DE JURE

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Redaksioneel

Hierdie is 'n geskiedkundige uitgawe van *De Jure* – om verskeie redes. Eerstens is dit die eerste uitgawe wat deur die Fakulteit Regsgeleerdheid se eie uitgewers, PULP, uitgegee word. LexisNexis, of Butterworths, soos hulle vroeër bekendgestaan het, het oor baie jare 'n lang pad saam met die Fakulteit geloop en tesame diep spore in die regslandskap van Suid-Afrika gelaat. Die toenemende druk op kommersiële uitgewers om wins te toon in moeilike ekonomiese toestande en die lae sirkulasie syfers van akademiese tydskrifte en veral regstydskrifte, het onvermydelik beteken dat die *status quo* nie meer volhoubaar was nie. Die skeiding was onvermydelik, maar dit was vriendskaplik en beide partye sal nog lank op ander vlakke saamwerk.

Dit is ook die eerste uitgawe wat by wyse van ooptoegang gratis op die Internet gepubliseer word. Daar sal steeds 'n beperkte oplaag hardekopie eksemplare gedruk word, maar *De Jure* betree met hierdie uitgawe uiteindelik die 21ste eeu van grootskaalse verspreiding van elektroniese inligting. Daarmee word ook gepoog om die navorsing wat in *De Jure* gepubliseer word, aan 'n groter gehoor beskikbaar te stel. Die doel van akademiese navorsing en die publikasie daarvan is immers om deel te neem aan 'n diskoers wat sy beslag meer as tweeduisend jaar gelede gehad het. Met die publikasie van *De Jure* gratis op die Internet word die deure van die debat nou wyd oopgegooi. So spreek die stem van elke outeur wat tot hierdie uitgawe bygedra het, nou luider as tevore en sal dit uiteindelik veel meer ore (of oë) bereik.

It is a real pity that the judiciary seems to withdraw more and more from this debate. Articles and notes published inlaw journals are cited in judgments with ever decreasing regularity. There can be many reasons for this: The courts are overloaded with work and there is a proliferation of legal academic research which is published. It becomes more and more difficult for judges who are overburdened to keep abreast of recent articles and case notes. Or perhaps counsel is to blame for not making enough use of journal articles and notes in their arguments before court. Perhaps judges, advocates and attorneys do not read law journals any more. Or perhaps the academic community has lost touch with the realities and needs of practise.Be it as it may, what is the point of conducting and publishing legalresearch if it becomes a separate parallel discourse, if it ends up sitting on a shelf gathering dust? Our law is the product of a robust debate in which various actors have participated over millennia. And it was for good reason that the study of law played a major part in the establishment of the first universities. Academic lawyers should take care to ensure that they do not get sidelined in this discourse. Hopefully, the open access platform will facilitate the dissemination of information so that more and more judges, advocates and attorneys will tap into the wealth of knowledge and hopefully we will find that academia has not yet lost all touch with the real world out there.

Dit is uiters belangrik dat 'n akademiese regstydskrif steeds relevant moet bly vir die gemeemskap wat dit bedien. Gevolglik is dit nodig om

ook erkenning te verleen aan die feit dat ons gemeenskap, met inbegrip van die regsprofessies, heterogeen en veeltalig is. Hierdie uitgawe maak daarom voorts geskiedenis met die plasing van die eerste artikel in Sepedi. Daarmee word op 'n konkrete wyse uitvoering gegee aan die Grondwetlike beginsel van veeltaligheid. Dit is 'n beginsel waaraan dikwels slegs lippediens gedoen word en wat meesal sommer net verontagsaam word. Daarmee word ook gepoog om die rassistiese persepsie dat hoëvlak akademiese diskoers nie in die inheemse tale gevoer kan word nie, hok te slaan. Die Redaksie spreek hiermee die wens uit dat dit slegs die eerste sal wees van vele artikels in die ander amptelike tale wat so misken word. Hierdie uitgawe toon ook 'n mate van oplewing in Afrikaanse bydraes en eweneens word die hoop uitgespreek dat die oplewing blywend van aard is en momentum sal kry.

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REDAKTEUR

Soewereiniteit van kerklike organisasies – die geval van die Moreletaparkse gemeente van die NG Kerk

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SUMMARY

Sovereignty of Ecclesiastical Organisations - The Case of the Moreleta Park Congregation of the Dutch Reformed Church

On 23 September 2010 the European Court of Human Rights (ECHR) handed down unanimous judgments in two similar cases, but reached completely opposite conclusions. Both cases dealt with dismissal of church employees based on aspects of their private lives. In *Obst v Allemagne* the ECHR ruled that the German Constitutional Court correctly upheld the dismissal of the Public Relations Director of the Church of Jesus Christ of Latter Day Saints due to adultery. On the other hand, the ECHR ruled that the German Constitutional Court violated Article 8 of the European Convention on Human Rights when it upheld the dismissal of an organist and choir master of a catholic congregation due to adultery, despite the constitutional guarantee of religious autonomy in the German Basic Law. In South Africa, the Equality Court held that dismissal of an organist due to a homosexual relationship constituted unfair discrimination. While all forms of unfair discrimination must be rejected, legal compulsion may not be the answer to change the prejudices of religious groups. Persuasion should rather be based on ethical arguments, which may hold better results in the long term.

1 Inleiding

Op 23 September 2010 het die Europese Hof vir Menseregte (EHMR) eenparige uitsprake gelewer in twee sake wat op soortgelyke feite gebaseer was maar wat tot direk teenoorstaande gevolgtrekkings gekom het. Dit was die heel eerste sake waarin die EHMR uitspraak moes lewer oor die ontslag van kerklike werknemers op grond van gedrag wat binne die grense van die werknemers se private lewens tuisgebring kon word. Dit het meer bepaald gegaan om die beskerming van die werknemers se private en familielewe ingevolge Artikel 8 van die *Europese Konvensie vir die Beskerming van Menseregte en Fundamentele Vryhede*.[1] Die

1 *Europese Konvensie vir die Beskerming van Menseregte en Fundamantele Vryhede*, art 8, 213 UNTS 222, wat op 1953-09-03 in werking getree het (hierna "Europese Konvensie"). Art 8 bepaal: "(1) Elke persoon het die reg op respek vir sy private en familielewe, sy tuiste en sy korrespondensie, (2) Geen openbare gesag sal op die uitoefening van hierdie reg inbreuk maak

vervolg op volgende bladsy

applikante in die twee sake was albei werknemers van kerklike organisasies en is afgedank – weereens in albei gevalle – omdat hulle in buite-egtelike verhoudings betrokke geraak het. In die een geval, wat betrekking gehad het op 'n wernemer van die Kerk van Jesus Christus van Laaste Dagse Heiliges (die Mormoonse Kerk), het die EHMR die beswaar van die wernemer teen sy ontslag verwerp.[2] In die ander geval, waarby 'n werknemer van die Rooms Katolieke Kerk betrokke was, het die EHMR bevind dat die applikant se afdanking in stryd was met die Europese Konvensie.[3] Die afdankings is in albei gevalle oorspronklik in die Duitse arbeidshowe aangehoor, en in die laaste instansie voor die Federale Arbeidshof en die Federale Grondwetlike Hof (*Bundesverfassungsgericht*). Die Federale Arbeidshof en die *Bundesverfassungsgericht* het albei bevind dat die afdanking van die werknemers ingevolge die Duitse reg geoorloof was. Die werknemers het daarop afsonderlike klagtes by die EHMR aanhangig gemaak.

Dit kom vir die leser miskien vreemd voor dat 'n artikel oor die soewereiniteit van kerklike organisasies in die Suid-Afrikaanse reg ingelei word met verwysing na twee uitsprake van 'n internasionale tribunaal. Die twee uitsprake van die EHMR is egter soortgelyk aan 'n Suid-Afrikaanse saak wat in beginsel met dieselfde aangeleentheid as die EHMR te make gehad het.[4] Die Suid-Afrkaanse saak is gebaseer op grondwetlike beginsels wat oënskynlik van die ooreenstemmende Duitse regspraak afwyk, welke regspraak in die uitsprake van die EHMR sydelings te berde gebring is.

In die eerste gedeelte van hierdie artikel word die twee oënskynlik teenstrydige uitsprake van die EHMR nader toegelig. In die tweede gedeelte word die reg wat deur die Duitse arbeidshowe toegepas is en wat op die *Grundgesetz für die Bundesrepublik Deutschland* gebaseer was onder die loep geneem. Dit bring ons dan, in die derde afdeling, by die Suid-Afrikaanse regspraak oor dieselfde onderwerp uit. In die vierde afdeling word die gesprek afgesluit met enkele samevattende opmerkings.

2 Uitsprake van die Europese Hof vir Menseregte

Michael Heinz Obst was 'n lewenslange lidmaat van die Mormoonse Kerk en is op 1 Oktober 1986 aangestel in die uiters belangrike amp van Direkteur vir Europa in die Departement vir Openbare Betrekkinge van

nie, behalwe ingevolge 'n regsvoorskrif wat reg inbreuk maak nie, behalwe ingevolge 'n regsvoorskrif wat noodsaaklik is in 'n demokratiese gemeenskap in belang van nasionale sekuriteit, openbare veiligheid of die ekonomiese welsyn van die land, vir die voorkoming van wanorde of misdaad, vir die beskerming van gesondheid of morele beginsels, of vir die beskerming van die regte en vryhede van ander persone."

2 *Obst v Allemagne*, Aansoek 425/03 (2010-09-23).

3 *Schüth v Allemagne*, Aansoek 1620/03 (2010-09-23).

4 *Strydom v Nederduitse Gereformeerde Gemeente, Moreletta Park* 2009 (4) SA 510 (Gelykheidshof, TPA).

die Kerk. In Desember 1993 het hy vir pastorale hulp by kerklike owerhede aangeklop nadat sy huwelik toe reeds vir 'n geruime tyd aan die verberokkel was en omdat hy buite-egtelike gemeenskap met 'n ander vrou gehad het. Hy is daarop en as gevolg van sy huweliksontrouheid uit sy amp in die Mormoonse Kerk ontslaan. Regstappe teen sy ontslag het aanvanlik in die arbeidshof van Frankfurt am Main geslaag en wel omdat sy ontslag, na die arbeidshof se oordeel, buite verhouding was met die daad wat daartoe aanleiding gegee het. 'n Appèl van die Kerk teen die uitspraak is deur die Arbeidshof van Appèl van Hesse van die hand gewys. Die Kerk se verdere appèl is egter deur die Federale Arbeidshof en die *Bundesverfassungsgericht* gehandhaaf en wel op grond van die reg van kerklike organisasies om hulle interne sake na eie goeddunke te reguleer en die ooreenstemmende reg van die Kerk om, in belang van sy eie geloofwaardigheid, te vereis dat kerklike ampsdraers die basiese geloofsbeginsels van die Kerk moet nakom. Obst het daarop 'n klag by die EHMR aanhangig gemaak.

Die EHMR het bevind dat die Duitse arbeidshof 'n noukeurige en deeglike ontleding gemaak het van die omstandighede van die geval, alle tersaaklik dienende faktore in aanmerking geneem het, en die belange van Obst teenoor dié van die Mormoonse Kerk opgeweeg het.[5] Die EHMR het spesifiek gewag gemaak van die feit dat die uitwerking van die applikant se ontslag op sy private en familielewe minimaal sal wees, as 'n mens naamlik in aanmerking neem dat hy nog betreklik jonk was en redelik maklik alternatiewe indiensneming sou kon vind.[6] Toe hy die betrekking as Direkteur vir Europa aanvaar het, was Obst daarbenewens bewus, of moes hy daarvan bewus geweees het, dat die Mormoonse Kerk 'n besondere premie plaas op huwelikstrou.[7] Daar kon dus nie met sy ontslag fout gevind word nie.

Bernhard Josef Schüth het op 23 November 1983 die pos aanvaar van orrelis en koormeester van die Katolieke Gemeente van St Lambert in Essen, Duitsland. Hy en sy vrou het in 1994 vervreem geraak, en sedert 1995 het hy met 'n nuwe nooi saamgeleef in 'n buite-egtelike verhouding. Hy is in 1998 uit sy amp ontslaan op grond daarvan dat hy basiese regulasies van die Katolieke Kerk wat op indiensneming deur die Kerk betrekking het, verontagsaam het, en meer bepaald deur in 'n buite-egtelike verhouding betrokke te raak met 'n vrou wat op daardie stadium 'n kind van hom verwag het. Hy het daardeur nie net owerspel gepleeg nie, maar was ook skuldig aan veelwywery. Die arbeidshof van Essen het in Desember 1997 sy ontslag ongeldig bevind. Die bevinding is op appèl deur die Arbeidshof van Appèl gehandhaaf, maar is deur die Federale Arbeidshof omver gewerp op grond daarvan dat afdanking van Schüth die bevindings van die *Bundesverfassungsgericht* oor kerklike outonomie gestant gedoen het en nie met die basiese beginsels van die Duitse regsorde in stryd was nie. Die Hof het bevind dat die gemeente hom nie

5 *Obst v Allemagne supra* par 49.
6 Vgl *idem* par 48.
7 *Idem* par 50.

in diens kon hou as orrelis sonder om die geloofwaardigheid van die Kerk aan tetas nie, aangesien sy indiensneming as orrelis intiem met die geestelike roeping van die Kerk verband gehou het. 'n Appèl teen hierdie beslissing na die *Bundesverfassungsgericht* het nie geslaag nie. Schüth het daarop 'n klag by die EHMR aanhangig gemaak op grond van Artikel 8 van die Europese Konvensie.

Die EHMR het besonder klem gelê op die vraag of die arbeidshof voldoende ag geslaan het op die gevolge van die applikant se ontslag ten aansien van sy private en gesinslewe. Die EHMR wys daarop dat die arbeidshof geen melding gemaak het van die *de facto* familielewe van die applikant of die regsbeskerming wat daaraan verleen word deur die Europese Konvensie nie.[8] Die belange van die Katolieke Kerk is daarom nooit teen die regte van die applikant opgeweeg nie.[9] Sy handtekening op 'n indiensnemingskontrak kan nie vertolk word as 'n ondubbelsinnige onderneming om 'n lewe van onthouding te lei in die geval van 'n verbrokkeling van die huwelik of 'n egskeiding nie.[10] Die feit dat die applikant slegs beperkte geleenthede sal hê om ander werk te kry, is deur die EHMR beklemtoon (ten tye van die verhoor het die applikant 'n deeltydse betrekking gehad by 'n Protestantse gemeente).[11] Aangesien die arbeidshof nagelaat het om die regte van die applikant ten aansien van sy private en familielewe teen die belange van die Kerk af te weeg, bevind die Hof dat die reg van Schüth op respek vir sy private en familielewe wat deur Artikel 8 van die Europese Konvensie beskerm word, aangetas is. Sy afdanking het dus op 'n skending van die Europese Konvensie neergekom.

Dit moet beklemtoon word dat die Mormoonse en die Katolieke Kerke nie onderworpe is aan die jurisdiksie van die EHMR nie. Die jurisdiksie van die EHMR is beperk tot die vraag of 'n Hoë Kontrakterende Party tot die Europese Konvensie (ledestate van die Europese Raad) aan hulle verpligtinge ingevolge die Europese Konvensie voldoen het.

Die EHMR het egter die "leerstuk van positiewe verpligting" ontwikkel, welke leerstuk voortgespruit het uit Artikel 1 van die Europese Konvensie, wat soos volg bepaal: "Die Hoë Kontrakterende Partye moet die regte en vryhede van alle persone binne hulle jurisdiksiegebiede, soos in .. . hierdie Konvensie omskryf, verseker." Ingevolge hierdie bepaling is die Hoë Kontrakterende Partye nie alleen verplig om hulle van ingrype teen die betrokke regte en vryhede te weerhou nie, hulle moet ook regsvoorskrifte en -prosedures neerlê wat die regte en vryhede van persone binne hulle onderskeie jurisdiksiegebiede teen skending daarvan deur nie-staatlike daders sal beskerm.[12] In *Obst* het die EHMR

8 *Schüth v Allemagne supra* par 67.
9 Par 74.
10 Par 71.
11 Par 73.
12 Vgl bv *HLR v France* 26 EHRR 29 par 40; *A v United Kingdom* [2008] ECHR 1581 par 22.

na die beginsel van positiewe verpligting verwys as "die aanvaarding van maatreëls wat gerig is op respek vir die private lewe selfs in onderlinge verhoudings tussen individue,"[13] en verder verklaar dat

> dit van die staat vereis word, as deel van sy positiewe verpligting ingevolge artikel 8, om erkenning te verleen aan die beswaarmaker se reg op respek vir sy private en familielewe teenoor maatreëls wat deur die Mormoonse Kerk vir sy ontslag afgedwing word.[14]

Duitsland het daardie positiewe verpligting nagekom deur arbeidshowe in te stel en voorsiening te maak vir die hersiening van beslissings van daardie howe deur die *Bundesverfassungsgericht*,[15] en verder deur die applikant die geleentheid te bied om sy saak voor die arbeidshof aanhangig te maak ten einde die regsgeldigheid van sy afdanking aan te veg met inagneming van die regte wat met sy kerklike werk verband hou en deur sy kompeterende belange teen dié van die Kerk af te weeg.[16] In *Obst* het die EHMR bevind dat Duitsland, deur bemiddeling van sy arbeidshof, aan sy positiewe verpligting voldoen het, naamlik deur die reg van die applikant op sy private en familielewe teen inbreukmaking daarop deur die Mormoonse Kerk in aanmerking te neem.

In *Schüth* het die EHMR tot die teenoorgestelde slotsom gekom: Die arbeidshof het nie die volle omvang van die botsende belange wat op die spel was, teen mekaar afgeweeg nie; dit het hoegenaamd geen melding gemaak van die applikant se familielewe nie,[17] en

> die belange van die kerklike werkgewer is nie opgeweeg teen die applikant se reg op respek vir sy private en familielewe soos deur artikel 8 van die Konvensie gewaarborg nie, maar slegs met sy belange om in diens gehou te word.[18]

Die beskerming wat aan hom verleen is, het daarom nie voldoen aan die positiewe verpligting van Duitsland as 'n Hoë Kontrakterende Party tot die Europese Konvensie nie.

Die vraag wat aldus deur die EHMR beslis moes word was nie in die eerste instansie of die Mormoonse en Katolieke Kerke die bepalings van die Europese Konvensie met betrekking tot die private en familielewe van hulle onderskeie werknemers nagekom het nie, maar of Duitsland,

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13 *Obst v Allemagne supra* par 41 ("l'adoption de mesures visant au respect de la vie privée jusque dans les relations des individus entre eux.");vgl ook *Schüth v Allemagne supra* par 55.

14 *Obst v Allemagne supra* par 43 ("l'Etat était tenu, dans le cadre de ses obligations positives découlant de l'article 8, de reconnaître au requérant le droit au respect de sa vie privée contre la mesure de licenciement prononcée par l'Eglise mormone.");vgl ook *Schüth v Allemagne supra* par 57.

15 *Obst v Allemagne supra* par 45; *Schüth v Allemagne supra* par 59.

16 *Ibid*.

17 *Schüth v Allemagne supra* par 67.

18 *Ibid* ("Les intérèts de l'Eglise employeur n'ont ainsi pas été mis en balance avec le droit du requérent au respect de sa vie privée et familiale, garanti par l'article 8 de la Convention, mais uniquement avec son intérèt d'être maintenu dans son emploi.")

as 'n lidland van die Europese Raad, daardie regte voldoende verseker het teen verontagsaming daarvan deur die betrokke Kerkgenootskappe. Die verrigtinge in die arbeidshowe, en nie die diskriminerende praktyke van die betrokke kerke nie, was daarom waarom dit in die twee sake gegaan het.

3 Die Status van Kerke en Kerklike Organisasies in Duitsland

Die status van kerke en ander godsdienstige organisasies word in Duitsland gereël deur die Kerkartikels (*die Kirchenartikel*) in die Weimarse Grondwet van 11 Augustus 1919,[19] wat by die Duitse grondwet geïnkorporeer is deur Artikel 140 van die *Grundgesetz* van 1949.[20] Artikel 137(3) van die Weimarse Grondwet bepaal soos volg:

> Alle godsdienstige organisasies reguleer en administreer hulle aangeleenthede selfstandig binne die perke van regsvoorskrifte wat vir almal geld. Hulle ken hulle ampte toe sonder deelname van die staat of die burgerlike samelewing.[21]

Daar word gangbaar na hierdie bepaling verwys as die "kerklike reg op selfbeskikking" (*das kirchlichen Selbstbestimmungsrechts*).

Die omvang van daardie reg is deur die *Bundesverfassungsgericht* uitgestippel in 'n uitspraak van 1985,[22] wat betrekking gehad het op beslissings van die Federale Arbeidshof ten opsigte van (a) die ontslag van 'n vroulike mediese dokter wat by 'n Katoklieke hospitaal in Essen werksaam was,[23] en (b) die afdanking van 'n vroulike werknemer wat na die geldelike sake van 'n katolieke jeughostel in München moes omsien.[24] Die dokter is afgedank omdat sy haar persoonlike standpunt oor aborsie (wat met die Kerk se standpunt in stryd was) wêreldkundig gemaak het, en die boekhoudster omdat sy uit die Katolieke Kerk bedank het.

Die *Bundesverfassungsgericht* het in hooftrekke bevind dat die bepalings van Artikel 137(3) nie slegs vir kerke en hulle juridies selfstandige komponente geld nie, maar ook vir alle instellings, ongeag hulle juridiese konstruksie, wat met die oog op hulle doel en ingesteldheid, volgens kerklike insigte, vanselfspekend op 'n bepaalde

19 Die Verfassung des Deutschen Rechts arts 137-141 (1919) (hierna "die Weimarse Grondwet").
20 Grudgesetz für die Bundesrepublik Deutschland art 140, wat op 1949-05-23in werking getree het en wat Arts 136-139 en 141 van die Weimarse Grondwet by die *Grudgesetz* geïnkorporeer het.
21 Weimarse Grondwet art 137(3): "Jede Religionsgesellschaft ordnet und verwaltet ihre Angelegenheiten selbständig innerhalb der Schranken des für alle geltenden Gesetzes. Sie verleiht ihre Ämter ohne Mittwirkung des Staates oder der bürgerlichen Gemeinschaft."
22 BVerfGE 70, 138 – Loyalitätspflicht (1985-06-04).
23 2 AZR 591/80 en 2 AZR 628/80 (1982-10-21).
24 7 AZR 249/81 (1984-03-23).

wyse aan die kerk verbonde is en van wie vereis word om 'n komponent van die kerklike roeping waar te neem en tot uitvoering te bring.[25] Die grondwetlike waarborg van die reg op selfbeskikking bly van wesenlike belang vir die verbesondering van hierdie arbeidsverhoudinge, en sluit die bevoegdheid van kerke in om van kerklike werknemers te vereis dat hulle die heersende beginsels van die kerklike geloofs-en sedeleer sal naleef.[26] Daar word in dié verband gangbaar na die "lojaliteits-verpligtinge" (*Loyalitätsobliegenheiten*) van kerklike werknemers verwys.[27]

Kerke moet weliswaar, net soos alle ander persone, hulle kontrakteervryheid onderworpe aan die arbeidsreg van die staat uitoefen.[28] Dit wil egter nie sê dat die staatlike regsreëlings in elke geval die kerklike selfbeskikkingsreg sal troef nie.[29] Dit is daarom noodsaaklik om die botsende belange wat in dwingende arbeidspraktyke opgesluit lê teen die eise van kerklike outonomie af te weeg, en in die proses moet aan die kerke se selfbeeld (*Selbstverständnis der Kirchen*) besondere waarde geheg word:[30]

> Dit bly per slot van sake van wesenlike belang dat dit aan die Kerk self oorgelaat moet word om bindende besluite te neem oor wat 'die geloofwaardigheid van die Kerk en die verkondiging daarvan vereis', wat 'spesifiek kerklike aangeleenthede' behels, wat 'naby' verbonde aan sodanige aangeleenthede beteken, wat alles by die 'wesenlike beginsels van die geloofs-en sedeleer' tuishoort, en wat as – in 'n gegewe geval ernstige – inbreuk op daardie leer beskou moet word.[31]

25 BVerfGE 70, 138 *supra* par B.II.1a): "Diese Selbstordnungs- und Selbstverwaltungsgarantie kommt nicht nur den verfaßten Kirchen und deren rechtlich selbständigen Teilen zugute, sondern allen der Kirche in bestimmter Weise zugeordneten Einrichtungen ohne Rücksicht auf ihre Rechtsform, wenn sie nach kirchlichem Selbstverständnis ihrem Zweck oder ihrer Aufgabe entsprechend berufen sind, ein Stück des Auftrags der Kirche wahrzunemen und zu erfüllen."

26 *Idem* par B.II.1d): "Die Verfassungsgarantie des Selbstbestimmungsrechts bleibt für die Gestaltung dieser Arbeitsverhältnisse wesenlich. ... Dazu gehört weiter die Befugnis der Kirche, den ihr angehörenden Arbeitsnehmern die Beachtung jedenfalls der tragenden Grundsätze der kirchlichen Glaubens- und Sittenlehre aufzuerlegen ... "

27 Bv *idem* par A. *pr* en A.2.

28 *Idem* par B.II.1e).

