

Aantekeninge/Notes

Incoterms[®] variants: greater precision or more uncertainty?

1 Introduction

The International Chamber of Commerce introduced Incoterms[®] to achieve some form of international standardisation pertaining to the delivery of goods, passage of risk, allocation of costs and customs formalities under an international contract of sale. These rules “explain a set of three-letter trade terms reflecting business-to-business practice in contracts for the sale of goods” (ICC *Incoterms*[®] 2010 (2010) 5). They are formulated with reference to the most consistent business practices and customs at a given point in time and are regularly updated to keep up with developments in international commercial practice (Foreword to *Incoterms*[®] 2010). By standardising trade term content Incoterms[®] achieve legal certainty, which means a reduction in disputes and, hence, also in transaction costs.

The latest revision, Incoterms[®] 2010, came into operation on 1 January 2011. It introduced a new classification of trade term rules by making a distinction between rules appropriate for all modes of transportation (the EXW, FCA, CPT, CIP, DAT, DAP and DDP rules), and rules aimed exclusively at maritime and waterway transport (FAS, FOB, CFR and CIF). The distinction facilitates the general use of the rules. In addition, the Guidance Note preceding each rule contains advice on the appropriateness of such rule in a particular trade context.

The standardised definitions may, however, be overridden by customs applicable at the place or port where the rule is used (*Incoterms*[®] 2010 5 par 2). Furthermore, they can be adapted by using Incoterms[®] variants. Additions to or variations of the basic term can either add to or derogate from the parties' obligations (Raty “Variants on Incoterms (Part 2)” in *Incoterms in Practice* (ed Debattista) (1995) 152-153). For example, an added obligation for the seller to load the goods on the buyer's collecting vehicle in the case of the EXW term, or to pay for costs of discharge in the case of the CIF term. Variants such as “free on board stowed” (FOBS) and “free on board stowed and trimmed” (FOBST) are also regularly used in international trade to extend the seller's delivery obligations.

Whilst Incoterms[®] merely reflect the commercial practice most commonly used, trade term variants are primarily aimed at obtaining greater precision (ICC *Incoterms* 2000 (1999) Introduction par 11; Ramberg *Guide to Incoterms*[®] 2010 (2010) 41; Raty 152-153). Incoterms[®] recognise the principle of party autonomy and therefore do not prohibit

variations of the standard definitions (*Incoterms*[®] 2010 Introduction 10). However, since there are no consistent practices in regard to the obligations contained under these variants, their content is not standardised and, hence, they create uncertainties. A lack of clarity on the extent of the parties' respective obligations and how far they deviate from the standard rule can create disputes and increase transaction costs. In the case of "EXW loaded" or "FOB stowed", for example, there is no general world-wide consensus that the addition extend the seller's obligations to include both the cost of actually loading the goods and the risk of fortuitous loss of or damage to the goods during the process of loading or stowage. Additions to the C-terms also present many problems. These terms constitute shipment contracts where the seller fulfils his delivery obligations on shipment of the goods. The addition of obligations referring to the destination could suggest that an arrival or destination term was intended. (Ramberg 42-43). In the result, the seller could be at risk until the goods actually arrive at the destination. Divergent opinions are held on whether *Incoterms*[®] variants postpone the passage of risk until the additional obligations are performed.

The official rules provide no guidance on how to deal with these variants, except to warn users against the dangers in contracting on this basis (*Incoterms*[®] 2010 Introduction 10). The question that this note addresses is whether *Incoterms*[®] variants succeed in providing greater clarity as regards the obligations of the seller and buyer, or whether they actually contribute to more uncertainty. For purposes of this analysis the discussion will be restricted to FOB and CIF variants.

2 Analysis

2.1 FOB Variants

The rationale for the FOB variants has its roots firmly in tradition. International mercantile custom determined that the seller's obligation to deliver the goods on board the vessel nominated by the buyer is fulfilled the moment that the goods cross the ship's rail. Although the ship's rail as a dividing point for risks and costs seems to be a fairly simple solution, it was never appropriate in practice. It is difficult to separate the loading costs for work performed before the point of passing the ship's rail from that performed thereafter, especially if the whole loading operation is conducted by the same company. Moreover, it is also impracticable to divide the functions and risks between the parties while the goods are swinging across the ship's rail. As Devlin J (as he then was) remarked in *Pyrene v Scindia Navigation* (1954 2 QB 402 419):

Only the most enthusiastic lawyer could watch with satisfaction the spectacle of liabilities shifting uneasily as the cargo sways at the end of a derrick across a notional perpendicular projecting from the ship's rail.

The question of the passing of risk can become especially difficult in the context of accidents during loading operations, for example if the ropes break when the cargo is lifted from the shore onto the ship. One suggestion has been that where the goods are damaged during the

loading process, the risk will be on the seller if they fall on the wharf or in the water, whereas it will be on the buyer if they fall on deck (Valiotti *Passing of Risk in international sale contracts: A comparative examination of the rules on risk under the United Nations Convention on Contracts for the International Sale of Goods (Vienna 1980) and Incoterms 2000* (LLM thesis 2003 University of Kent) text accompanying nn 207-212, 266-268). However, because it is purely fortuitous on which side of the rail the cargo drops, this suggestion does not produce a legally satisfying result. In principle, such an accident affects both the contract of sale and the contract of maritime carriage by sea. In the contract of carriage by sea, the loading operation is considered as an indivisible whole and the carrier's liability for negligence extends to all stages of that operation, irrespective of whether they occurred before or after crossing of the ship's rail (Devlin J in *Pyrene v Scindia Navigation supra* 419). However, when it comes to the contract of sale, the situation has never been clear, especially if the parties failed to stipulate this point in their contract.

Generally, there are two views. One view suggests that under an FOB contract the goods are at the buyer's risk when they pass the ship's rail so that it is irrelevant whether they reach the ship safely on completion of the loading operation. The other view suggests that the seller has fulfilled his obligations under an FOB contract only if the goods are deposited safely on board the vessel and the loading operation is completed (Murray et al *Schmitthoff's Export Trade: The Law and Practice of International Trade* (2007) par 2-013).

In practice, merchants developed trade usage variants to deal with the uncertainties that come with the ship's rail criterion in regard to the division of risks and costs. The seller's obligation to place the goods on board may be extended by a phrase added to the FOB term, for example "FOB stowed" (FOBS), "FOB trimmed" (FOBT) or "FOB stowed and trimmed" (FOBST). These variants of the FOB term are aimed at safety, stress and stability of the goods. "Stowing" means ensuring that the cargo is positioned on board the vessel in such a manner as to be safe during the proposed transit, for example to position the cargo so that it is distanced from parts of the ship that generate heat and to ensure the stability or balance of the ship. "Trimming" involves the levelling of the cargo during or shortly after loading so that it is evenly distributed in each hold and throughout the ship as a whole. This process applies to dry bulk cargoes to ensure the stability and structural strength of the vessel. In the case of some cargoes it also ensures that the holds are more efficiently filled or in others, such as in the case of coal, it can reduce the spontaneous heating of the cargo. (Reynolds "Stowing, trimming and their effects on delivery, risk and property in sales 'fobs', 'fobt' and 'fobst'" 1994 (1) *Lloyd's Maritime and Commercial LQ* 119 119-120; Klotz & Barrett *International Sales Agreements: An Annotated Drafting and Negotiating Guide* (1998) 71-72 nn 22, 23). In practice, these duties are performed by stevedores and the costs are included in the freight that is to be paid by the buyer. However, expenses for stowing and trimming can be shifted between buyer and seller. FOBS, FOBT or FOBST indicate

that such costs are shifted to the seller (Reynolds 1994 *Lloyd's Maritime and Commercial LQ* 121; Griffin Day & Griffin *The Law of International Trade* (2003) 58).

Apart from allocating costs, the question is whether these variations have any effect on what constitutes delivery under the contract of sale or on the moment that risk passes from the seller to the buyer. There is no clarity as to whether a seller will only effect delivery once loading, stowing and/or trimming, as the case may be, have been completed, and whether the passage of risk is postponed until these additional obligations are performed.

One opinion is that a resort to trade term variants does not change the point of delivery or the point where risk transfers to the buyer. It only serves to specify the costs for securing and trimming the goods at the port of loading (Raty 155, 161). In the case of an FOB sale where the buyer contracts for carriage, or the seller contracts on behalf of the buyer, the seller is unable to control stowage and trimming as there is no contract between him and those responsible for these obligations. One of the principles on which trade terms are based is that the obligations are kept together, namely that whoever has the custody of the cargo also bears the risk. Deviations of this basic rule distort the obligations and should only take place for special reasons. Moreover, policy considerations of international trade also dictate that risk should follow control (Mikkola "Variants on Incoterms (Part 1)" in *Incoterms in Practice* (ed Debattista) (1995) 144 147-148). Once the goods have crossed the ship's rail and are placed on board the vessel, control is relinquished to the buyer, who will then be protected by marine insurance or the contract of carriage. On strength of these considerations, the stowing and trimming obligations should merely entail an additional financial obligation on the part of the seller and not influence the point of delivery or the passing of risk.

The other view is that the seller's delivery obligation is not met until the stowing and trimming obligations have been completed. According to this view, the law should recognise that parties who insert such clauses into their sale contracts intend to provide for both a physical and a financial obligation, and that their intentions would be frustrated if the term was merely regarded as allocating a financial obligation. Delivery and the passing of risk should therefore be delayed until the stowing and trimming have been completed (Reynolds 1994 *Lloyd's Maritime and Commercial LQ* 121-123, 124-127). (For similar, but qualified, opinions see Klotz & Barrett 72; Treitel "Overseas Sales" in *Benjamin's Sale of Goods* (ed Guest) (2006) par 20-090.) Support for this view is found in an American case, *Minex Shipping v International Trading Company of Virginia and SS Eirini* (1969 303 F Supp 205). In this case, the sales contract provided that bags of cement would be shipped "FOB stowed Polish port". The cement became contaminated during the voyage as a result of soy beans falling on the cement bags. The buyer maintained that the contract term required the seller to sweep, clean and dry the holds of

the vessel. However, the court held that the “stowed” term did not impose these duties upon the seller. The seller was merely obligated to place the cement in the holds “in an orderly, compact manner” and “in such a manner as to protect the goods from friction, bruising, or damage from leakage”. The court held that once the cargo was properly stowed, the risk of damage passed to the buyer.

