (material form to which it was reduced) such as a book, was not physically copied. It is the work that is being copied (*Norowzian v Arks Ltd* [1998] FSR 394 398). The mere recitation of a poem might even, arguably, be seen as a "reproduction" (definition of "performance" in s 1(1) read with s 6(1)(c) Copyright Act) . One can also discern, on the other hand, a work such as a sound recording, which of course consists of one or two underlying works, namely a literary and/or musical work. The crisp question is whether the reproduction of the sound recording by non-mechanical means would amount to infringement? A performance with a different singer might perhaps not amount to the reproduction of the recording. What about the situation though where, for argument's sake, all performers involved in the original recording "reproduce" the original recording, in every aural facet, in a new recording? One must bear in mind that a sound recording has a separate existence from its constituent musical and literary works, and that copyright can exist simultaneously in a literary work and a sound recording (Van der Merwe (ed) *Law of Intellectual Property in South Africa* (2011) 157). Can infringement thus take place?

This issue came to the fore in the Australian decision in *CBS Records Australia Ltd v Telmak Teleproducts (Aust)(Pty) Ltd* (9 IPR 440). It was alleged that, apart from the lyrics and music, a "substantial number of the sounds" embodied in the original soundtracks were copied, in other words, it was a "sound alike". Section 85(a) of the Australian Copyright Act (of 1968) provided that copyright in relation to a sound recording involves the exclusive right to copy the recording. Section 10(3)(c) determines that "a reference to a copy of a sound recording shall be read as a reference to a record embodying a sound recording or a substantial part of a sound recording being a record derived directly or indirectly from a record produced upon the making of a sound recording". It was held that the said provision "is referring to an actual embodiment of the very sounds on the original record however they may be copied" (444). Also, in the context of the replacement of a lost or stolen recording "[t]he right given to make a copy, notwithstanding the existence of copyright, for the purpose of replacing that sound recording in the collection must refer to a copy of the actual sounds embodied in the original sound recording and not to something produced later by other performers by way of imitation of the original" (444). In the course of its judgment, the court also referred to the position in the United States (444). Section 114(b) of the American Copyright Act (of 1976) deals with the rights of the owner of the copyright subsisting in a sound recording, and determines, amongst others, the following:

> The exclusive rights of the owner of copyright in a sound recording under clauses (1) and (2) of section 106 do not extend to the making or duplication of another sound recording that consists entirely of an independent fixation of other sounds, even though such *sounds imitate or simulate* those in the copyrighted sound recording.

That the above reasoning may apply to films , appears from the British *Norowzian* decision (*supra*). Here it was alleged that the defendant's film was purposely made to resemble the plaintiff's film, a "reshoot" containing all the essential features. It was held that it is only the copying of the film itself which would amount to infringement (400). This approach seems applicable to section 8(1)(a) of the South African Copyright Act. It would follow that a non-physical "copy" would also not infringe the right to make an adaptation of the film (s 8(1)(e) Copyright Act). Yet another implication of this approach might apply to section 8(1)(a) of the Act, which also grants the copyright holder the exclusive right to make a still photograph from the film. It seems that having regard to the physical connotation a film has in an infringement context, it would not amount to infringement to paint an exact copy of a still photograph of a film. The physical copying of the photo would however infringe the copyright in the film. In summary of the above discussion, it appears that infringement of the copyright in the film was an incorrect basis for the court's finding in the *Santam* case (*supra*).

2 2 Protecting the *Real McCoy qua* Literary Work

An alternative basis for relief might be the infringement of a literary work, the script of the *Real McCoy* advertisement being a

"cinematograph film scenario" (definition of "literary work" in s 1(1)) Copyright Act). In relation to the requirement of "originality" in section 2(1) of the Act, the Supreme Court of Appeal has held that creativity is not required, only that a work must not have been copied from an existing source, and its production must have involved a substantial (or not trivial) degree of skill, judgment or labour (*Haupt t/a Soft Copy v Brewers Marketing Intelligence (Pty) Ltd* (2006 4 SA 458 (SCA) par 35). The script can probably amount to a few paragraphs, and, in light of the approach of the *Haupt* case (*supra*), would with ease qualify as a literary work. As alluded to above, any copying of a literary work, by handwriting or mechanically, would amount to infringement. This did not occur in the *Santam* case (*supra*). What is the position thus? One does not have to resort to section 6(f) of the Act which lists the making of an adaptation of a literary work as the exclusive right of the copyright owner. There already exists a specific provision. In so far as the exclusive right to reproduce is concerned, the Act namely determines that "reproduction", in relation to a literary work includes a reproduction in the form of a record or a cinematograph film. Accordingly, in a formal sense, the reproduction of the script could amount to infringement. However, it goes without saying that all literary works are not equal, so to speak. One can compare the modest script that resulted in the *Real McCoy* "film", a film with a duration of two minutes and six seconds, with the script of a full-length film of, say, two hours. Similarly, one can envisage a script of only a few pages by renowned filmmaker Quentin Tarantino, also resulting in a film of only two minutes, but containing vivid and varied scenarios. The unavoidable conclusion is that there are levels of creativity. Whilst the Act may disregard literary quality as far as the subsistence of copyright is concerned (s 1(1) Copyright Act), one must contemplate the possibility that the level of "originality" of a script may not always cast a shadow long enough to indicate infringement. In contrast, the *physical* copying of merely a part of a film, even though based on a script with a low level of originality, could amount to infringement of the copyright in the film. By way of example, film B is a mechanical copy of film A, which simply depicts a boy kicking a ball. Such copying would amount to infringement of the copyright in film A, but the two or three sentence script resulting in film A, whilst still perhaps an "original" literary work, will not have the *gravitas* to found a claim of infringement when this (literary) work is compared to film B. The nature of a work is thus important.

To develop the above proposition further, it can be noted that in cases of alleged infringement, it is necessary to prove that the first and second works, or substantial parts thereof, are the same or similar, and that B copied A's work. When comparing the two relevant works for purposes of determining infringement, one must consider the parts of the plaintiff's work which are original (Dean *Handbook of South African Copyright Law* (1987) 1-38). This was stated by said author by drawing an analogy with the test found in trade mark law, namely whether the respective trade marks are confusingly similar (see s 34(1) Trade Marks Act 194 of 1993). An interesting question that arises is whether one

cannot perhaps expand the analogy further? All registered marks are not treated equally. Notably, ordinary trademarks enjoy protection in relation to use on the same or similar goods or services (section 34(1)(a)-(b) Trade Marks Act). However, well-known or, rather, famous marks, enjoy protection against use in relation to *any* goods or services (section 34(1)(c) Trade Marks Act). The explanation is simply that famous marks have a greater amount of commercial magnetism. Similarly, various copyrighted works which all meet the originality requirement on a *minimum* level, can, factually, have different degrees of originality.

It is useful here to have regard to the decision in *Preformed Line Products (SA) (Pty) Ltd v Hardware Assemblies (Pty) Ltd* (202 JOC (N)). Here the court approved of the approach that even though a work is original, the copyright will not be infringed unless a substantial part is used. Furthermore, *substantiality relates, principally, to the quality of what is taken, specifically, its degree of originality*. Therefore, when the ideas which have been copied are of an insubstantial or hackneyed character, even taken collectively, there will be no infringement (215H). Applying the above to the *Real McCoy* script, it appears that one may argue that the level of originality might be so low that its copying through the *Yada Yada* film would not amount to infringement. There is, indeed, a causal connection between the *Real McCoy* script and the *Yada Yada* film, but a substantial part (as described above) was not copied, only the idea embodied in the former.