29 *Ibid*.

30 *Ibid*."Dabei ist dem Selbstverständnis der Kirchen ein besonderes Gewicht beizumessen."

31 *Idem* par B.2a): "Es bleibt danach grundsätzlich den verfaßten Kirchen überlassen, verbindlich zu bestimmen, was "die Glaubwürdigkeit der Kirche und ihrer Verkündigung erfordert", was "spezifisch kirchliche Aufgaben" sind, was "Nähe" zu ihnen bedeutet, welches die "wesentlichen Grundsätze der Glaubens- und Sittenlehre" sind und was als – gegebenenfalls schwerer – Verstoß gegen diese anzusehen ist."

Die uitsprake van die EHMR in *Obst* en *Schüth* het 'n bepaalde dimensie toegevoeg tot die arbeidsregtelike beginsels wat deur Duitsland van sy arbeidshowe vereis moet word: Die uitwerking van die afdanking van 'n werknemer, vir welke rede ook al, op sy of haar private en familielewe. Hierdie besondere beperking op die grondwetlike reg van 'n kerk om lojaliteit van sy wernemers te eis ten opsigte van die beginsels en praktyke wat deur die kerk onderhou word as deel van sy religieuse belydenis verteenwoordig miskien 'n onregverdigbare inbreuk op die kerk se "selfbeskikkingsreg". Dit sou naamlik kon gebeur dat 'n kerkgenootskap, op grond van menseregtebeskerming waarop die Europese Konvensie aandring, verplig kan word om 'n persoon in diens te hou wat troubreuk pleeg (*Obst* en *Schüth*), in die openbaar gevestigde dogma van die kerk weerspreek (2 AZR 591/80 en 2 AZR 628/80) of wat van sy lidmaatskap van die kerk afstand doen (7 AZR 249/81). Aan die ander kant, egter, vereis die EHMR alleen maar van arbeidshowe om die gevolge van ontslag van 'n werknemer op sy of haar private en familielewe in aanmerking te neem en om hulleself af te vra of die gevolge van die werknemer se optrede ten aansien van die roeping van die kerk werklik van so 'n aard was dat dit die nadelige uitwerking van sy of haar ontslag op sy of haar persoonlike en familielewe sal regverdig. Dit mag dan blyk dat die kool eintlik die sous nie werd was nie.

Die Duitse regspraak ten opsigte van kerk-staatverhoudings weerspieël nie die bykans puntenerige begripspresisering waarvoor Duitse regskundges internasionale bekendheid verwerf het nie. Die reg van kerke om hulle interne sake sonder staatsinmenging te reguleer en te administreer, soos deur Artikel 140 van die *Grundgesetz* (saamgelees met Artikel 137(3) van die Weimarse Grondwet) verorden, word gangbaar "die reg op selfbeskikking" (*das Selbstbestimmungsrecht*) van godsdienstige organisasies genoem.[32]

In die hedendaagse volkereg is aan die begrip "selfbeskikkingsreg" 'n besondere betekenis verbind wat niks met die kerk se magte teenoor dié van die staat te make het nie.[33] Die reg op selfbeskikking is wel ten dele

32 BVerfGE 70, 138 *supra*; en vgl bv Hesse, *Das Selbstbestimmungsrecht der Kirchen und Religiongemeinschaften*: *Handbuch des Staatskirchenrecht* (1999).

33 Vgl bv die *Handves van die Verenigde Nasies* arts 15, 73, 1976 YBUN 1043*; Internasionale Verdrag met betrekking tot Ekonomies, Sosiale en Kulturele Regte* art 1, GA Res 2200A(XXI) van 1966-12-16, 21 UN GAOR Supp (No 16) 49, UN Doc A/6316 (1966), 993 UNTS 3; *Internasionale Verdrag met betrekking tot Burgerlike en Politieke Regte* art 1, GA Res 2200(XXI) van 1966-12-16, 21 UN GAOR Supp (16) 52, UN Doc A/6316 (1966), 993 UNTS 171; *Deklarasie met betrekking tot Beginsels van die Volkereg ten aansien van Koloniale Lande en Volke* art 2, GA Res 1514 van 1960-12-14, 15 UN GAOR Supp (16) 66, UN Doc A/4684 (1960); *Deklarasie met betrekking tot Beginsels van die Volkereg ten aansien van Vriendelike Verhoudings tussen en Samewerking van State ooreenkomstig die Handves van die Verenigde*

vervolg op volgende bladsy

op godsdienstige gemeenskappe (nie godsdienstige organisasies nie) van toepassing,[34] naamlik as 'n kollektiewe groepsreg (nie 'n institusionele groepsreg nie) van persone met 'n gemeenskaplike godsdienstige verbintenis of geloofsbelydenis.[35] Die reg op selfbeskikkng van 'n godsdienstige gemeenskap vestig in individuele lede van daardie gemeenskap (nie in 'n groepsverband soos 'n kerkgenootskap nie) en kan deur die reghebbendes individueel of in semewerking met ander lede van die groep uitgeoefen word. Inhoudelik hou die reg op selfbeskikking van lede van 'n godsdienstige gemeenskap die bevoedgheid in om hulle godsdiens te beoefen, en om godsdienstige verenigings tot stand te bring en daarby aan te sluit, sonder ongeregverdigde staatsinmenging.[36]

Die reg van kerke om self hulle eie interne aangeleenthede te reguleer en te administreer word in Duitsland soms ook as "kerklike outonomie" aangedui.[37] Die terme is as sodanig nie aanvegbaar nie. Daar moet egter 'n onderskeid gemaak word tussen die uitoefening van magte wat deur een organisasie aan 'n ander gedelegeer is, en die uitoefening van interne magte deur 'n organisasie uit eie reg. Gedelegeerde magte is uitsluitlik beperk tot gevalle waar die organisasie aan wie die magte toevertrou is, deel vorm van 'n oorkoepelende organisasie, welke oorkoepelende organisasie die een is wat die magte aan sy ondergeskikte komponent gedelegeer het. Die toebedeling van magte deur 'n kerk aan plaaslike gemeentes is hiervan 'n voorbeeld.

Die onderskeie magte wat deur die staat en kerkorganisasies (onderskeidelik) uitgeoefen word, is van gans 'n ander aard, want staat en kerk is nie 'n organitories deel van mekaar nie. Kerk en staat is samelewingsverbande met verskillende leidende funksies wat onderskeidelik godsdiens-gerig en polities van aard is. Die reg van die kerk om sy eie interne sake te reguleer en te administreer berus daarom nie op 'n vergunning van die staat nie maar kom die kerk uit eie reg toe, en wel uit hoofde van sy eie aard as 'n selfstandige komponent van die menslike samelewing. In hedendaagse Calvinistiese wysbegeerte word die uitoefening van gedelegeerde magte in 'n deel-geheel verhouding van 'n enkele verbandstruktuur as 'n geval van "outonomie" van die ondergeskikte komponent van daardie groepsverband gekenteken,

Nasies, GA Res 2625 van 1970-10-24, 25 UN GAOR Supp (No 28) 121, UN Doc A/8028 (1970); *Finale Akte van die Konferensie ten aansien van Veiligheid en Samewerking in Europa*, par VIII, 14 ILM 1292 (1975).

34 Vgl in die breë Van der Vyver *Leuven lectures on religious institutions, religious communities and rights* 4-5 (oor die onderskeid tussen godsdienstige gemeenskappe en godsdienstige organisasies) en 67-90 (oor die reg op selfbeskikking van godsdienstige gemeenskappe) (2004).

35 *Idem* 72 (oor die onderskeid tussen kollektiewe en institusionele groepregte).

36 *Idem* 72; en vgl *Grondwet van die Republiek van Suid-Afrika* arts 31, 185.

37 Vgl bv Robbers (red) *Church autonomy: A contemporary study* (2001).

terwyl die interne magte van wesenlik verskillende verbande (soos kerk en staat) met die frase "soewereiniteit in eie kring" aangedui word.[38]

Die bepalings van Artikel 137(3) van die Weimarse Grondwet doen in dié sin die soewereiniteit in eie kring van godsdienstige organisasies teenoor die politieke magte van staatsorgane gestant. Die beslissing van die Suid-Afrikaanse Gelykheidshof in *Strydom v Nederduitse Gereformeerde Gemeente, Moreleta Park*[39] is op dieselfde beginsel gegrond, hoewel met 'n ietwat ander klem.

4 Soewereinitiet van Godsdienstige Organisasies in Suid-Afrika

Johan Daniel Strydom was verbonde aan die Kunsakademie van die Moreleta Parkse gemeente van die Nederduitse Gereformeerde Kerk in Pretoria as 'n musiekinstrukteur wat orrellesse gegee het. Hy is deur die kerklike owerhede afgedank omdat hy in 'n homoseksuele verhouding betrokke was en met sy gesèl van dieselfde geslag gaan saamwoon het. Hy het sy ontslag in die Gelykheidshof aangeveg. Die Hof het aan hom R.75,000 aan genoegdoening vir pyn en lyding toegeken en 'n verdere R.11,000 skadevergoeding vir verlies aan inkomste. Ds Dirkie van der Spuy van die Moreleta Parkse gemeente het getuig dat die Kerk toelaat dat ouderlinge en diakens homoseksueel mag wees, hulle moet dit net nie beoefen nie. Die ontslag van Strydom het volgens die Gelykheidshof op onbillike diskriminasie neergekom en was daarom strydig met die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie.[40] Moreleta Park het nie teen die uitspraak geappelleer nie.

Die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie[41] is deur die Suid-Afrikaanse wetgewer aangeneem ingevolge die gelykheidsbepalings van die Grondwet van die Republiek van Suid-Afrika, 1996. Die Suid-Afrikaanse grondwetlike verbod op onbillike diskriminasie is uniek in twee besondere opsigte: (a) dit sluit seksuele georiënteerdheid in by die gronde van differensiasies wat vir regsdoeleindes *prima facie* op onbillike diskriminasie neerkom;[42] en (b) die Grondwet maak ook voorsiening vir die verbod op onbillike diskriminasie deur private (nie-staatlike) persone (regspersone ingesluit).[43] Die Grondwet spesifiseer nie die verbod op onbillike diskriminasie deur nie-staatlike daders nie maar het dit aan die wetgewer oorgelaat om nasionale wetgewing aan te neem "om onbillike

38 Van der Vyver *Leuven lectures supra* 43-45; Van der Vyver "Sphere sovereignty of religious institutions: A contemporary Calvinistic theory of church-state relations" in Robbers 645 656.
39 2009 (4) SA 510 (Equality Court, TPD).
40 4 van 2000.
41 *Ibid*.
42 Art 9(3) van die Grondwet van die Republiek van Suid-Afrika, 1996.
43 *Idem* art 9(4).

diskriminasie te voorkom en te belet."[44] Die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie[45] is ingevolge hierdie grondwetlike opdrag ("wetgewing *moet* verorden word") aangeneem. Die ontslag van Strydom deur kerklike owerhede ten gevolge van sy seksuele georiënteerdheid moes derhalwe deur die Gelykheidshof beoordeel word – 'n orgaan wat ingevolge die gemelde Wet ingestel is om gevalle van onbillike diskriminasie te bereg.[46]

In die geval *Strydom* het die Gelykheidshof sy bevinding van onbillike diskriminasie in hoofsaak op drie oorwegings gebaseer:

> (a) Die feit dat die amp van die eiser niks met die geestelike roeping van die kerk te make gehad het nie;
>
> (b) Die feit dat die eiser as 'n onafhanklike kontrakteur diens gedoen het; en
>
> (c) Die feit dat die eiser nie eers 'n lidmaat van die NG Kerk was nie (hy is lid van die Nederduitsch Hervormde Kerk).

Die Arbeidshof het dit duidelik gestel dat die ontslag van die eiser regtens geoorloof sou gewees het indien sy betrekking in die Kerk te make sou gehad het met die verkondiging van die *Woord* of die geestelike roeping van die Kerk. In dié verband het die Arbeidshofverwys na die uiteensetting deur Paul Farlam van gevalle waar die staat, na Farlam se oordeel, nie met interne sake van die kerk moet inmeng nie; en die Arbeidshof het met goedkeuring die volgende passasie uit die Farlam artikel aangehaal:

> The first scenario involves discrimination against a person with *spiritual responsibilities* (such as a priest or a candidate for ordination). Few exercises are more central to religious freedom than the right of a church to choose its own spiritual leaders. If a court were to hold that churches could not deem sexual orientation, or any of the other enumerated grounds in the equality clause, a disqualifying factor for the priesthood, the effect on many churches could be devastating. Consequently, although the value of equality is foundational to the new constitutional dispensation, it is unlikely that equality considerations could outweigh the enormous impact of failing to give churches an exemption in relation to their spiritual leaders. Where the appointment, dismissal and employment conditions of religious leaders (such as priests, imams, rabbis, and so forth) are concerned, religious bodies are likely to be exempted from compliance with legislation prohibiting unfair discrimination.[47]

Hierdie aanhaling – al was dit dan ook slegs by wyse van *obiter dictum* – is gerusstellend.

Gelyke regsbeskerming en die verbod op diskriminasie is ongetwyfeld 'n grongliggende basiese norm, *die Grundnorm* sou die Duitsers sê, van

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44 *Ibid*.
45 4 van 2000.
46 *Idem* art 16.
47 *Strydom supra* par 15, met verwysing na Farlam, "Freedom of religion" in Woolman *et al Constitutional Law of South Africa* (2009) vol 3 47.

die Suid-Afrikaanse grondwetlike bestel.[48] Die Grondwet beskryf die "nuwe Suid-Afrika" as "'n oop en demokratiese samelewing gebaseer op menswaardigheid, gelykheid en vryheid."[49] Regter Froneman het met die oog op hiedie bepalings in 'n onlangse uitspraak van die Konstitusionele Hof verklaar: "Equality, together with dignity and freedom, lie at the heart of the Constitution."[50] Die Grondwet waarborg meer bepaald die gelykheid van almal voor die reg en die reg op gelyke regsbeskerming en voordele van die reg,[51] onderworpe egter aan regstellende aksie "vir die beskerming of ontwikkeling van persone, of kategorieë van persone, wat deur onbillike diskriminasie benadeel is."[52] Dit verbied regstreekse of onregstreekse onbillike diskriminasie deur die staat en deur ander persone gegrond op

> ras, geslagtelikheid, geslag, swangerskap, huwelikstaat, etniese of sosiale herkoms, kleur, seksuele georiënteerdheid, ouderdom, gestremdheid, godsdiens, gewete, oortuiging, kultuur, taal en geboorte

of op ander soortgelyke gronde.[53] Die grondwetlike reg op gelykheid is dienooreenkomstig "foundational to the open and democratic society envisaged by the Constitution."[54] Dit is op 'n keer beskryf as "a core and fundamental value" wat tot "the bedrock of our Constitutional architecture" behoort.[55]

As 'n mens die geskiedenis van rassediskriminasie in Suid-Afrika in ag neem, maak dit alles sin. Die verbod op diskriminasie in die interne terrein van nie-staatlike organisasies en in die private lewe van staatsonderdane is egter riskant en kan in wese neerkom op 'n vorm van politieke totalitarisme;[56] dit wil sê "staatsinmenging in die private lewe van mense en/of die interne huishouding van nie-staatlike sosiale entiteite."[57] Waarskynlik die meeste kerkverbande diskrimineer naamlik op grond van geslagtelikheid teen byvoorbeeld vroulike lidmate, en wil 'n mens dit nou werklik aan die staat opdra om (onder meer) die Rooms Katolieke Kerk, of die Grieks OrtodokseKerk, of die Joodse

48 Van der Vyver "Gelykberegtiging" 1998 THRHR 367 369-70.
49 Art 39(1)(a) van die Republiek van Suid-Afrika, 1996; vgl ook arts 1, 7(1), 36(1).
50 *Bengwenyana Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* Saak No CCT 39/10 [2010] ZACC 26 (2010-11-30).
51 *Idem* art 9(1).
52 *Idem* art 9(2).
53 *Idem* art 9(3) en (4); vgl ook die par (a) van die "verbode gronde" in art 1 van die Wet op die Bevordering van Gelykhied en die Voorkoming van Onbillike Diskriminasie 4 van 2000.
54 *Strydom supra* par 14; and vgl ook *Prince v President, Cape Law Society*, 2002 (2) SA 794 (CC) par 49.
55 *Minister of Finance v Van Heerden* 2004 (6) SA 121 (CC) par 22; vgl ook *Minister of Education v Syferts Trust Ltd NO* 2006 (4) SA 205 (CC) par 31; *Strydom supra* par 10.
56 Van der Vyver in Robbers 645 671.
57 Van der Vyver 1998 THRHR 367 395; en vgl ook Vyver "The function of legislation as an instrument for social reform" 1976 *SALJ* 56 66 ("Totalitarianism ... becomes evident when State authority extends into the private enclave of non-State societal circles, such as family life, academic institutions and the sovereign sphere of the churches").

geloofsorganisasies, of die Gereformeerde Kerk te verplig om vrouens in die bedieningsamp van priester of rabbie of predikant te ordineer?[58]

Die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie[59] het nie juis bygedra om hieroor gemoedsrus te bring nie. Die wetgewer het trouens versuim om die grondwetlike bedoeling met die Wet gestant te doen, en wel in ten minste drie opsigte:

- Dit is duidelik dat die grondwetlike opdrag wat tot die Wet aanleiding gegee het, slegs op onbillike diskriminasie deur nie-staatlike daders betrekking het, maar die wetgewer het dit goed gedink om onbillike diskriminasie deur die staat self by sy verbodsbepalings in te sluit.[60]
- Skrywers van die Grondwet was met die opdrag aan die wetgewer daarop bedag dat die verbod op diskriminerende praktyke in die private sfeer aan minder of ander beperkinge onderworpe gestel moet word as dié wat op diskriminasie deur die staat betrekking het, maar die wetgewer het dit goed gedink om nie daardie onderskeid te maak nie.[61]
- Die verbod op diskriminasie deur die Staat en in die private sfeer wat op ras, geslagtelikheid of gestremdheid gegrond is, word in die Wet uitgesonder en aan besondere perke onderworpe gestel wat nie op diskriminasie op enige van die ander gronde van toepassing gemaak is nie.[62]

Ingevolge die Wet sluit onbillike diskriminasie gegrond op geslagtelikheid "enige . . . godsdienstige gebruik" in "wat die waardigheid van vrouens aantas en die gelykheid tussen vrouens en mans ondermyn."[63] Hierdie bepaling sou beslis die uitsluiting van vrouens van sekere kerklike ampte in die kollig kon bring. Omdat geslagtelikheid een van die "verbode gronde" is,[64] berus die onus op die betrokke kerk om te bewys dat uitsluiting van vrouens uit die kerklike amp billik is.[65] Die Wet bevat 'n lang lys van omstandighede wat vir dié doel in aanmerking geneem moet word, byvoorbeeld "of die diskriminasie redelik en regverdigbaar onderskei tussen persone volgens objektief bepaalbare maatstawwe wat inherent is aan die betrokke aktiwiteit";[66] die uitwerking of waarskynlike uitwerking van die diskriminasie op die beswaarmaker;[67] en die vraag of die diskriminasie 'n geregverdigde doel dien.[68] Dit lyk nie asof hierdie oorwegings enigsins sal bydra om die kerk se bewyslas te vergemaklik nie; en, soos ek self tevore opgemerk het: "Die blote feit dat die kerk

58 Van der Vyver 1998 THRHR 367 396-97.
59 4 van 2000.
60 Arts 5(1) en 6 van die Wet op die Bevordering van Gelykheid en die Voorkoming van Onbillike Diskriminasie 4 van 2000.
61 *Ibid*.
62 *Idem* arts 7-9.
63 *Idem* art 8(d).
64 *Idem* art 1(xxii).
65 *Idem* art 13(2)(b)(ii).
66 *Idem* art 14(2)(c).
67 *Idem* art 14(3)(b).
68 *Idem* art 14(3)(f).

verplig mag word om sy interne regsreëlings voor 'n sekulêre tribunaal te moet verdedig, kom neer op totalitarime van die ergste graad."[69]

Die *obiter dictum* van Regter Basson in *Strydom* waarna hierbo verwys is,[70] kan bydra tot die vermyding van staatsinmenging in praktyke wat intiem aan die geestelike ingesteldheid, leerstellings en werksaamhede van kergenootskappe verbind is.

5 Slotopmerkings

Die Suid-Afrikaanse grondwetlike bestel kan, vanuit 'n bepaalde hoek beskou, as 'n godsdiensvriendelike bedeling beskryf word. Dit verleen aan kerklike organisasies as regspersone "die regte in die Handves van Regte in die mate waarin die aard van die regte en die aard van daardie regspersoon dit vereis";[71] dit waarborg "vryheid van gewete, godsdiens, denke, oortuigings en mening" van elke persoon;[72] dit verleen aan elkeen vryheid om te vergader[73] en vryheid van assosiasie;[74] dit beskerm die reg op selfbeskikking van lede van 'n godsdiensgemeenskap;[75] dit maak voorsiening vir 'n Kommissie vir die Bevordering en Beskerming van die Regte van Kulturele, Godsdiens- en Taalgemeenskappe;[76] en dit baan die weg vir nasionale wetgewing vir die instelling van 'n Pan Suid-Afrikaanse Taalraad wat belas sal wees met, onder meer, die bevordering van Arabies, Hebreeus, Sanskrif en ander tale wat in Suid-Afrika vir godsdiensdoeleindes gebruik word.[77] Die Konstitusionele Hof het by verskeie geleenthede die belangrikheid van godsdiens as 'n komponent van die Suid-Afrikaanse grondwetlike demokrasie beklemtoon. In *Christian Education v Minister of Education* het Regter Albie Sachs dit soos volg verwoord:

> There can be no doubt that the right to freedom of religion, belief and opinion in an open and democratic society contemplated by the Constitution is important. The right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity. Yet freedom of religion goes beyond protecting the inviolability of the individual conscience. For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of

69 Van der Vyver 1998 THRHR 367 397.
70 Vgl die gepaardgaande teks van n 47.
71 Art 8(3) van die Grondwet van die Republiek van Suid-Afrika, 1996.
72 *Idem* art 15(1).
73 *Idem* art 17.
74 *Idem* art 18.
75 *Idem* arts 31 en 235.
76 *Idem* arts 181(1)(c) en 185-86; en vgl die Wet op die Bevordering en Beskerming van die Regte van Kulturele, Godsdiens- en Taalgroepe 19 van 2002.
77 Art 6(5)(b)(ii) van die Grondwet van die Republiek van Suid-Afrika, 1996.

> human rights. It affects the believer's view of society and founds the distinction between right and wrong. It expresses itself in the affirmation and continuity of powerful traditions that frequently have an ancient character transcending historical epochs and national boundaries.[78]

By 'n ander geleentheid het Regter Sachs, in 'n eenparige uirspraak van die Konstitusionele Hof, verklaar dat heelwat probleme opgesluit lê in "the relationship foreshadowed by the Constitution between the sacred and the secular."[79] Hy het die volgende daaraan toegevoegom die belangrikheid van godsdienstige organisasies *vir die staat* in die kollig te stel:

> Religious bodies play a large and important part in public life, through schools, hospitals and poverty relief programmes. They command ethical behaviour from their members and bear witness to the exercise of power by State and private agencies; they promote music, art and theatre; they provide halls for community activities, and conduct a great variety of social activities for their members and the general public. They are part of the fabric of public life, and constitute active elements of the diverse and pluralistic nation contemplated by the Constitution. Religion is not just a question of belief or doctrine. It is part of the people's temper and culture, and for many believers a significant part of their way of life. Religious organizations constitute important sectors of national life and accordingly have a right to express themselves to government and the courts on the great issues of the day. They are active participants in public affairs fully entitled to have their say with regard to the way law is made and applied.[80]

Suid-Afrikaanse regspraak het dusver ook die soewereiniteit in eie kring van kerklike organisasies gerespekteer. Om daarvan maar net een verdere voorbeeld te vermeld: In Suid-Afrika kan beslissings van kerklike tribunale nie op appèl deur burgerlike howe heroorweeg word nie, maar sodaninge beslissings is wel onderworpe aan hersiening deur burgerlike howe.[81] Godsdienstige organisasies is besonderlik sensitief vir die uitoefening van hersieningsbevoegdhede deur sekulêre howe met betrekking tot interne dissiplinêre verrigtinge van kerklike tribunale.[82] Die burgerlike hof wat 'n beslissing van 'n kerklike tribunaal op

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78 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757 (CC) par 36; vgl ook *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) par 89 (waar Sachs r die aanhanling bevestig); *Prince v President, Cape Law Society* 2002 (2) SA 794 (CC) par 149 (waar Sachs r in 'n minderheidsuitspraak verklaar dat "where there are practices that might fall within a general legal prohibition, but that do not involve any violation of the Bill of Rights, the Constitution obliges the State to walk the extra mile").

79 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC) par 89.

80 *Idem* par 93.

81 *Du Plessis v Synod of the Dutch Reformed Church* 1930 CPD 403 420-21; *Taylor v Kurtstag* 2005 (1) SA 362 (W) par 42.