But what is the position after the latest revision of Incoterms[®]? In pursuance of modern commercial practice, the ICC’s standardised FOB rule now omits all references to the ship’s rail and states that delivery takes place when the goods are placed “on board the vessel nominated by the buyer at the named port of shipment or by procuring the goods so delivered” (FOB *Incoterms*[®] 2010 article A4; *Incoterms*[®] 2010 Introduction 7). Ambiguities and arbitrary results that have accompanied the notion of the ship’s rail are now removed. Because Incoterms[®] link the passing of risk to the point of delivery, this means that the goods are delivered and the risk passes when they are placed on board the vessel nominated by the buyer (FOB *Incoterms*[®] 2010 article A5). But when are the goods considered to be delivered on board the vessel? The ICC advises that in the absence of port customs and practices between the parties, the default position would be when the goods are “first at rest on deck” in an undamaged condition (see answer to Question 17 “Incoterms Rules Q&A September 2011: ICC general guidance on selected questions on the Incoterms[®] 2010 rules” available online at <http://www.iccwbo.org/Products-and-Services/Trade-facilitation/Incoterms-2010/Q-A-September-2011> (accessed 2012-08-30)). Would that then mean that under FOBS and FOBST delivery takes place and risk passes only when the goods are safely stowed and trimmed? The ICC seems to support this view. In reply to a question on when risk transfers under “stowed and secured/trimmed” variants, the ICC states that the costs for the buyer would “most likely be understood to begin only when the goods were safely stowed/secured/trimmed as set out in the contract and passage of risk would likewise be delayed” (see answer to Question 18 “Incoterms Rules Q&A September 2011 ICC” supra). Port customs should, however, also be taken into consideration when interpreting these variants.

However, this is not necessarily the final word on this issue. The ICC points out that their views “are intended as general interpretive guidance only, and not as authoritative opinion” (Introduction to “Incoterms Rules Q&A September 2011” supra). Furthermore, they choose to state their answer to this particular question in a cautious and general manner. The phrase “most likely to be understood”, which introduces the reply, leaves room for other interpretations. This means that there is still no certainty on the legal position concerning delivery and risk under FOB variants. For these reasons, it is important that parties clarify whether the seller is to undertake the responsibilities for loading and stowage operations at his cost or whether this also entails an assumption of risk until the loading and stowage obligations are completed, for example, by adding a phrase such as “FOB stowed, costs and risks in connection with loading on the seller”. (See also the second part of the reply to Question 18

“Incoterms Rules Q&A September 2011” supra where the ICC strongly encourages parties to clarify their intentions.)

2.2 CIF Variants

Because the CIF rule may not be suitable for all situations, merchants have sought to tailor the standard-form CIF term to fit specific commercial conditions. For example, if the goods are sold “CIF landed”, the unloading costs including lighterage and wharfage charges are borne by the seller or are included into the sea freight which he has to pay. Another example is “CIF undischarged” or “CIF free out” where the intention is that the seller’s obligations are limited to those that are to be effected inside the ship’s hold in the port of discharge. Costs for unloading should be borne by the buyer (Raty 156; Ramberg 43).

Deviations from the standard-form CIF contract are common where oil is transported by sea. A common modification is the “out-turn” or “landed weight” clause which relieves the buyer from having to pay on the basis of the quantities shown on the bill of lading as is normally the case under CIF. These practices evolved because of the potential for losses during the transportation of oil. A distinction must be made between transportation loss and marine loss. Transportation loss refers to loss in the volume of oil during transit due to evaporation, sludge, accumulation, spillage or measurement error, whilst marine loss covers loss caused by fortuitous events such as vessel destruction, bad weather or war (Lightburn & Nienaber “Out-turn clauses in cif contracts in the oil trade” 1987 *Lloyd’s Maritime and Commercial LQ* 177 178).

There is agreement that unavoidable transportation loss is shifted to the seller. However, when it comes to other types of risks, there are conflicting views on their apportionment. According to one view, other types of risk pass on shipment as is the case under the normal CIF rule. The out-turn clause is therefore only a price adjustment mechanism with regard to unavoidable transit losses, leaving the risk of marine loss on the buyer. A more far-reaching approach is that an out-turn clause moves the time at which the risk of loss, whether marine or transportation loss, transfers to the buyer from the point of shipment to the port of destination. This view eliminates the need to distinguish between marine loss and transportation loss (Lightburn & Nienaber 178-179).

Scholars such as Lightburn and Nienaber (179) prefer to deal with the issue as under any normal CIF contract. It is their argument that by choosing CIF as the applicable contract basis, a range of obligations is made part of the contract without the use of express words to that effect. No compelling reasons exist for justifying an exception to the normal CIF rules in the case of an out-turn clause. Traditionally out-turn clauses are a short-hand way of dealing with unavoidable transportation loss as opposed to marine loss. A party seeking to overcome the accepted meaning of an out-turn clause in a particular case should therefore carry the burden of showing that the parties intended to disregard the legal

consequences that would normally flow from its use. If parties wish to deviate from the standard meaning, they should provide for that through express contractual terms (Lightburn & Nienaber 179).

Before the 2004 revision of article 2 of the American Uniform Commercial Code (UCC), section 2-321 UCC reflected a policy decision that the out-turn variant should be construed so as to involve the least possible deviation from the CIF basis, while at the same time taking into account the inevitability of transportation losses. This section dealt with CIF or C&F “Net Landed Weights”, “Payment on Arrival”, and “Warranty of Condition on Arrival” terms. The Official Comment to the section stated that they are:

[v]ariations of the C.I.F. contract which have evolved in mercantile practice but are entirely consistent with the basic C.I.F. pattern. Subsections (1) and (2), which provide for a shift to the seller of the risk of quality and weight deterioration during shipment, are designed to conform the law to the best mercantile practice and usage without changing the legal consequences of the C.I.F. or C.&F. term as to the passing of marine risks to the buyer at the point of shipment.

The UCC drew a clear distinction between “CIF out-turn” contracts and “CIF no arrival-no sale” contracts. Section 2-234 UCC left the risk of loss in “no arrival-no sale” contracts explicitly on the seller. In the case of “CIF out-turn” contracts, section 2-321 split the risk, by placing the risk of necessary loss (“the risk of quality and weight deterioration during shipment”) on the seller, and the risk of extraordinary loss (“marine risks”) on the buyer. The case law shows that this position correlates with mercantile expectations (Lightburn & Nienaber 180-181). It is therefore likely that the legal position will remain the same even after the provisions have been repealed from the official Code.

There is no statutory provision in the English Sale of Goods Act on CIF out-turn clauses. Although CIF variants may create the impression that the contract becomes a destination or arrival contract, the case law indicates that that they do not affect the character of the contract as a true CIF contract (Murray *et al* par 2-037). In a number of cases where the amount payable was made dependable on the quantity of goods which actually arrive, the courts have held that clauses which shift the risk of loss from the buyer to the seller do not necessarily change the essence of a CIF contract and that it merely entails that the seller should allow a price adjustment after the goods have landed (*Denbigh Cowan & Co v Atcherley* 1921 90 LJKB 836; *The Gabbiano* 1940 P 166 174; *Oleificio Zucchi SpA v Northern Sale Ltd* 1965 2 Lloyd’s Rep 496 518; *Oricon Waren & Handels GmbH v Intergraan NV* 1967 2 Lloyd’s Rep 83 94).

In *Soon Hua Heng Co Ltd v Glencore* (1996 1 Lloyd’s Rep 398), the court held that out-turn or similar clauses are normally intended to relate only to the determination of the price. If the goods are lost and the buyer has already paid an estimated price on tender of the documents, he is not entitled to an adjustment, unless he can prove that the shipped goods

were less in quantity or quality than he has paid for. The out-turn clause should therefore only apply to cases where the weight difference arises from ordinary circumstances. Such a clause does not entail that the whole of the risk is to remain on the seller until actual delivery, since such an interpretation would mean that the contract would no longer be a CIF contract (Treitel par 19-006).

These opinions should be supported inasmuch as they underline the need to preserve the basic character of the CIF term. Variations of the CIF term should not affect the character of CIF as a shipping term where delivery and the passing of risk take place on shipment. An additional obligation does not necessarily, nor automatically, change the risk distribution under Incoterms® (Lightburn & Nienaber 184-185). Risks do not follow from functions and costs. That is evidenced by the C-terms where the seller has to pay for the freight to the indicated destination but does not have to assume the risk of loss of or damage to the goods after dispatch from the country of export (Ramberg 41). CIF variations should therefore merely affect the financial obligations of the parties. If the parties intend to shift the point of delivery or the passing of risk for accidental disasters, they should conclude their contract on the basis of an arrival term.

The out-turn variant, in particular, is intended to cover a range of limited events which would otherwise have fallen under the ambit of the risk rule and should not be used to move the point of delivery or the general point where risk transfers from the seller to the buyer. Moreover, in the case of an out-turn clause, the variation is primarily aimed at a specific type of trade, namely the oil trade, where it reflects the commercial practice of dealing with unavoidable transportation losses. These types of risk have been extensively analysed by industry specialists and are clearly recognised in the oil trade (Lightburn & Nienaber 179). If the parties want to broaden the scope of the out-turn clause they should choose another term or they should state their intention clearly.

3 Conclusion

The discussion and analysis of the FOB and CIF variants have shown that, even though they originate from a need to simplify matters, Incoterms® variants create more uncertainty than clarity (Mikkola 145). Because there is no consistent practice as regards trade term variants, the ICC could not yet standardise their meaning, and thus the organisation cautions against their use (*Incoterms® 2010* Introduction 10).

The ICC has endeavoured to formulate guidelines for interpreting the “stowed” and “stowed and trimmed” variants. However, these formulations do not function as an authoritative opinion and are only intended as general interpretive guidelines. Moreover, because they are expressed in uncertain terms, they leave room for differing interpretations. For these reasons, parties should clarify whether the

seller intends to merely undertake the responsibilities for loading and stowage operations at his cost or whether this also entails an assumption of risk until the loading and stowage obligations are completed.

An additional obligation does not necessarily, nor automatically, change the point that risk passes under Incoterms[®]. The analysis showed that expressions such as “CIF landed” or “CIF out-turn weights” are normally not interpreted as changing the nature of the CIF term. The word “landed” usually refers to the costs of discharge, and “out-turn weights” merely signifies that the buyer should pay according to the weight ascertained after discharge so that condensation of the goods during their transport should, for instance, be taken into account when fixing the price. However, this does not mean that the seller bears the risk of fortuitous loss of or damage to the goods during their carriage.

Because Incoterms[®] do not standardise commonly used trade term variants, parties who use them contract at their own peril. Incoterms[®] leave it either to trade usage in a particular trade sector, to port customs or to the parties themselves to clarify the content of such deviations. If parties wish to deviate from the standard meaning of Incoterms[®] they should avoid misunderstandings by using express contractual terms which explain their intention clearly (*Incoterms[®] 2010* Introduction 10). If, for example, the parties merely intend to clarify the extent to which the seller should pay for certain costs without moving the point where risk passes, this should be said explicitly by adding the phrase “discharging costs until placing the goods on the quay for seller’s account”, or “stowed and trimmed but at the buyer’s risk after the goods have been placed on board” to their contract (Ramberg 42-43).