3 The ASA Code

It is interesting to speculate as to what the position would have been if Santam lodged a complaint with the Advertising Standards Authority (ASA), instead of approaching the High Court? The following rules might apply.

3 1 Clause 6 (Disparagement) Clause 6 Provides as Follows:

> 6.1 Advertisements should not attack, discredit or disparage other products, services, advertisers or advertisements directly or indirectly.

A point of reference might be the decision of the ASA Appeal Committee in *Kentucky Fried Chicken International Holdings v Golden Fried Chicken (Pty) Limited, t/a Chicken Licken* (2009-03-02). Here a competitor showed, amongst others, characters having features similar to the well-known Colonel Sanders image, criticising the complainant's products on the basis that they are boring. The conclusion reached by the ASA was that the advertisement "diminishes and devalues" the well-established Kentucky Fried Chicken brand. Chicken Licken relied on its advertisement being a parody, with reference to the decision in *Laugh It Off Promotions CC v SAB International (Finance) BV t/a Sabmark International and Another* 2006 1 SA 144 (CC). This defence was however rejected as "... the right of Chicken Licken to freedom of expression must give way to its obligation not to advertise in a manner which would discredit or be disparaging of its major competitor's product or advertisements."

The *Yada Yada* advertisement implies that the commercial of Santam contains nonsense, which amounts to disparagement. An allegation of racial exploitation would also seem to do so. But in the *Laugh It Off* ruling (*supra*) a robust view was followed and it was noted by Sachs J that "There is no proof whatsoever that imputations of racist labour practices in the past by SAB would in any way affect the eagerness of present day customers to down another glass of Carling Black Label." (par 98). To be read with this *dictum*, is the important statement by Moseneke J that "It is appropriate to observe that the mere fact that the expressive act may indeed stir discomfort in some and appear to be morally reprobate or unsavoury to others is not ordinarily indicative of a breach of s 34(1)(c)." (par 55). Is this to be taken to refer only to offensive types of use? The picture that emerges for a litigant finding itself in the position of Santam is, accordingly, bleak. The position seems to be that a "mere" insulting advertisement would simply have to be tolerated. Where will the line be drawn though? One possibility might be the requirement of "substantial economic detriment" (*Laugh It Off* case (*supra*) par 56). To be sure, the principle laid down by the case is that a "negative" connotation with a mark is permitted, unless the owner can prove substantial economic harm. The question that arises now is to what extent this finding can be applied to clause 6? Is disparagement in itself enough? Can guidance be obtained from the Trade Marks Act? Infringement in terms of section 34(1)(a)-(b) of the Act, in contrast to section 34(1)(c), does not require proof of detriment (disparaging use of a mark will not easily fall within the scope of these provisions though, as such use will mostly differentiate the respective marks). The above *dictum* from the *Laugh It Off* case (*supra*) thus cannot represent the whole spectrum of trade mark infringement, only that envisaged in section 34(1)(c) of the Trade Marks Act. The Trade Marks Act accordingly does not take the matter further. Can guidance be obtained from the common law? The position also seems to be that "mere" disparagement is not enough, there must be a probability of loss (Van Heerden-Neethling *Unlawful Competition* (2008) 276). What is the solution therefore? It must be borne in mind that the ASA Code is a contract, containing rules to which the participants agreed. Consequently, "mere" disparagement might be sufficient for a contravention of clause 6, even in the absence of substantial economic detriment or probable damage to the advertising function of a trade mark. However, as mentioned by Neethling (319), if a ground of justification is present a business may be disparaged (or defamed) under the banner of the constitutional right to freedom of expression. The obvious ground of justification, in the context of the *Santam* case (*supra*), is parody. This aspect is discussed below.

3 2 Clause 8 (Exploitation of Advertising Goodwill)

Clause 8 reads as follows:

> 8.1 Advertisements may not take advantage of the advertising goodwill relating to the trade name or symbol of the product or service of another, or advertising goodwill relating to another party's advertising campaign or

> advertising property, unless the prior written permission of the proprietor of the advertising goodwill has been obtained…
>
> 8.2 Parodies, the intention of which is primarily to amuse and which are *not likely to affect adversely the advertising goodwill of another advertiser to a material extent*, will not be regarded as falling within the prohibition of paragraph 8.1 above.

It can be assumed that there will be goodwill attached to the advertising campaign of Santam. The inevitable question is that of the meaning of clause 8.2? The parody defence contained in clause 8.2 can be seen in two contexts. Firstly, the phrase "which are not likely to affect adversely the advertising goodwill of another advertiser to a material extent" is reminiscent of section 107(4) of the American Copyright Act. Section 107, delineating the fair use defence to copyright infringement, reads as follows:

> [T]he fair use of a copyrighted work … is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include-
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) …
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work.

The United States Supreme Court earlier held that the fourth factor was the most important (*Harper & Row Publishers v Nation Enterprises* 471 US 539 (1985) 566). However, in the leading case of *Campbell v Acuff-Rose Music Inc* (510 US 569 (1994) 578) the court followed the approach that the four factors must not be considered in isolation, but all must be explored, and the results weighed together, in the light of the purposes of copyright law. In the conventional situation, a copyrighted work is an end in itself. The specific item, a book for instance, is being traded in, it is made available to members of the public. Sales can fluctuate, and the process of determining market harm is relatively easier than is the case with the *Real McCoy* script. It is a once-off product, a commodity not circulated in the market. On a narrow interpretation, there can thus be no market harm. Should one always separate a work from the medium in which it is embodied though? A broader interpretation of the issue of market harm could lead one to the conclusion that the *Yada Yada* commercial would basically erode the effectiveness of the *Real McCoy* advertisement. After all, the impact of the *Real McCoy* commercial is diminished and *its* message diluted, however, there is no market harm to the *script*, there is no reasonable potential for it to become commercially valuable outside the relationship between the author of the script and Santam. It seems real however to recognise the fact that the continued flighting of the *Yada Yada* commercial would have neutralised the *Real McCoy* advertisement to a large extent, jeopardising Santam's investment in the advertisement, which amounted, according to the

founding papers, to R25 million (par 12.6). This figure cannot be laughed off. Of relevance is section 107(4) of the American Copyright Act that mentions "the effect of the use upon the potential market for or *value* of the copyrighted work." In summary, if the ASA considered the latter argument, it should have rejected the parody defence.

Guidance may also be found, secondly, in the *Laugh It Off* decision (*supra*). One consideration is that the fact that the particular use is offered as humour does not automatically render it immune from restraint (par 81). Of more significance, it was said, is whether the activity is primarily communicative in character or primarily commercial (par 86). Adopting the position that Dial Direct's expressive activity was primarily commercial, and that humour does not automatically provide a defence, it is submitted that the parody defence should also be rejected. Incidentally, it was said in the *Campbell* ruling (*supra*) (585) that "The use ... of a copyrighted work to advertise a product ... will be entitled to less indulgence …".

3 3 Rule 9 (Imitation of an Advertisement)

Rule 9 reads as follows:

> 9.1 An advertiser should not copy an existing advertisement, local or international, or any part thereof in a manner that is recognisable or clearly evokes the existing concept and which may result in the likely loss of potential advertising value. This will apply notwithstanding the fact that there is no likelihood of confusion or deception or that the existing concept has not been generally exposed.