82 Vgl Broyd "Forming Religious Communities and Respecting Dissenter's Rights: A Jewish Tradition for a Modern Society" in Witte en Van der Vyver (reds) *Religious human rights in global perspective: Religious perspectives* (1996) 203 224, waar die skrywer verklaar dat "the question of membership in the colony of the Church should be beyond a secular court", welke verklaring met goedkeuring aangehaal is in *Taylor v Kurtstag supra* par 43.

hersiening neem, sal nie inmeng in die huishoudelike aangeleenthede van die kerklike organisasie nie, maar sal wel ingryp indien die kerklike tribunaal nagelaat het om sy eie voorgeskrewe prosedures na te kom of sy magte te buite gegaan het.[83] Die kerklike tribunaal moet ook die "elementêre beginsels van geregtigheid" nakom.[84] Daar word in dié verband gewoonlik klem gelê op die reg van 'n persoon om in belang van sy verdediging gehoor te word (*audi alteram partem*), maar die eintlike maatstaf is in die laaste instansie bloot "the fairness of the process" in die lig van die aard van die verrigtinge.[85] Die *audi alteram partem*-reël geld in elk geval nie indien die persoon wat gehoor wil word, aanspraak maak op 'n eis waartoe hy of sy nie geregtig is nie.[86]

Beroep op grondwetlik beskermde regte deur 'n beswaarmaker teen dissiplinêre optrede binne die grense van 'n godsdienstige organisasie word ook deur Suid-Afrikaanse howe met 'n knippie sout geneem. In *Taylor v Kurtstag* is die Witwatersrandse Plaaslike Afdeling van die Hoë Hof juis met so 'n probleem gekonfronteer. 'n Kennisgewing van uitsetting (*cherem*) uit die Ordodokse Joodse Geloof is in daardie saak deur die Joodse kerklike tribunaal (*Beth Din*) op die eiser bestel. Die eiser het by die burgerlike hof aansoek gedoen vir tersydestelling van die *cherem* omdat dit, na sy oordeel, sy grondwetlike reg op vryheid van geloof in artikel 15(1) van die Grondwet aantas, en ook sy bevoegdheid om sy geloof te beoefen en godsdienstige verbintenisse met geloofsgenote te onderhou, geweld aandoen en sodoende sy reg op selfbeskikking in artikel 31(1)(b) ondermyn. Die Hof bevind dat dit inderdaad die geval is, maar gaan voort met 'n ondersoek na die vraag of daardie ingrype ingevolge die beperkingsklousule van die Grondwet geoorloof is. Die Hof bevind dat "[a] religious tribunal is subject to the discipline of the Constitution, but its being a religious body giving effect to the associational rights of its members, must be accounted for."[87] Die Hof boekstaaf dat "the reluctance to interfere in matters of faith, whether it be procedural or otherwise, cannot be discarded," en by gebrek aan getuienis van vooroordeel of kwade trou aan die kant van die *Beth Din*,[88] handhaaf die Hof die grondwetlikheid van die *cherem*.

Moet dieselfde toeskietlikheid ook vir diskriminasie deur godsdienstige organisasies op grond van geslagtelikheid en seksuele

83 *Odendaal v Loggerenberg NNO (1)* 1961 (1) SA 712 (O) 719; *Yiba v African Gospel Church* 1999 (2) SA 949 (C) 961; vgl *ook NGK van Afrika v Verenigde Geref Kerk in Suider-Afrika* 1999 (2) SA 156 (SCA) 170 (waar beslis is dat die Algemene Sinode die interne reels van die kerk moet nakom).

84 *Theron v Ring van Wellington van die NG Kerk in SA* 1976 (2) SA 1 (A) 10; *Odendaal v Loggerenberg supra* 719.

85 *Taylor v Kurtstag supra* par 63.

86 *Mankatshu v Old Apostolic Church of Africa* 1994 (2) SA 458 (Tk AD) 463-64. Vgl ook *Jacobs v Old Apostolic Church of Africa* 1992 (4) SA 172 (Tk GD) (waarin beslis is dat 'n kerklidmaat nie kan aandring op insae in boeke en finansiële state van die kerk waar 'n reg daartoe nie aan hom verleen is ingevolge die toepaslike kerkorde nie).

87 *Taylor v Kurtstag supra* par 63.

88 *Idem* par 62.

georiënteerdheid geld? Gedurende die suigelingsjare van die nuwe Suid-Afrikaanse grondwetlike bestel het Regter Yvonbne Mokgoro op 'n keer verwys na die "delicate and complex" taak om tradisionele gewoontereg van Afrika gemeenskappe binne die raamwek van die Menseregte Handves te akkommodeer, en sy het daaraan toegevoeg dat "[t]his harmonization will demand a great deal of judicious care and sensitivity."[89] Dieselfde geld vir diepgewortelde vooroordele wat in die tradisies van godsdiensgroepe wortel geskiet het.

Daar moet inderdaad op die openbare akker sterk standpunt ingeneem word teen ongeregtighede wat histories in die gebruike en tradisies van etniese en godsdiensgroepe veranker is. Dit sluit alle manifestasies van diskriminasie gegrond op geslagtelikheid en seksuele georiënteerdheid in. Regsdwang is egter nie die aangewese medium om godsdiensgroepe met verstarde vooroordele tot beter insigte te bring nie, en kan selfs teenproduktief wees.[90] Godsdiens sluit naamlik geloofsoortuigings in wat nie met empiriese gegewens of rasionele analise bevestig kan word nie, en godsdienstige organisasies kan daarom in vele opsigte nie deur logiese denke en morele insigte – en allermins deur regsdwang – tot nuwe insigte gebring word nie. Oorreding deur bemiddeling van eties-gegronde oortuigings is daarom die aangewese, hoewel langdurige, proses wat verandering moet stimuleer. Waardes wat op oortuiging gegrond is, is in elk geval ver verhewe bo dié wat met regsgebiedinge gehandhaaf moet word.[91]

89 *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) par 174.
90 Van der Vyver 1976 *SALJ* 56 65.
91 *Idem* 67.

Molao wa tšhireletso ya leago ka mo go ditšhaba tšeo di hlabologago tša borwa bja Afrika

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SUMMARY

Code on social security in the Southern African development community

The Code on Social Security in the Southern African Development Community (Code) was approved by the Integrated Committee of Ministers in June 2007 in Windhoek Namibia. This contribution critically examines how the Code attempts to develop sound social security systems in the Southern African Development Community (SADC) region. It pays special attention to the approach adopted by the Code in its quest to address pertinent issues such as the right to social security, social protection framework, and social risks as well as vulnerable groups and categories of persons protected. It concludes by observing that the ratification record of SADC member states of the officially current conventions in the field of social security is unsatisfactory. Accordingly, member states must be encouraged to ratify these important instruments. Secondly, preventative and (re)integrative measurers are a part and parcel of a social security system. Thus, the call by the Code for the introduction of these measures is to be welcomed. Furthermore, social security coordination is an integral part of regional integration and the free movement of labour and persons. To this end, the provisions in the Code aimed at these matters are timely. Finally, the Code is not legally binding. Nonetheless, its adoption is commendable for it is a right step towards the improvement of social security systems in the SADC region which are largely undeveloped and, in some instances, underdeveloped.

1 Matseno

Molao wa Tšhireletšo ya Leago ka mo go Ditšhaba tšeo di Hlabologago ka mo Borwa bya Afrika o dumeletšwe ke Komiti ya Ditona yeo e Kopanetšwego (ICM) ka Phupu 2007 go la Windhoek Namibia.[1] Maikemišetšo a Molao ke go fa dinagamaloko (mohl. Angola, Botswana, Democratic Republic of the Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Afrika Borwa, Seychelles, Swaziland, Tanzania, Zambia le Zimbabwe) le (ge go lebelelwa(b) le (c)) Ditšhaba tšeo di Hlabologago ka mo Borwa bya Afrika (SADC) ka:

(a) leano la tsela le ditlhahlo ka go tlhabollo le kaonafatšo ya ditsela tša tšhireletšo ya leago, gore o kgone go oketša pabalelo ya batho ba selete se;

1 Lebelela Post-ICM Media Briefing Statement 2007-06-16 Windhoek, Namibia – e hweditšwe mo go http://www.sadc.int.

(b) melawana le maemo ao a hlokegago a tšhireletšo ya leago, gammogo le tlhako ya tekolo go maemo a bosetšhaba le a selete; le

(c) sedirišwa seo se šomago gabotse sa kgohlaganyo, kopanyo le go swana ga ditsela tša tšhireletšo ya leago ka mo seleteng se.[2]

Maikemišetšo a pele a Molao wo, go fihla bokgole bjo itšego, a laetša mathata a tšhireletšo ya leago le ditlhohlo tšeo di lebanego le selete sa SADC. Mohlala, tšhireletšo ya leago ka mo SADC ka kakaretšo, e fase ka tlhabologo.[3] Go tlaleletša, ditsela tša tšhireletšo ya leago ka mo seleteng e fela e sa akaretše le go phaela thoko sehlopha sa batho ba bantši bao ba diilago le magoro a batho bjalo ka bahudugi, bašomi ba go tšwa ka ntle le bafaladi.[4] Go tšwelapele, go na le hlokego e kgolo kudu ya kgohlaganyo ya ditsela tša tšhireletšo ya leago ka mo seleteng.[5]

Sengwalwa se, se lekola ka tsitsinkelo gore Molao o leka bjang go hlama ditsela tšeo di kwagalago tša tšhireletšo ya leago ka mo seleteng sa Ditšhaba tšeo di hlabologago tša ka Borwa bja Afrika. Se fa šedi ya go ikgetha go mokgwa wo o amogetšwego ke Molao ka go nyaka go šogana le ditaba tše di lego maleba bjalo ka tokelo go tšhireletšo ya leago, tlhako ya tšhireletšo ya leago, le dikotsi tša leago gammogo le dihlopha tšeo di lego kotsing le magoro a batho ao a šireleditšwego. Poledišano ka ga ditaba tšeo go boletšwego ka tšona ka mo godimo e tla latelwa ke kakaretšo ya bofelo.

2 Tokelo go Tšhireletšo ya Leago

2 1 Tokelo ya Kakaretšo go Tšhireletšo ya Leago

Molao o fa 'o mongwe le o mongwe ' yo a lego ka mo SADC tokelo go tšhireletšo ya leago.[6] Ka go dira bjalo, o tsenela ka boati didirišwa tša boditšhabatšhaba[7] le melaotheo ya bosetšhaba[8] yeo e hlokomelago tokelo go tšhireletšo ya leago bjalo ka tokelo ya motheo yeo e swanelwago ke go hwetšwa ke o mongwe le o mongwe.[9] Go ya ka Molao wo, kgopolo ya 'tšhireletšo ya leago 'e bolela ka mekgwa ya mmušo le

2 Temana ya 3 ya Molao wa Tšhireletšo ya Leago ka mo go Ditšhaba tšeo di Hlabologago ka mo Afrika ya ka Borwa.

3 Olivier le Mpedi "Co-ordination and integration of social security in the SADC region: Developing the social dimension of economic co-operation and integration" 2003 *Journal for Juridical Science* 10 mo go 12.

4 *Idem* mo go 13.

5 *Ibid*.

6 Temana ya 4(1) ya Molao.

7 Bjalo ka Income Security Recommendation (1944), Universal Declaration of Human Rights (1948) le International Covenant on Economic, Social and Cultural Rights (1966).

8 Lebelela, mohlala, s 27(1) (c) ya Molaotheo wa Repabliki ya Afrika Borwa, 1996.

9 Lebelela Eichenhofer *Social Security Reform and the Law* ka mo go Pieters (ed) *Confidence and Changes: Managing Social Protection in the New Millennium* (2001) 237; Schulte *Legal Protection of Social Benefits and Expectancies – Social Rights under International and National Law* ka mo go Kremalis (ed) *Simplification and Systematisation of Social Protection Rules*

continued on next page

poraebete, goba mekgwa yeo e kopantšwego ya mmušo le ya poraebete yeo e hlamilwego go šireletša batho le malapa kgahlanong le go se šireletšwe ga letseno mo go hlolago ke tšeo di bego di se tša emelwa bjalo ka go se šome, kgobalo ya mošomong, botswetši, bolwetši, bogole, botšofadi le lehu. Maikemišetšo a magolo a tšhireletšo ya leago ke: (a) go boloka letseno, (b) go fana ka tlhokomelo ya maphelo, le (c) go fana ka mehola go malapa (matseno). Go tšwa go tebelelo ya kgopolo, Molao o tiišetša gore tlhalošo ya wona ya tšhireletšo ya leago o akaretša inšorense ya leago, thušo ya leago le diputseletšo tša leago.[10] Le ge go le bjalo, go swanetšwe go bolelwa gore Molao, ka tlaleletšo go tšhireletšo ya leago, o bolela ka 'tšhireletšo go leago'. Tšhireletšo go leago, go ya ka Molao, "o akaretša tšhireletšo ya leago le ditirelo tša leago, gammogo le pabalelo yeo hlabologago ya leago. Tšhireletšo ya leago ka gona e ra gore mekgwa ya mmušo le ya poraebete, goba mekgwa yeo e kopantšwego ya mmušo le ya poraebete yeo e hlamilwego go šireletša batho kgahlanong le mathata a bophelo ao a fokotšago bokgoni bja bona go ka fihlelela dinyakwa tša bona. Maikemišetšo ke go godiša pabalelo ya motho."[11] Ge e bonwa go tšwa ka kgopolong, ka gona Molao o laetša gore, tšhireletšo ya leago (a) e akaretša dibopego ka moka tša tšhireletšo ya leago, (b) e akaretša ditirelo tša leago le pabalelo ya leago yeo e hlabologago e bile ga e ganetšwe go tšhireletšo kgahlanong le tšhireletšo ya letseno yeo e hlolago ke dikotsi tšeo di itšeng.[12] Ka lebaka leo, pabalelo ya leago e feta tšhireletšo ya leago.[13]

2 2 Go Hloma le go Hlokomela Mokgwa wa Tšhireletšo ya Leago

Molao o nyaka gore dinagamaloko di hlome le go hlokomela tsela ya tšhireletšo ya leago go ya ka bopaki bya ona le tša temana ya semolao ya 10 ya Tšhata ya Tokelo ya Motheo ka go SADC (2003) (Tšhata).[14] Temana ya semolao ya 10 ya Tšhata e hlagiša gore: "Dinagamaloko di tla hlola tikologo yeo e kgontšhago gore mošomi o mongwe le o mongwe ka mo Seleteng a be le tokelo go pabalelo ya leago yeo e lekanego e bile, go sa lebelelwe maemo le mohuta wa mošomo, a tla hwetša diputseletšo tšeo di lekanego tša tšhireletšo ya leago. Batho bao ba bego ba sa kgone go ka tsena goba go tsena gape mo mešomong e bile ba se na mekgwa ya go iphediša ba tla ba le maswanedi a go hwetša methopo yeo e lekanego le thušo ya leago." Go bohlokwa ka nnete gore dinagamaloko di hlome le go hlokomela ditsela tša tšhireletšo ya leago go mabaka a tokelo go tšhireletšo ya leago, bjalo ka ge e hwetšwa ka gare ga temana ya semolao

(1996) 137; Craven *The International Covenant on Economic, Social, and Cultural Rights: A Perspective on its Development* (1995); Van Langendonck *The Right to Social Security and Allied Rights* ka mo go Ruland *et al* (eds) *Verfassung, Theorie und Praxis des Sozialstaats* (1998) 477; le Perrin "The recognition of the right to social protection as a human right" 1985 *Labour & Society* 239.

10 Temana ya 1(5) ya Molao.
11 Temana ya 1(4) ya Molao.
12 *Ibid*.
13 *Ibid*.
14 Temana ya 4(2) ya Molao.

ya 4(1) ya Molao, e tla hloka mohola ge go se na (tšhomo e botse) ditsela tša tšhireletšo ya leago.

Go tšwelapele, Molao o bea tlamo ya kgapeletšo go dinagamaloko ka moka go boloka ditsela tša bona tša tšhireletšo ya leago go maemo ao a kgotsofatšago ao a nyakegago gore a tle a tiišetše ke Kwano ya Boditšhabatšhaba ya Mokgatlo wa Bašomi (ILO) ya Tšhireletšo ya Leago ke (Kwano 102 ya 1952).[15] Go ya le ka tebelelo ya dikgoeletšo tšeo di fetilego, go maleba go laetša gore palo ya tiišetšo ke dinaga tša SADC tša kwano tša bjale tše seswai tša semmušo ka go lefapha la tšhireletšo ya leago(mohl. Social Security (Minimum Standards) Convention, Equality of Treatment (Social Security) Convention, Employment Injury Benefits Convention, Invalidity, Old-Age and Survivor's Benefits Convention, Medical Care and Sickness Benefits Convention, Maintenance of Social Security Rights Convention, Employment Promotion and Protection against Unemployment Convention le Maternity Protection Convention)

Tiišetšo ya go fihla ga bjale ya dikwano tša tšhireletšo ya leago ke dinaga tša SADC

Naga	Social Security (Minimum Standards) Convention 102 of 1952	Equality of Treatment (Social Security) Convention 118 of 1962	Employment Injury Benefits Convention 121 of 1964	Invalidity, Old Age and Survivor's Benefits Convention 128 of 1967	Medical Care and Sickness Benefits Convention 130 of 1969	Maintenance of Social Security Rights Convention 157 of 1982	Employment Promotion and Protection against Unemployment Convention 168 of 1988	Maternity Protection Convention 183 of 2000
Angola	✘	✘	✘	✘	✘	✘	✘	✘
Botswana	✘	✘	✘	✘	✘	✘	✘	✘
DR Congo	☑	☑	☑	✘	✘	✘	✘	✘
Lesotho	✘	✘	✘	✘	✘	✘	✘	✘
Madagascar	✘	☑	✘	✘	✘	✘	✘	✘
Malawi	✘	✘	✘	✘	✘	✘	✘	✘
Mauritius	✘	✘	✘	✘	✘	✘	✘	✘
Mozambique	✘	✘	✘	✘	✘	✘	✘	✘
Namibia	✘	✘	✘	✘	✘	✘	✘	✘
Seychelles	✘	✘	✘	✘	✘	✘	✘	✘
Afrika Borwa	✘	✘	✘	✘	✘	✘	✘	✘
Swaziland	✘	✘	✘	✘	✘	✘	✘	✘
Tanzania	✘	✘	✘	✘	✘	✘	✘	✘
Zambia	✘	✘	✘	✘	✘	✘	✘	✘
Zimbabwe	✘	✘	✘	✘	✘	✘	✘	✘
☑ = e tiišeditšwe.								
✘ = ga se ya hlwa e tiišetšwa.								

Mothopo: ILOLEX (go tloga ka la 2 Mopitlo 2011)

ga e kgotsofatše. Go dinagamaloko tše lesome hlano tša SADC, go tloga ka la 02 Mopitlo 2011, the Democratic Republic of the Congo e tiišeditše tše tharo tša kwano tša bjale (mohl. Social Security (Minimum Standards) Convention, the Equality of Treatment (Social Security) Convention le Employment Injury Benefits Convention). Madagascar, go tloga ka la 02 Mopitlo 2011, e latetše Democratic Republic of the Congo ka tiišetšo e tee ya dikwano tša bjale (mohl. Equality of Treatment (Social Security) Convention). Ka nnete go bohlokwa kudu go dinagamaloko tša SADC go tiišetša dikwano tše bohlokwa tše, e sego fela go mohola wa tšona ka go lefapha la tšhireletšo ya leago, eupša gape le go mabaka a gore maemo a

15 Temana ya 4(3) ya Molao.

boditšhabatšhaba a maswa a tšhireletšo ya leago ga bjale a swanetše go tšeela hloko diteng tša dikwano tša bjale tše seswai pele di ka amogelwa.[16]

2 3 Tswetšo Pele ya go Godisetša Godimo Tsela ya Mokgwa wa Tshirelotšo

Ka ntle le mošomo wa go hloma le go boloka ditsela tša tšhireletšo ya leago, Molao o gapeletša tlamo go dinagamaloko go godiša gannyane ga gannyane ditsela tša tšhireletšo ya leago go ya go maemo a godimo ao a ka akaretšago go fihlelela kakaretšo yeo e nago le mohola go motho yo mongwe le yo mongwe ka fase ga tsela ye.[17] Le ge go le bjalo, mošomo o tla laolwa ke dinnete le maemo a tlhabollo ka go nagaleloko.[18] Tlhagišo ye e sepelelana le tumelo yeo e akaretšwago ke Molao wa dipalo tša dibopego tša go fapana, moo e lego gore sehlopha sa dinagamaloko seo se ka sepelago ka lebelo la mmutla ka go ditiro tše itšego le maitemogelo ao go ithutilwego go tšwa go wona ao a tla go šomišwa go dinagamaloko tše dingwe.[19]

3 Motheo wa Tshireletšo ya Leago

Molao o na le diritlha tšeo di ka tšewago ele ditšhupo tšeo dinagamaloko di swanetšego go hlahlwa ke tšona mo phegelelong ya tšona ya go hlabolla goba go kaonafatša metheo ya tšona ya tšhireletšo ya tša leago. Temana ya 20 ya Molao e gapeletša dinagamaloko: go ela šedi dikgokagano magareng ga tlhabollo ya leago le ya ekonomi e bile di swanetše gore ka maleba di kgonthise gore melao ya tšhireletšo ya leago le tlhabollo ya ekonomi e hlangwa ka mokgwa wa go nyalelana, wo o kopantšwego le wo o tiišwago mmogo;[20] di lemoge gore tšhireletšo ya leago e šoma ka gare ga motheo wwo o akaretšago wa tšhireletšo ya leago woo o ka bago ka mokgwa wa go ba thwii le wa go se be thwii, le gona o swanetše gore o netefatše gore, mekgwa ya go se be thwii, e thekga le go tlaleletša mekgwa ya go ba thwii;[21] di lemoge go ba gona ga mehuta yeo e sego ya semmušo ya tšhireletšo ya leago le gore ba nyake go di tiiša le gore di kwagale (ka go, mohlala, fana ka tlhahlo ya bokgoni le dibopego tša maleba tša thekgo) le go di kopanya le mehuta ya semmušo ya tšhireletšo ya leago[22] le go lebelela kudu go hlabolla pabalelo ya tšhireletšo ya leago yeo e kopantšwego e bile e le yeo e akaretšago yeo e nago le mehuta ya semmušo le yeo e sego ya semmušo

16 Javillier J-C "The impact of international social security standards" Letlakala leo le abilwego mo go Conference on the ISSA Initiative, Vancouver, Canada 2002-09-10 to 12.
17 Temana ya 4(4) ya Molao.
18 *Ibid*.
19 Temana ya 2(2)(b) ya Molao.
20 Temana ya 20(1) ya Molao.
21 Temana ya 20(2) ya Molao.
22 Temana ya 20(3) ya Molao.

yeo e kgohlagantšwego le dibopego tšeo di lego thwii le tšeo di sego thwii tša thekgo ya leago.[23]

Ge o bala go tšwa go ditlhagišo tša temana ya 20 (le ditemana tše dingwe tšeo di lego ka gare ga Molao), go molaleng gore Molao o lemoga dibopego tše di latelago tša tšhireletšo ya leago, mohlala: tšhireletšo ya leago yeo e lego thwii goba ya semmušo, tšhireletšo ya leago yeo e sego thwii le tšhireletšo ya leago yeo e sego ya semmušo.