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Postscript

This note is based on research conducted towards the author’s unpublished doctoral dissertation Coetzee *INCOTERMS as a form of standardisation in international sales law: the interplay between mercantile custom and substantive sales law with specific reference to the passing of risk* (LLD dissertation 2010 US).

The winner takes it all! Reflections on the world anti-doping code and the possible criminalisation of doping in sport

"I got caught in Seoul and lost my gold medal. I'm here to try to tell people ... it's wrong, to cheat, not to take drugs, they're bad for your health"

(Ben Johnson, 1989 as quoted in Nafziger "International Sports Law" (2004) 147).

1 Introduction

The use of performance enhancing substances in sport has been a phenomenon of time immemorial. The use of performance enhancing substances in order to ensure the best possible results in sports is commonly referred to as doping (see Law "Doping Regulation" in *International Encyclopaedia of Laws* (eds Blanpain & Colucci) (2009) 129-143; Gardiner *et al Sports Law* 3rd ed (2007) 269-291; Gardiner *et al Sports Law* 4th ed (2012) 364-392; Anderson *Modern Sports Law - a textbook* (2010) 113-140; Nafziger *supra* 147-164; O'Leary *Drugs and Doping in Sport - Socio-legal perspectives* (2001) 1-57; 125-146; David *A guide to the World Anti-doping Code - fight for the spirit of Sport* (2008) 1-52; Ioannidis "The application of criminal Law on doping infractions and the 'whereabouts information rule - state regulation v self-regulation" (2010) *ISLJ* at www.buckingham.ac.uk/wp-content/uploads/2010/11/ioannidis.pdf (accessed 2012-12-04)).

Doping in sports is currently a highly debated and controversial issue impacting severely on the spirit of sport and the principle of fair play. The question as to how doping in sport can be effectively combatted poses a major challenge to sport. Recently, doping in sport once again received much attention in the highly controversial Lance Armstrong debacle. Armstrong was banned for life by the United States Anti-doping Agency (USADA) and stripped of his seven Tour de France titles. USADA's comprehensive report pertaining to Armstrong revealed that Armstrong was the centre of a sophisticated doping programme. The report disclosed that Armstrong used, *inter alia*, testosterone and blood transfusions and in addition expected his teammates to likewise take part in using prohibited substances (see "USADA: Armstrong 'cheated' way to top" at <http://uk.eurosport.yahoo.com/news/usada-report-proves-armstrong-used-drugs-15393> (accessed 2012-12-04)). USADA's report further provided that Armstrong and his teammates used a range of performance enhancing substances ranging from erythropoietin (EPO), blood transfusions, testosterone, corticosteroids, human growth hormone and masking agents (USADA *supra*). Armstrong subsequently admitted to the use of performance enhancing substances which included, *inter alia*, blood transfusions (See for example the article by

Okuro "Lance Armstrong's doping admission: Cheap confession in a reality of TV culture" *Washington Post* 2013-01-28).

Armstrong's case is yet one more example of doping in sport by a highly acclaimed sport star. A question which inevitably arises upon reading the plethora of newspaper coverage pertaining to Armstrong is whether the sanctioning of doping in sport is by any means effective. Upon closer scrutiny of doping in sport, it becomes apparent that doping encompasses a much wider playing field than merely the athlete doping him or herself. USADA's report on Armstrong confirmed that the doping regime in Armstrong's case comprised of a team of individuals all participating in the doping process.

The World Anti-Doping Agency (WADA) was established on 10 November 1999 with the aims of promoting, coordinating and monitoring the combat against doping in sport (David 1). WADA later sought to develop a standardised approach in respect of the detection and punishment of doping and introduced the World Anti-Doping Code (Code) which was unanimously adopted in March 2003 (David 2-3). The code has been adopted by signatories around the world. The striking reality is, however, that despite WADA's efforts to combat doping and despite the Code, the practice of doping in sport is not decreasing. On the contrary, it seems to be escalating.

The latter inadvertently leads to the question as to whether current anti-doping mechanisms are effective in combatting the phenomenon. It is clear that a more robust approach to doping is essential in eliminating this phenomenon. The question which inevitably falls to be assessed is whether doping in sport should not be criminalised. Ioannidis (1-2) eloquently espouse the following opinion:

It is submitted that the invocation of such powerful machinery, such as the criminal law, needs to be made with reference to sufficient reasons that can justify its application in the area of doping in sport.

In this contribution I will assess the practice of doping in sport against the backdrop of the instruments currently operative in support of combatting the practice of doping. I will, in addition, address the question as to whether doping should be criminalised.

2 Doping Defined

From the outset it is to be noted that there is no general legal definition of doping. Doping is defined in terms of article 1 of the Code as the occurrence of at least one of the eight anti-doping violations as provided for in article 2 of the Code (Anderson 122). The eight anti-doping violations can be summarised as follows (David 100-131):

- (i) Presence of a prohibited substance or its metabolites or markers in an athlete's bodily specimen (article 2.1);

- (ii) Use or attempted use of a prohibited substance or a prohibited method (article 2.2);
- (iii) Refusing, or failing without compelling justification, to submit to sample collection after notification as authorised in applicable anti-doping rules or otherwise evading sample collection (article 2.3);
- (iv) Violation of applicable requirements regarding athlete availability for out of competition testing including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules (article 2.4);
- (v) Tampering or attempting to tamper with any part of doping control (article 2.5);
- (vi) Possession of prohibited substances and methods (article 2.6);
- (vii) Trafficking in any prohibited substance or prohibited method (article 2.7);
- (viii) Administration or attempted administration of a prohibited substance or prohibited method to any athlete, or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation (article 2.8).

An in depth analysis of each of the abovementioned violations falls beyond the scope of this contribution. It is important to note that articles 1 and 2 of the Code should be read in conjunction with the preamble to the Code which provides that anti-doping rules equate, in a quasi-contractual fashion to sports competition rules regulating the conditions under which the particular sport is played and athletes are deemed to accept and be bound to the rules as a condition of participation (Anderson 122-123). Articles 1 and 2 should, in addition be read within the context of article 21.1.1 of the Code which provides that athletes are deemed to have constructive notice of their specific roles and responsibilities and “to be knowledgeable of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code” (Anderson 123).

3 Code – Fighting for the Spirit of Fair Play in Sport?

For purposes of the current contribution, emphasis will be placed on the Code as the most prominent international code dealing with the prohibition on doping.

As stated above, the Code was the initiative of the WADA and was the product of a long drafting process. The Code was first adopted in 2003 and became effective in 2004 (Gardiner *et al* 371). The current revised Code came into operation on 1 January 2009 (Gardiner *et al* 371). The main objective of the code was to produce international consensus with the organisations which are signatories to it (David 2). The code contains “core” articles dealing mainly with doping violations, the proof of such violations and sanctions (David 2). The practical implication of the acceptance of the code is that both national and international level athletes who are bound by the code can be subjected to both testing for the presence of prohibited substances in their bodily samples in and out

of competition and to investigation pertaining to various violations which do not necessarily require adverse analytical outcomes or the analysis of bodily samples (David 4). In addition, other individuals who are bound by the code such as athlete support personnel, who may commit anti-doping violations such as trafficking or administering prohibited substances, can also be assessed by anti-doping organisations at both national and international level (David 4). The organisations which can accept the code as signatories save for WADA itself, include the International Olympic Committee, national Olympic committees, the International Paralympic Committee, national Paralympic committees, international federations, national anti-doping organisations and major event organisations (David 3; Gardiner *et al* 371). Neither governments nor national sporting organisations may be signatories to the code (David 3). National sporting organisations are brought within the ambit of the code by means of agreements made by signatories which adopt the code such as international federations and national anti-doping organisations (David 3).

The Code contains a set of regulations that strive to promote consistency in the application of anti-doping regulation (Gardiner *et al* 372). Gardiner *et al* (372) elucidates the problematic aspect of implementing the code as follows:

One of the major obstacles for any body intent on implementing a rule for the whole world is that it must encompass a diverse range of religious, legal and social perspectives. The imposition at a global level of blood testing, for example would meet with resistance on the grounds of religion and might prove counter-productive for where resistance to the global regime has arisen at a local level, whether as a result of cultural, social or legal disparities, this has had the effect of creating a situation of imbalance, where athletes are either subject to much stricter controls or effectively allowed to act irrespective of the rules 'imposed by the global regulator' (see also Boyes "The International Olympic Committee, transnational doping policy and globalisation" in O'Leary (ed) "Drugs and Doping in Sport" (2000) 178).

The preamble to the Code strives to preserve the essence and intrinsic value of the "spirit of sport" (Gardiner *et al* 372). In terms of the "spirit of sport" various values come into play such as ethics, fair play, honesty, health, excellence in performance, fun and joy, teamwork, dedication and commitment, respect for rules and laws, respect for self and other participants and courage (Gardiner *et al* 372).

Articles 1 and 2 of the Code contain the anti-doping rule violations under the code. The various violations have already been noted under paragraph 2 above. Article 3.1 of the Code provides that the burden of establishing that an anti-doping violation was committed falls on the anti-doping organisation alleging the violation (Gardiner *et al* 377; David 133). The standard of proof will entail whether the particular anti-doping organisation sufficiently established an anti-doping violation to the satisfaction of the hearing panel. The standard of proof is more than a mere balance of probability but less than proof beyond reasonable doubt

(Gardiner *et al* 377). Where the code specifically places the burden of proof upon an athlete or other person alleged to have committed an anti-doping rule violation, the burden of proof is a balance of probabilities except in terms of articles 10.4 and 10.6 where the athlete is required to meet a higher burden of proof (Gardiner *et al* 377; Anderson 128-129; David 133-134). Article 3.2.1 of the Code, in addition, contains a rebuttable presumption that the accredited laboratory conducted the particular assessment correctly (Gardiner *et al* 378).

Article 8 to the Code specifically pertains to the right to a fair hearing. The hearing process should address whether an anti-doping rule violation was indeed committed and, if so, the consequences thereof (Gardiner *et al* 378; David 189).

The hearing process should, *inter alia*, respect the values of a timely hearing; fair and impartial panel; the right to legal representation; the right to be timely informed of the alleged violation and the right to a written and reasoned decision with specific reference to an explanation of the reasons for any period of ineligibility (Gardiner *et al* 378). WADA provides for its own list of banned substances providing not only for a list of substance outlawed, but also their metabolites and 'related' substances (Gardiner *et al* 381). Article 4.3 provides for the following:

- 4.3.1 A substance or method shall be considered for inclusion on the Prohibited List if WADA determines that the substance or method meets any two of the following criteria:
 - 4.3.1.1 Medical or other scientific evidence, pharmacological effect or experience that the substance or method, alone or in combination with other substances or methods has the potential to enhance or enhances sport performance;
 - 4.3.1.2 Medical or other scientific evidence, pharmacological effect or experience that the use of the substance or method represents an actual or potential health risk to the Athlete;
 - 4.3.1.3 WADA's determination that the use of the substance or method violates the spirit of sport described in the Introduction to the Code.
- 4.3.2 A substance or method shall also be included on the Prohibited List if WADA determines there is medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to mask the Use of other Prohibited Substances or Prohibited Methods.