The mere fact that the "new" advertisement evokes the existing one is not sufficient to obtain relief. For example, in the *Campbell* case (*supra*) it was said (588-589) that even the use of "the heart" of a work could be protected under parody. Also, in the *Laugh It Off* ruling (*supra*), Sachs J stated that the fact that the trademark image is central to the parody does not make it automatically or even presumptively liable for restraint (par 81). One is thus in a position where, to decide the issue, the aspect of "harm" must be considered. It seems reasonable to accept that there will be a "likely loss of potential advertising value", not only because the central theme of the *Real McCoy* advertisement was copied, but also that the *Yada Yada* commercial effectively erases, alternatively dilutes the message of the *Real McCoy* advertisement. Accordingly, the parody defence should also not apply in the context of clause 9.

4 Unlawful Competition

A full discussion of the above falls outside the scope of this note. Suffice it to say, as indicated above, and accepting the summation of the legal position by Neethling (319), that it appears that if a ground of justification is present a business may be disparaged (or defamed) as the other party may rely on the constitutional right to freedom of expression.

5 Conclusion

The *Santam* judgment (*supra*) is incorrect as far as the copyright infringement aspect is concerned. It is possible that copyright would subsist in the script of the *Real McCoy* advertisement, but that the level of creativity would probably not have been sufficient to found a claim for copyright infringement. The Dial Direct commercial could notionally lie within the scope of various clauses of the ASA Code. However, the impact of the *Laugh It Off* ruling (*supra*) makes the expression of a final view thereon problematic.

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Pienaar v Meester van die Vrystaat Hooggeregshof Bloemfontein[1]
Ongerapporteerde Vrystaat Hooggeregshof saak nommer 364/2010 (FSHC)

Pienaar v Master of the Free State High Court Bloemfontein
2011 (6) SA 338 (SCA)

Gemeenregtelike herroepingswyses – stilswyende herroeping – latere testament

1 Inleiding

Die opstel van 'n testament is 'n baie belangrike stap wat geneem word tydens 'n persoon se lewe aangesien in 'n testament bepaal word wie moet erf en hoe met die boedel gehandel gaan word by die dood van die testateur. Die verlyding van 'n testament vorm ook 'n integrale deel van boedelbeplanning. Tydens die opstel van 'n testament moet groot sorg aan die dag gelê word om te verseker dat daar geen onduidelikheid bestaan oor die bedoeling van die testateur nie. (Sien Abrie ea *Bestorwe Boedels* (2011 87).

1 Op 25 Maart 2010 dien twee aansoeke voor die Vrystaat Hooggeregshof, Bloemfontein. Beide is op die hofrol geplaas as *Nelri Pienaar & 1 Ander v Meester van die Vrystaat Hooggeregshof*, Bloemfontein en 3 Ander. Die eerste is saak 364/2010 (hier onder bespreking) maar nie gerapporteer. Die tweede is saak 365/2010 word as *Pienaar and Another v Meester van die Vrystaat Hooggeregshof, Bloemfontein and Anders* (365/2010) [2010] ZAFSHC 41 (2010-04-22) op die SAFLII webblad gevind. Laasgenoemde handel met 'n eis teen die boedel wat nie hier verder bespreek word nie.

Die verlyding van 'n testament is selde 'n eenmalige gebeurtenis aangesien persoonlike omstandighede voortdurend verander. 'n Testateur behou ook die reg om sy testament te wysig of te herroep na goeddunke. (Sien De Waal & Schoeman-Malan *Erfreg* (2008) 93). Dit is baie belangrik om gereeld 'n testament op te dateer of te hersien in omstandighede waar 'n persoon trou, skei of weer trou, 'n kind kry of aanneem, eiendom of 'n sakeonderneming koop of verkoop, lewensversekering aanpas, 'n gade deur die dood verloor en veral as die testateur besluit om te emigreer.

Indien daar besluit word om 'n bestaande testament te hersien of by veranderde omstandighede aan te pas kan dit op een van die volgende maniere gedoen word: die bestaande testament kan gewysig word (met nakoming van die formaliteitsvereistes) of die testament kan herroep word (ingevolge een van die gemeenregtelike herroepingswyses. (De Waal & Schoeman-Malan 93; Corbett ea *South African Law of Succession* (2001) 94; Schoeman *Wysiging en Herroeping van Testamente* (LLD verhandeling 1990 UP) 345).

Alhoewel daar streng formaliteitsvereistes gestel word vir die verlyding en wysiging van 'n testament (sien art 2(1)(a) en (b) van die Wet op Testamente 7 van 1953) word die herroeping en gedeeltelike herroeping van testamente nie statutêr gereël nie. Die gemeenregtelike beginsels wat geld by die herroeping van testamente word volledig bespreek in De Waal & Schoeman-Malan (93); Schoeman (1990) 345; *Marais v The Master* 1984 4 SA 288 (D) 291).

Daar word in hierdie bespreking met die gemeenregtelike reëls ten aansien van herroeping van testamente gehandel en meer spesifiek met die vraag of stilswyende herroeping deur 'n latere testament plaasgevind het aan die hand van die hooggeregshof beslissing *Pienaar en 'n Ander v Meester van die Vrystaat Hooggeregshof* (364/2010 van 22 April 2010) (hierna *Pienaar*-saak HH) en die beslissing in die hoogste hof van appèl *Pienaar and Another v Master of the Free State High Court, Bloemfontein and Others* 2011 6 SA 338 (SCA) (hierna *Pienaar* HHA).

2 Gemeenregtelike Herroepingswyses

2 1 Algemeen

Die herroeping van 'n testament kan enige tyd voor die testateur se dood plaasvind, mits die testateur testeerbevoeg is ten tyde van die herroepingshandeling. Die testateur moet dus steeds die aard en uitwerking van die herroepingshandeling kan begryp (De Waal & Schoeman-Malan 93).

Ingevolge die gemeenregtelike reëls vir die herroeping of gedeeltelike herroeping van 'n geldige testament kan 'n testament uitdruklik of stilswyend herroep word. (Corbett ea 95; De Waal & Schoeman-Malan 93). Telkens wanneer daar onduidelikheid is oor die vraag of 'n testament herroep is of nie, moet eers gekyk word of die wyse waarop die testament herroep is, gemeenregtelik erken word as 'n herroepingswyse (sien *Marais v The Master* supra). Indien nie, is daar nie

geldige herroeping nie. Die Suid-Afrikaanse regskommissie (Werkstuk 14 Projek 22 *Hersiening van die Erfreg: Wysiging en Herroeping van Testamente* (1987)) het in 'n stadium oorweging daaraan geskenk om die verskillende herroepingwyses statutêr te reël (soortgelyk aan die formaliteitsvereistes in art 2(1)(a) van die Wet op Testamente 7 van 1953), maar het uiteindelik daarteen besluit. Artikel 2A is ingevoeg in die Wet op Testamente om potensiële probleme wat met herroepingswyses kan ontstaan te ondervang (Projek 22 *Hersiening van die Erfreg* (1991)).

Gemeenregtelik kan 'n geldige testament in geheel of gedeeltelik herroep word deur 'n latere geldige verlyde dokument. Herroeping van 'n testament deur 'n latere geldige verlyde dokument kan uitdruklik of stilswyend wees.

Ander herroepingswyses, soos vernietiging, outomatiese verval deur egskeiding en adempsie, val buite die bestek van hierdie bespreking. (Sien De Waal & Schoeman-Malan 93 ev).

2 2 Herroeping deur 'n Latere Dokument

Die herroepingswyse wat in die *Pienaar*-sake (HH en HHA) ter sprake was, is herroeping deur 'n latere dokument. Vir doeleindes van die bespreking sal so 'n latere dokument 'n geldige verlyde testament, kodisil, ander dokument of huweliksvoorwaardekontrak insluit (sien die onlangse beslissing van Satchwell R in *Radebe v Sosibo NO* 2011 5 SA 51 (GSJ).