(a) Tšhireletšo ya leago yeo e lego thwii goba ya semmušo*:* Tšhireletšo ya leago ya thwii goba ya semmušo e ra gore tšhireletšo ya leago bjalo ka ge e hlalošitšwe ka gare ga Molao. Tšhireletšo ya leago e ka aroganywa ka mananeo goba ditsela tša tšhelete tša lekgetho le mananeo a go ithekga ka thušo ya mašeleng. Mekgwa goba mananeo a tšhelete ya lekgetho bogolo a bopilwe ke thušo ya leago, ditirelo tša leago le diputseletšo tša leago. Go ya le ka Molao motho o mongwe le o mongwe ka mo SADC yo a se nago ditsela tše di lekanego tša go iphediša le bafepša ba bona ba swanetše go ba le maswanedi a go hwetša thušo ya leago, go sepelelana le maemo a tlhabollo ya leago le ya ekonomi ya nagaleloko leo le itšego.[24] Sa bobedi, Molao o gapeletša dinagamaloko go fana ka tikologo yeo e kgontšhago kabo ya ditirelo tša leago go batho le dihlopha tšeo di nyakago thekgo ka pabalelo le ka tlhabollo ka mo setšhabeng.[25] Ge re tlaleletša, go nyakega gore dinagamaloko di hlohleletše go tšeakarolo ga batho, mekgatlo ya setšhaba, bakgathatema bao e sego ba mmušo le mekgatlo yeo e sego ya mmušo gore di kgone go hloma le go hlokomela ditirelo tše bjalo.[26] Kgopolo ye e laeditšwego, e sepelelana le tumelo ya boikarabelo bja batho ba bantši yeo e lego ka gare ga temana ya 2(2)(c) ya Molao. Go ya ka tumelo ye, "kabo ya tšhireletšo ya leago ke mošomo wo o hlakanetšwego ke mebušo, ditheo tša setšhaba tša tšhireletšo ya leago le bakgathatema ba poraebete, re beile ka mogopolong gore mmušo ke wona o rwelego maikarabelo ka botlalo."[27] Go tšwela pele, Molao o hlohleletša dinagamaloko "– moo go kgonegago ka ekonomi – go aba diputseletšo tša leago go batho bao ba welago ka go magoro ao a kgethilwego gore di kgone go ba thuša ka go fihlelela bokgoni bja bona ka botlalo."[28] Mabapi le mananeo a go ithekga ka thušo ya ditšhelete, a ke mananeo ao bontši e lego mananeo a inšorense ya leago. Ka mo go legoro la inšorense ya leago, Molao o nyaka gore dinagamaloko di hlome mananeo a inšorense ya leago e bile di re gannyane le gannyane di katološe kakaretšo le khuetšo ya mananeo a.[29] Se se bohlokwa kudu, kudu kudu ge motho a ela hloko go hwa ga didirišwa tša inšorense ya leago yeo e lebišitšwego go tšhireletšo ya kgahlanong le dikotsi tša leago bjalo ka go se šome. Mo e lego gore di gona, bogolo bja kakaretšo ya tšona e ba bjo bo lekaneditšwego. Afrika Borwa ke mohlala wa ntlha ye.[30] Go tšwela pele, Molao o laela dinagamaloko go amogela tlhakamolao ya maleba le mekgwa e mengwe gore di kgone go dira bonnete bja gore go ba le taolo le tshepedišo ya maleba ya

23 Temana ya 20(4) ya Molao.
24 Temana ya 5(1) ya Molao.
25 Temana ya 5(2) ya Molao.
26 *Ibid*.
27 *Ibid*.
28 Temana ya 5(3) ya Molao.
29 Temana ya 6(1)) ya Molao.
30 Lebelela Mpedi *Redesigning the South African Unemployment Protection System: A Socio-Legal Inquiry* (2006) 61-147.

mananeo a inšorense ya leago;[31] le go fana ka mehola ya inšorense ya leago yeo e kwagalago le yeo e lekanego, yeo e lekanago le seo se šireleditšwego seo se tla go hlaga ka moso le mohuta wa bogolo bja tahlegelo yeo e tla go ba e diregile.[32] Go tlaleletša, e šupetša dinagamaloko gore di katološe bogolo bja inšorense ya leago go setšhaba ka moka seo se šomago;[33] go fana le go sepediša ka molao mekgwa ya inšorense ya leago ka mo go lefapha leo e sego la semmušo;[34] le go hlohleletša le go sepediša ka molao bokgathatema bja lefapha la poraebete le la mmušo go inšorense ya leago, mabapi le kabo le taolo ya inšorense ya leago, gammogo le tefo ya mehola ya inšorense ya leago.[35] Se se tla amogelwa, ka lebaka la gore gantši ka mo seleteng ga se batho ka moka bao ba šomago bao ba šireleditšwego ke mananeo a inšorense ya leago. Mabaka ao a hlolago maemo a ke a go swana le go hloka melao yeo e fetišitšwego ya go tšeakarolo ka lebaka la nnete ya gore bašomi ba bangwe ga ba wele ka go tlhalošo yeo e sesefaditšwego ya mošomi bjalo ka ge e hwetšwa ka gare ga melao ya bašomi. Ka tlaleletšo, ka maatla a ditlhagišo tšeo go boletšwego ka tšona pele, batho ba bantši ka mo seleteng bao ba dulago go ekonomi yeo e sego ya semmušo ba tla hwetša kimollo go mananeo a inšorense ya leago a dinaga tša bona moo ba šomago gona. Se se bohlokwa ge go lebeletšwe nnete ya gore bontši bja bašomi ba bjale ba tlogetšwe e bile ba phaetšwe ka thoko go tšwa go mananeo a mantši a inšorense ya leago.

(b) Tšhireletšo yeo e sego thwii ya leago*:* Tšhireletšo ya leago yeo e sego thwii e ra gore "ditirelo tšeo di sa bopego karolo ya tšhireletšo ya leago yeo e sego thwii goba yeo e sego ya tlwaelo, eupša le ge go le bjalo e bohlokwa kudu ka go thibelo ya tshenyo ya motho , le go nyakega go thuša batho gore ba kgone go phela maphelo ao a tlotlegago."[36] Tšhireletšo ya leago yeo e sego thwii le tšhireletšo ya leago yeo e lego thwii di nyalelana kudu. Kamano ya kgauswi ya magareng ga dilo tše pedi e swantšhitšwe ka tsela ya mohlala wo o bonalago ka tsela ye e latelago: "Kabo ya ditirelo tša tlhokomelo ya maphelo tša go se lefelwe go basadi bao ba ithwelego le bana ba ka fase ga mengwaga e tshela , mohlala, e ka fokoletšwa go ba toro ya go se fihlelelwe ge, magareng ga tše dingwe, go se na phihlelelo go: meetse a go hlweka le ao a lekanego *le tlhwekišo* (go boloka bomme bao ba ithwelego le bana ba mengwaga ya ka fase ga ye tshela kgole le go nwa meetse ao a tsenwego ke kholera); senamelwa sa ka mehla*, sa go bolokega le seo se fihlelelegago* (go sepediša basadi bao ba ithwelego le bana ba ka fase ga mengwaga e tshela go ya go disenthara tša maphelo); ntlo le bodulo (go fokotša dikgonagalo le tšhilafalo ya dijo ka lebaka la didirišwa tšeo di sego tša lekana tša polokelo); le dijo le phepo (go boloka basadi bao ba ithwelego le bana ba ka fase ga mengwaga e tshela ba tiile e bile ba phedile gabotse).[37]

(c) Tšhireletšo ya leago yeo e sego ya semmušo*:* Dikelotlhoko tše dintši di hlalošitše ka seo se (swanetšego) go bopa tšhireletšo ya leago yeo e sego ya

31 Temana ya 6(2) ya Molao.
32 Temana ya 6(3)) ya Molao.
33 Temana ya 6(4) ya Molao.
34 Temana ya 6(5) ya Molao.
35 Temana ya 6(6) ya Molao.
36 Mpedi "Indirect social security" ka mo go Olivier *et al* (eds) *Social Security: A Legal Analysis* (2003) 537.
37 *Ibid* 557 n 106.

semmušo.[38] Go makatša kudu gore ga go na tlhalošo ya nnete ya tšhireletšo ya leago yeo e sego ya semmušo.[39] Ka ntle le seo, dibopego tše pedi tša dipeakanyo tša tšhireletšo ya leago yeo e sego ya semmušo di a bonagala. Tše di ithekgile ka malapa a poraebete goba kamano ya batho (mohl. Phetišetšo ya go tsenelelana ga moloko) le mekgatlo ye e ithekgilego ka boleloko goba maano a go iphediša ao a ithekgilego ka kamano yeo e sego ya lešika (mohl. mekgatlo ya polokano). Tšhireletšo ya leago yeo e sego ya semmušo ke karolo ye bohlokwa ya tšhireletšo ya leago. Go tšwelapele, bontši bja batho le malapa a bona bao ba tlogetšwego e bile ba phaetšwe ka thoko ke mananeo a tšhireletšo ya leago a semmušo ba phefa dikotsi tša leago ka mekgwa ya tšhireletšo ya leago yeo e sego ya semmušo. Go ya ka maleba, kgoeletšo ya Molao go dinagamaloko gore di ele hloko go ba gona ga mekgwa ya tšhireletšo ya leago yeo e sego ya semmušo le go katanela go tiiša le dira gore di kwagale le go di kopanya le dibopego tša tšhireletšo ya leago ya semmušo gore di amogelwe.[40]

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38 Lebelela, mohlala, Olivier le Dekker "Informal social security" ka mo go Olivier *et al* (2003) 562; Kaseke "Informal social security in Eastern and Southern Africa" Letlakala le abilwe go SADC Social Security Conference, Johannesburg, Afrika Borwa, 17-19 Diphalane 2001; Freiberg-Strauss *Social Security for the Poor – Options and Experiences* (1999) 3; le Gsänger "Linking informal and formal social security systems" *Deutsche Stiftung für Internationale Entwicklung* – e hweditše mo go http://www.dse.de/ef/social/gsaenger.htm. Lebelela, go tšwela pele ka go bala ka ga kgopolo ya tšhireletšo ya leago yeo e sego ya semmušo, Van Ginneken (ed) *Social Security for the Excluded Majority: Case Studies of Developing Countries* (1999); Devereux S *'Making Less Last Longer': Informal Safety Nets in Malawi* (Institute of Development Studies Discussion Paper 373 (1999)); Dercon "Safety nets, savings and informal social security systems in crisis-prone economies" Letlakala le abilwe mo go Annual Bank Conference on Development Economics in Europe, Paris, 21 – 23 Ngwatôbošego 1999; Subarro *Namibia's Social Safety Net: Issues and Options for Reform* (Policy Research Working Paper (1996)); McDonald *et al Income Distribution, Informal Safety Nets, and Social Expenditures in Uganda* (International Monetary Fund Working Paper (1996)); Clu le Gupta "Social safety nets in economic reform" ka mo go Clu le Gupta (eds) *Social Safety Nets: Issues and Recent Experiences* (International Monetary Fund (1998)) 7 mo go 27; Ahmad "Protecting the vulnerable: Social security and public policy" ka mo go Lipton le Van der Gaag (eds) *Including the Poor* (World Bank (1993)) 359 mo go 364-366; Platteau "Traditional systems of social security and hunger insurance: Past achievements and modern challenges" ka mo go Ahmad *et al* (eds) *Social Security in Developing Countries* (1991) 112; Von Braun "Social security in sub-Saharan Africa: Reflections on policy challenges" ka mo go Ahmad *et al* (1991) 395 mo go 406-410; Ahmad "Social security and the poor: Choices for developing countries" (1991) 6 *World Bank Research Observer* 105 mo go 111-112; le Von Benda-Beckmann *et al* (eds) *Between Kinship and the State: Social Security and Law in Developing Countries* (1988).

39 Olivier *et al* "Formulating an integrated social security response – Perspectives on developing links between informal and formal social security in SADC region" Letlakala le abilwe mo go EGDI-WIDER Conference on Unlocking Human Potential Linking the Informal and Formal Sectors, Helsinki, 2004-09-17 to 18.

40 Temana ya 20(3) ya Molao.

4 Dikotsi tša Leago tšeo di Širelediťswego

Molao o širelediťša tšeo di sego tša emelwa tšeo di ka hwetšwago go Kwano ya 102 ya 1952 ya ILO ya Tšhireletšo ya Leago (Bonnyane) tšona ke maphelo,[41] botswetši le go ba ntate,[42] lehu le baphologi,[43] go rola modiro le botšofadi,[44] go se šome le mošomo wo o sego wa lekana[45] le dikgobalo le malwetši a mošomong.[46] Go a bonagala kudu gore Molao o lekile go širelediťša dikotsi tšeo go boletšwego ka tšona pele ka tsela yeo e elago hloko dinnete tša leago, ekonomi le politiki ka mo seleteng sa SADC. Go fa mohlala, Molao o nyaka dinagamaloko gore, ge di šogana le ditaba tša maphelo, di lebelele HIV/Aids.[47] Go tšwelapele, e gapeletša dinagamaloko go amogela melao le mekgwa ya go laola seemo go lebilwe go tlhabollo ya kakaretšo ya ekonomi le leago gore di kgone go fediša bodiidi[48] le go kopanya mahlakore a ekonomi a semmušo le ao e sego a semmušo.[49] Ka tlaleletšo, Molao o bolela ka dikotsi tše itšeng tšeo di tlwaelegilego ka mo seleteng bjalo ka dikhuduego tša dipolitiki le masetlapelo a tlhago. Temana 18(1) e bolela gore dinagamaloko di swanetše go dira bonnete bja gore mananeo a bona a tšhireletšo ya leago a fana ka pabalelo kgahlanong le dikotsi tša go ikgetha le tša mohlakanelwa, go akaretša dithulano tša dipolitiki[50] le masetlapelo a tlhago.[51]

41 Temana ya 7 ya Molao.
42 Temana ya 8 ya Molao.
43 Temana ya 9 ya Molao.
44 Temana ya 10 ya Molao.
45 Temana ya 11 ya Molao.
46 Temana ya 12 ya Molao.
47 Temana ya 7(8) ya Molao.
48 Temana ya 11(2) ya Molao.
49 Temana ya 11(3) ya Molao.
50 SADC ka kakaretšo ke selete seo se homotšego kudu. Le ge go le bjalo, go no le karolo tša dintwa tšeo di itemogelago ke dinagamaloko tša go swana le Democratic Republic of the Congo le seemo sa ka Zimbabwe (seo se hlotšego ke lenaneo la kabolefsa ya naga leo le bego le tletše ka dingangišano leo le phethagaditšwego ka 2000) se sa tekateka. Lebelela Olivier le Kalula "Regional social security" ka mo go Olivier *et al* (eds) *Social Security: A Legal Analysis* (2003) 655; Centre for International and Comparative Labour and Social Security Law le Institute of Development and Labour Law Developing and Integrated and Inclusive Framework for Social Protection in SADC (Centre for International and Comparative Labour and Social Security Law le Institute of Development and Labour Law (2003)); Taylor "Social protection challenges in southern Africa" (2001) 2 *Cooperation South* 49; Fultz le Pieris *Social Security Schemes in Southern Africa: An Overview and Proposals for Future Development* (ILO/SAMAT (1999)); le Von Benda-Beckmann le Kirsch "Informal security systems in Southern Africa and approaches to strengthen them through public policy measures" – yeo e hweditšwego mo go http://www.gtz.de.
51 SADC e hloile ke dikotsi tša tlhago bjalo ka mafula le komelelo.

5 Dihlopha tšeo di Lego kotsing le Magoro a Batho ao a Šireleditšwego

5 1 Batho Bao ba Sego ba Itekanela Mmeleng

Molao o hlohloletša dinagamaloko go hlola tikologo yeo e kgontšhago yeo e tla go dira bonnete bja gore batho bao ba sego ba itekanela mmeleng ba na le maswanedi go tšhireletšo ya leago.[52] Ka tlaleletšo, di nyakwa gore di dire bonnete bja gore didirišwa tša bona tša tšhireletšo ya leago di netefatša gore di tla ba le phihlelelo ya go lekana le go kakaretšo ya batho bao ba sego ba itekanela mmeleng.[53] Go tšwelapele, Molao o gapeletša dinagamaloko go tšwetšapele kopano ya leago le ya seprofešenale ya batho bao ba sego ba itekanela mmeleng.[54]

5 2 Basadi, Bana le Baswa

Molao o amogela maemo ao a lego boima a basadi, bana le baswa. Magareng ga tše dingwe, o nyaka dinagamaloko go dira bonnete bja gore go ba le tekatekano magareng ga banna le basadi mo ditikologong tšeo di akaretšwago le phihlelelo go tšhireletšo ya leago.[55] Mabapi le bana le baswa, Molao o gapeletša dinagamaloko gothibela go šoma ga bana le tlaišo ya bana, magareng ga tše dingwe, [56] go dira bonnete bja gore tšhireletšo ye ntši e katološetšwa go bana bao ba fiwago mošomo ka tsela ya maleba,[57] go tiišetša gore go na le phepo ya maleba yeo e lekanego ya bana,[58] go fana ka thekgo go ditšhiwana le malapa ao a hlokometšwego ke bana[59] le go hloma mekgwa yeo e šomago gabotse le go fana ka tlhokomelo ya kgodišo le dipeakanyo tša go fepa.[60]

5 3 Lapa

Lentšwana le 'lapa' bjalo ka ge le hwetšwa ka go didirišwa tša tšhireletšo ya leago gantši le a solwa gore le na le magomo ka kgopolo ya gore ga le bonale le akaretša le go ela hloko kgopolo ya Seafrika ya lapa yeo e hwetšwago ka mo seleteng. Lentšwana la 'lapa' ka mogopolo o mosese le akaretša tate, mme le bana.[61] Lentšwana la Yuropa la lapa [62] le elwa hloko ka go melao e mengwe ye itšego ya tšhireletšo ya leago ya

52 Temana ya 14(1) ya Molao.
53 Temana ya 14(2) ya Molao.
54 Temana ya 14(3) ya Molao.
55 Temana ya 13(1) ya Molao.
56 Temana ya 16(2) ya Molao.
57 Temana ya 16(3) ya Molao.
58 Temana ya 16(6) ya Molao.
59 Temana ya 16(8) ya Molao.
60 Temana ya 16(9) ya Molao.
61 Songuemas "Social security and indigenous institutions in African societies" (1967) 3 *African Social Security Series* 18 ka mo go 20; le Isizoh "African traditional religions: One stereotype less" (2003) 4 *African Societies* – e hweditšwe mo go http://www.africansocieties.org/n4/eng/chidi.htm.
62 Folbre *Women and Social Security in Latin America, the Caribbean and Sub-Saharan Africa* (International Labour Office (1993)) 6.

dinagamaloko tša SADC.[63] Ka go setšhaba sa setšo sa Seafrika 'lapa' ke leinakakaretšo go feta seo: "le bopilwe ke sehlopha ka moka sa batho: hlogo ya lapa le basadi ba gagwe le bana ba gagwe, le ditlogolo, gape le bagolle ba gagwe le dikgaetšedi tša gagwe le basadi ba bona le bana, batlogolo ba gagwe le batlogolo ba banenyana, ka lentšu le tee, batho bao ka moka ba tšwago go mogologolo o tee yo a swanago."[64] Ge re lebelela seo re šetšego re boletšego ka sona, lentšu le 'leloko leo le katološitšwego' gantši le šomišwa sebakeng sa 'lapa' ge re bolela ka lapa la Seafrika.[65] Ka dikgoeletšo tšeo go boletšwego ka tšona ka mogopolong go a thabiša gore ela hloko gore Molao o šupetša dinagamaloko go dira bonnete bja gore lapa, bjalo ka lekala la motheo la setšhaba, le šireleditšwe ka tsela ya maleba.[66] Ka tlaleletšo, e gapeletša dinagamaloko go tiišetša gore ditsela le mananeo a tšhireletšo ya leago a laetša nnete le bohlokwa bja lapa leo le katološitšwego.[67] Dinagamaloko di laetšwe gore di šetše le go tiiša mekgwa ya thekgo ya lapa leo le katološitšwego.[68]

5 4 Bahudugi, Bašomi ba go Tšwa Ntle le Bafaladi

Molao o ipiletša go dinagamaloko go katanela tokologo ya mosepelo wa batho le phokotšo yeo e tšwelago pele ya ditaolo tša phalalelo.[69] Ka tlaleletšo, o nyaka dinagamaloko gore di katološe phihlelelo go tšhireletšo ya leago go bafaladi bao ba filwego mošomo mo mellwaneng ka metheo ya kgohlaganyo ya tšhireletšo ya leago yeo e swanetšego go hwetšwa ka gare ga melao ya bosetšhaba ya dinagamaloko le ka gare ga dipeakanyo tša dinaga tše pedi goba tše tharo magareng ga dinagamaloko. Metheo yeo go boletšwego ka yona ke ye e latelago: bašomi bao e lego bahudugi ba swanetše go tšea karolo ka go mananeo a tšhireletšo ya leago a dinaga tšeo ba lego go tšona; bašomi bao e lego bahudugi ba swanetše go fiwa tshwaro ya go lekana le ya badudi ba naga yeo ba lego ka yona ya mananeo a tšhireletšo ya leago e bile, go swanetše go ba le palomoka ya dipaka tša inšorense le tlhokomelo ya ditokelo le mehola yeo e hweditšwego ya magareng ga mananeo ao a swanago le a ka mo go dinagamaloko tša go fapana; dinagamaloko di swanetše go dira bonnete

63 Lebelela, mohlala, *Unemployment Insurance Act* 63 of 2001 (Afrika Borwa). Lebelela gape, go bala go tšwelapele,

64 Isizoh (2003) 4 *African Societies* – e hweditšwe mo go http://www.africansocieties.org/n4/eng/chidi.htm.

65 Lebelela, mohlala, Ijere "Indigenous African social security as a basis for future planning – the case of Nigeria" (1967) 2 *African Social Security Series* 11 mo go 27. Lebelela gape Segre "Family stability, social classes and values in traditional and industrial societies" 1975 *Journal of Marriage and the Family* 431 mo go 431-432.

66 Temana ya 15(1) ya Molao.

67 Temana ya 15(2) ya Molao.

68 *Ibid*.

69 Temana ya 17(1) ya molao. Go swanetše go bolelwa gore go na le SADC Draft Protocol on the Freedom of Movement of Persons (1998). Lebelela, go bala go tšwelapele, Oucho le Crush "Contra free movement: South Africa and the SADC migration Protocols" 2002 *Africa Today* 139; le Mengelkoch *The Right to Work in SADC Countries: Towards Free Movement of Labour in Southern Africa* (2000).

bja gore go ba le nolofatšo ya thomelontle ya mehola, go akaretša tefelo ya mehola ka go naga yeo ba lego ka go yona; dinagamaloko di swanetše go laetša melao yeo e lego maleba go mabaka a phethagatšo ya metheo ye e lego ka mo godimo, e bile dinagamaloko di swanetše go dira bonnete bja gore bašomi bao e lego bahudugi bao ba nago le dikgwebo tša bona ba a akaretšwa ka mabaka a go swana le a bahudugi bao ba šomago.[70] Tlhagišo gape e dirilwe go badudi bao e sego ba semolao, bahudugi le bafaladi bao ba se nago mangwalo a bohlatse. Badudi bao e sego ba semolao le bahudugi bao ba se nago mangwalo a bohlatse ba swanetše go fiwa tšhireletšo ya nnyane ya motheo le go ipshina ka go akaretšwa go ya ka melao ya selegae.[71] Mabapi le bafaladi, Molao o laetša gore tšhireletšo ya leago e swanetše go katološetšwa go legoro le la batho go ya le ka ditlhagišo tša didirišwa tša boditšhabatšhaba le tša selete.[72]

6 Ditabana tše Dingwe tša go Hlamatsega tša Ditumelo tša Motheo go Kabo ya Tšhireletšo ya Leago

6 1 Mekgwa ya Thibelo ye e Kopantšwego

Molao o hlohleletša dinagamaloko go dira bonnete bja gore ditsela tša bona di kopanya mekgwa ye e lekanego ya thibelo le ya kopanyo e bile ga se ya lebelela feela tefelo.[73] O fana go tšwelapele ka gore kopanyo e swanetše go ba ya leago le ka go mebaraka ya mošomo gore o kgone go hlohleletša go ipota le go thekga serithi sa motho.[74] Se, go ya ka kgopolo ya ka, ke kgato ya maleba go ya go tšhireletšo ya leago yeo e nyakegagago kudu ya kakaretšo. Ka go fana ka mekgwa ya thibelo le ya kopanyo, Molao o tlogela setlwaedi sa gore mananeo a tšhireletšo ya leago (kudu kudu mananeo a inšorense ya leago) a lebeletše fela ditefelo tša mehola. Ka go tlaleletša, se se sepelelana le maemo a boditšhabatšhaba – kudu ao e lego a ILO.

6 2 Phethagatšo le Tlhokomelo

Temana ya 21(1) ya Molao e gapeletša dinagamaloko go katanela go hloma taolo le metheo ya taolo tša nnete. Mabaka a metheo ya taolo a swanetše "go dira bonnete bja gore go na le kabo ya mehola ya tšhireletšo ya leago yeo e kgontšhago le yeo e šomago gabotse, kudu kudu: (a) dibopego tšeo di kopantšwego, tšhomišano ya dikgoro le tšhomišano ya mafapha tšeo di nago le thekgo ya tšhelete ye e lekanego e bile e le ye ntši; (b) phihlelelo go o mongwe le o mongwe go ditheo tšeo di ikemego tša kahlolo tšeo di nago le maatla a mafelelo a go ahlola dingangišano tša tšhireletšo ya leago, ka ditsela tša go se bitše tšhelete ya

70 Temana ya 17(2) ya Molao.
71 Temana ya 17(3) ya Molao.
72 Temana ya 17(4) ya Molao.
73 Temana ya 19(1) ya Molao.
74 Temana ya 19(2) ya Molao.

godimo, ka potlako le gona ka tsela e botse le gona ka ditshepedišo tše dinnyane tša semmušo; (c) kabo ya go se fele ya tšhireletšo ya leago yeo e kopantšwego le molao wa ekonomi; (d) dihlopha tšeo di lego kotsing di tla bewa pele ka go kabo ya mehola ya tšhireletšo ya leago; (e) ka ntle le tšhomišo ya dibopego tše tharo tša bosetšhaba le tša selete, maitapišo a mangwe le a mangwe a swanetše go dirwa go akaretša setšhaba le ditho tšeo e sego tša mmušo bjalo ka NGO's le CBO's ka go tlhamo, phethagatšo le tlhokomelo ya dipholisi tša tšhireletšo ya leago; le (f) tlhokomelo yeo e kaonafaditšwego le taolo ye botse ya dibopego tšeo di ikemego go tšwa go baabi ba tšhireletšo ya leago go dira bonnete bja gore go na le tšhireletšo ya maloko, go tšea diphetho ka go ikema le peeletšo e botse, magareng ga dinyakwa tše dingwe."[75]

Go tšwelapele, Molao o nyaka dinagamaloko le dibopego tša maleba tša SADC go hloma mekgwa ya tshepedišo mo maemong a bosetšhaba le a SADC go hlokomela kobamelo yeo e tšwelago pele ya ditlhagišo tša yona.[76] O laetša ICM go hloma Komiti ya go Ikema ya Ditsebi (komiti) ka mo go dibopego tša maleba tša SADC.[77] Mošomo wa komiti ke go "hlokomela kobamelo ya Molao le go dira ditigelo go dibopego tša maleba tša SADC le dibopego tša go swana le tšona tša bosetšhaba go phihlelelo ya ditlhagišo tša wona tšeo di tšwelago pele."[78] Komiti e swanetše go bopa maloko ao a sego ka fase ga a šupa e bile ao a sa fetego a lesomepedi.[79] Maloko a yona a bewa ka bowona e bile e swanetše go ba batho bao ba nago le botshephegi le botsebi bjo bo bonalago bja maleba.[80] Ba swanetše go bewa gatee mo sebakeng sa mengwaga e tshela seo se ka mpshafatšwago.[81] Ge go bewa maloko, go swanetše go tlhokomelwa dirwa go dira bonnete bja gore go na le kemedi ya go lekana ge go lebelelwa mabaka a bong, go se itekanele mmeleng, lefapha la tsebo le phatlalatšo ye e katologilego go ya le ka lefelo.[82]

Kgopolo ya Komiti ya go Ikema ya Ditsebi ga se ya moswananoši mo go Molao. E ka hwetšwa gape ka go Lengwalo la Tumelelo ya Leago la Yuropa (1961). Molao ga o bolele ka ditlamorago tša tlamo tša dikutollo tša komiti. Go tšwela pele, ga go molaleng gore magato afe goba afe a kgalemo a ka bewa kgahlanong le nagaleloko yeo e palelwago ke go latela dikobamelo tšeo di bewago ke Molao. Le ge go le bjalo, go a belaetša gore go ka ba le magato afe goba afe a kgalemo ao Molao o nago le ona bjalo ka ge e le molao o boleta.