The sanctioning of doping violations is provided for in articles 9 and 10 of the Code. One of the fundamental cornerstones of the Code is premised on the principle of strict liability. The latter doctrine entails that an athlete is strictly liable for the prohibited substance detected in, and revealed by, the testing of their bodily specimen and that an anti-doping violation is committed regardless of whether the athlete intentionally or unintentionally used a prohibited substance or was negligent in respect thereof (Anderson 123; Gardiner *et al* 387; David 169). Article 9 of the Code reaffirms the position of strict liability in respect of anti-doping

violation and provides that an anti-doping transgression in respect of an in-competition test automatically leads to the disqualification of the individual result in the competition in conjunction with all the resultant consequences such as the forfeiture of any medals or prizes won (David 169). In terms of Article 10, fixed periods of ineligibility are provided for each anti-doping rule violation as well as subsequent violations (David 170). The most important sanctioning provisions can be summarised as follows (Gardiner *et al* 388-389; David 172):

- (i) Article 10.2 – the periods of ineligibility for a contravention of article 2.1 (as discussed above in paragraph 2), article 2.2 or 2.6 are for a first violation two years and second violation, life.
- (ii) Article 10.3.1 – for violations of article 2.3 or article 2.5 the period shall be two years for a first violation.
- (iii) Article 10.3.2 – for violations of articles 2.7 or 2.8, the period of ineligibility shall be four years for a first violation up to a maximum of life.
- (iv) Article 10.3.3 – for violations of article 2.4 the period of ineligibility shall be a minimum of one year and a maximum of two years.
- (v) Article 10.5.3 – provides that an anti-doping organisation may, prior to a final appellate decision under article 13, suspend a part of a period of ineligibility imposed in an individual case where the athlete or other person provided substantial assistance to an anti-doping organisation or professional disciplinary body which results in the discovery or establishing of an anti-doping rule violation by another person. The extent to which the period of ineligibility may be suspended will depend on the seriousness of the anti-doping rule violation committed as well as the significance of the substantial assistance provided by the athlete or person concerned.
- (vi) Article 10.5.4 – provides that a period of ineligibility may be reduced where an athlete or other person voluntarily admits to the commission of an anti-doping rule violation.
- (vii) Article 10.10.1 – provides that no athlete or other person who has been declared ineligible may, during the period ineligibility, participate in any capacity in a competition or activity initiated or organized by any signatory, signatory's member organization or a club or other member organization.

In addition article 11 provides for sanctions to be imposed on teams who participate in team sports (Gardiner *et al* 390).

It is clear from the abovementioned summary of the most important principles of Code, that the code provides a well-structured and coordinated regulatory framework aimed at combatting doping in sport and to enhance the spirit of sport. The question which inevitably arises is whether the sanctions imposed upon athletes or other persons who committed anti-doping violations are effective in combatting the phenomenon. Should doping in sport not also be criminalised at a national level? Despite movements in some countries to criminalise doping, doping in sport to a large extent is not regarded as a criminal

offence (see for example Halgreen “The Danish Elite Sports Act” 2005 *ISLR* 74-75; Gardiner *et al* 391).

4 Doping Regulation in South Africa – a Synopsis

In South Africa it is notable that the South African Institute for Drug free Sport (SAIDS) was established in terms of the South African Institute for Drug-free Sport Act 14 of 1997 (hereinafter “the Act”). In terms of the Act, the SAIDS “fulfils an independent testing, education and research function relating to drugs and doping in sport” (Louw 129). In 2006 the Act was amended in order to provide for the enactment of matters contained in the Code and established a doping control programme in line with the code (Louw 129). The definition of doping in terms of the Act corresponds with the definition contained in the Code as well as the anti-doping violations and the burden of proof (Louw 133-136). South Africa is also a signatory to the Code. The SAIDS, in addition, provides for its own unique list of prohibited substances (see www.drugfreesport.org.za (accessed 2012-12-04)).

5 A Move Towards the Criminalisation of Doping in Sport

Despite the immense value of the Code and its regulatory framework in respect of doping, the practice of doping in sport is still a reality. The deterrent effect of the Code in respect of doping remains questionable. A related anomaly pertains to the potential criminal liability of not only the athlete him- or herself, but also of the coaches, medical doctors and others involved in the doping process. Principles of criminal liability which come to fore are *inter alia*, the crime of fraud, aiding and abetting as well as the doctrine of participation. Ioannidis correctly opines that establishing a criminal framework for doping in sport achieves those elements which are currently missing from the sporting governing bodies’ regulatory disposition which are certainty, consistency and transparency (Ioannidis (2010) *supra* 15). Ioannidis (15) in addition note that the purpose of a criminal framework:

[i]s not retribution for an injustice, but the protection of athlete’s health, as well as the protection of the social and cultural role of sports, the “fair play” principle, the genuineness of the results and the general and specific prevention.

Criminal sanctions should also pertain to those who encourage and assist an athlete with the use of the prohibited substances. Athletes may perhaps not have the necessary medical knowledge to assess the dosage or the most appropriate time for receiving these substances and will inadvertently turn to doctors or coaches for advice which in turn exacerbates the need for criminalising the conduct of such persons assisting the athlete (Ioannidis (2010) *supra* 16). The regulatory framework currently in place will in all probability be effective in the case of individual transgressions due to the principle of strict liability prevailing, but will be less successful in unveiling the organised crime of doping underlying the system of doping in sport. The main advantages

of criminalising doping are certainty, independent and transparent proceedings and consistence (see “Making doping criminal – the Austrian ‘sports fraud’ provision and general thoughts on criminalizing doping” in *Sport and the Law* (2010) at <http://www.law.ed.ac.uk/courses/blogs/sportsandthelaw/blogentry.aspx?blogentryref=8> (accessed 2012-12-04) hereinafter referred to as “Making doping criminal”). It could be argued that the aspect of prevention within the criminal context renders the criminalisation of doping more effective to the system currently run by the various sporting governing bodies (Making doping criminal 1). Criminalising doping will, in addition, have the added benefit of public prosecution which entails that doping transgressions will be investigated more effectively due to enhanced legal backing and manpower of the prosecuting authority (Making doping criminal 2). Ioannidis states that doping has an inherent element of cheating and correctly asserts that any manifestation of cheating has the potential to undermine and infringe upon sport (24).

It is submitted that doping in sport should be criminalised in terms of legislation specifically providing for the offence of doping within sport and prescribing penalties for the various violations. Such legislation should obviously be drafted with due regard to the Code and as such the legislation could complement the Code.

Ioannidis (24) mentions the following in respect of the enactment of legislation criminalising doping in sport:

The adoption of such legislation is intended to reflect the important role sport plays in society and in citizen’s lives. In this legislation, the parties involved will accept responsibility for safeguarding the public interest in sport, which encompasses education, professionalism and the ideals of fairness, justice and equality. The legislation will also have to take into account the enormous public interest in sport as a means of promoting health and the vital role that sport plays in improving the health of a nation.

It is submitted that doping impacts severely on the whole principle of sport. It remains an undeniable fact that sport plays an integral and vital role in society. Doping destroys the spirit and purport of sport and will inadvertently result in society losing interest in sport due to the fundamental principle of fair play being diminished. Despite the vital role of WADA in the ultimate struggle against doping, doping violations in sport remains an inescapable reality. It is submitted that a more robust approach is needed to penultimately combat this phenomenon and to protect the reputation and image of sport. The latter can be achieved by means of a statutory framework in terms of which athletes or other persons, who have committed anti-doping transgressions will be prosecuted in terms of the criminal law regime and if found guilty, sentenced according to prescribed statutory sentences. Such legislation should in addition, punish doping on all levels as it is clear that doping is more often than not, a multi-layered programme stretching beyond merely the athlete doping him or herself.

6 Conclusion

Fair play in sport means fairness in all respects. Athletes gaining unfair advantages to other athletes due to the use of performance enhancing substances, need to be prosecuted and punished appropriately as such conduct not only destroys the spirit of sport, but could also prove detrimental to the athlete as well. In addition, all other parties involved in the process of doping should be punished for their involvement in the doping process. A possible way forward would be to criminalise doping in terms of a statutory framework punishing doping on all levels. Legislation criminalising doping can be effectively applied in conjunction with the Code. Public awareness of doping should also be increased with specific reference to the serious implications of doping in modern sport. The detrimental side effects of performance enhancing substances should also be constantly emphasised in an ultimate hope of convincing participants not to use these substances thereby protecting the true spirit of sport and fair play.

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Regulated flexibility and the Labour Relations Amendment Bill of 2012

1 Introduction

Contrary to statements by Zwelinzima Vavi, general secretary of the Congress of South African Trade Unions (Cosatu), the South African government is not ignoring a decision adopted at the African National Congress' (ANC's) 2007 national congress in Polokwane to ban "labour brokers" (s 198 Labour Relations Act 66 of 1995 (LRA) refers to "labour brokers" as "temporary employment services" (TES); Anon "Labour Brokers" *Leadership* 19 March 2012 available at <http://bit.ly/13Wyg1v> (accessed 2013-5-25)). This is confirmed by the ANC's 2009 election manifesto which called for laws that would "ensure decent work . . . introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices" ("2009 ANC Election Manifesto" available at <http://bit.ly/gP5gKl> (accessed 2013-5-25); Benjamin "To regulate or to ban? Controversies over temporary employment services in South Africa and Namibia" in *Labour Law Into the Future: Essays in Honour of D'Arcy du Toit* (eds Malherbe & Sloth-Nielsen) (2012) 189 202). A lot of water has flowed into the sea since these political commitments were made, but all

indications are that the amendments are not far from their implementation.

A package of labour law amendment bills has been published during 2012 and the different pieces of legislation will be implemented in a staggered fashion. The Basic Conditions of Employment Amendment Bill [B15-2012] (BCEAB) is currently before the national assembly, the Labour Relations Amendment Bill [B16-2012] (LRAB) is presently being discussed before a parliamentary portfolio committee and the draft Employment Equity Amendment Bill and a draft Employment Services Bill are yet to be tabled in parliament. Indications are that the BCEAB will be signed into law before the end of 2013 and the LRAB will follow shortly thereafter (Botes & Sishi "Proposed amendments to labour legislation: Where are we?" *SA Labour Guide* available at <http://bit.ly/11upyrX> (accessed 2013-5-24).