Herroeping van testamente kan soms problematies wees aangesien die herroeping deur 'n daaropvolgende testament, kodisil, huweliksvoorwaardekontrak of ander behoorlik verlyde dokument geldig is vanaf die datum van verlyding van die geldige herroepende testament of ander dokument. (Corbett ea 96; *Wood v Estate Fawcus* 1935 CPD 350). Uitvoering aan die bemakings in die testament word egter eers by die dood van die erflater gegee (Corbett ea 96).

2 2 1 Uitdruklike Herroeping deur 'n Latere Testament

Uitdruklike herroeping is die mees algemene wyse waarop testamente in die normale loop van omstandighede herroep word. Dit word bewerkstellig deur 'n behoorlik verlyde latere dokument waarin daar 'n uitdruklike herroepingsklousule vervat is (De Waal & Schoeman-Malan 95; *Oosthuizen v Die Weesheer* 1974 2 SA 434 (O) 436). Die Suid-Afrikaanse regskommissie het egter in hulle verslag (Projek 22 *Hersiening van die Erfreg* (1991) [par 3.2 – 3.8]) die gedagte dat uitdruklike herroeping deur 'n latere testament as die enigste geldige wyse waarop 'n testament herroep behoort te kan word, verwerp.

Indien daar 'n herroepingsklousule is, gee die testateur ondubbelsinnig kennis van sy voorneme om sy vorige testament geheel of gedeeltelik te herroep (De Waal & Schoeman-Malan 95). Die *animus revocandi*, oftewel die bedoeling om die testament te herroep, moet dus duidelik blyk (Corbett ea 96). Herroeping van 'n testament laat nie die herroepe testament herleef nie. (Corbett ea 110; De Waal & Schoeman-

Malan 113; *Raabe v The Master* 1971 1 SA 780 (T); *Wessels v Die Meester* [2007] HHA 17 (RSA)).

Ingevolge artikel 2A van die Wet op Testamente (7 van 1953) het die hof die bevoegdheid om, indien die hof oortuig is dat 'n testateur bedoel het om sy testament of 'n gedeelte daarvan te herroep, die herroepingsdokument te kondoneer alhoewel die testament nie op een van die gemeenregtelik erkende wyses herroep is nie (De Waal & Schoeman-Malan 100-106). Indien die hof die herroepingsdokument erken sal dit meebring dat die vorige testament ingevolge die gekondoneerde dokument geheel of gedeeltelik herroep word. Artikel 2A word nie verder hier bespreek nie. (Sien die volledige bespreking in De Waal & Schoeman-Malan 100 ev).

2 2 2 Stilswyende Herroeping deur 'n Latere Dokument/ Testament

By stilswyende herroeping van 'n testament deur 'n latere, geldig verlyde testament, is daar geen uitdruklike herroepingsklousule in die latere dokument nie. Indien die geldig verlyde vroeëre testament steeds bestaan, ontstaan die vraag na herroeping van daardie testament (De Waal & Schoeman-Malan 107; *Vimpany v Attridge* 1927 CPD 113). Sodanige vraag na herroeping is soortgelyk aan die feite in die *Pienaar*-sake (HH en HHA) waar daar 'n geldig verlyde 2006-testament en 'n latere, geldig verlyde 2007-testament met strydige bepalings was (soos in meer detail sal blyk uit die bespreking van die feite hieronder). Die herroepingsbedoeling word by stilswyende herroeping afgelei uit 'n bepaalde handeling wat die testateur uitvoer, naamlik die verlyding van 'n latere strydige testament (sien De Waal & Schoeman-Malan 106; *Ex parte Estate Adams* 1946 CPD 267 268).

Daar is gemeenregtelike bepalings oor stilswyende herroeping: Indien daar meerdere geldige testamente is by die dood van die erflater sal die testamente sover as moontlik saamgelees word (De Waal & Schoeman-Malan 107). Indien daar egter onduidelikheid is oor welke testament die laaste testament is sal *aliunde* getuienis toelaatbaar wees. In die geval waar 'n testateur meerdere testamente nagelaat het en die testamente strydige bepalings bevat, sal die latere testament geag word die geldige testament te wees wat die vroeëre testament stilswyend herroep tot die mate wat dit teenstrydig is. Dit kan dan op gedeeltelike herroeping neerkom. (Corbett ea 95; De Waal & Schoeman-Malan 107; *Vimpany v Attridge* supra; *Louw NO v Engelbrecht* 1979 4 SA 841 (O); *Bredenkamp v The Master and Bredenkamp* 1947 1 SA 388 (T); *Price v The Master* 1982 3 SA 301 (N)).

Ingevolge die gemenereg word verder bepaal dat insoverre die bepalings van die testamente onversoenbaar is, gaan die bepalings van die latere testament voorop (Voet 28 3 8; *Ex parte Estate Adams* (supra); *Louw NO v Engelbrecht* (supra)). Sien ook in die verband die *Pienaar*-sake (HH en HHA). Indien daar verskeie testamente is met teenstrydige bepalings en daar kan nie bepaal word welke een die laaste testament is nie, sal almal geag word nietig te wees omdat die bedoeling van die

testateur dan nie duidelik sal wees nie (Sien Corbett ea 93 ev; De Waal en Schoeman- Malan 106 ev).

3 Aansoek Voor Hof

3 1 Feite

Teen die agtergrond van die gemeenregtelike posisie word die feite en uitsprake van die hooggeregshof en die hoogste hof van appèl in die *Pienaar*-sake (supra), vervolgens bespreek.

In November 2006 verly F 'n testament (die 2006-testament) en ongeveer ses maande later, in Mei 2007, verly hy nog 'n testament (die 2007-testament). F sterf 'n maand na die verlyding van die 2007-testament. Die 2006-testament het 'n herroepingsklousule (uitdruklike herroeping) bevat in terme waarvan die testateur alle vorige bemakings herroep het. Die 2006-testament herroep dus alle testamente voor 2006 verly. Testamente voor 2006 verly is dus uitdruklik herroep en irrelevant vir doeleindes van hierdie bespreking. Die latere 2007-testament het geen herroepingsklousule nie, maar dit bevat wel bepalings wat strydig is met die 2006-testament (HHA par 12).

F het twee dogters, A1 en A2 (applikante) uit sy eerste huwelik gehad. F is van hulle moeder geskei. Hy het ook 'n seun, D, uit sy tweede huwelik met C gehad. Ten tyde van sy dood was hy reeds geskei van sy tweede vrou, C. Al hierdie persone is egter as begunstigdes in beide die 2006 en 2007-testamente aangewys, maar die bemakings verskil soos in die tabel hieronder aangedui.