75 Temana ya 21(1) ya Molao.
76 Temana ya 21(2) ya Molao.
77 Temana ya 21(3) ya Molao.
78 *Ibid*.
79 Temana ya 21(4) ya Molao.
80 Temana ya 21(5) ya Molao.
81 Temana ya 21(7) ya Molao.
82 Temana ya 21(6) ya Molao.

7 Morumo Kakaretšo

Temana e sekasekile ka tlhokomelo gore Molao o leka bjang go hlama ditsela tša go kwagala tša tšhireletšo ya leago ka mo seleteng sa SADC. E file šedi ya go ikgetha go mokgwa wo o amogetšwego ke Molao ka go maitapišo a yona a go nyaka go šogana le ditaba tša maleba bjalo ka tokelo go tšhireletšo ya leago, tlhako ya tšhireletšo ya leago, le dikotsi tša leago gammogo le dihlopha tšeo di lego kotsing le magoro a batho bao ba šireleditšwego. E ile ya ela hloko gore rekoto ya tiišo ya dinagamaloko tša SADC a dikwano tša bjale tša semmušo ka go lefapha la tšhireletšo ya leago ga di kgotsofatše. Go ya ka maleba, dinagamaloko di swanetše go hlohleletšwa go tiišetša didirišwa tše bohlokwa tše. Sa bobedi, magato a thibelo le kopanyo ke setho le karolo ya tsela ya tšhireletšo ya leago. Ka gona, boipiletšo bja Molao gore go tsenywe dikgato tše bo swanetše go amogelwa. Go tšwelapele, kgohlaganyo ya tšhireletšo ya leago ke karolo e bohlokwa ya kopanyo ya selete le tokologo ya mosepelo wa bašomi le go batho. Go fihla mo, ditlhagišo ka gare ga Molao tšeo di lebišitšwego go ditaba tše di tlile ka nako e botse. La bofelo, Molao ga o tleme motho ka semolao. Le ge go le bjalo, kamogelo ya wona e a retwa ka lebaka la gore ke kgato e botse go kaonafatšo ya ditsela tša tšhireletšo ya leago ka mo seleteng sa SADC seo bogolo bja sona tlhabollo e lego fase e bile, go maemo a mangwe, tlhabollo e fase kudu.

The legal validity of an advance refusal of medical treatment in South African law (part 1)

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OPSOMMING

Die Regsgeldigheid van 'n Gebeurlikheidsweiering van Mediese Behadeling in die Suid-Afrikaanse Reg

Mediese tegnologie het sodanig ontwikkel dat dit vandag moontlik is om die lewe van 'n persoon byna onbepaald te verleng in omstandighede waarin hy of sy andersins 'n natuurlike dood sou sterf. Sommige mense verkies om sodanige behandeling te vermy, onder meer omdat hulle met waardigheid wil sterf.

Mediese gebeurlikheidsaanwysings stel persone in staat om mediese behandeling in die toekoms, wanneer hulle nie meer in staat is om wilsbesluite te neem nie, te weier. 'n Mediese gebeurlikheidsaanwysing is 'n lewende testament waarin die outeur weier om mediese behandeling in bepaalde omstandighede in die toekoms te ondergaan. Dit kan ook bestaan uit 'n volmag waarin die outeur 'n ander persoon aanstel om namens hom of haar in die toekoms mediese behandeling te weier. In Suid-Afrika is die regsgeldigheid van sodanige gebeurlikheidsaanwysing onseker. 'n Oorweging van grondwetlike kernwaardes dui egter daarop dat mediese gebeurlikheidsaanwysings in beginsel as regtens afdwingbare wilsbesluite erken behoort te word. In die eerste gedeelte van hierdie bydrae word die huidige regsposisie en die etiese norme wat in die mediese beroep geld, bespreek. Die toepaslike grondwetlike kernwaardes word dan ontleed en teen bepaalde belange van die gemeenskap opgeweeg. In die tweede gedeelte van hierdie bydrae word aandag geskenk aan die etiese oorwegings wat 'n rol behoort te speel by beantwoording van die vraag of 'n gebeurlikheidsaanwysing in bepaalde omstandighede as regtens afdwingbaar beskou behoort te word. Die ontwikkeling in buitelandse regstelsels word dan oorweeg en empiriese navorsing wat aldaar onderneem is om die doeltreffendheid van gebeurlikheidsaanwysings in die praktyk te evalueer, word krities ontleed. Die studie lei tot die gevolgtrekking dat die Suid-Afrikaanse parlement oorweging moet skenk aan die destydse voorstelle van die Suid-Afrikaanse Regskommissie in hierdie verband, en dat statutêre erkenning aan die regsgeldigheid van gebeurlikheidsaanwysings verleen moet word. Die ondervinding in buitelandse regstelsels dui egter daarop dat blote statutêre erkenning van die regsgeldigheid van gebeurlikheids-aanwysings nie enige noemenswaardige verandering in die praktyk teweeg bring nie. Daar dus word aan die hand gedoen dat 'n holistiese benadering gevolg moet word wat beteken dat die staat self betrokke moet raak by die implementering van doeltreffende strategieë om groter bewuswording van die reg op selfbeskikking van pasiënte by gesondheidsorg-werkers sowel as die breë publiek te bewerkstelling.

1 Introduction

The most challenging goal of medical science has always been to sustain life or, to put it differently, to postpone the onset of death. Before the 20th century, this was mostly unattainable but from the middle of the 20th century, there have been extraordinary advances in life-sustaining medical technologies which have contributed significantly to the prolongation of human life. To mention just a few: in 1930 insulin was developed to control diabetes; in 1931 the ventilator was introduced and in the 1950s open-heart surgery was performed for the first time. Cardiopulmonary resuscitation was introduced in the 1960s and has been routinely performed ever since. Coronary artery bypass surgery, kidney transplants, chemotherapy and hospital intensive care units have become commonplace as well.[1] Today, the development of new ways to prolong life remains the priority of medical science. This has made a huge difference to the life expectancy of human beings with, in many cases, added quality of life. But, unfortunately, it is possible to prolong life without any benefit to the patient. Whereas death used to be seen as a natural event determined by fate or an "act of God", decisions must be made today on whether a person can be regarded as "legally" dead (in other words, brain dead)[2] and if not, whether life should nevertheless be prolonged by artificial means in cases where there is no hope or reasonable prospect of recovery. For instance, technological advances in intensive care units have enabled more elderly patients to survive acute critical illness. It has actually been said that these advances have "created a new population who are chronically critically ill".[3] Such patients may have persistent respiratory failure, dysfunction of other organs and complications such as recurrent infections and pressure ulcers. Prolonged mechanical ventilation is often required to keep them alive. Sadly, the outcome of the treatment of patients with chronic critical illness is usually death shortly after discharge from hospital or total dependence requiring long-term custodial care. Long-term dependence imposes a heavy burden on patients, their families, caregivers and the healthcare systems, which incur enormous costs.

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1 King *Making Sense of Advance Directives* (1991) 32; Kruse "A Call for New Perspectives for Living Wills (you might like it here)" 2002 *Probate and Trust Journal* 545 546-549.

2 In terms of s 1 of the National Health Act 61 of 2003 the moment of death is defined as "brain death", which is defined as "an irreversible and irreparable cessation of all the brainstem functions inclusive of complete cessation of the heartbeat, respiration, blood circulation and digestive functions" Carstens and Pearmain *Foundational Principles of South African Medical Law* (2007) 204 n 433. This definition of death is accepted in other jurisdictions as well but defining death remains problematic and controversial. See Herring *Medical Law and Ethics* (2010) 464-469 for a discussion of alternative definitions of death.

3 Camhi, Mercado, Morrison, Du, Platt, August and Nelson "Deciding in the Dark – Advance Directives and Continuation of Treatment in Chronic Critical Illness" 2009 *Critical Care Medicine* 919.

The question that arises is: Who should take the decision to withdraw or withhold treatment in medically futile situations? Should it be the doctor, who is generally perceived to know best, or should the wishes of the family prevail? What about the patient? Should the overriding concern not be what the patient would have wished had he or she been able to make the decision? What is the position if the patient has given a specific written or oral instruction, while still competent, that he or she does not want to be kept alive by artificial means in such circumstances, or in a similar condition? These questions have been debated elsewhere and, to a lesser extent, in South Africa as well. The traditional assumption, namely that that these questions should be answered by applying medical standards only, has been challenged by lawyers and ethicists, particularly during the last decades. It is now generally accepted that questions relating to the foregoing of medical treatment are not only questions of medical science, but also questions rooted in law and ethics. In many jurisdictions the rules of conduct for physicians are no longer restricted to the application of medically-accepted standards. They also comprise of legal and ethical norms such as respect for patient autonomy.

The shift in emphasis from medical paternalism to recognition of patient autonomy has given rise to drastic changes in the law relating to medical practice. In most constitutionally-grounded jurisdictions it has been accepted also that there is a need for legal recognition of a means of some kind to enable people to exercise control over their bodies once they are no longer able to communicate their medical preferences. Such control may be achieved by an instruction by a competent person regarding his or her future medical treatment. Generally referred to as advance directives, such instructions can take two different forms which are not necessarily exclusive of each other: Living wills and enduring powers of attorney for healthcare. Living wills (also referred to as instructional advance directives) are written documents designed to allow people to express their preferences regarding the withholding of specified treatments if at any time in the future they are no longer able to take such decisions.[4] The lasting power of attorney (also referred to as a "proxy directive") allows an individual to appoint someone else as a health care proxy (for example, a trusted friend or relative) to make health care decisions on his or her behalf.

The legal status of advance medical directives in South African law and the validity of such directives in terms of various constitutional imperatives and ethical concerns are the main issues considered in this article. As an introduction, the legal status of a contemporaneous

4 Brown "The Law and Practice associated with Advance Directives in Canada and Australia: Similarities, Differences and Debates" 2003 *Journal of Law and Medicine* 59 60 points out that the first "living wills" were letters that individuals wrote to their families and loved ones stating that they would not want to have their life extended artificially if they were no longer competent to make these decisions for themselves.

decision to refuse medical treatment is first described. This is followed by a discussion of the current legal status of a prospective decision to refuse medical treatment. The current legal position is then compared with the medical approach – the guidelines to health care practitioners which apply internally in the medical profession. The relevant constitutional values are then discussed and balanced against various counter-interests of the community and the state. In the follow-up article various ethical concerns regarding the exercise of prospective autonomy are raised. This is followed with a discussion of the legal status of advance medical directives in other legal systems. Problems encountered in these jurisdictions with the enforcement of advance medical directives and the steps taken to address these problems are highlighted with a view to deal effectively with similar problems which may be encountered here.

2 The Legal Status of a Contemporaneous Decision to Refuse Medical Treatment

In South Africa the common law is clear on the legal status of a contemporaneous decision. People with decisional capacity may refuse life-sustaining medical treatment with regard to an illness or injury from which they may be suffering even though such a refusal may hasten their death. In *Castell v De Greeff*[5] it was confirmed that the right stems from the person's fundamental right to self-determination, which includes the right to bodily integrity and that it relates to the doctrine of informed consent which recognises the autonomy of the patient to make decisions regarding whether he or she wishes to receive or does not wish to receive medical treatment. The idea that consent may render an act not unlawful is treated in South African law as falling under the defence of *volenti non fit iniuria,* the enquiry being whether the said defence has been established and, in particular, whether the patient's consent has been a properly informed consent.[6] In terms of the doctrine of informed consent, physicians must inform their patients about the material risks and benefits of recommended treatment and the patient must decide whether to undergo the treatment or not.[7] What is more, the patient's judgment of his or her interests is decisive and, as pointed out by Ackerman J in *Castell v De Greeff*:[8]

> It is, in principle, wholly irrelevant that her attitude is, in the eyes of the entire medical profession, grossly unreasonable, because her rights of bodily integrity and autonomous moral agency entitle her to refuse medical treatment.

For instance, if a person refuses to undergo a blood transfusion for religious reasons, his or her decision must be respected, even if he or she

5 *Castell v De Greeff* 1994 4 SA 408 (C) 420J; 422 H-J, citing Van Oosten *The Doctrine of Informed Consent in Medical Law* (LLD dissertation 1989 UNISA) 414.
6 420H-J; 425H-I.
7 Van Oosten 414.
8 421C.

will die as a result of the refusal. Thus, for the refusal of treatment to have legal force the patient must have had the capacity to refuse treatment and such refusal must be based upon essential knowledge regarding the nature and effect of the proposed refusal.[9]

3 The Legal Status of a Prospective Decision to Refuse Medical Treatment

When the patient has lost his or her capacity to make a decision to undergo or refuse treatment, the question arises whether an instruction to refuse medical treatment should be honoured if given by the patient at some time in the past while he or she still had the mental capacity to make a decision. For instance, the patient may have issued an instruction in a "living will" refusing specific treatment should he or she become incompetent to do so. Living wills do not fall under the Wills Act,[10] which only covers testamentary dispositions, nor are they recognised explicitly by any other statute. Further, there is no direct authority at common law on the legal validity of a "living will". The only decision in which a so-called "living will" featured was *Clarke v Hurst*.[11] Dr Clarke, while undergoing an epidural block, suffered cardiac arrest after a sudden drop in blood pressure. His heart stopped beating and he stopped breathing. Had he not been resuscitated, he would have died. His heartbeat and breathing were restored but by that stage he had suffered irreversible brain damage and was diagnosed as being in a permanent vegetative state.[12] He was unable to take food and was artificially fed through a nasogastric tube. After the patient had been in this state for four years, his wife applied to the court to be appointed as curatrix. She sought authority to agree to or withhold agreement to any medical treatment for him; to authorise the discontinuance of any present or future treatment

9 McQuoid-Mason "The Legal Status of the 'Living Will' 1993 *Continuing Medical Education* 59; McQuoid-Mason "Pacemakers and Living Wills: Does turning down a Pacemaker to allow Death with Dignity constitute Murder?" 2005 *SACJ* 24 27. The theoretical premise is of course, not always similar to the *de facto* position in practice. As pointed out by Biggs *Euthanasia, Death with Dignity and the Law* (2001) 103 many patients give or refuse consent without fully understanding the implications of the medical intervention or treatment that is proposed. Patients do not always understand the language used by physicians which presupposes a good knowledge of the workings of the human body. Many patients also blindly trust their physicians to know better than they do as to what is in their best interest.

10 Wills Act 7 of 1953.

11 1992 4 SA 630 (D).

12 A permanent vegetative state was explained by Thirion J in *Clarke v Hurst* 1992 4 SA 630 (D) 640D-F as "a neurological condition where the subject retains the capacity to maintain the vegetative part of neurological function but has no cognitive function. In such a state the body is functioning entirely in terms of its internal controls. It maintains digestive activity, the reflex activity of muscles and nerves for low level and primitive conditioned responses to stimuli, blood circulation, respiration and certain other biological functions but there is no behavioural evidence of either self-awareness or awareness of the surroundings in a learned manner".

including the discontinuance of any nasogastric feeding or hydration regime; and to act within these powers, despite the fact that the implementation of her decisions might hasten the death of the patient. The order as sought was granted and a week later the patient died.

At the hearing, evidence was led to the effect that Dr Clarke was a life member of the South African Voluntary Euthanasia Society (SAVES). He had signed a living will directing that should he in the future contract a terminal illness with no hope of recovery or become permanently unconscious, he should not be kept alive by artificial means but be allowed to die. He had even delivered a public speech in favour of the right to die in certain circumstances.[13] On the basis of this evidence, Thirion J recognised that there was a strongly held conviction on the patient's part that should he ever be in the kind of condition in which he had been since the cardiac arrest, no effort should be made to sustain his life by artificial means but he should be allowed to die.[14] But the court did not base its decision on these instructions by the patient nor did it rule on the validity of the "living will". Instead, Thirion J ruled that the discontinuance of an artificial feeding regime would not be the legal cause of the death,[15] that in terms of the legal convictions of society, it would not be wrongful or unlawful to discontinue any medical treatment or artificial feeding regime previously administered to the patient that had merely kept his body alive[16] and that it would be in the patient's best interests to permit him to die.[17] The court added that although the patient had passed beyond the point where he could be said to have an interest in the matter, his wishes as previously expressed when he was competent should be given effect to, just as a living person has an interest in the disposal of his body.[18] It is beyond dispute, however, that this case does not provide any authority for recognition of the legal validity of a living will.[19]

In 1992, an effort was made by the South African Law Commission to address, *inter alia*, this lacuna in our law. The commission initiated a research project on euthanasia, the artificial preservation of life and related issues such as the need for legal recognition of advance directives. In response to widespread public support, draft legislation was

13 633J-A.
14 633J-634A.
15 660B-C. The court based its finding on the more flexible criterion for legal causation introduced in *S v Mokgethi* 1990 1 SA 32 (A), namely whether policy considerations of reasonableness, fairness and justice require that an act is viewed as the legal cause of a result.
16 653-657.
17 660D-F.
18 660E.
19 Strauss "The 'right to die' or 'passive euthanasia': Two Important Decisions, One American and the Other South African" 1993 *SACJ* 196 208 who regrets the court's reluctance to give explicit recognition to living wills; Fleischer "End-of-life Decisions and the Law: A New Law for South Africa?" 2003 (21) *Continuing Medical Education* 20; McQuoid-Mason 59.

proposed by the commission in 1998[20] which authorises health care practitioners to honor advance directives – a living will or medical power of attorney prepared by a patient when he or she was competent. The relevant recommendation[21] provides that any person above the age of eighteen may, if of sound mind, make an advance directive by signing either a living will that directs withholding or withdrawing any medical treatment when a patient has a terminal illness or a power of attorney to appoint a surrogate to make medical decisions if the patient becomes incompetent and terminally ill. An advance directive may be honoured only if doctors decide the patient cannot make or communicate decisions and has a "terminal illness" which is defined as either a permanent vegetative state (pvs) or any condition that will inevitably cause "untimely death" and cause the patient "extreme suffering". It is beyond the scope of this article to indulge in a critical analysis of these recommendations. Suffice it to say that since 1998, the proposed law has been in the hands of the Minister of Health, who has the authority to forward it, or a revised version, to parliament for enactment. This has not as yet taken place and is clearly not regarded as a priority.

Therefore, the current legal position is that advance directives in the form of "living wills" are not recognised as legally enforceable instructions by either statute or common law. But legal academics argue that since an instruction in a "living will" is merely an instruction to refuse medical treatment in the future, the principles governing a contemporaneous refusal of treatment by a patient would also apply to situations where a patient makes an advance directive in a living will. The first legal writer who considered the need to recognise the legal validity of a living will in South Africa was Strauss.[22] Even before the judgment in *Clarke,*[23] Strauss argued that if a person is entitled to refuse medical treatment when it is proposed that he or she should immediately receive such treatment, there is no reason why he or she should not be entitled to express a standing refusal at an earlier stage. Such a refusal, if properly recorded, would stand until revoked by the person who made it.[24] Strauss added that doctors and hospital staff must respect the declarant's statement of refusal and that should a doctor disregard it and keep the patient alive by artificial means, the doctor would, in his opinion, be "technically" guilty of assault in both civil and criminal law.[25] This point of view is still accepted by other experts on medical law.[26]

20 South African Law Commission "Report on Euthanasia and the Artificial Preservation of Life "(1998) RP 186/1999.

21 In the "Summary of Recommendations" of the report. For critical discussions of the recommendations, see Landman "Legalising Advance Directives in South Africa 2000 *SA Medical J* 785 786-787; Fleischer 22-25.

22 Strauss *Doctor, Patient and the Law: A Selection of Practical Issues* (1984) 387.

23 *Clarke v Hurst* 1992 4 SA 630 (D).

24 Strauss 344-345.

25 345.

26 McQuoid-Mason 2005 *SACJ* 27-28; Carstens and Pearmain 209; Burchell *Principles of Criminal law* (2006) 328.

But what is the position if a person, in an advance directive, appoints another person to consent to or refuse medical treatment on his or her behalf once he or she becomes incompetent? In terms of the common law, an enduring power of attorney becomes invalid when the patient becomes mentally incompetent. But certain provisions of the National Health Act 61 of 2003 may provide grounds for arguing that advance directives in the form of enduring powers of attorney must be honoured by health care practitioners. Some of these provisions, although stated in very general terms, also add weight to the argument that "living wills" should be accorded legal validity.

Section 7(1)(a) of the Act provides:

> Subject to section 8, a health service may not be provided to a user without the user's informed consent, unless - (a) the user is unable to give informed consent and such consent is given by a person – (i) mandated by the user in writing to grant consent on his or her behalf.

Section 7(1)(e) further states that a health service may not be provided to a user without the user's informed consent unless

> any delay in the provision of the health service to the user might result in his or her death or irreversible damage to his or health and the user has not expressly, impliedly or by conduct refused that service.[27]

McQuoid-Mason interprets section 7 as providing a possible mechanism for overcoming the common-law problem of enduring powers of attorney becoming invalid if patients become mentally incompetent.[28]

Regrettably, the provisions of section 7 are subject to section 8 of the Act, which is rather confusing. Section 8(1) clearly provides: "A health care user has the right to participate in any decision affecting his or her personal health and treatment." Section 8 (2)(a) provides further that if the informed consent required by section 7 is given by a person other than the user, "such person must if possible consult the user before giving the required consent". The words "if possible" indicate that the act recognizes that consultation *may not be possible* because the health care user was mentally incompetent at the time the consent was required.[29] But then section 8(3) provides that if a user is unable to participate in a decision affecting his or her health and treatment, he or she must be given full information on the treatment received after the provision of the health service. There is no reference to "if possible" in this section. It could therefore be argued that there is an expectation that the patient will *not* be permanently incompetent and that the information should be provided on his or her recovery.

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27 The rest of s 7 sets out a hierarchy of persons who may consent on behalf of the user if he or she is unable to consent and no person has been mandated or authorised to give such consent.

28 McQuoid-Mason "Advance Directives and the National Health Act" 2006 *SA Medical J* 1236 1237.

29 See the views of McQuoid-Mason 1237.

The act therefore contains provisions which, if interpreted broadly, could provide the basis for arguing that an advance directive in the form of an enduring power of attorney made by a patient while competent attains legal validity once the patient becomes incompetent. The question that arises is that, if such powers of attorney are legally enforceable instructions, should the same legal status not be afforded to advance directives in the form of "living wills"? Living wills are not expressly recognised in the act, but section 8(1) makes it clear that a health care user has the right to participate in *any* decision affecting his or her personal health and treatment. Does this mean that a decision to refuse medical treatment in the future has the same legal validity as a contemporaneous decision? In view of the absence of clear and express recognition at common law or statute of the legal status of advance directives, this remains an open question.