Although a number of issues are covered in the amendments, the package is dominated by the suggested regulation of non-standard forms of work, which include TESs, fixed-term contracts and part-time employees. Three aspects are covered in this contribution: Firstly, what is South Africa's overarching labour policy framework and to what extent have these policies been influenced by the International Labour Organisation's (ILO's) "decent work" agenda and the European Union's (EU's) so-called "flexicurity" policies? Secondly, what are the content and salient characteristics of the suggested amendments pertaining to non-standard work? Thirdly, concluding remarks are made with the emphasis on the question whether an appropriate balance has been struck between the protection of workers' rights and the provision of flexibility in the labour market.

2 Decent Work, Flexicurity and Regulated Flexibility

South Africa was one of the founding members of the ILO in 1919. However, after being criticised for its racial policies during the 1950s and 1960s, South Africa resigned from the ILO in 1964 and was only readmitted shortly before the first democratic elections in 1994 (Van Niekerk *et al Law@work* (2012) 19–20). The ILO sets international norms in the labour environment and prevents unfair competition amongst member states. The implementation of protective measures, such as the principle of equal pay for men and women and social security benefits during the time of unemployment, increases labour costs. One of the purposes of the ILO is to prevent a "race to the bottom" whereby member states may contemplate a reduction of social protection with the view of becoming a more attractive investment proposition (Hepple *Global Laws and Global Trade* (2005) 13).

The ILO functioned optimally in the previous century during an era in which there was a joint commitment towards full employment and providing social security to workers (Hepple 33). This was an era during which the standard eight-hours-per-day, five-day-a-week, indefinite

contract of employment formed the basis of employment relationships. The conventions of the ILO were predominantly rights based providing protection to the weaker party in the employment relationship. Economic and business factors were not the main concern in policy formulation, but rather techniques to provide protection to workers. During the 1950s and the 1960s the eminent labour law scholar, Sir Otto Kahn-Freund, described the key function of labour law as being “a countervailing force” to counter the imbalance in the power relationship between employers and employees (Davies & Freedland *Kahn-Freund’s labour and the law* (1983) 18; Le Roux “The purpose of labour law: can it turn green?” in *Labour Law Into the Future: Essays in Honour of D’Arcy du Toit* (eds Malherbe & Sloth-Nielsen) (2012) 230-238).

A lot has changed in the past half a century and the ILO was compelled to reconsider its policy directions. During the post-World War II era the ILO was increasingly being challenged by uneven ratification of conventions, problems regarding the ILO’s supervisory mechanisms and globalisation, which saw the exponential growth of non-standard forms of work. As mentioned by Hepple (33), the ILO’s response was threefold. It adopted the ILO *Declaration of Fundamental Principles and Rights at Work*, revised and integrated its international labour standards (of which 71 of the 185 conventions were up to date and 54 were outdated) and most significantly for purpose of this discussion, adopted its labour strategy by embracing the “decent work” agenda. The objectives of this policy, which was accepted in 1999, are well known. In a four-pronged approach, it seeks to balance the realisation of fundamental rights at work; the promotion of job creation; the promotion of effective social protection for all; and the encouragement of “tripartism” and social dialogue (Rodgers, Lee, Swepston & Van Daele *The ILO and the Quest of Social Justice 1919-2009* (2009) 205-235). In sum, the decent work agenda has shifted the ILO’s attention from a rights-based agenda to one which includes policies that could potentially create jobs and reduce poverty. This sensitivity to labour market conditions is confirmed by the statement of the then Director General of the ILO, Juan Somavia, namely, that “the principle rout out of poverty is work, and to this end the economy must generate opportunities” (ILO *Organising Social Justice*, Report by the Director General (2004) 16).

In 2007 the EU followed suit and changed its labour market policies when it adopted the flexicurity approach (European Commission *Towards Common Principles of Flexicurity: More and Better Jobs through Flexibility and Security* (2007) 359). The term is a combination of the words “flexibility” and “security”. Following the Treaty of Lisbon in 2003, a task team headed by the former Dutch prime minister, Wim Kok, devised strategies to counter unemployment and to improve the EU’s competitiveness (Kok *Jobs, jobs, jobs – creating more employment in Europe* Employment Task Force Report (2003) 29–30). The underpinning of the strategy is to balance the protection of fundamental rights of workers, but at the same time, to establish flexibility in the labour market to enable employers to respond to changing market conditions. Although

not developed as a one-size-fits-all approach, four broad mutually supportive pathways were conceived which could ultimately provide guidance to member states. The strategy seeks to provide for flexible and reliable contractual arrangements to promote the upward transition of non-standard contractual arrangements to a situation of full protection; to promote investments in comprehensive lifelong learning; to enhance active labour market policies to strengthen the transition of workers between jobs; and to modernise social security systems to enhance the mobility of workers in the labour market (European Commission *Flexicurity Pathways: Turning Hurdles into Steppingstones* (European Expert Group on Flexicurity) (2007) 2-3; Bekker & Wilthagen "Flexicurity – a European approach to labour market policy" 2008 *Intereconomics* 68).

The change of policy direction after the adoption by the ILO of its decent work agenda and the implementation of the EU's flexicurity approach are reflected in the adoption of international standards relating to the regulation of triangular agency work relationships. Rather than prohibiting TESSs, the ILO adopted the Private Employment Agencies Convention 1997 (No 181) which seeks to balance flexibility and the protection to agency workers. One of the stated purposes of the Convention is "to allow the operation of private employment agencies as well as the protection of [such] workers" (art 2(3) of the Convention).

The EU has since followed the same policy direction and has implemented the Temporary Agency Work Directive 2008/104/EC, which, amongst others, is aimed at recognising "temporary work agencies", providing protection to agency workers and establishing a framework which could contribute to the creation of jobs (art 2 of the Directive). The Agency Directive is the third of a trilogy of directives which seek to balance the social rights of non-standard employees on the one hand, and on the other, to leave room for flexible working arrangements as part of labour market regulatory strategies. (The other two directives are the Framework Agreement on Part-Time Work Council Directive 97/81/EC and the Framework Agreement on Fixed-term Work 1999/70/EC.):

To what extent has South Africa adopted a policy framework that seeks to balance the protection of workers' rights without stifling economic growth? The Cheadle Task Team was briefed to prepare South Africa's first set of post-constitutional labour legislation and in its ensuing Explanatory Memorandum it mentioned that the draft Bills sought to "avoid the imposition of rigidities in the labour market" as it aimed to "balance the demands of international competitiveness and the protection of fundamental rights of workers" ("Explanatory Memorandum prepared by the Ministerial Task Team" 1995 *ILJ* 278 285–286).

At more or less the same time an ILO *Country Review Report* swayed influential South African labour law scholars to develop the notion of "regulated flexibility" (Standing, Sender & Weeks *Restructuring the Labour Market: The South African Challenge: An ILO Country Review* (1996)

1–10; Cheadle “Regulated flexibility: Revisiting the LRA and the BCEA” 2006 *ILJ* 663 668 mentions that the “concept of regulated flexibility was developed by Paul Benjamin” based on the *ILO Country Review’s* conception of flexibility.) Regulated flexibility amongst others represents a policy framework which provides for the selective application of legislative standards, depending on the remuneration earned by workers and the size of employers’ undertakings. Two principles underpin the South African brand of balancing flexibility and the protection of workers’ fundamental rights. Firstly, it is recognised that lower earning employees are generally in a more precarious position than higher earning employees, who, through education or experience may have earned a level of security in employability. Secondly, smaller undertakings should not be burdened with obligations that could potentially introduce rigidities and costs which would ultimately inhibit job creation.

The structure of the Basic Conditions of Employment Act 75 of 1997 (BCEA) has until now been the most notable example of the implementation of the regulated flexibility policy (Godfrey & Witten “The BCEA: Statutory, administrative and case law developments” 2008 *ILJ* 2406). Only employees earning below the current threshold amount of R183,006 are entitled to protection in terms of Chapter II of the BCEA which covers aspects like maximum hours of work (45 hours in any week; s 9(1)(a) BCEA) and maximum overtime (10 hours in any week; s 10(1)(b) BCEA). In similar vein, only employees earning below the threshold amount can rely on the rebuttable presumption regarding who is deemed to be an employee (s 83A BCEA; s 200A LRA). In respect of the size of undertakings, the Employment Equity Act 55 of 1998 (EEA) provides that only employers who employ fewer than 50 workers fall within the definition of “designated employer” (s 1 EEA).

It is argued that South African policy makers do take account of the fact that it is not the sole purpose of labour law to provide protection to workers. At least some thought goes into the notion that different categories of workers need different levels of protection and that start-up undertakings should not be burdened by regulations to the same extent as larger undertakings. However, as pointed out by Godfrey and Witten (*op cit* 2408-2409), attempts by policy makers to introduce the policy of regulated flexibility have been tempered by the strong position adopted by trade unions in South Africa. The authors point out that the final 2002 amendments resulted in “some balance being restored to the combination of flexibility and ‘core’ conditions” and turned out to be a “significant victory of labour”.

Added to this, it is clear that South Africa has developed its own brand of balancing flexibility and regulation. As part of an integrated labour law strategy the ILO and the EU also emphasises the improvement of social dialogue between social partners, investment in education and training and the modernisation of social security systems. Yes, in South Africa there has been a dramatic improvement of the level of social security

protection that is being extended to the needy, and yes, investments are being made towards skills development, but it seems that there is ample room for improvement regarding the integration and harmonisation of these strategies into a coherent labour policy framework (Benjamin “Labour law beyond employment” in *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (eds Le Roux & Rycroft) (2012) 21–35 confirms that expenditure on social grants have increased from approximately R30.1 billion in 2001/2002 to R101.4 billion in 2008/2009)).

3 LR Amendment Bill 2012: Protection of Non-standard Workers

3.1 Introduction

Although most of the media attention has focused on those amendments dealing with TESs, the thrust of the amendments is broader in so far as they cover three categories of non-standard employees (see eg Mawson “Labour broking to be regulated, not banned” (9-7-2012) available at <http://bit.ly/171UbaE> (accessed 2013525)). As will be discussed below, apart from employees placed by TESs, fixed-term and part-time employees are also provided with improved protection in terms of the suggested amendments. In the EU agency work was valued as potential “steppingstones” for job applicants to enter the workplace before the Temporary Agency Work Directive was adopted in 2008 (Kok *op cit* 29–30 mentions that temporary agency work was impaired by “legal obstacles” in the EU and they suggested that the “removing of obstacles . . . could significantly support job opportunities and job matching”). The discussion below considers the extent to which the suggested amendments seek to establish a balance between protection and regulation in South Africa and the extent to which the policy of regulated flexibility has influenced this round of proposed amendments.