Die 2006-testament par [5] HH en par [3] HHA	**Die 2007-testament par [6] HH en par [4] HHA**
F bemaak sy boedel soos volg: 1. A1 erf 'n legaat (eikehout eetkamerstel) en deel in die restant. 2. A2 erf 'n legaat (klavier) en deel in die restant. 3. C erf die Sanlam presoonlike portefeulje en indien sy vooroordele is verval die bemaking aan haar en vorm deel van die restant. 4. D erf 'n onroerende eiendom (nr 52 vir doeleindes van die bespreking) en 'n motor. D se bevoordelings gaan in Trust indien hy onder die ouderdom van 21 is. 5. Restant (wat die polis sou insluit indien C vooroorlede was) gaan aan A1 en A2. 6. D erf die motor. 7. Voorsiening word gemaak vir representasie. 8. Voorsiening word verder gemaak vir dat persone onder die ouderdom van 21 se bevoordelings in trust geplaas word, gevolg deur trustbepalings. 9. Voorsiening word gemaak vir die aanstelling van 'n eksekuteur.	F bemaak sy boedel soos volg: 1. A1 erf onroerende eiendom (nr 53 vir doeleindes van die bespreking) en dieselfde eikehout eetkamerstel. 2. A2 erf onroerende eiendom (nr 137 vir doeleindes van die bespreking) en dieselfde klavier. 3. C erf lewenslange vruggebruik oor die eiendom (nr 42) wat aan D bemaak word. 4. D erf dieselfde eiendom as voorheen (nr 52) onderhewig aan vruggebruik deur C en 'n kontantlegaat van R300 000.00 aan D vir skool en universiteitsopleiding. D se bevoordelings word in trust gehou tot hy 25 jaar oud is. 5. Die restant word aan A1 en A2 bemaak. 6. Die motor wat voorheen aan D bemaak is word nou aan G, 'n skoonseun van F, bemaak.

Die eerste ooglopende verskil tussen die twee testamente is die eiendomsbemakings aan A1 en A2 in die 2007-testament. Aangesien die 2007-testament ses maande na die 2006-testament verly is, word die afleiding gemaak dat hierdie twee eiendomme in die 2006-testament deel van die restant (in die 2006-testament) gevorm het. Effektiewelik sou hierdie twee eiendomme as deel van die restant ook aan A1 en A2 toegeval het maar nie individueel nie en nie as legate nie. A1 en A2 is dus beter daaraan toe as daar uitvoering gegee word aan die 2007-testament aangesien daar minder van 'n risiko verbonde is aan 'n legaat bemaking as aan 'n erfstelling (Abrie ea 71, 72).

Verder word C se bemaking in die 2007-testament verander na 'n lewenslange vruggebruik en die motor wat D ingevolge die 2006-testament sou toeval, word in die 2007-testament aan 'n ander persoon, naamlik G, wat die skoonseun van F is, bemaak. Ook die ouderdomsbeperking vir die uitkeer van D se bemaking, word in die 2007-testament verhoog na 25 jaar.

Die oorledene het ten tye van sy dood drie beleggings in sy Sanlam persoonlike portefeulje gehad (HHA par 5). Die eerste belegging is gemaak in 2002 en die erflater het sy eerste vrou (A1 en A2 se moeder) genomineer as begunstigde. Ten opsigte van die tweede belegging wat gemaak is op 2 Maart 2007 (dus na die oorledene se egskeiding van C, aangesien die egskeidingsdatum 19 Oktober 2006 is) word C, die tweede respondent aangewys as begunstigde. Die derde belegging is gemaak op 22 Maart 2007. Geen beleggingsbegunstigde is hier aangewys nie met die gevolg dat die belegging in die boedel val. Die eerste twee beleggings met die begunstigde klousules vorm nie deel van die distribusie nie (Abrie ea 156).

Die erflater het sy Sanlam persoonlike portefeulje in die 2006-testament aan C bemaak. Op daardie stadium was slegs die eerste belegging, waarvan F se eerste vrou die begunstigde was, gedoen. In die 2007-testament word daar nie uitdruklik beskik oor die Sanlam beleggingsportefeulje nie wat sou meebring dat (in soverre daar nie begunstigdes aangewys is nie) dit deel van die restant van die boedel vorm. C ontvang in die 2007-testament 'n lewenslange vruggebruik oor die eiendom wat aan haar seun D bemaak is (HHA par [5]).

3 2 Beredderingsproses

Nadat die 2007-testament en ’n afskrif van die 2006-testament aanvanklik ingehandig is by die Meester van die Hooggeregshof (Bloemfonteint) (hierna die meester) (par [7] HH) aanvaar hy die 2007-testament as die laaste geldige testament. Daarna word ook die oorspronklike 2006-testament ingedien. Na ontvangs van die oorspronklike 2006-testament versoek die meester dat die 2006- en 2007-testamente saamgelees moet word vir doeleindes van die bereddering van die boedel. Die eksekuteur, soos aangewys in die 2006-testament (later die derde respondent) stel die eerste en finale likwidasie- en distribusierekening op deur uitvoering te gee aan die 2007-testament met die gevolg dat die derde beleggingsbedrag as deel van die restant toegedeel word. (Sien HHA par 6).

C (die oorledene se tweede vrou) en D (die oorledene se seun uit sy tweede huwelik) maak beswaar teen die rekening by die meester. Die meester handhaaf die beswaar en beslis dat C wel die belegging moet erf soos bepaal in die 2006-testament (HH par 6).

3 3 Vrystaatse hooggeregshof, Bloemfontein

A1 en A2 bring daarop ’n aansoek by die hooggeregshof (HH) teen die bevinding van die meester en vra dat die hof ’n verklarende bevel maak (HH par 3) dat die bemaking van die Sanlam persoonlike portefeulje aan C in die 2006-testament, stilswyend herroep is deur die 2007-testament, die beslissing van die meester dat die Sanlam persoonlike portefeulje aan C toekom, ter syde gestel word. (HH par 1) en ’n kostebevel gemaak word teen die tweede respondente of alternatiewelik die boedel.

Namens die applikante is eerstens aangevoer dat die 2007-testament nie die 2006-testament in sy geheel herroep nie (HH par 8) en dat onder

andere die trustbepalings steeds geldig is. Ten tweede voer die applikante aan dat die omstandighede en posisie waarin die testateur hom bevind het toe hy die testament gemaak het beoordeel moet word aan die hand van die goue reël "to ascertain the wishes of the testator from the language used". Daar word in die verband gesteun op *Robertson v Robertson Executors* 1914 AD 503 en Voet 28 7 30 soos ook bespreek in *Aronson v Estate Hart and Others* (1950 1 SA 539 (A) 558) ("that the interpretation should prevail which is most likely to reflect the testator's probable intention, even at the expense of the proper meaning of the words used" 558) (HH par 9). In die derde instansie, en insoverre daar na eksterne omstandighede gekyk moet word steun die applikant op *Thesnaar v Die Meester* 1997 3 SA 169 (K), *Dison NO v Hoffman NNO* 1979 4 SA 1004 (A) en *Webb v Davies NO* 1998 2 SA 957 (HHA). Ten opsigte van stilswyende herroeping word laastens gesteun op die volgende aanhaling uit *Price v The Master* (1982 (3) SA 301 (N) 304 D):

> It is clear that in each of the wills the testatrix set about disposing of her entire estate. In a situation such as this where there are two wills, the terms of which are to some extent identical, but in the main they differ and each of which deals with the entire estate, I have great difficulty in appreciating how they can be reconciled. I have no doubt that they cannot stand together and that the later must be construed as impliedly revoking the earlier

(HH par 9). Die meester (eerste respondent) volhard met sy standpunt dat C die Sanlam portefeulje moet erf en gee redes in 'n verslag (HH par 7.4). Die meester verduidelik dat die Sanlam persoonlike portefeulje aan C bemaak is in die 2006-testament en dat die testateur nie daarna verwys het in die 2007-testament nie (HH par 5). Die meester is wel die mening toegedaan dat ten opsigte van die bemaking van die motor daar stilswyende herroeping was.