4 The Position in Medical Practice

Until recently, there were also no specific guidelines for health care practitioners to follow if confronted with living wills. But in 2008, the Health Professions Council of South Africa took a great step forward by creating ethical guidelines for health care practitioners.[30] The predominant ethical principle that underpins these guidelines is that of patient autonomy. In the introduction to these guidelines, it is stated that to establish mutual trust between health care practitioners and patients, practitioners must respect patients' autonomy, for instance, their right to refuse treatment even if it may result in harm to themselves or in their own death.[31] It is emphasized that the right to an informed consent flows, *inter alia*, from the South African Constitution, the National Health Act and the common law. It is also stated that patients have a right to information regarding their condition and the treatment options available and that sufficient information should be given to patients by means of effective communication.[32]

Firstly, the guidelines assume that the provisions of the National Health Act 61 of 2003 allow patients to give a written mandate to a person to act on their behalf when they are no longer able to do so.[33] Secondly, the Health Professions Council of South Africa suggests that patients should be encouraged to appoint in writing a person to make decisions on their behalf when they are no longer capable of doing so,[34] and that patients should be given the opportunity and be encouraged to indicate their wishes regarding further treatment and to place in writing their directives for future care in possible critical circumstances (for example, permanent coma or terminal illness). A further suggestion is

30 Health Professions Council of South Africa (HPCSA) *Guidelines for Good Practice in the Health Care Professions* (2008) booklet 12 "Guidelines for the Withholding and Withdrawing of Treatment".
31 Par 2.1 of booklet 9.
32 Par 2.3 and 3.11 of booklet 9.
33 Par 2.1 of booklet 12.
34 Par 2.1.

that an appropriately drafted "living will" could be used for this purpose.[35] The guidelines recognise that these instructions can also be contained in a mandate to a third party.[36] It is also recommended that patients should be given the opportunity to reconsider and alter their directives from time to time.[37]

A further paragraph, which deals with "making decisions for the patient" states that "[w]here a patient lacks the capacity to decide, health care practitioners must respect any valid advance refusal of treatment".[38] It is significant that the circumstances in which a health care practitioner *must* respect any valid advance refusal of treatment are not explicitly limited to cases of a permanent vegetative state or terminal illness. The fact that these ethical guidelines apply in medical practice shows that the law is not in accordance with generally accepted medical practice. Of even greater significance, however, is the discrepancy between other laws and the South African Constitution.

5 The Relevant Constitutional Values

Decisions to refuse medical treatment in the future engage certain fundamental human rights which should be balanced against various interests of the community. The constitutional imperatives which are of particular significance for our purposes are: the right of the person to preservation of his or her dignity;[39] the right to freedom and security of the person, in particular the right to bodily integrity;[40] the right to

35 Par 2.3.
36 Par 2.3.
37 Par 2.3.
38 Par 8. Of course in the case of children it is required that their decisions to refuse health care should be respected, provided they have legal capacity to make such decisions and it is in the child's best interests. If the practitioner believes that such refusal is not in the child's best interests, he or she should approach the court for a decision. See par 14 of booklet 12 of the HPCSA guidelines.
39 S 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected". Currie and De Waal *The Bill of Rights Handbook* (2008) 272 describe "human dignity" as "a central value of the 'objective normative value system' established by the Constitution, perhaps the pre-eminent value" (citing the Constitutional Court in *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC) par 56). These writers point out that the origins of the concept can be traced to Kantian moral values according to which human dignity gives a person intrinsic worth. In *S v Dodo* 2001 3 SA 382 (CC) par 38 Ackerman J emphasised that "[h]uman beings are not commodities to which a price can be attached, they are creatures with inherent worth and infinite worth; they ought to be treated as ends in themselves, never merely as means to an end".
40 S 12(2)(b) provides: "Everyone has the right to bodily and psychological integrity which includes the right to security and control over their body".

privacy;[41] the right to life and the right to equality and freedom from discrimination.[42]

Clearly the right to bodily integrity and the right to dignity provide the bases for arguing that the patient has a right to refuse medical treatment.[43] The famous words of John Stuart Mill[44] that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others" is of particular significance in the context of refusal of medical treatment. The core value of self-determination is arguably equally valid in respect of both contemporaneous and prospective refusal of medical treatment. A patient does not lose his or her autonomy and more specifically his or her right to bodily integrity because of possible loss of decisional capacity in the future. Even if it is argued that the rights of competent persons to refuse medical treatment in the future is not derivative of those of competent persons who refuse medical treatment in a contemporaneous setting, the claim to exercise "future-oriented rights" deserves consideration. [45]

In the literature, the concept of autonomy has been addressed mainly in the context of the exercise of choices in a contemporaneous setting. However, Dworkin has made an important contribution in explaining the ethical foundations of prospective autonomy in the context of refusal of medical treatment. He distinguishes between the "critical interests" and "experiential interests" of a person.[46] Critical interests reflect a person's sense of identity and the lived narrative that gives rise to his or her values. However, mere experiential interests are more related to the satisfaction of immediate experience and the activities of daily living – a

41 S 14 provides that everyone has the right to privacy, which shall include the right not to (a) have their person or home searched; (b) their property searched (c) their possessions seized; or (d) the privacy of their communications infringed.

42 The relevant parts of s 9 provide that (1) everyone is equal before the law and has the right to equal protection and benefit of the law; (2) that to promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken and (3) that the state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including, race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth and (4) that national legislation must be enacted to prevent or prohibit unfair discrimination.

43 Van Oosten 441 states that "the cardinal principle of self-determination still demands that the ultimate and informed decision to undergo or refuse [a medical] intervention should be that of the patient and not that of the doctor" (cited in *Castell v De Greeff* 422J-423A).

44 Gray and Smith (eds) *JS Mill 'On Liberty' in Focus* (1991) 30.

45 Olick *Taking Advance Directives Seriously* (2001) 46 defends "a deeper claim about the importance of the principle of prospective autonomy". He argues that "future-oriented decisions are integral to the life of autonomous persons, no less concerning the way we die than the way we live".

46 Dworkin *Life's Dominion: An Argument about Abortion, Euthanasia and Individual Freedom* (1993) 200-213.

person's enjoyment of concrete aspects of life such as listening to music; enjoying a good meal or dislike of certain other activities such as sport. Dworkin argues that the values in society, such as autonomy and dignity, require us firstly to respect the *critical interests* of a person. The lack of control over one's own destiny (including one's own death) essentially involves loss of autonomy and possible loss of dignity. The paramount concern of a person who refuses medical treatment through an advance directive is to preserve his or her capacity to control his or her own life and to preserve his or her dignity. Therefore, argues Dworkin, advance directives should be obeyed because it presents a person's "critical interests" namely, how to live and how to die.

The right to dignity and the right to self-determination also inform the right to privacy. This right guarantees the individual the freedom to make certain fundamentally private choices without state interference, including choices about how to lead his or her own life.[47] It is submitted that such a choice includes the decision to refuse medical treatment, which may also be expressed in an advance directive.

The right to equality is relevant as well. According to South African equality jurisprudence, differentiation between people that amounts to unfair discrimination is prohibited. If the differentiation is on certain specified grounds, such as age, disability or religion, discrimination as such will be established. If not, the enquiry into discrimination will examine whether the ground is based on attributes and characteristics that have the potential to impair the fundamental human dignity of persons as human beings.[48] It may be argued that to allow a person to refuse medical treatment in a contemporaneous decision, and to disallow a person from making an advance directive to forego medical treatment should he or she become incompetent in future, amounts to discrimination on the basis of one of the specified grounds, namely "disability". But even if this argument fails, a case for unfair discrimination can nevertheless be made out. In *Brink v Kitshoff*[49] the Constitutional Court subscribed to a substantive concept of equality which requires the law to ensure equality of outcome and not only to treat persons in the same circumstances alike, as required by the concept of formal equality.[50] In other words, even if it may be argued that patients who refuse medical treatment in future by means of advance

47 In *Bernstein v Bester* 1996 2 SA 751 (CC) par 67 Ackerman J stated that it would be reasonable to expect privacy "in the inner sanctum of a person …" that lies in the "truly personal realm…". He also referred (par 73) to the Council of Europe's view of the right to privacy, namely that it "consists essentially in the right to live one's own life with a minimum of interference".

48 *Harksen v Lane* 1988 1 SA 300 (CC) par 53.

49 1996 6 BCLR 752 (CC) paras 41-44.

50 See also Currie and De Waal *Bill of Rights Handbook* (2008) 233: "Formal equality means sameness of treatment: the law must treat individuals in like circumstances alike. Substantive equality requires the law to ensure equality of outcome …"

directives are not in the same position as patients who refuse medical treatment in a contemporaneous decision, the equality guarantee is violated if the law denies both categories of persons the same outcome.[51]

The fundamental rights identified must, however, be weighed against counter-interests of society. It has been argued in other jurisdictions that the "potential interests" of a foetus to be born alive should be considered before giving effect to the wishes of a pregnant patient to refuse medical treatment, irrespective of whether such wishes were expressed in a contemporaneous decision by a competent patient or at a previous stage in an advance directive.[52] In South African law, a foetus is not regarded as a "person vested with rights such as a constitutional right to life.[53] But

51 Olick 13: "Equating the rights of incompetent patients with those of competent patients also embraces the law's long-standing commitment to equality and to protection of disabled and vulnerable persons from discrimination and abuse. The value of human dignity and worth extends to all persons equally, not just to competent and healthy persons. To conclude otherwise would … do violence to incompetent patients' interests in self-determination …"

52 In the United States treatment has been forced on unwilling pregnant patients on grounds such as "the unborn child's right to live and "the state's compelling interest in preserving the life of the foetus" (*Jefferson v Griffin Spalding Country Hospital Authority* (1981) 274 SE 2d 457)). Currently, a majority of the states have legislation which specifically addresses the status of an advance directive of a pregnant but incompetent woman. The legislation varies considerably. In seventeen of the states, advance directive of pregnant women have no binding effect irrespective of the stage of development of the foetus. In other states a balance between the constitutional rights of an incompetent woman and the interest of the state to protect potential life is sought by criteria such as the "probability" that the foetus will develop to live birth if the treatment is administered. Pregnancy clauses have not been found to be unconstitutional under United States jurisprudence. See Sperling "Do Pregnant Women have (living) will?" 2005 *Journal of Health Care Law and Policy* 331 336-340. He argues (333) that since there is no specific provision which deals with the status of advance directives of pregnant women in Canadian law, it seems as if "Canadian law treats the incompetent pregnant woman who issued an advance directive while competent the same way as it treats other incompetent patients, that is, it respects the patient's right to control her medical decisions". The South African Law Commission also did not consider this particular issue in its "Report on Euthanasia and the Artificial Preservation of Life". In the United Kingdom, absolute value is attached to the right of a competent pregnant woman to refuse medical treatment even if she is in the final stages of pregnancy and her own life and that of the unborn child depend on such treatment and even if her decision appears "morally repugnant" (*St George's Healthcare NHS Trust v S* [1998] 3 All ER 673 692a-c). There is also no provision in the United Kingdom legislation (*The Mental Capacity Act 2005*) that an advance directive refusing life-saving treatment would not apply if the patient were pregnant with a viable foetus. Therefore, an advance refusal would be regarded as enforceable in such circumstances, provided that the advance directive is clear and there is no reason to believe that the patient did not anticipate that she would be pregnant at the crucial time. (See s 25(4) of the *Mental Capacity Act 2005*.)

53 See *Christian Lawyers' Association v Minister of Health* 2004 10 BCLR 1086 (T); *S v Mshumpa* 2008 (1) SACR 126 (E) par 56; *Road Accident Fund v Mtati* 2005 6 SA 215 (SCA).

in terms of the Choice on Termination of Pregnancy Act,[54] it is an offence for a medical practitioner to perform an abortion after the 20th week of pregnancy if the mother's life is not in danger or there is no danger of serious malformation of the foetus. Because *some value* is attached to the interests of a well-developed foetus, it may be argued that these interests should at least be considered and balanced against the interests of the incompetent mother who made an advance directive refusing medical care. In the United States of America, the courts have also limited the right of self-determination expressed in a contemporaneous decision if necessary to protect public health.[55] It is submitted that the right to refuse medical treatment may be challenged on this ground in the context of the exercise of prospective autonomy as well.

Can the principle of prospective autonomy also be challenged on the basis of a general state interest in preserving life? Section 11 of our Constitution merely provides that "[e]veryone has a right to life". In *S v Makwanyane*[56] the Constitutional Court held that the death sentence violated the right to life, which includes the right "not to be deliberately killed by the state through a systematically planned act of execution sanctioned by the State as a mode of punishment …".[57] But what is the significance of the right to life in the context of refusal of medical treatment in an advance directive? It is submitted that the unqualified nature of the right to life in the Constitution certainly provides for an interpretation of the concept of "life" as something more than merely physical existence – signifying at least a certain *quality of life*. In *Makwanyane*, O'Regan J emphasised the interrelationship between the right to life and the right to dignity as follows: [58]

> The right to life was included in the Constitution not simply to enshrine the right to existence. It is not life as mere organic matter that the Constitution cherishes, but the right to human life: the right to share in the experience of humanity ... the rights to human dignity and life are entwined. The right to life is more than existence – it is the right to be treated as a human being with dignity: without dignity, human life is substantially diminished …

54 S 2*(c)*(i) and s 2*(c)*(ii) of the Choice on Termination of Pregnancy Act 92 of 1996.

55 See Neeley *The Constitutional Right to Suicide: A Legal and Philosophical Examination* (1994) 148, citing *Jacobson v Massachusetss* 197 U.S. 11 (1905).

56 1995 3 SA 391 (CC).

57 Par 269.

58 Paras 326-327. Singer "Rethinking Life and Death" (1994) 75 argues that in the contemporary age considerations as to the *quality* of life are an inherent feature of medical practice. Dworkin 210 emphasises, however, that it is not every kind of dependent life of a person with a severe handicap that is not worth living. He refers, for example to the meaningful life of the brilliant scientist Stephen Hawking and millions of other ordinary people who lead valuable lives despite being handicapped. But, in his view (210) "[t]otal or near-total dependence with nothing positive to redeem it may seem not only to add nothing to the overall quality of a life but to take something important from it." This is particularly the case where there is no comprehension that care is given.

English legal writers and philosophers have considered the meaning of concepts such as "quality of life and "sanctity of life".[59] According to Herring, sanctity of life seeks to value the good of life itself independent of any disability or incapacity. Quality of life is concerned with the assessment of the worthwhileness of the patient's life and rejects the argument that there is something good about life in itself. Huxtable refines this explanation. He distinguishes between the "intrinsic value of life"; the "instrumental value of life" and the "self-determined value of life."[60] The concept "intrinsic value of life" means that life is sacred and absolutely inviolable, to the extent that every attempt should be made to preserve life. But, as Huxtable points out, the doctrine is not absolute since it does allow life to be ended in some situations such as killing in self-defence.[61] In terms of the concept "instrumental value of life" the absolute value of life itself is not the fundamental consideration. The "quality of life" also comes into play. For instance, a decision of a court of law that it would not be unlawful to withdraw treatment from a person in a permanent vegetative state who has no quality of life left, would rather be grounded in the *instrumental* value of life. The concept "self-determined value of life" is based on the principle of respect for patient autonomy. The individual determines the value of his or her life.[62] It is submitted that the right to refuse medical treatment by way of an advance directive gives effect to the idea of "quality of life" in the sense of *self-determined* value of life.

But could it nevertheless be argued that the state has a general interest in the preservation of life which deserves to be balanced against the patient's right to autonomy? King distinguishes between the societal value of prevention of suicide (in limited circumstances) and the broader societal value of the preservation of life.[63] She argues that refusal of treatment which hastens death is not viewed as suicide because:

> the patient does not wish to die, but rather does not wish to live under the conditions of treatment – and therefore accepts death only as the outcome of his or her refusal of burdensome treatment.[64]

59 Herring 499-501; Huxtable *Euthanasia, Ethics and the Law: From Conflict to Compromise* (2007) 133-140.

60 Huxtable 133-140.

61 *Idem* 136-137.

62 *Idem* 11 and 135.

63 King 47 argues that although an attempt to commit suicide is no longer punishable, prevention of suicide is a legitimate beneficent concern in cases where the would-be suicide lacks the mental capacity to make an autonomous decision. She points out, however, that American courts have held that prevention of suicide is not a legitimate societal concern in cases of refusal of medical treatment.

64 I 47 gives the example of a Jehovah's witness who refuses blood not in order to die but in order to avoid damnation. Likewise, patients who refuse to stay on artificial respiration do not necessarily wish to die. Herring 476 explains that the general view is that "suicide involves a person intentionally killing themselves". If the patient refuses treatment because he or she wants to die then it could be viewed as suicide, but if the patient's act is not prompted by

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But there is also a broader societal interest in the preservation of life which largely relates to the principle that all human life should have equal value. If a decision to refuse medical treatment has the effect of devaluing others' lives, the value of autonomy should yield to the state's interest in the preservation of life.[65] The interest of the state in safeguarding the notion of the sanctity of life features prominently in the debate on whether voluntary active euthanasia should be legalised. In that context, it is argued that to allow physicians to actively participate in terminating their patients' lives at their request potentially devalues the lives of other, vulnerable members of society.[66] But this argument appears to be too broad in the context of mere refusal of medical treatment. It would seem to be remote and unreasonable to require that a person forfeit his or her right to refuse medical treatment in the general interest of society in respecting the sanctity of life.[67]

The constitutional analysis demonstrates that law reform, whether via development of the common law[68] or through legislation is required. But recognition of the legal validity of the advance directives does not mean that such directives should be honoured in all circumstances. There are

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the desire to kill herself or himself (even if death is foreseen) then the act is permissible. But Herring 541 points out that there may be cases where a patient refuses treatment with the purpose of committing suicide. He gives the example of a teenager who has a septic cut and refuses treatment because he has been disappointed in love. But in such instances where the decision is assessed by the courts as "utterly unreasonable" the patient is declared incompetent.

65 Perry " Legal Implications for Failure to comply with Advance Directives: An Examination of the Incompetent Individual's Right to refuse Life-Sustaining Medical Treatment" 2002 *Behavioral Sciences and the Law* 253 257 cites the case of *Superintendent of Belchertown State School v Joseph Saikewicz* 370 NE 2d 417 426-427 (1977) in support of his statement that American courts "rarely find that state interests [such as preservation of life] are sufficiently compelling to deny an individual's right to refuse medical treatment".

66 Proponents of this argument are, *inter alia*, Keown *Euthanasia, Ethics and Public Policy – An Argument against Legalisation* (2002) 37-80 and Amarasekara and Bagaric "Moving from Voluntary Euthanasia to Non-Voluntary Euthanasia: Equality and Compassion" 2004 *Ratio Iuris* 398.

67 *Cf* the views of Porter "Advance Directives and the Persistent Vegetative State in Victoria: A Human Rights Perspective" 2005 *Journal of Law and Medicine* 256. She points out (261-262) that the right to life is concerned with the prevention of arbitrary taking of life which is a threat to the existence of society and that it is not violated where a person is allowed to die following the withdrawing or withholding of treatment in accordance with a person's previously expressed wishes.

68 S 39(2) of the Constitution of the Republic of South Africa, 1996 provides that a court, when developing the common law, must promote the spirit, purport and objects of the Bill of Rights. Since the inception of the Constitution the Constitutional Court and the Supreme Court of Appeal have ruled in a number of cases that the common law should be developed in terms of these values, norms and objects. See *Carmichele v Minister of Safety and Security* 2001 4 SA 938 (CC); *Van Eeden v Minister of Safety and Security* 2003 1 SA 389 (SCA); *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (SCA); *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (SCA).

various ethical concerns which relate to prospective refusal of medical treatment. There are also practical problems with the enforcement of advance directives. These issues are discussed in more detail in the follow-up article.

How do you determine a fair sanction? Dismissal as appropriate sanction in cases of dismissal for (mis)conduct*

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OPSOMMING

Hoe Word 'n Billike Sanksie Bepaal? Ontslag as Gepaste Sanksie in Gevalle van Ontslag weens (Wan)gedrag

Elke werknemer in Suid Afrika het die reg om nie onbillik ontslaan te word nie. Die Wet op Arbeidsverhoudinge 66 van 1995 bepaal dat 'n werkgewer 'n werknemer billik mag ontslaan op grond van gedrag, vermoë op bedryfsvereistes. Die werkgewer moet egter ook 'n billike prosedure voor ontslag volg. Die Kode van Goeie Praktyk: Onbillike Ontslag (bylae 8 by die Wet) bepaal dat die vraag of 'n rede vir ontslag billik is of nie, word deur die feite van elke saak asook die gepastheid van ontslag as sanksie beantwoord (in besonder item 7(b)(iv)). Dit is egter nie maklik om te bepaal of ontslag die gepaste sanksie in 'n bepaalde geval is nie. Hierdie bydrae oorweeg hierdie vraag sonder om na prosedurele billikheid te verwys. In die saak van *Edcon Ltd v Pillemer NO (Reddy)* is beklemtoon dat 'n werkgewer getuienis moet voorlê om die bewering dat ontslag in werklikheid die gepaste sanksie was, te ondersteun. Sodanige getuienis kan insluit dat die vertrouensverhouding onherstelbare skade gely het. Die werkgewer moet dus kan aandui dat die werknemer skuldig is aan wangedrag en dat die *aard* sowel as die *impak* of uitwerking daarvan sodanig is dat ontslag die gepaste sanksie is. Die bydrae ondersoek 'n aantal sake in die lig van hierdie oorweging, naamlik: (i) die bewyslas in ontslaggeskille; (ii) wanneer ontslag 'n gepaste sanksie kan wees; (iii) die finale besluitnemer rakende of ontslag billik was of nie (maw was dit in die bepaaalde geval wel die gepaste sanksie); en (iv) hoe moet 'n werkgewer die besluit om ontslag as sanksie te gebruik of nie benader. Hierdie vrae word telkens bespreek met verwysing na beginsels wat reeds in regspraak gevestig is.

1 Introduction

1 1 Background

Every employee in South Africa has a right not to be unfairly dismissed.[1] After an employee proves that he or she was dismissed,[2] in the case of dismissals that are not automatically unfair,[3] the employer may establish that the dismissal was effected for a fair reason, after following a fair

* Another version of this contribution was presented at the 23rd Annual Labour Law Conference *Justice on the Job* held from 2011-08-11 at the Sandton Convention Centre.

1 S 185 of the Labour Relations Act 66 of 1995 (LRA).

2 See s 186 LRA.

3 These dismissals are listed in s 187 LRA.

procedure.[4] Section 188 of the Act provides that if a dismissal is not automatically unfair, it is unfair if the employer fails to prove that the dismissal is for a fair reason related to the employee's conduct or capacity or based on the employer's operational requirements, and that the dismissal was effected in accordance with a fair procedure.[5] The Code of Good Practice: Unfair Dismissal[6] notes that whether or not a reason for dismissal is a fair reason is determined by the facts of each case and the appropriateness of dismissal as a penalty.[7] It is the latter enquiry that has proven particularly problematic.[8] This contribution will not consider the procedural fairness of a dismissal; I discuss only the more limited issue of the fairness of dismissal as a sanction, given that the employer has established the existence of misconduct.[9]

Edcon Ltd v Pillemer NO (Reddy)[10] emphasised that an employer must put forward evidence to sustain the allegation that dismissal was in fact an appropriate sanction. This would require evidence, for example, that the trust relationship between the employer and employee had broken down. Put differently, an employer can dismiss fairly if it can prove that there was a transgression, the *nature* as well as the effect or *impact* of which was such as to make the sanction of dismissal appropriate.

In the rest of this paper the following issues will therefore be considered: i) The onus of proof in dismissal disputes; ii) when dismissal could be an appropriate sanction; iii) the final decision regarding whether or not dismissal was fair (ie whether it was in fact the appropriate sanction); and iv) how to approach the decision whether to impose dismissal as sanction or not.

1 2 *Edcon* Case

In *Edcon Ltd v Pillemer NO*[11] Reddy was the user of a company vehicle, a Toyota Corolla, courtesy of Edcon's car scheme policy. In June 2003, Reddy's son was involved in an accident. In terms of the company car policy, Reddy was obliged, amongst other things, to report the accident

4 See again s 192 LRA "Onus in dismissal disputes".
5 The fair reasons for dismissal recognised by s 188 LRA originate in Art 4 of the International Labour Organization (ILO) Convention on the Termination of Employment 158 of 1982.
6 Sch 8 LRA.
7 *Idem* item 7(b)(iv).
8 Grogan *Dismissal, Discrimination and Unfair Labour Practices* (2005) 226 states that the choice of the word "appropriate" reflects the difficulty that courts have experienced in deciding whether dismissal or some lesser sanction should be imposed for a case of proven misconduct.
9 The decision in *Avril Elizabeth Home for the Mentally Handicapped v Commission for Conciliation, Mediation and Arbitration* 2006 27 *ILJ* 1644 (LC) had far-reaching consequences for managing discipline in the workplace as it stressed the need for more informal discipline (unless otherwise stipulated in companies' disciplinary codes).
10 [2010] 1 BLLR 1; 2009 30 *ILJ* 2642 (SCA).
11 [2010] 1 BLLR 1 (SCA).

to Edcon, the South African Police Service and the relevant insurance company within 24 hours and not carry out repairs on the motor vehicle without the approval of the insurance company. Reddy did not comply with these policy regulations, did not report it and instead arranged with her husband to do repairs at his panel beating shop at own cost. Edcon discovered this when the motor vehicle started to give problems and the Toyota dealership detected the damage. Reddy initially denied that the motor vehicle had been involved in a collision whilst driven by her but later came clean in her final statement. In due course Edcon convened a disciplinary enquiry to look into the matter and charged Reddy with "failure to be honest and act with integrity in that you committed an act, which has affected the trust relationship between the company and the employee in that on 8 June 2003 to 8 October 2003, you failed to report an accident of a company vehicle ...".[12] She was found guilty and dismissed from her employment.