3.2 TES

The current LRA provides that the TES is the employer in instances where (a) a TES procures the services of an employee; (b) the TES remunerates the employee; and (c) the employee renders services to a client (s 198(2) LRA). Furthermore, the LRA confirms that the TES and the client are jointly and severally liable in respect of obligations established by a collective agreement concluded in a bargaining council, binding arbitration awards that regulate conditions of employment and the provisions of the BCEA (s 198(4) LRA.) Despite the fact that the word “temporary” forms part of the term TES, the LRA in its current format is silent regarding the duration of these triangular relationships. The LRA also does not extend joint liability in respect of unfair dismissal and unfair labour practices between the TES and the client. There is also no obligation on TESs to provide agency workers with equal conditions of service (especially equal pay for similar work) compared to workers who are in the employ of clients doing essentially the same work. This has

resulted in a situation in terms of which agency workers are being exploited. In the *Regulatory Impact Assessment Report*, which preceded the set of amendments it is stated that:

There are also documented cases of large employers employing their entire workforces through TES. Reported case law includes instances of employers 'transferring' their employees to TES, and employees who are unaware that their employer is in fact a TES ... Section 198 can be used by employers to deprive employees of protection against unfair dismissals ... and to apply less favourable terms and conditions of employment

(Benjamin, Borat and Van der Westhuizen "Regulatory impact assessment of selected provisions of the: Labour Relations Amendment Bill, 2010, Employment Equity Amendment Bill, 2010, Employment Service Bill, 2010" available at <http://bit.ly/1au4fpO> (accessed 2013-5-27) 32).

The new section 198A of the LRAB suggests that there will be improved protection afforded to agency employees who earn below the earnings threshold in terms of the BCEA which currently stands at R183,008 per annum. In other words, the same level of protection (some would say lack of protection) applies to all employees earning above the threshold amount. Three categories of protection will be introduced:

- (1) Temporary in nature: The LRAB provides that employees not rendering "temporary services" will be "deemed to be the employee of the client and the client will be deemed to be the employer" (s 198A(3)(b)). Furthermore, "temporary service" is defined to mean work not exceeding a period of six months, work performed as a substitute for an employee of the client who is temporarily absent or work that has been categorised as such by a collective agreement or a sectoral determination (s 198A(1)(a)-(c)).
- (2) Termination to avoid consequences: The LRAB proposes that should a TES terminate the assignment of a worker to a client in order to avoid the operation of the section that deems the worker to be an employee of the client, the termination will be deemed to be a "dismissal" in terms of section 186(1) of the LRA.
- (3) Equal treatment: The LRAB suggests that unless there is a justifiable reason to do so, an employee deemed to be the employee of a client must on the whole be treated "not less favourably than an employee of the client" doing similar work (s 198A(5)).

When analysing the suggested protective measures the following aspects need to be highlighted. It is predicted that the words "deemed to be the employer" will cause uncertainty. Would this mean that the client does not become the actual employer and that the TES remains a party to the contract of employment after the initial six-month period? The provision only "deems" the client to be the employer, but does not stipulate that the client steps into the shoes of the TES in respect of the contract of employment. This is the statutory position in respect of transfers of businesses as going concerns (s 197 LRA). Even though it is clear that the client will bear the responsibilities of an employer, especially in respect of unfair dismissal and unfair labour practices, the suggested provision does not make it clear that the TES will be absolved of responsibilities in

terms of the initial contract of employment. It is suggested that rather than deeming the employee to be the worker of the client, the section should rather have maintained the position that the TES is the employer with the added protection of rendering the TES and the client jointly and severally liable for all employer-related obligations after the initial six-month period. This, with the equal treatment provision, would prevent the interpretational problems that will in all likelihood result from the suggested amendments.

In respect of the second protective measure, it can be foreseen that TESs will probably rely on the provisions of section 189 of the LRA and subject affected employees to dismissal on grounds of operational requirements to prevent the employee from becoming an employee of the client. If the drafters of the amendments had been serious about blocking such terminations it would have been more appropriate to classify them as “automatic unfair” dismissals, which attract the more stern sanction of a maximum of 24 months’ compensation (ss 187(g), 194(3) LRA). This is the way in which dismissals associated with the transfer of businesses as going concerns are currently dealt with (s 187(1)(g)).

Taking a leaf from the EU Temporary Agency Work Directive, it seems like an omission in the amendments in so far as no provision is being made for any guarantees for agency employees regarding the right to be informed of, and the right to apply for, vacant positions at the client. It could also have been useful had the amendments suggested that any agreement which has the effect of preventing agency employees from concluding contracts with a client after an assignment will be declared void (art 6 of the Temporary Agency Work Directive). This principle can be linked to the sentiment that agency work can serve as a potential spring board for job seekers into the labour market.

3 3 Fixed-term Contracts

The current provisions of the LRA provide limited protection to employees engaged in fixed-term contracts. So, for example, there is no protection in respect of the maximum duration of fixed-term contracts, or any obligation to apply the principle of equal pay for equal work performed. The only mentionable protection is in respect of the non-renewal of fixed-term contracts. The LRA presently provides that in instances where an employee “reasonably expected” the renewal, and where the employer does not offer to renew a fixed-term contract (or only offers to renew the contract on less favourable terms), it constitutes dismissal (s 186(1)(b) LRA). From this it follows that once it is determined that it is a dismissal, the employer bears the onus to prove that there was a sound reason for the dismissal and that a fair pre-dismissal procedure had been followed (s 188 LRA). The Labour Appeal Court has interpreted the current section to mean that it does not protect employees who reject reappointment on a fixed-term contract on grounds that they may have expected to be appointed on a permanent basis pursuant to consecutive

fixed-term contracts (*University of Pretoria v Commission for Conciliation, Mediation and Arbitration* 2012 ILJ 183 (LAC)). This, the amendments suggest, should be changed. A new section 186(1)(b)(ii) will read that “dismissal” means that:

- (b) an employee engaged in a fixed-term contract of employment reasonably expected the employer -
- (ii) to retain the employee on an indefinite contract of employment but otherwise on the same or similar terms as the fixed term contract, but the employer offered to retain the employee on less favourable terms, or did not offer to retain the employee.

This is an improvement on the current situation. In practice, and if based on supporting evidence, it is possible that consecutive contracts can play a role in establishing an expectation in respect of the indefinite appointment of an employee rather than merely being offered another fixed-term contract. However, it can be argued that the wording of the suggested inclusion is vague and could be interpreted to have two meanings. The clause can be reduced for ease of reading to say that “an employee ... reasonably expected the employer ... to retain the employee on an indefinite contract of employment but otherwise on the same or similar terms as the fixed term contract, but ... did not offer to retain the employee”. The first interpretation is the one that the drafters are aiming at, namely, to cover a situation where the previously fixed-term employee is not offered an indefinite contract. However, the clause does not say as much. It only says “but ... did not offer to retain the employee”. This leaves room for a second interpretation, namely, that the employer did not offer a further fixed-term contract on the same or better terms. This problem could have been solved by adding towards the end the provision “but ... did not offer to retain the employee on an indefinite contract”.

Apart from the abovementioned protection offered to fixed-term employees, a new section 198B introduces significant additional protection for employees who earn below the current earnings threshold of R183,008. A “fixed term contract” of employment is defined to mean a contract that terminates on “the occurrence of a specified event”, “the completion of a specified task” or “a fixed date other than an employee’s normal or agreed retirement age” (s 198B(1)(a)-(c)). Fixed-term employees will be protected in a number of key ways:

- (1) Maximum duration: The LRAB suggests that, unless it can be justified, an employer may only engage an employee on a fixed-term contract (or successive fixed-term contracts) for a maximum duration of six months (s 198B(3)). An extensive list of justifications has been enumerated to which I shall return later. Should an employer without justification engage an employee on one or more fixed-term contracts for a longer duration than the mentioned six-month period, the contract of employment is “deemed to be of an indefinite duration” (s 198B(5)).
- (2) Written offer: The amendments propose that an offer to employ an employee on a fixed term, or an offer to extend a fixed term, must be

in writing and it must state the reason justifying the fixed-term appointment (s 198B(6)(a)-(b)).

- (3) Equal treatment: The LRAB puts forward that a fixed-term employee employed for longer than six months must be treated “on the whole not less favourably” than indefinitely employed workers performing similar work, unless there is justification for dissimilar treatment (s 198B(8)).
- (4) Application for vacancies: An employer must provide fixed-term employees with the same opportunities to apply for vacancies as it applies to employees employed on an indefinite basis (s 198B(9)).
- (5) Severance pay: Employees engaged for justifiable reasons for a longer duration than 24 months must be paid one week’s remuneration for each completed year in accordance with the provisions of the BCEA (s 198B(10)).

Of significance for purposes of this discussion are the exclusions to the mentioned protection and the justifications. It is clear that the drafters were mindful of the fact that start-up and smaller enterprises may find it difficult to comply with the amendments’ additional protection for part-time employees. In what can be classified as one of the most significant expressions of the policy of regulated flexibility, the amendments suggest that the protective measures do not apply to employers employing less than 10 employees, or employers whose business has been in operation for less than two years and that employ less than 50 workers. This exception does not apply in respect of employers with less than 50 workers who conduct more than one business or if the business was formed by the division of a business (s 198B(2)(a)-(b)).

Also of importance is the fact that the reasons which have been included in the amendments, which could justify the appointment of fixed-term employees beyond six months, are ample and cast in wide terms. The reasons include replacing an employee who is temporarily absent; being a recent graduate or student who is being employed for training; is engaged exclusively to work on a “genuine and specified project”; being engaged in seasonal work; employees who have reached the normal or agreed retirement age; and employees who have been engaged for a trial period of less than six months for the purpose of determining whether the employee is suitable for employment (s 198B(4)).

Two aspects need to be highlighted – the first is positive and the second raises a concern. The drafters have adopted a constructive approach by limiting the use of fixed-term contracts to six months in situations where there is no justification for not employing such workers in terms of an indefinite contract. Furthermore, rather than merely providing that it must be justified, specific reasons have been provided which could have the result of limiting the need to litigate in order to establish the boundaries of justifiable reasons. In addition, the list of reasons which could justify longer fixed-term contracts is not closed. The door is still open to “demonstrate any other justifiable reason” of fixing a longer term for a contract of employment (s 198B(3)(b)). An aspect that

is worrying though is that one of the reasons being mooted as being justifiable is to appoint an employee on a fixed-term contract rather than following the route of placing an employee on probation. Although this will provide employers with flexibility in the form of an escape clause in respect of newly appointed employees, it may have the consequence of undermining the established guidelines contained in the Code of Good Practice: Dismissal, which deal with probation and dismissal on grounds of poor work performance (Its 8, 9 Sch 8 LRA).