C (tweede respondent) opponeer die aansoek in die Vrystaase hooggeregshof (HH par 10) by wyse van 'n kennisgewing van 'n regspunt ("… soos bedoel in hofreël 6(5)(d)(ii) van die Eenvormige Hofreëls") en steun op die meester se verslag (sien HH par 3.1 en 3.2). Daar word aangevoer dat die 2007-testament net die wyse waarop die bates moes vererf verander het en niks herroep het nie (HH par 10); die standaard herroepingsklousule wat die 2006-testament inlei afwesig is in die 2007-testament en dat die testateur in die 2007-testament nie die 2006-testament herroep nie, hy wou dit slegs aanpas.

Die argumente van die regsverteenwoordiger van die respondente is egter onduidelik. Daar word hier gepoog om die kern van elke argument weer te gee: Namens die respondente word aangevoer dat meneer Wagener ('n finansiële adviseur) albei testamente opgestel het en dat die skema van die testateur (of eerder testament) uit die geskrifte bepaal moet word (HH par 10). Daar word verder aangevoer dat aangesien die standaard herroepingsklousule afwesig is, die afleiding gemaak kan word dat die testateur net sy testament wou aanpas en dat daar geen rede is om die afleiding te maak dat die erflater die bedoeling gehad het om die tweede respondent te onterf nie.

Die hof volg, anders as in ander sake, 'n metode van beredenering (par 11 en 12) wat lei tot die hof se bevindinge (par 13). In sy eerste punt van beredenering/bespreking van die meriete van die aansoek verwys sy edele regter Kruger na *Ex parte Estate Adams* (supra 268) en bevind (par 11) dat die testamente derhalwe saamgelees moet word en sover moontlik met mekaar versoen word. Verder word bevind dat 'n uitdruklike bemaking in ewe uitdruklike terme herroep moet word. In 'n tweede punt van beredenering in paragraaf 12 word gehandel met die vraag na wie die testament opgestel het en mnr Wagener se eedsverklaring. 'n Hele reeks negatiewe afleidings word gemaak uit die verklaring soos (i) hy (Wagener) sê *nie* hoekom die testateur die respondent wou onterf *nie*, (ii) hy sê *nie* hoekom daar *nie* 'n uitdruklike herroepingsklousule is *nie*, (iii) hy sê *nie* hy het as die opsteller van die testament *nie* bedoel dat die 2007-testament die 2006-testament outomaties herroep *nie*, (iv) hy sê *nie* dat hy *nie* geweet het 'n uitdruklike herroepingsklousule is nodig *nie*. (Sien die kritiese evaluering hieronder.)

Wat die bewyslas betref word beredeneer dat mens nie hier met die ongeldigverklaring van 'n testament te doen het nie en dat die applikante die bewyslas dra. Die moontlikheid word genoem dat die tweede respondent, deur 'n regspunt onder hofreël 6(5)(d)(iii) vir beslissing voor te lê, die bewyslas na haar oortrek.

Die deurslaggewende oorwegings vir die hof a quo word gevind in paragraaf 13 v en vi]:

> Die tweede testament verander die struktuur van die bemakings. Die 2007-testament getuig nie van 'n ommeswaai in die denke van die testateur betreffende sy bemakings nie. Oor die Volkswagen kewer het hy sy idees verander. Niks toon dat daar enige herbesinning oor die Sanlam Portefeulje was nie.

en

> Die afleiding dat die testateur beoog het om die bemaking van die Sanlam Portefeulje aan die tweede respondent implisiet te herroep in die 2007-testament, kan nie op 'n oorwig van waarskynlikhede gemaak word nie.

Die ander punte (i tot iv) wat die hof bevind handel met Wagener se getuienis en wat bevind word ontoelaatbaar te wees. Die aansoek van die applikante word deur die hooggeregshof van die hand gewys. Die applikante neem die beslissing van die hof a quo op appèl.

3 4 Hoogste Hof van Appèl

In die hoogste hof van appèl (*Pienaar* HHA) vra die appellante (A1 en A2) dieselfde regshulp as in die hof a quo. (Sien 3.2 hierbo.)

Ook die meester volstaan met sy verslag soos ingedien by die hooggeregshof. Die derde en vierde respondente (die eksekuteur, F en C se seun, D) berus hulle by die bevinding van die hof. Die tweede respondent (C) het geen opponerende verklaring geliasseer nie, maar sy opper wel sekere regsvrae vir beslissing soortgelyk aan die in die hooggeregshof (HHA par 9):

> The essence of the questions raised were whether the Master had correctly determined that the 2007 will did not revoke the 2006 will, whether the two wills should be read together and whether the bequest of the policy had been revoked by the later will.

Die hoogste hof van appél bevind (die uitspraak word gelewer deur appèlregter Theron) dat indien 'n testateur sterf en meer as een testamentêre beskikking nalaat die testamente saamgelees moet word. (HHA par 11). Die bepalings in die vroeëre testament geag word herroep te wees sover dit nie versoenbaar is met latere bemakings nie. (Sien *Ex parte Adams* (supra) en die verwysings na Van Leeuwen *Censura Forensis* 1 3 11 9; *Ex parte Scheuble* 1918 TPD 158; *Ex parte Mark's Executors* 1921 TPD 284.) (HHA par 11 n 4). Indien daar konflik is tussen die bepalings van die twee testamente, word die bepalings in die vroeëre testament stilswyend deur die latere testament herroep. (HHA par 11 n 5; *Vimpany v Attridge* 1927 CPD 113; *Bredenkamp v The Master* 1947 (1) SA 388 (T); *Gentle v Ebdens Executors* 1913 AD 119).

Die testateur het in beide testamente gehandel met die restant van die boedel. In die latere testament het hy anders beskik oor die restant as in die 2006-testament en daarin lê die teenstrydigheid. (Sien par 13 vir 'n bespreking van wat in die restant val). Die hof verwys (met verwysing na *Robertson v Robertson Executors* (supra 507), *Cuming v Cuming* 1945 AD 201 206; *Cohen NO v Roetz* 1992 1 SA 629 (A) 639A) na die goue reël by die uitleg van testamente en dat die hof uitvoering moet gee aan die bedoeling van die testateur. Die bedoeling dat die beleggingsportefeulje in die restant moet val "*can be gathered with relative certainty from the scheme as well as the terms of the later will*". (Sien ook *Ex parte Adams* (supra 268) en (HHA par 14)).

Daar was geen rede om die 2006-testament te herroep nie aangesien dit belangrike bepalings bevat het ten opsigte van die bereddering van die boedel (HHA par 15). Die appèl word derhalwe gehandhaaf en die hof maak die bevinding dat die latere testament die vroeëre testament stilswyend herroep het in soverre die bepalings van die twee testamente onversoenbaar was.

4 Kritiese Evaluering van die Uitspake

4 1 Vrystaatse Hooggeregshof

Die meester, en uiteindelik ook die hooggeregshof (Pienaar HH), fouteer in vele opsigte ten opsigte van die beredenering van die regsbeginsels en die bevindinge wat gemaak word:

> (i) Die hof se afleiding dat daar nie in die 2007-testament oor die Sanlam Beleggingsportefeulje beskik word nie is ongegrond. In die 2006-testament word die Sanlam persoonlike portefeulje (in so verre dit deel van die erflater se boedel vorm – sien klousule 1.1 van 2006-testament) aan C bemaak, met dien verstande, dat dit wel in die restant sou val indien C vooroorlede is. In die 2007-testament word die bemaking van die Sanlam persoonlike portefeulje aan C, vervang met 'n lewenslange vruggebruik oor die onroerende eiendom. Die noodwendige afleiding kan gemaak word dat die

erflater die aanvanklike bemaking van die portefeulje nou vervang met die vruggebruik.