Contending that her dismissal was unfair, Reddy referred a dispute to the second respondent, the CCMA who appointed the first respondent ("Pillemer") to arbitrate the dispute after conciliation failed. Pillemer made an award in which she concluded that Reddy's dismissal was *substantively unfair* and ordered Edcon to *reinstate* her but *without arrear salary*. The commissioner found that failure to report the accident was in itself insufficient to warrant dismissal, but that the crucial issue was whether the employee's subsequent "lack of candour" had breached the trust relationship, as the presiding officers of the disciplinary and appeal hearing had found.[13] The commissioner did not regard the sanction of dismissal fair because of the circumstances of the matter, the employee's length of service (43 years), her previous unblemished record and the fact that the employee was only two years away from retirement.

Edcon was unhappy with the award and contended that the commissioner had not appreciated the extent of the employee's dishonesty. Edcon further contended that the commissioner had erred by having regard to hearsay evidence, and that the company had led sufficient evidence to prove a breakdown of the trust relationship and launched review proceedings in the Labour Court in terms of section 145 of the Act. The Labour Court declined to set the award aside and accordingly Edcon appealed to the Labour Appeal Court with that court's leave. The Labour Appeal Court dismissed the appeal, concluding that the award was unassailable.

The Supreme Court of Appeal reviewed the history of the various tests applied by the courts in applications to review and set aside arbitration awards, up to and including the judgment of the Constitutional Court in *Sidumo v Rustenburg Platinum Mines Ltd.*[14] It noted that the earlier test

12 *Idem* par 5.
13 *Idem* paras 8 and 17.
14 [2007] 12 BLLR 1097 (CC). In the internal disciplinary hearing Mr Sidumo was charged as follows: "Negligence – Failure to follow established

continued on next page

requiring a "rational connection between the material properly before the arbitrator and the decision reached" had been replaced with a test requiring an inquiry into whether the award is "one that a reasonable decision-maker could arrive at considering the material placed before him/her." The court observed, interestingly, that the standard of "reasonableness" confirmed by the *Sidumo* case[15] is conceptually the same as the earlier "rationality" test, the only difference being semantic.

On the merits, the court held that the only issue was whether the material before the commissioner was sufficient to prove that the trust relationship between the employee and the company had been destroyed. The court noted that the company's only witness had merely recounted developments in the investigation of the matter. He could not and did not testify on the effects of the employee's conduct on the trust relationship. Not only was the commissioner obliged to find that there was no evidence to conclude that the trust relationship had been destroyed, but she had also correctly taken into account the employee's years of service and clean disciplinary record. Accordingly, the appeal was dismissed.

2 Onus

The employee must establish the existence of the dismissal.[16] On the other hand, the employer must prove that the dismissal is fair.[17] There is no shift of the burden of proof from one party to the other in dismissal cases.[18] In a dismissal dispute each party bears the burden of proof in relation to separate issues (ie the employee regarding *the fact* of

procedures in terms of the Protection Services Department search procedure which caused prejudice or possible prejudice to the Company in terms of production loss and Failure to follow established procedures in terms of the Protection Services Department search procedures."

15 *Ibid*.

16 S 192(1) LRA.

17 S 192(2) LRA.

18 In the context of automatically unfair dismissal the following has been raised - in *Janda v First National Bank* [2006] 12 BLLR 1156 (LC) Van Zyl AJ held: "This essential point is obscured if one speaks of 'the employee must prove' or a 'shifting' of the onus or a duty 'to establish a *prima facie* case that the reason for the dismissal was an automatically unfair one'. The evidentiary burden placed upon an employee creates the need for there to be sufficient evidence to cast doubt on the reason for the dismissal put forward by the employer or, to put it differently, to show that there is a more likely reason than that of the employer ... The essential question however remains, after the court has heard all the evidence, whether the employer upon whom the onus rests of proving the issue, has discharged it". Furthermore, in *Kroukam v SA Airlink (Pty) Ltd* 2005 12 BLLR 1172 (LAC) (par 28): "In my view, section 187 imposes an evidential burden upon the employee to produce evidence which is sufficient to raise a credible possibility that an automatically unfair dismissal has taken place. It then behoves the employer to prove the contrary, that is to produce evidence to show that the reason for the dismissal did not fall within the circumstance envisaged in s 187 for constituting an automatically unfair dismissal."

dismissal and the employer regarding *the fairness* of the dismissal). If there is no dispute about the fact of transgression of a workplace rule (ie misconduct was proven)[19] the employer still has to prove that the dismissal was substantively fair as it was, *inter alia*, the appropriate sanction for the conduct in question. Where there are factual disputes a court must make findings on "(a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities." Clearly the scheme of the Act requires of the employer to adduce evidence "that is sufficient to persuade a court, at the end … that the claim or the defence, as the case may be, should succeed".[20]

As has now become apparent from the *Edcon* case,[21] it is not sufficient to rely on general statements made without providing supporting evidence and putting material in front of the decision maker to ensure that he or she reaches a reasonable decision. The employer has to look beyond the fact of misconduct, it must consider the effect of such misconduct on the employment relationship. Something more is thus required of the employer than to prove that the employee was guilty of misconduct of a certain nature and it may prove rather difficult to some.[22] Put differently, the chairperson of a disciplinary inquiry can no longer "deal with the issue of sanction on a cursory basis"[23] and if there should be a dismissal dispute the employer must lead evidence regarding the appropriateness of the dismissal as sanction.

The employer has the burden of proof in the sense of a persuasive burden – it must place enough material and facts before the decision maker to persuade such person that the sanction of dismissal was fair. Schmidt and Rademeyer[24] comment on the nature and function of the law of evidence and state:

> The court's judgment as to whether something is reasonable … is strictly speaking, also not capable of resolution by invoking a burden of proof. It would not be correct to say that one of the parties has to prove that a regulation is reasonable … That is a matter for the court to decide in the light

19 *Stellenbosch Farmers' Winery Group Ltd and Another v Martell et Cie* 2003 1 SA 11 (SCA) par 5; Zeffertt and Paizes *The South African Law of Evidence* (2009) 151 *et seq*.

20 Schwikkard et al *Principles of Evidence* (2009) 571 with reference to *Pillay v Krishna* 1946 AD 946 952-3.

21 *Edcon Ltd v Pillemer NO* (2010) 1 BLLR 1 (SCA).

22 Zeffertt and Paizes (2009) 46: "The law of evidence is well known for its power both to fascinate and to perplex. Even in this arcane field, however, the onus of proof stands out for its extraordinary ability to tantalise the legal mind. Few subjects that are so important a part of the practical workings of a legal system can, at the same time, remain so mysterious, enigmatic and elusive to the questioning mind. It is a concept that seems to recede the harder it is pursued and that resists any effort to define or contain it. It is as if, sometimes, one is chasing shadows and as if any attempt at coming to grips with the subject can never yield anything of substance."

23 Le Roux "Proving the fairness of the dismissal: The need to present evidence" 2010 *Contemporary Labour Law* 57 59.

24 *Law of Evidence* Issue 7 (2009) 2-3.

> of the facts set before it. But, of course, the facts influencing the court's decision could be placed in issue, and in that respect the burden of proof could become operative.

In the *Sidumo* case[25] the Constitutional Court rejected the so-called "reasonable employer" test. The court emphasised the importance of "holding the scales between the competing interests of employees and employers evenly in the balance".[26] The court stated that

> [u]ltimately, the commissioner's sense of fairness is what must prevail and not the employer's view. An impartial third party determination on whether or not a dismissal was fair is likely to promote labour peace.[27]

The employer must be aware of its reasons to dismiss and should be able to put the relevant material supporting such decision in front of a commissioner should a dismissal dispute occur later on. The Constitutional Court's view in *Sidumo*[28] that "[u]ltimately, the commissioner's sense of fairness is what must prevail and not the employer's view" seems to take away the decision from the employer. However, the facts influencing the commissioner's decision could be placed in issue and in that respect the burden of proof become operative.[29]

It should be noted that the courts have emphasised that "fairness" is a double-edged sword.[30] It does not only serve to benefit and protect one of the parties to the employment relationship. This approach cannot be faulted in a "mutual" contract. In *Branford v Metrorail Services (Durban)*[31] it was held that

> [t]he concept of fairness, in this regard, applies to both the employer and the employee. It involves the balancing of competing and sometimes conflicting interests of the employer, on the one hand, and the employee on the other. The weight to be attached to those respective interests depends largely on the overall circumstances of each case.

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25 *Sidumo v Rustenburg Platinum Mines Ltd* (2007) 12 BLLR 1097 (CC).
26 *Idem* par 66.
27 *Idem* par 75.
28 *Ibid*.
29 In the *Sidumo* case (*supra*) the commissioner considered Mr Sidumo's service record in his favour. He concluded that dismissal was too harsh a sanction and motivated it as follows: There had been no losses suffered by the Mine; the violation had been unintentional or had been a "mistake"; and Mr Sidumo had not been dishonest. Before making his award the Commissioner stated that he did not consider the offence committed by Mr Sidumo to "go into the heart of the relationship [with the employer], which is trust."
30 *NEHAWU v University of Cape Town & others* (2003) 24 *ILJ* 95 (CC) par 38-39. See also par 3 below.
31 2003 24 *ILJ* 2269 (LAC) 2278H-2279A. See also *NUMSA v Vetsak Co-operative Ltd* 1996 4 SA 577 (A) 589C-D: "Fairness comprehends that regard must be had not only to the position and interests of the worker, but also those of the employer, in order to make a balanced and equitable assessment. In judging fairness, a court applies a moral or value judgment to established facts and circumstances."

Often the decision in a dismissal dispute turns on the factual findings. In *NUM v CCMA*[32] the applicant employees were dismissed after being found guilty of selling diesel from a company vehicle at a squatter camp as well as steel belonging to the respondent to one of the applicant's competitors for their own profit (ie gross dishonesty). The applicants denied any wrongdoing. The CCMA commissioner found that the employer had proven its case against the employees, and upheld their dismissals. On review, the applicants contended, *inter alia*, that the commissioner had not explained why he had found the employee(s) untruthful, that he had relied on hearsay evidence, and that he had ignored the true reason for the dismissals. The court found that the applicants' case principally amounted to a claim that the commissioner had evaluated the evidence incorrectly. The court stated that:[33]

> It is trite that in a dismissal case the employer bears the onus of showing that the dismissal was fair. Thus the starting point for a commissioner in assessing the versions presented by the parties during the arbitration hearing is to determine the extent to which the employer's version is more probable than not. In *Early Bird Farms (Pty) Ltd v Mlambo* [1997] 5 BLLR 541 (LAC) at 544, the court held that the employer did not have to prove with absolute certainty that the employee was guilty of the alleged misconduct but that proof on a balance of probability was sufficient. In *Marapula & others v Consteen (Pty) Ltd* (1999) 20 ILJ 1837 (LAC), the court in dealing with the approach to be adopted in dealing with the evaluation of evidence held that:
>
> 'The credibility of witnesses and probability or improbability of what they say should not be regarded as separate enquiries to be considered piecemeal. They are part of the single investigation into the acceptability or otherwise of the employer's version, an investigation where questions of demeanour and impression are measured against the content of the witnesses' evidence, where the importance of any discrepancies or contradictions are assessed and where a particular story is tested against facts which cannot be disputed and against the inherent probabilities that at the end of the day one can say with conviction that one version is more probable and should be accepted, not that therefore the other version is false and may be rejected with safety.'

In *Sil Farming CC t/a Wigwam v CCMA,*[34] in relation to a factual finding on the merits, the court held that it will only overturn a decision on review if:

> [a] commissioner arrives at a decision which no reasonable decision maker could reach if the decision is unsupported by any evidence, or by evidence that is insufficient to reasonably justify a decision arrived at or where the decision maker ignores uncontradicted evidence.

In *Senama v CCMA*[35] the employee was dismissed for theft (of stock from a warehouse by a vehicle registered in his name). The

32 [2010] 6 BLLR 681 (LC).
33 *Idem* par 20.
34 Unreported labour court judgment JR 3347/2005 par 16 - as referred to by Myburgh "*Sidumo v Rustplats*: How have the courts dealt with it?" 2009 *ILJ* 1 13.
35 [2008] 9 BLLR 896 (LC).

commissioner upheld the substantive fairness of the dismissal and rejected the employee's version of having been on leave at the time. The commissioner drew an adverse inference against the employee due to his failure to provide a plausible explanation for only disclosing his ownership of the vehicle at the arbitration. The Labour Court dismissed the review application and held as follows:[36]

> A reasonable decision is reached when a commissioner, in performing his/her functions as an arbitrator, applies the correct rules of evidence, and if there is to be a deviation it must not be of such a nature that it materially denies any party a fair hearing. It is also required of the commissioner to weigh all the relevant factors and circumstances of the case before him or her to ensure that his decision is reasonable …

Regarding so-called "hearsay evidence" in the *NUM* case[37] the court agreed with the statement made in *Swiss South Africa (Pty) Ltd v Louw NO & others*:[38]

> Depending on the circumstances of each particular case, hearsay evidence may accordingly be admitted by an arbitrator in the proceedings held before him or her under the auspices of the CCMA.

The court decided that the commissioner relied on such evidence in keeping with the provisions of section 3(1)(c) of the Law of Evidence Amendment Act.[39] As the commissioner did apply his mind to the issue of the hearsay evidence which had been presented and recognised that he was vested with the discretion in the interests of justice whether or not to accept such hearsay evidence the commissioner did not act unreasonably.

Myburgh submits that an analysis of Labour Court decisions indicates the following:[40]

> In summary, a commissioner's finding on the facts will be unreasonable if it is: (i) unsupported by any evidence; (ii) based on speculation by the commissioner; (iii) entirely disconnected from the evidence; (iv) supported by evidence that is insufficient reasonably to justify the decision; or (v) made in ignorance of evidence that was not contradicted.

3 Who Decides whether the Dismissal was an Appropriate Sanction and therefore Fair?

Even though the Supreme Court of Appeal[41] has confirmed that employers may set reasonable standards of conduct in the workplace and may enforce such standards it is still rather controversial whether an employer knows best when deciding on the appropriate sanction for

36 *Idem* par 18-19.
37 *Idem* par 22.
38 2006 27 *ILJ* 395 (LC) par 43.
39 45 of 1988 (ie in the interests of justice etc).
40 Myburgh 2009 *ILJ* 1 13.
41 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* 2006 27 *ILJ* 2076 (SCA).

transgression of a workplace rule. The Constitutional Court[42] has stated that employees are a vulnerable group in society[43] and thus deserving of protection. An employer may enforce discipline in its workplace and may dismiss for conduct, capacity or operational requirements. However, the dismissal must be substantively fair. The Constitutional Court in the *Sidumo* case[44] did not agree with the Supreme Court of Appeal's approach to determining the fairness of a dismissal for misconduct and held that:[45]

> There is nothing in the constitutional and statutory scheme that suggests that, in determining the fairness of a dismissal, a commissioner must approach the matter from the perspective of the employer. All the indications are to the contrary. A plain reading of all the relevant provisions compels the conclusion that the commissioner is to determine the dismissal dispute as an impartial adjudicator.

The ultimate decision maker will therefore be the commissioner.[46] Navsa AJ also reconfirmed the decision of the Labour Appeal Court in *County Fair Foods (Pty) Ltd v CCMA*[47] that CCMA arbitrations are in fact hearings *de novo*. The court referred to sections 138(1) and (2) of the LRA, which accord commissioners discretion to determine the manner and form of proceedings. Navsa AJ stated that in terms of section 138(2), subject to the discretion of the commissioner, a party may give evidence, call witnesses and address concluding arguments to the commissioner. In *County Fair Foods* (*Pty) Ltd v CCMA*[48] the court held that

> the decision of the arbitrator as to the fairness or unfairness of the employer's decisions is not reached with reference to the evidential material that was before the employer at the time of its decision but on the basis of all the evidential material before the arbitrator. To that extent the proceedings are a hearing de novo.[49]

The test that a commissioner must employ when impartially considering the fairness of a dismissal dispute therefore requires that the commissioner must take into account the totality of circumstances.[50] Put differently, rather than to defer to the decision of the employer the

42 *Sidumo v Rustenburg Platinum Mines Ltd* 2007 28 *ILJ* 2405 (CC). See also Le Roux and Mischke "The disciplinary sanction: when is dismissal appropriate?" 2006 *Contemporary Labour Law* 91 and Le Roux and Young "The role of reasonableness in dismissal: the constitutional court looks at who has the final say" 2007 *Contemporary Labour Law* 21.
43 *Idem* Par 72.
44 *Sidumo v Rustenburg Platinum Mines Ltd* 2007 12 BLLR 1097 (CC).
45 *Idem* Par 61.
46 See in this regard Grogan "Two-edged sword" *Sibergramme 5/2008*: "*Cheetham's* case confirms, then, that after *Sidumo* the scope for review of commissioners' decision on proven misconduct has been reduced to virtually zero – except, perhaps, in cases where … the sanction imposed by a commissioner is so aberrant that no reasonable commissioner could possibly have agreed that it was appropriate."
47 1999 20 *ILJ* 1701 (LAC). Refer to the *Sidumo* case *supra* par 18: "An arbitration under the auspices of the CCMA is a hearing de novo".
48 *Ibid*.
49 *Idem* par 11.
50 *Idem* par 78.

commissioner must consider all relevant circumstances. However, the court also stated that a commissioner "is not given the power to consider afresh what he or she would do, but simply to decide whether what the employer did was fair".[51] Therefore as long as the decision is one that a reasonable decision maker could make a court won't interfere.[52]

In *Fidelity Cash Management Service v CCMA*[53] the Labour Appeal Court explained that the *Sidumo*-review test is a stringent test that will ensure that awards are not lightly interfered with.

> It will ensure that, more than before, and in line with the objectives of the Act and particularly the primary objective of the effective resolution of disputes, awards of the CCMA will be final and binding as long as it cannot be said that such a decision or award is one that a reasonable decision maker could not have made in the circumstances of the case. It will not be often …[54]

In an earlier contribution[55] I have submitted that in considering the fairness of a dismissal and the appropriateness thereof as a sanction one must have regard of the Labour Appeal Court's observation in the *Phalaborwa* case[56] that: "[c]learly, commissioners of the CCMA have a weighty responsibility to act fairly". Having regard of the stringent nature of the *Sidumo* test this certainly cannot be over-emphasised. In addition, the stringent nature of the *Sidumo* test must not be interpreted as a licence for commissioners not to apply the substantive law on dismissal.

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51 *Idem* par 79.

52 In *Samson v Commission for Conciliation, Mediation and Arbitration* 2010 31 *ILJ* 170 (LC) the applicant employee was charged with distributing pornography on the third respondent employer's intranet. He pleaded guilty, expressed remorse and apologised to the co-employee to whom he had accidentally sent the e-mail containing the pornographic material. The chairperson of the disciplinary enquiry found the employee guilty and imposed a final written warning valid for three years. The employer's executive vice president set aside the original sanction and imposed a sanction of dismissal. The employee appealed raising the defence of "double jeopardy". The sanction of dismissal was upheld on appeal. The employee then referred a dispute to the CCMA. At the commencement of the arbitration hearing the commissioner granted the employer the right to be represented by its attorney although the employee opposed the application. The commissioner having heard evidence and argument found that the employee's dismissal had been substantively and procedurally fair. On review the court noted that it would only review and set aside the commissioner's award if it failed to meet the threshold established by the *Sidumo* judgment *supra*, namely whether the commissioner's decision was one to which no reasonable decision maker could come. The court was not willing to come to such a finding in this case.

53 2008 29 *ILJ* 964 (LAC).

54 *Idem* par 100.

55 Smit "When is a dismissal an appropriate sanction and when should a court set aside an arbitration award? *Sidumo & another v Rustenburg Platinum Mines Ltd & others* (2007) 28 *ILJ* 2405 (CC) / [2007] 12 BLLR 1097 (CC)" 2008 *ILJ* 1635.

56 *Palaborwa Mining Co Ltd v Cheetham* 2008 6 BLLR 553 (LAC) par 8.

4 When Could a Dismissal be Appropriate and Fair?

4 1 Introduction

The Code of Good Practice: Dismissal[57] states that whether or not a dismissal is for a fair reason is determined by the facts of the case, and the appropriateness of dismissal as a penalty.[58] The code proceeds to state that the courts have endorsed the concept of corrective or progressive discipline,[59] meaning that the purpose of discipline is viewed as a means for employees to know and understand what standards are required of them.[60] The code then suggests that "[d]ismissal should be reserved for cases of serious misconduct or repeated offences".[61]

A reading of item 3 of the code seems to suggest that "serious" misconduct will be conduct which is of such gravity that it makes a continued employment relationship intolerable.[62] Examples of such conduct (with the proviso that each case should be judged on its own merits) include gross dishonesty, wilful damage to employer property, wilful endangering the safety of others, physical assault and gross insubordination.

The code then proceeds by stating that when deciding whether or not to impose dismissal as penalty, in addition to the gravity of the misconduct, the *employer* should consider certain factors. These include the employee's circumstances (length of service, previous disciplinary record and personal circumstances, etc), the nature of the job and the circumstances of the infringement itself.[63]

In the *Sidumo* case[64] the Constitutional Court proceeded to list the factors that a commissioner must consider when deciding on the fairness of a dismissal. These factors do not represent a closed list and the weighting that should be attached to each factor would differ from case to case. The factors are:

i. The importance of the rule that was breached.
ii. The reason the employer imposed the sanction of dismissal.
iii. The basis of the employee's challenge to the dismissal.
iv. The harm caused by the employee's conduct.
v. Whether additional training and instruction may result in the employee not repeating the misconduct.
vi. The effect of dismissal on the employee.

57 Sch 8 LRA.
58 Item 2(1) Sch 8 LRA.
59 Item 3(2) Sch 8 LRA.
60 *Ibid*.
61 Item 3(3) Sch 8 LRA.
62 Item 3(4) Sch 8 LRA.
63 Item 3(5) Sch 8 LRA.
64 *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

vii. The long-service record of the employee.

It therefore appears that an employer must firstly indicate that the misconduct in question is serious and grave to the extent that it makes the employment relationship intolerable. In addition to this the employer must then proceed to show that it had considered all relevant factors and that dismissal was still considered to be the appropriate sanction.

In the *Sidumo* case[65] the court stated that the absence of dishonesty is a significant factor in favour of the application of progressive discipline rather than dismissal.[66] It could be argued that the converse is perhaps also true, namely that the presence of gross dishonesty is a significant factor against the application of progressive discipline. However, the absence or presence of dishonesty is but one of a number of factors that must be considered.

3 2 Serious Misconduct of such Gravity to Make a Continued Employment Relationship Intolerable

In a case dating back to 1996, the Appellate Division held in *Council for Scientific and Industrial Research v Fijen*[67] that it is well established that the relationship between employer and employee is "in essence one of trust and confidence".[68] It also stated that, at common law, conduct clearly inconsistent with such trust and confidence entitled the "innocent" party to cancel the agreement. The court referred to an old decision of the Supreme Court of the Transvaal dating back to 1908. In *Angehrn and Piel v Federal Cold Storage Co Ltd,*[69] a case concerning misconduct and breach of faith, it was held that "trust and confidence were of the essence of the relationship which existed between each … [employee] and his employer".[70] The court formulated the legal question to be decided as follows - whether any of the acts of misconduct alleged against the palintiffs were sufficient (either singly or in the aggregate) to justify the employer dismising them? As to what is required of an employee in an employer-employee relationship (still referred to as master and servant relationship back then) the court noted that it includes[71]

> to be just and faithful to the company, that is to say, … conduct … in its service with diligence, integrity and single-mindedness and generally in such a way as to show that the confidence intended by the contract [ie the contract of employment] could be safely reposed in them.

The court concluded that if the employees could be shown to have been guilty of conduct clearly inconsistent with the "faithfulness and single-mindedness" required of them it would be a violation of an essential term

65 *Ibid*.
66 *Idem* par 117.
67 [1996] 6 BLLR 685 (AD) 691I.
68 *Idem* 691I.
69 1908 TS 761.
70 777.
71 *Ibid*.

of the contract which would justify immediate dismissal.[72] In 1991 the (then) Labour Appeal Court held, in *Humphries & Jewell (Pty) Ltd v Federal Council of Retail & Allied Workers Union & others*,[73] that the relationship of trust, mutual confidence and respect "which is the very essence of a master-servant relationship" cannot continue where there was gross insubordination.[74] In this matter, Spoelstra J stated that in the absence of facts "showing that this relationship was not detrimentally affected by the conduct of the employee it is unreasonable to compel either of the parties to continue with the relationship". This approach is out of step with the onus in dismissal disputes as now regulated in section 192 of the LRA. However, it is submitted that the substantive finding remains valid, ie where the trust relationship has been breached it will normally be considered a material breach of an essential term that may justify dismissal. Another matter from the same year considered trust as a tacit contractual term.[75]

In the often quoted *Anglo American Farms t/a Boschendal Restaurant v Komjwayo*[76] the court stated that the employment relationship can only be healthy if the employer can be confident that it can trust the employee not to steal from it. The court continued that if that confidence is destroyed or substantially diminished due to a theft

> the continuation of their relationship can be expected to become intolerable, at least for the employer. Thenceforth he will, as it were, have to be continually looking over his shoulder to see wether this employee is being honest.[77]

Importantly, the court held[78] "the correct test to apply … to be whether or not respondent's actions had the effect of rendering the continuation of the relationship of employer and employee intolerable."