3 4 Part-time Workers

The LRA presently provides no specific protection to part-time employees. The amendments suggest a definition for both a “part-time” and “comparable full-time” employee. A part-time employee means an employee who is paid by reference “to the time that the employee works and who works less hours than a comparable full-time employee”. A “comparable full-time employee” is defined as an employee who is “remunerated wholly or partly by reference to time that the employee works” and who “in terms of custom and practice” of the employer is identifiable as a full-time employee (s 198C(1)(a)-(b)).

The limitations and protections in respect of part-time and fixed-term employees correspond in a number of respects but there are also a number of differences. The protective measures for part-time employees do not protect employees who earn in excess of the threshold amount and employers with less than 10 employees, and start-up employers with less than 50 workers are excluded (s 198C(2)(a)-(b)). Apart from these exclusions, the provisions also do not apply to employees who ordinarily work for an employer less than 24 hours a month and during an employee’s first six months of employment (s 198C(2)(c)-(d)).

The main protective measures are that part-time employees who earn below the threshold (a) are entitled to be treated on the whole not less favourably than comparable full-time employees doing similar work unless there is a justifiable reason for different treatment; (b) such workers should be provided access to skills development and training; and (c) they should receive the same access to opportunities to apply for vacancies as full-time employees (s 198C(3)-(4)).

The main concern lies within the definition of part-time and comparable full-time employee. The definition states that a “comparable full-time employee” is one who is “remunerated wholly or partly by reference to time that the employee works” and a “part-time employee” is a person who is paid by reference “to the time” that the employee works. Does this mean that it only applies to persons who are being paid on an hourly basis or does it also refer to persons who are being remunerated on a monthly basis? One could arguably have a half-day and full-day secretary at the same workplace who are being remunerated on a monthly basis and not necessarily for the “time the employee works”. Yes, such employees will generally agree to five or six working

days a week, and there will be agreement on whether they either work between 08:00 and 17:00, or between 08:00 and 13:00. However, such employees are paid their agreed upon salary at the end of each month irrespective of the fact that February and March generally do not have the same number of working days. Does this mean that they do not fall under the mentioned definitions as they are not remunerated specifically by reference “to the time” that they work? It is suggested that this problem could have been avoided by omitting the words “time the employee works” from both definitions.

4 Concluding Remarks

At more or less the same time when the flexicurity approach was adopted in the EU, the South African Government briefed Halton Cheadle in 2006 to consider the conceptual underpinnings of the local policy of regulated flexibility as it was applied to the post-constitutional labour laws introduced in the mid-1990s. In a sobering report, Cheadle points out that despite the adoption of the policy of regulated flexibility, the phased and urgent nature of the reforms after the first democratic elections resulted in piecemeal negotiations about specific statutes and it prevented the formation of a logical integrated set of labour laws (“Regulated flexibility” *op cit* 663). This sentiment is echoed by Benjamin, who in 2012 stated that the problems of unemployment and appropriate regulation “would best be dealt with in a broad framework covering the range of labour market regulation. Unless this can be achieved, the terms of the debate will remain too narrow” (“Labour law beyond employment” *op cit* 40).

It is clear that the drafters of the amendments under discussion were mindful of the overarching policy of regulated flexibility and that they did not merely introduce new obligations on employers without taking account of the fact that it may impact negatively on especially smaller employers and lower earning employees to implement additional obligations on employers. Furthermore, it is clear that some flexibility remains in place for employers, in so far as all of the added protective measures only become effective after six months after the employment of non-standard employees.

South Africa can gain direction from both the “decent work” and “flexicurity” policy approaches adopted by the ILO and the EU respectively. In both instances their policies seek to balance the protection of employees’ rights with aspects like investment in training and social security measures and the promotion of social dialogue. The purpose of labour law should be extended beyond the mere fortification of employees’ rights. This field of study should be alert to aspects that may discourage (and encourage) job creation and which integrates skills development and social security protection into a nuanced and harmonised labour market policy. As pointed out, although the suggested amendments are not perfect in all respects, they were definitely influenced by the principles of regulated flexibility which seek to strike a

balance between providing protection to employees and balancing this with some flexibility for employers. At the very least, it is a positive development that the TES industry was not prohibited and that the imposition of enhanced protection for fixed-term and part-time employees were not extended to small employers and start-up businesses.

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The consequences of pleading a non-admission

1 Introduction

The purpose of pleadings is to define the issues in dispute in a civil case, not only for the judge but also for the other party. The opponent must be properly informed of the case he has to meet (*Hillman Brothers Ltd v Kelly and Hingle* 1926 WLD 153). Consequently a party has a duty to allege in his pleadings the material facts upon which he relies (*Minister of Safety and Security v Slabbert* 2010 2 All SA 474 (SCA) 475).

It is unfair to ambush one's opponent at trial by facing him with a case different to the one presented in the pleadings. Rule 22(2) of the Uniform Rules of Court provides:

The defendant shall in his plea either admit or deny or confess and avoid all the material facts alleged in the combined summons or declaration or state which of the said facts are not admitted and to what extent, and shall clearly and concisely state all material facts upon which he relies.

If a party has no knowledge of assertions made by his opponent he is not in a position to either admit or deny the averments. Hence he may plead that he does not admit certain facts. If a party pleads in this manner he must in terms of rule 22(2) of the Uniform Rules of Court "clearly and concisely state all material facts upon which he relies."

There seems to be a measure of consensus by the courts regarding what constitutes a technically correct pleading when the pleader does not admit an averment. However, there is more controversy concerning what such a pleader may and may not do at the trial. The purpose of this note is twofold:

- (i) To ascertain how one must plead in a situation where the pleader does not admit an averment (as opposed to denying an averment) in order for the plea to be technically correct; and
- (ii) to determine whether the pleader in these circumstances is entitled to -

- (a) cross examine his opponent and his witnesses on the issues that are not admitted; and
- (b) call and examine one's own witnesses on the issues that are not admitted.

It is our view that the questions as to technical correctness of the pleading of non admission and the question whether such a pleader may rebut his opponent's averment by calling witnesses, are questions that are inextricably linked. The reason for this is that the manner of pleading must inform the opponent of the case he will have to meet. If the pleader adequately informs his opponent of the case he faces, this will be a technically correct pleading. Furthermore, if the plea is technically correct, the pleader should be entitled to cross examine his opponent and any witnesses his opponent may call. Whether the pleader can call his own witnesses (other than expert witnesses) is questionable.

The conclusions reached in this note are based on the premise that an important purpose of pleadings is to clearly inform one's opponent of the case he has to meet.

2 The Purpose of Pleadings

Pleadings serve the purpose of identifying the issues in a particular matter. The judge refers to pleadings in the course of a trial for the purpose of *inter alia* deciding whether evidence is admissible. Evidence that is extraneous to the issues identified in the pleadings is not relevant and therefore inadmissible. Pleadings:

[m]ust ensure that both parties know what the points of issue between them are, so that each party knows what case he has to meet. He or she can thus prepare for trial knowing what evidence he or she requires to support his own case and to meet that of his opponent.

(*Becks Theory and Principles of Pleadings in Civil Actions* (2002) 44).

In *Minister of safety and Security v Slabbert* (2010 2 All SA 474 (SCA) 478 par 11) Mhlantla JA stated:

The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial. It is equally not permissible for a trial court to have recourse to issues falling outside the pleadings when deciding a case.

(See *Nieuwoudt v Joubert* 1988 2 All SA 189 (SE) 194 where the court simply stated that the purpose of pleadings is to define the issues and inform one's opponent of what case he has to meet).

In order to determine whether a pleading is technically correct, the question to be posed is whether the pleading in question properly defines the issues so that the other side is in a position to ascertain what evidence it requires to pursue its case at the trial.

3 Technically Correct Pleadings

In order to establish how to plead a technically correct non-admission, it is necessary to understand how and why the Rules of Court were expanded so as to allow a party to plead a non admission. Marais AJ in *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* (1985 (3) SA 410 (C) 417) explains the evolution of the Rules of Court to include the possibility of a non-admission as follows:

The Rules of Court relating to pleading usually confined the defendant to one of three possible courses. He could admit, or deny, or confess and avoid the plaintiff's allegations. No specific provision was made for a non-admission (as opposed to a denial). Moreover, the Rules then in force provided that 'every allegation of fact not specifically denied in the plea shall be taken to be admitted.' The net result of all this was that a defendant who genuinely had no knowledge as to whether a particular allegation made by plaintiff was correct, was compelled to deny it in order to avoid being taken to have admitted it. It soon came to be recognised that the specific options for which the relevant Rule of Court provided were too limited and did not cater for a case which frequently arises in practice, namely the case where the defendant cannot admit an allegation because he has no way of knowing whether or not it is correct, but on the other hand, does not wish to deny it positively and so create the impression that he intends to contradict it at the trial. A practice developed of allowing the defendant, notwithstanding the silence of the Rules in this regard, to plead non-admissions instead of denials, and of regarding such a plea as sufficient to oust the presumed admission which the Rules provided should be the consequence of a failure to enter a specific denial.

Rule 22(2) of the Uniform Rules of Court now specifically provides for the option of pleading a non-admission. From this it follows that there is a distinct difference between a non-admission and a clear denial. (See *Wilson v South African Railways and Harbours* 1981 3 SA 1016 (C) 1018; *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* 1985 (3) SA 410 (C) 417). This distinction is necessary because of the difference in the practical effect of the respective pleadings. The view taken by Van den Heever in *N Goodwin Design (Pty Ltd v Moscak* (1992 1 SA 154 (C) 163) that the only difference between a non-admission and a clear denial is merely a matter of emphasis, begs the question as to the purpose of the rules providing for both a denial and a non-admission. This is especially so given that the option of pleading a non-admission was specifically and intentionally added to the Rules after the practice of pleading a non-admission had developed in order to cater for situations where the pleader had no knowledge of a particular allegation and therefore was neither in a position to admit or deny the allegation. More fundamentally the view of Van den Heever J ignores the basis for the distinction, namely that the purpose of pleadings is to properly inform one's opponent of the case he has to meet.