(ii) Sy edele regter Kruger se bevinding dat "die tweede testament herroep die eerste testament nie uitdruklik nie" (par 11) en verder "die 2007-testament getuig nie van 'n ommeswaai in die denke van die testateur betreffende sy bemakings nie" (par [13 (v)]) val vreemd op en is ook nie 'n waterdigte argument nie. In die 2007-testament word daar soos in die eerste testament oor "my boedel" beskik. Daar was geen sprake van uitdruklike herroeping nie en die vraag was of daar stilswyende implisiete herroeping was (par 13 iii). Daar is 'n duidelike verskil in die bewoording en beoogde uitkomste van die twee testamente (sien die uiteensetting van die bepalings supra). Dit is verder gemeensaak dat indien daar meerdere testamente is hulle saamgelees moet word en dat die latere strydige testament voorkeur sal geniet bo die vroeëre testament. Die hooggeregshof verwys foutiewelik na *Ex parte Estate Adams* (supra) om te bevind dat daar nie 'n strydige testament is nie. Die saak verduidelik juis dat waar daar 'n ommeswaai in die denke van die erflater is, daar stilswyende herroeping sal wees aan die hand van die gemenereg.

(iii) In paragrawe 12 tot 13 word die opsteller van die testament (Wagener – wat 'n eedsverklaring geliasseer het) en sy bedoeling gekritiseer. Hierbo (par 3 2) word verwys na die negatiewe afleidings wat die hof *a quo* gemaak het oor 'wat die opsteller *nie* gesê het *nie*'. Verder bevind die hof dat die eedsverklaring, sover dit handel met dit wat die testateur sou gesê het, ontoelaatbare hoorsê getuienis is.

(iv) Handhawing van die meester se standpunt (teen die saamlees van die testamente) deur die hooggeregshof is verder ongegrond. In sy verslag sê die meester "dit is dus my submissie dat daar geen botsende bepalings in die twee testamente bestaan wat betref die Sanlam Persoonlike Portefeulje nie' en verder 'omdat die twee testamente saamgelees moet word, volg dit dat die Sanlam Persoonlike Portefeulje as 'n legaat aan die oorledene se vorige eggenote toegeken moet word' (par 4.2 van die verslag – HH par 7).

(v) By die uitleg van 'n testament is daar sekere belangrike uitlegreëls wat geld. Daar moet uitvoering gegee word aan die woorde soos gebruik in die testament (De Waal & Schoeman-Malan 232 ev).

Die uitspraak van die hooggeregshof word verder krities geëvalueer in paragraaf 5 hierna.

4 2 Bespreking van Appèlhof Beslissing

Onses insiens word die appèl tereg gehandhaaf en die volgende bevel word gemaak (par 16): Die bevel van die hooggeregshof word ter syde gestel en vervang met die volgende bevel: Dit word verklaar dat die testament van die erflater, Frederik Jacobus du Toit gedateer 28 Mei 2007, die vroeëre testament gedateer 27 November 2006 stilswyend herroep tot die mate wat dit strydig is met die laasgenoemde. Die Sanlam Persoonlike Portefeulje vorm deel van die restant van die boedel van die testateur.

Die hoogste hof van appél se bevindinge is gebaseer op die gemeenregtelike beginsels ten opsigte van stilswyende herroeping van testamente. Die hof bevind dat waar 'n testateur sterf en meer as een testamentêre beskikking nalaat, die testamente saamgelees moet word en versoek moet word dat die bepalings in die vroeëre testament herroep

geag te wees in soverre dit nie versoenbaar is met latere bemakings nie (*Ex parte Estate Adams* (supra); Van Leeuwen *Censura Forensis* 1 3 11 9; Ex parte *Scheuble* 1918 TPD 158 en *Ex parte Mark's Executors* 1921 TPD 284).

Wanneer daar egter 'n konflik is tussen die bepalings van die twee testamente, word die bepalings in die vroeëre testament deur die latere testament stilswyend herroep. (*Vimpany v Attridge* 1927 CPD 113; *Bredenkamp v The Master* 1947 1 SA 388 (T); *Gentle v Ebdens Executors* 1913 AD 119.)

Alhoewel daar nie 'n herroepingsklousule in die tweede testament is nie, bevind die hof dat dit duidelik blyk wanneer die testament gelees word dat die erflater telkens oor die hele boedel beskik (par 12). Daar word anders gehandel met die bates in die latere testament en daar word verwys na *Price v The Master* (supra 304D-E) waar sy edele regter Broom verduidelik:

> dat indien daar twee testamente is wat tot 'n sekere mate soortgelyke bepalings het, maar tog verskil, en *elkeen handel met die hele boedel*, dan kan hulle nie albei staan nie en die latere testament moet uitgelê word asof dit stilswyend die vroeëre testament herroep.
> (Eie vertaling en beklemtoning).

Die bedoeling van die erflater is duidelik. Beide testamente begin met die woorde "Ek bemaak my boedel soos volg". In die 2007-testament is daar ooglopend 'n nuwe skema. Die Sanlam persoonlike portefeulje het in 2006 uit een belegging bestaan. In 2007 het die testateur twee verdere bedrae belê.

Die hof pas die "*golden rule for the interpretation of wills*" reg toe en bevind dat die testament uitgelê moet word aan die hand van die woorde in die testament (par [14; n 9]). Die skemas van die testamente verskil en die appèlhof bevind dat die erflater sy 2006-testament wou verander. Die gevolgtrekking waartoe die hof kom, is dat daar geen rede was waarom die 2006-testament herroep moes word nie, aangesien dit belangrike bepalings vir die bereddering van die boedel bevat (par 15) het, blyk korrek te wees.

5 Samevatting

Herroeping van 'n bestaande testament deur 'n latere geldig verlyde dokument/testament is 'n gemeenregtelik erkende herroepingswyse wat nie statutêr gereël word nie. Die feite van die *Pienaar*-saak is 'n handboek-voorbeeld van stilswyende gedeeltelike herroeping deur 'n latere strydige testament. Die testament wat in 2007 deur die testateur verly is, het geen herroepingsklousule bevat nie. Dit het ook bepalings bevat wat strydig was met die testament wat in 2006 deur hom verly is

Die hooggeregshof het in sy uitspraak fouteer deur nie die gemeenregtelike beginsels wat van toepassing is wanneer daar meerdere testamente met teenstrydige bepalings is, toe te pas nie. Die hof het eerstens fouteer deur te bevind dat die latere testament nie op 'n ommeswaai in die denke van die testateur dui nie. Dit is onverstaanbaar

hoe die hof kon bevind dat die erflater die testament wou aanpas maar ter selfder tyd bevind dat die testament nie (gedeeltelik) herroep is nie. Enige verandering (wat sal insluit "aanpassings") wat die erflater wou maak aan die 2006-testament moet aan die bepalings van artikel 2(1)(b) van die Wet op Testamente 7 van 1953 voldoen. Aangesien hier 'n tweede geldig verlyde testament is, sal (indien dit nie 'n wysiging soos bedoel in art 2(1)(b) is nie) hierdie handeling deur die testateur neerkom op herroeping of gedeeltelike herroeping. (Sien Schoeman "Is daar 'n verskil tussen Wysiging en Gedeeltelike herroeping van 'n testament" 1996 *De Jure* 336).

Die hof fouteer verder deur te veel klem te lê op die bedoeling van die opsteller van die testament. Die vraag wat beantwoord moet word, is wat was die erflater se bedoeling, en nie wat was die opsteller van die testament se bedoeling nie? Die opsteller se bedoeling is irrelevant vir doeleindes van die saak. Die hof moes sy getuienis gebruik het om die vraag na die erflater se bedoeling te beantwoord en dit moet afgelei word uit die woorde in die testament. In hierdie geval is beide testamente duidelik, samehangend, skematies – elke keer word daar aan 'n spesifieke erfgenaam 'n spesifieke bate toegeken en dan met die restant gehandel. Daar kan by die uitleg van 'n testament slegs van omstandigheidsgetuienis gebruik gemaak word as daar 'n dubbelsinnigheid is. (De Waal & Schoeman-Malan 235).

Die hoogste hof van appèl het tereg die twee testamente saamgelees en bevind dat daar teenstrydige bemakings was van al die bates in die boedel en dat ander bepalings soos die oprigting van die trust en aanstelling van die eksekuteur nie herroep is nie en daarom steeds geldig is. Die afleiding word tereg deur die hof gemaak in paragraaf 13 (HHA) dat die oorledene die restant anders wou verdeel en dat hy geweet het wat presies die restant is in teenstelling met spesifieke bemakings (legate). Daar word bates uit die restant (soos dit was in 2006) geneem en daar is nuwe beleggings toegevoeg tot die portefeulje voor verlyding van die 2007-testament.

Die toepassing van die volgende gemeenregtelike beginsels soos uitgespel in Corbett ea (supra 95) blyk korrek te wees: "Whether or not two wills can be reconciled or whether or not there has been a revocation by a subsequent will is a question of construction."

Waar die hof *a quo* dus fouteer het deur te bevind dat daar nie weer in die 2007-testament oor die Sanlam persoonlike portefeulje beskik is nie, word onses insiens die korrekte benadering gevolg in die Appèlhof-saak.

Die implikasie hiervan is dat die gemeenregtelike posisie steeds geld. Hierdie uitspraak moet verwelkom word, aangesien dit die *status quo* bevestig en hopelik 'n einde sal maak aan verwarring op hierdie gebied.

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Redaksionele Beleid

1.De Jure se hoofoogmerke is die bevordering van die regswetenskap en 'n kritiese analitiese benadering tot die reg. Ten einde hierdie doelwitte te verwesenlik, word oorspronklike bydraes van 'n hoë akademiese standard daarin gepubliseer.

2.De Jure is 'n nasionale en algemene regstydskrif, waartoe akademici, lede van die regsbank en lede van die verskillende regsprofessies bydra. Geen voorkeur word aan outeurs van enige instelling verleen nie. Die besluit om 'n voorlegging te publiseer, hang daarvan af of dit aan die hoë kwaliteitsvereistes van De Jure en of daar plek vir die publikasie beskikbaar is.

3.Voorleggings in beide Afrikaans en Engels word gepubliseer en dit kan uit artikels, aantekeninge en resente regspraak en boekresensies bestaan. 'n Vertaalde title en 'n kort opsomming van ongeveer 300 woorde in Engels moet 'n artikel vergesel indien die artikel in Afrikaans geskryf is. In geval van 'n artikel in Engels, word dieselfde vereiste gestel met betrekking tot 'n Afrikaanse title en opsomming.

4.Ten einde vir publikasie oorweeg te word, moet 'n voorlegging die resultaat van oorspronklike navorsing deur die outeur(s) wees, aan die toepaslike regsbeginsels met betrekking tot die publikasie voldoen (soos outeursreg ensovoorts), iets wat voldoende nuut is tot die bestaande literatuur voeg en aan taalkundige, tegniese en styl-vereistes van publikasies in De Jure voldoen. Outeurs is persoonlik daarvoor verantwoordelik om toe te sien dat hul voorleggings aan al hierdie vereistes voldoen.

5.Voorleggings word slegs vir oorweging aanvaar op die basis dat alhoewel die redaksie die finale besluit oor publikasie maak, voorleggings aan gepaste portuur-evalueting en evaluering deur deskundiges onderwerp word, asook aan evaluering deur lede van die advieskomitee indien nodig. Die redaksie behou die reg voor om alle voorleggings wat ivr publikasie aanvaar is, ooreenkomstig die redksionele beleid te redigeer, asook om dit te verkort indien nodig.

6.Manuskripte mag slegs in elektroniese format (gebruik MS Word) via 'n e-pos aan die redkteur of deur aflewering van 'n elektroniese skyf by die kantoor van die redakteur, voorgelê word. Bykomend, moet outeurs

(a) relevante kontakbesonderhede, in besonder e-posadres(se) en telefoonnommers verskaf;

(b) waarborg dat hulle geregtig is om die volle voorlegging te publiseer en dat dit, of deel daarvan die elders gepubliseer is nie;

(c) openbaar of die voorlegging, of deel daarvan, ook aan 'n ander tydskrif vir publikasie voorgelê is; en

(d) onderneem om redelike kennis aan die redakteur te gee indien die voorlegging weens enige rede onttrek word.

7.Tensy reelings vooraf met die redakteur getref is, mag 'n artikel (insluitend voetnotas en opsomming) nie 8000 woorde oorskry nie. Ender bydraes mag nie 5500 woorde oorskry nie.

8.Tegniese riglyne vir outeurs is op die webblad van die Fakulteit Regsgeleerdheid van die Universiteit van Pretoria bekikbaar: http://www.up.ac.za/academic/law/dejure.

Editorial Policy

1.De Jure has the promotion of legal science and a critical and analytical approach to law as its main objectives and towards this aim publishes original contributions of a high academic standard.

2.De Jure is a national and general legal journal to which academics, members of the judiciary and members of the different legal professions may contribute. No preference is given to authors from any particular institution. The decision whether to publish any submission depends on whether it meets the high quality standards of De Jure and whether space is available for publication.

3.Contributions in both English and Afrikaans are published and may consist of articles, notes, discussions of recent cases and book reviews. A translated title and a brief summary of approximately 300 words in Afrikaans must accompany an article written in English. In the case of Afrikaans articles a similar requirement applies regarding an English title and summary.

4.In order to be considered for publication a contribution must be the result of original research by the author(s), meet with all applicable legal principles in respect of publication (such as copyright, etcetera), contribute something sufficiently new to the existing legal literature and conform to the linguistic, technical and stylistic requirements for publications in De Jure. Authors are personally responsible to ensure that their submissions meet all these requirements.

5.Submissions are accepted for consideration only on the basis that while the editorial committee makes the final decision on publication, submissions will be subjected to appropriate peer and expert review, as well as review by members of the advisory committee when necessary. The editorial committee further reserves the right to edit all submissions accepted for publication in terms of the editorial policy, as well as to shorten submissions if necessary.

6.Manuscripts may only be submitted in electronic format (utilising MS Word) through an e-mail to the editor or on an electronic disc delivered to the editors office. In addition, authors

(a) must supply their relevant contact particulars, especially e-mail address(es) and telephone numbers;

(b) guarantee that they are legally entitled to have the full submission published and that it, or a part of it, has not been published elsewhere before;

(c) disclose whether it, or a part of it, has been submitted to any other journal for publication; and

(d) undertake to give reasonable notice to the editor if the submission is withdrawn for any reason.

7. Unless prior arrangements have been made with the editor, an article (including footnotes and the summary) may not exceed 8000 words and other contributions may not exceed 5500 words.

8.Technical guidelines to authors are available on the website of the Faculty of Law of the University of Pretoria: http://www.up.ac.za/academic/law/dejure