The question as to whether a reason for the non-admission must be pleaded arose in various cases (*Wilson v South African Railways and Harbours* 1981 3 SA 1016 (C); *Standard Bank Factors Ltd v Furncor*

Agencies (Pty) Ltd 1985 3 SA 410 (C); *Nqupe v MEC, Department of Health & Welfare, Eastern Cape Province* 2006 JOL 16933 (SE)). In *Wilson* the court held (1018) that rule 22(2) must be read in conformity with existing practice. Therefore the court found that it is not sufficient to plead a non-admission without more. Furthermore, the court held that if it were permissible to plead a non-admission without more, there would be no reason for the rule 22(2) to provide that a pleader must admit, deny or confess and avoid. Furthermore, the court held that a plaintiff is entitled to know what the defendant's defence is and that a bare denial does not properly state what one's defence is. In *Standard Bank Factors Ltd* counsel for the plaintiff argued that since rule 22(2) requires a pleader to "clearly and concisely state all material facts upon which he relies", a pleader may only plead a non-admission on the basis of no knowledge when the facts warrant the lack of knowledge. Counsel for the plaintiff argued that where the defendant's lack of knowledge is self evident it is not necessary for the defendant to explain the reasons for the lack of knowledge. However, counsel reasoned, that in situations where it would appear *prima facie* that the defendant should have knowledge, it is incumbent upon the defendant to divulge the reasons for the lack of knowledge. Marais AJ rejected this argument (416) on the basis that it conflates technical legitimacy and ethical legitimacy. Marais AJ held that ethical legitimacy can rarely be tested at exception stage as evidence at trial stage would be necessary to determine the *bona fides* of a non-admission based on lack of knowledge. Marais AJ therefore concluded that a non-admission which does not explain why the pleader has no knowledge is technically sound even in situations where it would *prima facie* appear that the plaintiff should have such knowledge. Marais JA held that the *Wilson* case is not authority for the proposition that a pleader must explain why he has no knowledge. It merely is authority that the pleader must state that the reason for the non-admission is a lack of knowledge. Marais AJ left the question open as to whether the court in *Wilson* was correct in its findings. The court in *Nqupe*, on the other hand, seems to agree with the arguments put forward by the plaintiff's counsel in *Standard Bank Factors Ltd*. The court held that in circumstances where the defendant should have knowledge of the facts, the pleadings should provide reasons for the lack of knowledge. In this case the defendant (employer) admitted that the plaintiff was employed by it, but pleaded a non admission, based on a lack of knowledge with regard to plaintiff's post and remuneration. The court concluded (16933) that in these circumstances, it would be incumbent on the pleader, not only to state that the basis for the non-admission is a lack of knowledge, but also to explain the reason(s) for the lack of knowledge. A failure to do so, the court held, results in the pleading being technically inadequate since the requirement in rule 22(2) that the non-admission must state clearly and concisely all material facts upon which the pleader relies would not be met. In summary the courts seem to be in agreement regarding the necessity to state the reason for the non admission. This is usually a lack of knowledge. However, there seems to be less consensus with regard to whether the pleader who pleads a non admission is obliged to not only

state the reason therefore (usually lack of knowledge), but to also state or explain the reason for the lack of knowledge. If there is an obligation on the pleader to state the reasons for the lack of knowledge there is no clarity from the case law whether or not this is necessary only in circumstances where it would appear *prima facie* that the pleader should have knowledge.

We submit that all these questions must be answered with reference to the most important purpose of pleadings, namely to inform one's opponent of the case he has to face. So for example, if a lack of explanation or reason for the lack of knowledge would result in one's opponent not knowing the case he faces, then in order for the pleading to be technically correct, it should state the reason for the lack of knowledge.

4 Cross-examination of Opponent's Witnesses and Leading of Evidence in Rebuttal

In *Goodwin Design (Pty) Ltd v Moscak* (1992 1 SA 154 (C) 163) Van den Heever J expressed the view *obiter* that the following statement of Bullen, Leake and Jacobs (*Precedents of Pleadings* (1975) 80) is a correct reflection of the law: "there is no difference in effect between denying and not admitting an allegation. The distinction is simply a matter of emphasis, a denial being more emphatic than a non admission." Consequently, Van den Heever J concluded that a defendant who pleads a non-admission is entitled not only to cross examine plaintiff and his witnesses but also to call his own witnesses and lead rebutting evidence. She added that in the event that the defendant's witnesses are expert witnesses, the plaintiff would be given notice that they would be called in terms of the Court Rules and would therefore not be caught by surprise. Van den Heever J justifies her conclusion by arguing that if the pleader of a non-admission is not permitted to cross-examine the plaintiff or adduce evidence, the plaintiff's version would prevail by the plaintiff simply re-iterating what was stated in the pleading at the trial. This is not entirely correct. This would only be the case in situations where the court could be convinced that the plaintiff's evidence was sufficient to satisfy the plaintiff's onus of proof (Zeffert & Paizes *The South African Law of Evidence* (2009) 129-130). In order to do this the plaintiff must adduce sufficient and credible evidence to establish a *prima facie* case. A failure to do so will result in the court not accepting the plaintiff's version even in the absence of evidence in rebuttal from the defendant (Zeffert & Paizes 132).

The view of Van den Heever J was not shared by the courts in other cases (*Ntshokomo v Peddie Stores* 1942 EDL 289; *Wilson v South African Railways and Harbours* 1981 3 SA 1016 (C) and *Standard Factors Ltd v Furncor Agencies (Pty) Ltd* 1985 3 SA 410 (C)). The reason for this was that a plaintiff faced with a positive denial can expect the defendant to lead rebutting evidence whereas a plaintiff faced with a non-admission need not, hence the difference between a non-admission and a denial

(*Standard Factors Ltd v Furncor Agencies (Pty) Ltd* 410). The court however held that it may be going too far to contend that the defendant “need not even anticipate a challenge by way of cross-examination”. In *Ntshokomo v Peddie Stores* (289), on the other hand the court held that the pleader of a non-admission is not entitled to lead evidence or to cross-examine the plaintiff on matters that were not admitted.

The question whether a party should be allowed to cross-examine his opponent or his opponent’s witness regarding a matter to which he pleaded a non-admission is dependent upon the purpose of cross-examination. Cross-examination has two purposes, “first, to elicit evidence which supports the cross –examiner’s case, and second, to cast doubt upon the evidence given for the opposing party.” (Zeffert & Paizes 909). It is our submission that even in circumstances where the cross-examination relates to issues where a non-admission on the basis of lack of knowledge was pleaded, the pleader should be allowed to cross examine the opponent’s witness. Knowledge of facts is not necessary for cross-examination. If for example, the evidence-in-chief of the witness was flimsy or contradictory, cross-examination may cast further doubt on the credibility of the witness or the evidence without the necessity of calling one’s own witness to contradict or cast doubt on the evidence. One should always be given the opportunity to cross examine an opponent or his witnesses, even if one has no knowledge of events. This is to test credibility of the witness and of the version put forward by the witness.

However, if the pleader of a non-admission based on a lack of knowledge were allowed to lead evidence to contradict the plaintiff’s version, this would imply that the defendant in fact had knowledge. It is doubted that an order for costs against such a pleader, would be sufficient to remedy the potential injustice suffered by a plaintiff if the defendant were allowed to lead evidence (that is not expert evidence) in rebuttal of the plaintiff’s case. This is because the plaintiff now faces a case for which he was not prepared. This runs contrary to the fundamental purpose of pleadings, namely to inform one’s opponent of the case he has to face.

If this knowledge was acquired after the pleading of non-admission was entered, the defendant should simply amend his pleadings on becoming aware of new evidence. The non-admission should either be changed to a denial to or an admission, depending on the new evidence that has come to light. If the pleader fails to amend the pleadings, the pleadings, although technically correct may be untruthful and consequently unethical. Failure to amend one’s pleadings should result in the defendant not being permitted to lead evidence unless it is evidence of an expert witness. If the defendant’s witness is an expert witness plaintiff would in terms of the rule 36(9) deliver notice not less than 15 days before the hearing of his intention to call the expert witness and not less than 10 days before the trial must have delivered a summary of such expert’s opinions and the reasons therefore. Therefore, in terms

of the Uniform Rules of Court, the plaintiff would be informed of the case he faces, albeit by short notice, thus avoiding the plaintiff being taken by surprise.

5 Conclusion

In order to satisfy the requirement of rule 22(2) of the Uniform Rules of Court, that a pleader “shall clearly and concisely state all material facts upon which he relies”, the pleader of a non-admission should state why he cannot admit an allegation. This is usually that he has no knowledge. If it appears *prima facie* that the pleader should have knowledge, the pleader must explain why he has no knowledge if a failure to do so would result in his opponent not knowing what case he faces. This serves to place one’s opposition in a position to apprise him or herself fully of the defendant’s defence, thus fulfilling the purpose of pleadings.

The pleader of a non-admission should be permitted to cross-examine his opponent and his opponent’s witnesses with regard to the matters pertaining to the non-admission. The pleader of a non-admission should also be permitted to lead evidence in rebuttal of the matters pertaining to the non-admission if such evidence is that of an expert witness. However, the pleader of a non-admission should not be permitted to lead evidence in rebuttal if that evidence is not the evidence of an expert witness. In short the pleader of a non-admission is only entitled to test the veracity of the plaintiff’s case but may not lead evidence relating to the facts or happenings to traverse or contradict the plaintiff’s case.

We are of the view that case law supports our conclusions. In *Ntshokomo v Pedi Stores* (1942 EDL 289 298) it was held that the pleader of a non-admission:

[w]ould not be entitled, either by way of cross-examination or by himself leading evidence, to traverse the accuracy of any of the items in the account for the above period to the correctness of which the plaintiff has deposed.

We agree with this statement save for the bar on cross-examination to test the veracity of the opponent’s evidence. Our view is supported in *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd* (1985 (3) SA 410 (C) 417-418) where Marais AJ states *obiter* that although he agrees that a pleader of a non-admission may not lead evidence to traverse his opponent’s evidence, that it may be going too far to disallow cross examination of one’s opponent to test the veracity of his evidence. However, Van den Heever J in *N Goodwin Design (Pty) Ltd v Moscak* (163) disagrees with this view. Her view is that the only distinction between a denial and a non-admission is a matter of emphasis and therefore the pleader of a non-admission is entitled not only to cross examine his opponent but also to traverse the veracity of his evidence with reference to facts by leading contradictory evidence. However Van den Heever J refrains from deciding the issue when she states *obiter* after referring to *Ntshokomo v Pedi Stores* and *Standard Bank Factors Ltd v Furncor Agencies (Pty) Ltd*: “In any event, if it is I who am wrong, both those cases differ

toto caelo from the present...” Clearly Van den Heever J is wrong. The distinction between a non-admission and a denial and the consequences thereof are manifest not only in case law but is also clearly provided for in rule 22(2) of the Uniform Rules of Court. Our contentions are supported by various authors (Becks *Theory and Principles of Pleading in Civil Actions* (2002) 81-82; Morris *Techniques in Litigation* (2010) 96-98; Marnewick *Litigation Skills for South African Lawyers* (2007) 126, 128; Van Blerk *Legal Drafting* (1998) 23).

It is a matter of simple logic that a pleader of a non-admission because of no knowledge should not be allowed to traverse the veracity of his opponent’s evidence by leading new evidence. If he has no knowledge how can he lead evidence? If such a pleader were allowed to lead evidence this would be tantamount to encouraging unethical or dishonest pleading, which unethical tendency was noted in *Ngupe v MEC Department of Health and Welfare Eastern Cape* (2006 JOL 16933 SE). It is also a matter of common sense that the pleader of a non-admission should be allowed to cross-examine his opponent.

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