In *Council for Scientific and Industrial Research v Fijen*[79] the court held that with relation to the duty of good faith and confidence such reciprocal duty simply flows from *naturalia contractus* and there is no need to work with the concept of an implied term to such effect in our law.[80] The court also confirmed that if there is a material breach of the contract a dismissal would be substantively fair – this includes conduct

72 778. The court stated that one act would be sufficient, provided that it was clear and unequivocal, but in the absence thereof that unfaithfulness might be established by the cumulative force of a succession of acts each insufficient when taken alone.
73 1991 12 *ILJ* 1032 (LAC).
74 1037.
75 *Central News Agency v Commercial Catering and Allied Workers Union of SA* 1991 12 *ILJ* 340 (LAC) 344G: "This trust which the employer places in the employee is basic to and forms the substratum of the relationship between them. A breach of this duty goes to the root of the contract of employment and the relationship between employer and employee".
76 1992 13 *ILJ* 573 (LAC).
77 591A.
78 591B.
79 [1996] 6 BLLR 685 (AD) 691I.
80 692A.

of the employee that destroys the faith and goodwill of the employer towards the employee.[81]

4 2 Approach of Courts pre *Sidumo*

The Labour Appeal Court held in *Lahee Park Club v Garratt*[82] that

> [i]t is an entirely reasonable stance for an employer to adopt that it wishes to terminate its relationship with the employee who has breached the trust reposed in her and who acted dishonestly. Dismissal was the appropriate sanction.

In *Nampak Corrugated Wadeville v Khoza*[83] the Labour Appeal Court stated that

> [t]he determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable.[84]

This dictum was cited with approval by the Supreme Court of Appeal in the *Sidumo* case.[85] However, the Constitutional Court[86] interpreted this to be close to a "reasonable employer" test and rejected such approach.

In *Visser and Standard Bank of SA Ltd*[87] the applicant was employed as a sales manager with sixteen years' service. He was dismissed for breaching confidentiality and misrepresenting facts in a meeting with subordinates (alienating or inciting the subordinate employees). He was charged with dishonesty which had destroyed the trust relationship with his employer. The commissioner was not convinced that Visser was guilty of serious misrepresentation as alleged but continued to consider the relationship between Visser and the bank. The commissioner found that the employer and the employee had a duty to maintain trust in the relationship[88] and when there is a problem in the relationship parties must try to resolve it.[89] The commissioner stated that the decision on an appropriate sanction in any individual case is a discretionary act that must be exercised in good faith after considering relevant facts and

81 Refer to 692C-E.
82 [1997] 9 BLLR 1137 (LAC) 1139.
83 [1999] 2 BLLR 108 (LAC); 1999 20 ILJ 578 (LAC).
84 Par 33.
85 *Rustenburg Platinum Mines Ltd (Rustenburg Section) v CCMA* [2006] 11 BLLR 1021 (SCA) par 29.
86 *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).
87 2003 24 *ILJ* 890 (CCMA).
88 *Idem* 900.
89 *Idem* 900. If it is relationship problems an employer's response ought to be: "(a) to try to isolate the problems, (b) to identify their causes and (c) to find ways to remedy the problem. Only if no solutions are forthcoming, should the employer move to termination of the relationship".

excluding irrelevant ones.[90] On the facts the employer's argument could not succeed but the award stated that[91]

> [a]n employer is not required to retain a person in employment if the evidence discloses that a continued employment relationship had been irreparably damaged and that the more senior the position, the greater the need for high levels of trust relationship.

In *De Beers Consolidated Mines Ltd v CCMA*[92] in an appeal against the judgment of the Labour Court relating to a review application brought for the purpose of setting aside a certain arbitration award which was issued by a commissioner of the CCMA, the court considered the following: The two respondent employees had both been truck drivers in the employ of the appellant who were dismissed for fraudulently claiming overtime pay for work they had not performed. The CCMA commissioner, subsequently held that their dismissal was unfair in that they served the appellant for many years without previously committing similar misconduct and because the relationship of trust between the respondent employees and the applicant had not been destroyed. The respondent employees were reinstated retrospectively subject to a final warning. In a subsequent review of the commissioner's award, the Labour Court declined to intervene. In an appeal against that decision, the appellant contended that the Labour Court had erred by not setting the award aside, because the commissioner's conclusion was irrational.

The court noted that the commissioner had found that the respondent employees had committed serious misconduct but then held that the commissioner had erred by finding that the relationship of trust had not broken down. The respondent employees had attempted to defend themselves by lying. The appellant had correctly concluded that this was a further reason not to trust them. Furthermore the appellant reposed a high degree of trust in the respondent employees who were responsible for valuable consignments. The court held further that the commissioner had misunderstood the significance of the respondent employees' relatively long periods of services. The court held that unless a commissioner is able to make a positive finding that a dismissal is unfair, he or she lacks the power to order reinstatement. The approach of the court was that the onus rests on an employer to prove the facts upon which it relies for a dismissal and once these facts have been proven the commissioner decides whether the dismissal is unfair.[93] The court held that in deciding whether a dismissal is fair, the prevailing norms of society must be taken into account. The appeal was upheld.

90 *Idem* 904.
91 *Idem* 901.
92 [2000] 9 BLLR 995 (LAC); 2000 21 *ILJ* 1051 (LAC).
93 See also par 17: "Of course, a commissioner is not bound to agree with an employer's assessment of the damage done to the relationship of trust between it and a delinquent employee, but in the case of a fraud, and particularly a serious fraud, only unusual circumstances would warrant a conclusion that it could be mended".

In *Toyota South Africa Motors (Pty) Ltd v Radebe*[94] an appeal was considered against a judgment of the Labour Court dismissing an application brought by the appellant to review and set aside an arbitration award. Radebe, an employee of the appellant, enjoyed car lease benefits as part of his conditions of employment. After he had been involved in four accidents in the car in less than 12 months, his lease benefits were suspended. When the first respondent was again permitted to lease a car he was involved in a further accident. He drove the damaged car to a public parking area and abandoned it with the keys in the ignition and reported that the car had been hi-jacked. The first respondent subsequently admitted that he had lied about the hi-jacking. He was charged with fraudulent and dishonest conduct and negligently damaging company property and accordingly dismissed. The CCMA commissioner, subsequently found that dismissal was too harsh a penalty and ordered that he be re-employed.[95]

As to whether the arbitrator's decision amounted to a gross irregularity, the court noted that the irregularities may be patent or latent. Patent irregularities are defects in the way in which the proceedings are conducted and latent irregularities are defects that are ascertainable only from the reasons given by the administrative functionary. Theft and fraud have always constituted grounds for dismissal of employees because of the breach in the trust relationship between employer and employee. However there is no invariable rule that offences involving dishonesty should incur the supreme penalty of dismissal.

The question *in casu* was whether the third respondent had misconceived the nature of the question of a fair sanction and his duties in connection therewith to such a degree that interference with the award was warranted. The parties could not be held to have had a fair hearing if the commissioner selected a sanction that was grossly inappropriate even if the award was otherwise unimpeachable. However, the irregularity must be so egregious that a court is satisfied that the commissioner has misconceived his function of selecting a fair sanction. The test is whether the sanction selected by the commissioner is so out of kilter with variations within the continuum of a fair sanction that it induces a sense of shock and alarm. The conduct of the first respondent amounted to fraud, perjury and an attempt to defeat the ends of justice. His abandonment of the vehicle was a gross dereliction of his duties to the appellant to preserve its property. The first respondent's disregard for

94 [2000] 3 BLLR 243 (LAC).

95 On appeal, the appellant contended that the third respondent had committed a gross irregularity, had exceeded his powers and that his decision was not justifiable according to the reasons provided. The court held that the only ground upon which the award could be reviewed was under s 145 LRA which refers to gross irregularity in the proceedings. The contention that an award was not "justifiable according to the reasons given" did not provide a ground for review because it blurred the distinction between appeal and review.

the appellant's rights coupled with his gross dishonesty rendered the third respondent's choice of penalty so egregious and out of kilter with the penalty that the court would have imposed that it could be said to amount to a gross irregularity. Furthermore the third respondent had erred in finding that the appellant should not have selected dismissal as a sanction because other penalties were available. The commissioner had therefore failed to explain the finding that the dismissal was unfair. The first respondent's length of service was of no relevance and did not mitigate his gross misconduct. Contrary to the third respondent's finding that the first respondent has shown remorse and had "come clean" about the hi-jacking, the first respondent had continued to lie to the employer and had even attempted to deceive the arbitrator and the reviewing court about his alleged decision to tell the truth. The third respondent had in fact found that the first respondent was guilty of gross dishonesty. By ruling that in spite of this finding, dismissal was not an appropriate penalty the third respondent had misconceived his functions. The appeal was accordingly upheld.

In *Consani Engineering (Pty) Ltd v CCMA*[96] the court considered whether to review and set aside an arbitration award of a CCMA commissioner. In the arbitration the employee, dismissed for theft, was reinstated as from the date of the award without any back pay on the grounds that the sanction of dismissal was too harsh because the trust relationship had not in fact irretrievably broken down, especially in the light of the evidence of the chairperson of the inquiry that Shoko was a good worker and that he regretted having to dismiss him. The applicant submitted that the second respondent's findings in regard to substantive unfairness were not rationally justified in relation to the evidence presented to her at the arbitration.

From the arbitration award and record, it was evident that in the period prior to Shoko's dismissal the applicant had experienced significant stock losses as a result of theft perpetrated by employees. The disciplinary code classifies theft as a dismissible offence, but explicitly states that each case has to be considered on its merits. The applicant had spent considerable time and effort readdressing its policy relating to stock loss problems and had opted for a firmer policy regarding theft and unauthorised possession of company property. The applicant described

96 [2004] JOL 12846 (LC). Mr Joseph Shoko after approximately five years of employment was found in unauthorised possession of a roll of rubber tape that was concealed under his jacket. A security guard who had conducted a body search of Shoko when he was leaving the applicant's premises at the end of his shift discovered the rubber tape under his jacket. Shoko was accordingly charged with theft of company property, alternatively attempted theft of company property and pleaded guilty at a disciplinary enquiry. After consideration of mitigating factors, the chairperson of the enquiry dismissed Shoko, who then lodged an internal appeal in terms of the disciplinary code, which was unsuccessful.

its policy in this regard as a "zero-tolerance" approach and in order to effect such approach had effected certain changes and in particular notifying its employees through various notices posted at different places throughout its premises that unauthorised removal of company property will result in a disciplinary action possibly leading to dismissal.

The court found that the second respondent had erred in substituting her own standard for that of the employer's. She failed to recognise that the employer's conduct fell within the range of reasonable options in the circumstances, and, albeit on the harsh side, dismissal as a sanction fell within the band of reasonableness in this instance and accordingly that no rational objective basis existed in terms of which the second respondent was justified in not endorsing the employer's sanction. The award of the second respondent was set aside.

4 3 Approach of Courts Post *Sidumo*

Westonaria Local Municipality v SALGBC[97] dealt with misconduct in that an employer dismissed an employee for falsely claiming at a pre-appointment interview that she possessed a matriculation certificate. However, the employer had failed to dismiss another employee guilty of the same misconduct. This inconsistency led the court to presume that the misconduct did not necessarily destroy the trust relationship. The dismissal was therefore held to be unfair. The court held that the onus to show that the employee was guilty of the offence and that the dismissal was fair rests with the employer and that the employer also bears the duty to show that the trust relationship between it and the employee has broken down because of the employee's conduct.[98] *In casu* the court also took into account the fact that the employee "owned up to her wrongdoing".[99] The court summarised the position post *Sidumo*[100] to state that the key question which an arbitrator has to ask is simply "Is this dismissal fair?"[101]

In answering this question the Labour Appeal Court in *Mutual Construction Co Tvl v Ntombela*[102] cited with approval the *dictum* in the earlier *De Beers* case:[103] "Where an employee has committed a serious fraud one might reasonably conclude that the relationship of trust between him or her and the employer has been destroyed".[104] The court thus proceeded to find that it was satisfied that the decision of the commissioner in that case was indeed one which a reasonable decision maker could not make.

97 [2010] 3 BLLR 342 (LC).
98 *Idem* par 16 and 26.
99 *Idem* par 30.
100 *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).
101 Par 18.
102 2010 31 *ILJ* 901 (LAC).
103 *De Beers Consolidated Mines Ltd v CCMA* [2000] 9 BLLR 995 (LAC); 2000 21 *ILJ* 1051 (LAC).
104 The *Mutual Construction Co Tvl* case par 38.

In *Shoprite Checkers (Pty) Ltd v CCMA*[105] the employee, in a supervisory position was dismissed for "unauthorised consumption". The employee had a clean record and 30 years' service. He was captured on video putting a piece of food into his mouth on two separate occasions and, on a third occasion, consuming a plate of food in the company's delicatessen. The commissioner found the sanction of dismissal unfair and reinstated the employee on a "severe final warning" without backpay. The company brought a review on the merits and the union a cross-review regarding the forfeiture of backpay. The Labour Court set aside the award due to the absence of a record of the arbitration. In the subsequent appeal, the Labour Appeal Court found that there was "no doubt that the result of the award met the test for reasonableness".[106] Zondo JP stated that he

> would go so far as to say that there is no prospect that a reasonable decision maker - including a CCMA commissioner – could, on the facts of this case, find that dismissal was a fair sanction.[107]

However, another case involving the same employer, *Shoprite Checkers (Pty) Ltd v CCMA*[108] led to a completely different result. In this instance an employee, an assistant baker with a clean record and nine years' service was dismissed after being captured on video eating (from the company's delicatessen) *pap* on two days and a slice of bread on another day. The commissioner, finding that the employer had failed to prove that the employee was in fact guilty of misconduct, reinstated him. On review the Labour Court did hold that the commissioner had erred with such finding but nevertheless held the sanction of dismissal to be unfair and thus reinstated the employee on a final warning. *Shoprite Checkers* was convinced that this was a decision that a "reasonable" decision maker could not make. On appeal the court therefore considered the Labour Court's decision on the sanction of dismissal and the court examined the case by analysing the Labour Appeal Court's jurisprudence on theft (specifically theft of items of relatively small value). The court, per Davis J, came to a different conclusion than that of Zondo JP in the earlier *Shoprite* case.[109] The court also stated that in the earlier judgment the court "appears to adopt a different approach to the body of jurisprudence as analysed in this judgment".[110] However, Davis J then distinguished the two cases on the facts (or at least set out to do so) having regard of the fact that the employee *in casu* had less service, had produced "manufactured evidence" and had consumed more produce. The outcome was that the employee's dismissal was held to be fair.

105 *Shoprite Checkers (Pty) Ltd v CCMA* [2008] 12 BLLR 1211 (LAC).
106 Par 19 and Myburgh "*Sidumo v Rustplats*: How have the courts dealt with it?" 2009 30 *ILJ* 1.
107 Par 19.
108 2008 29 *ILJ* 2581 (LAC).
109 *Shoprite Checkers (Pty) Ltd v CCMA* [2008] 12 BLLR 1211 (LAC).
110 Par 24.

In a recent matter, *Miyambo v CCMA*[111] the Labour Appeal Court decided that dismissal after the theft of scrap metal was an appropriate dismissal, and a fair operational response from the employer's side. The court also rejected a rather technical distinction being made between theft and petty pilfering.

4 4 Factors to be Considered and Evidence to be Led

The factors listed in the code (and even those listed by the Constitutional Court in the *Sidumo* case)[112] have been raised in numerous cases over more than a decade. A few factors have however been regarded more significant than others.

4 4 1 Progressive Discipline and the Harm Caused by the Misconduct

Cash Paymaster Services, North-West (Pty) Ltd v CCMA (2009) 30 *ILJ* 1587 (LC) concerned an application to review and set aside the award that the dismissal of the employee for misconduct was too harsh.[113] The commissioner reasoned as follows when finding the sanction of dismissal was inappropriate in the circumstances:[114]

> In as much as I have found that the Applicant's conduct was dishonest I do not find that it is of such a serious nature that it is deemed to have affected the trust relationship between him and the Respondent beyond repair. Whilst I may not prescribe to the Respondent the type of sanctions to give to employees I believe that the procedures should act as a guideline. As correctly submitted by Mr Grudlingh, in this instance, the Applicant was untruthful in handing in an assignment, which related to a training programme organised by the Respondent. He should have been put on terms and advised of the consequences of him and not fulfilling the training modules designed for his advancement. … An appropriate sanction would be a written warning.

The court approached the review by stating that the central question does not relate to the substance of the offence, but whether the commissioner performed her duties properly in the assessment of the fairness of the dismissal. The court reiterated that the approach to be adopted by commissioners in performing their duties of assessing whether or not the

111 [2010] 10 BLLR 1017 (LAC). See also par 20: "To my mind, a disciplinary procedure that draws subtle distinctions between degrees of theft, and likens the lesser or "technical" sort of theft to negligence, is impractical."

112 *Sidumo v Rustenburg Platinum Mines Ltd* [2007] 12 BLLR 1097 (CC).

113 The respondent who was employed on a fixed term contract as a support supervisor at the Vryburg branch was charged with and disciplined for a number of offences, including the failure to obey instructions in that the respondent was alleged to have failed to submit a compact disc with assignments in it and dishonesty in that the employee submitted a compact disc with the full knowledge that it did not contain any of the assignments. During the arbitration hearing it was testified that the manager could no longer trust the employee because of the incident involving (non)submission of his assignment.

114 Par 11.

sanction of dismissal in the circumstances of a given case is fair is that which was stated in *Sidumo and Another v Rustenburg Platinum Mines Ltd and Others:*[115] "Ultimately, the commissioner's sense of fairness is what must prevail and not the employer's view."

The court held that in the present case there was no reason why the court should interfere with the conclusion reached by the commissioner regarding the finding that the sanction was too harsh and that it is apparent from the reading of the award that the commissioner in arriving at her decision took into account the seriousness of the failure by respondent to submit his assignment. This however did not in her view affect the core of the trust relationship. In conclusion, the court found that there is no basis upon which the court can fault the commissioner in arriving at the conclusion that the sanction of dismissal was unfair. However, the powers and authority of the commissioner in the circumstances of the present case was limited to the terms of the contract of employment agreed to by the parties and by extending the contract of employment beyond the fixed term agreed to by the parties, the commissioner exceeded her powers.

Furthermore, in T*imothy v Nampak Corrugated Containers (Pty) Ltd*[116] the Labour Appeal Court was satisfied that in a case of gross dishonesty coupled with a complete lack of showing remorse, progressive discipline was not called for and dismissal was fair.[117]

4 4 2 Long Service

In the *De Beers Consolidated Mines Ltd* case[118] Conradie JA declared that

> [l]ong service is no more than material from which an inference can be drawn regarding the employee's probable future reliability. Long service does not lessen the gravity of the misconduct or serve to avoid the appropriate sanction for it. A senior employee cannot, without fear of dismissal, steal more than a junior employee. The standards for everyone are the same. Long service is not as such mitigatory. Mitigation, as that term is understood in the criminal law, has no place in employment law. Dismissal is not an expression of moral outrage; much less is it an act of vengeance. It is, or should be, a

115 [2007] 12 BLLR 1097 (CC).

116 [2010] 8 BLLR 830 (LAC). In a matter where an employee posed as an attorney representing the employer to obtain privileged information for a colleague from a firm of attorneys.

117 835: "Progressive sanctions were designed to bring the employee back into the fold, so as to ensure, by virtue of the particular sanction, that faced with the same situation again, an employee would resist the commission of the wrongdoing upon which act the sanction was imposed. The idea of a progressive sanction is to ensure that an employee can be reintegrated into the embrace of the employer's organisation, in circumstances where the employment relationship can be restored to that which pertained prior to the misconduct. In these circumstances, where there is nothing more than an aggressive denial and a perpetuation of dishonesty, it is extremely difficult to justify a progressive sanction, particularly in a case where the dishonesty is as serious as this dispute."

118 2000 21 *ILJ* 1051 (LAC) par 22.

> sensible operational response to risk management in the particular enterprise. That is why supermarket shelf packers who steal small items are routinely dismissed. Their dismissal has little to do with society's moral opprobrium of a minor theft; it has everything to do with the operational requirements of the employer's enterprise.

More recently, in *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO*,[119] Ndlovu AJA in a case involving gross dishonesty held that even if the respondent had much more than two and a half years' service with the appellant, that "would not (and should not) have spared him in the circumstances of the case".[120] The court quoted with approval the earlier dictum in *Toyota SA Motors SA (Pty) Ltd v Radebe & others*:[121]

> Although a long period of service of an employee will usually be a mitigating factor where such employee is guilty of misconduct, the point must be made that there are certain acts of misconduct which are of such a serious nature that no length of service can save an employee who is guilty of them from dismissal. To my mind one such clear act of misconduct is gross dishonesty. It appears to me that the commissioner did not appreciate this fundamental point. I hold that the first respondent's length of service in the circumstances of this case was of no relevance and could not provide, and should not have provided, any mitigation for misconduct of such a serious nature as gross dishonesty. I am not saying that there can be no sufficient mitigating factors in cases of dishonesty nor am I saying dismissal is always an appropriate sanction for misconduct involving dishonesty. In my judgment the moment dishonesty is accepted in a particular case as being of such a serious degree as to be described as gross, then dismissal is an appropriate and fair sanction.

4 4 3 Disciplinary Record

In *NCAWU obo Van Niekerk and Moolman*[122] the applicant was employed as a bench supervisor in the respondent's factory. He was dismissed on 12 March 2009 after a disciplinary enquiry at which three witnesses testified that he had entered the production manager's office where others were present, and had called him "arrogant", a "liar" and a "coward". He was suspended and charged with gross insubordination, serious disrespect, impudence and insolence, and was summarily dismissed. He filed an internal appeal application at which the appeal chairperson considered the record of the enquiry and decided that there was no need for a new hearing. The sanction of dismissal was accordingly upheld.

Regarding substantive fairness the applicant claimed that his words had been taken out of context, that there had been no contravention of a rule and no evidence that he had committed the offences charged. The commissioner found that the employee had failed in his duty to show respect to the production manager, and was guilty of insolence, disrespect and impudence. The applicant's words and actions were wilful and deliberate, and there was no evidence that the production manager

119 2010 31 *ILJ* 901 (LAC).
120 Par 37.
121 2000 21 *ILJ* 340 (LAC) 344C-F.
122 2010 31 *ILJ* 241 (CCMA).

had provoked the applicant. Taking into account that the applicant had four previous disciplinary actions on record the sanction of dismissal was not unfair.

4 4 4 Consistency

In some decisions dismissals were set aside where misconduct, though serious did not warrant dismissal where an employer had reinstated other employees dismissed for the same offence.[123] Consistency in disciplining is thus an important element of showing that a dismissal was "fair".[124]

4 4 5 Admitting Wrongdoing and Showing Remorse

In a number of cases this issue has been raised[125] as a factor to consider in deciding whether the trust relationship has been irretrievably broken down. In *Hulett Aluminium (Pty) Ltd v Bargaining Council for the Metal Industry & others* the court held that[126]

> "[i]t would in my view be unfair for this court to expect the applicant to take back the employee when she has persisted with her denials and has not shown any remorse. An acknowledgement of wrongdoing on the part of the employee would have gone a long way in indicating the potential and possibility of rehabilitation including an assurance that similar misconduct would not be repeated in the future."

In *Timothy v Nampak Corrugated Containers (Pty) Ltd & others*[127] it was held that when considering the appropriateness of a sanction, progressive discipline is not called for where an employee has committed act of gross dishonesty and had shown no remorse.[128]

In a 2010 judgment, *Mutual Construction Co Tvl (Pty) Ltd v Ntombela NO & others*,[129] after finding the employee guilty of gross dishonesty and fraud, the Labour Appeal Court stated that it "was also significant that the third respondent elected not to own up to this misdemeanour". In other

123 *SACCAWU v OK Bazaars Kimberley* [1998] 7 BALR 887 (CCMA). In this matter the commissioner stated (895) that: "The real test is whether the trust relationship has been breached to the extent that the employment relationship has become intolerable. … The question whether the trust relationship between employee and employer has in fact broken down in a particular case is a question of fact and not a question of law. One must scrutinise the evidence on record carefully … ".

124 See also *Gcwensha v CCMA* [2006] 3 BLLR 234 (LAC) and *SACCAWU v Irvin & Johnson Ltd* 1999 20 *ILJ* 2302 (LAC).

125 *Westonaria Local Municipality v SALGBC* [2010] 3 BLLR 342 (LC).

126 2008 29 *ILJ* 1180 (LC) par 45.

127 DA 22/08. The employee posed as the employer's attorney in order to obtain information for a colleague from an actual attorney.

128 In the *Sidumo* case *supra* the Constitutional Court stated (par 117) that the fact that Mr Sidumo did not own up to this misconduct and his denial that he received training were factors that counted against him.

129 2010 31 *ILJ* 901 (LAC).

words, the court stated, he showed a complete lack of remorse or contrition for what he did.[130]

4 4 6 Totality of Circumstances

In the *Mutual Construction Co Tvl* case[131] the Labour Appeal Court held that gross dishonesty was a fair reason to justify dismissal. In considering the commissioner's contrary finding, the court held that it was important for the commissioner to take "the totality of circumstances into account in making his decision …". The court illustrated that in this instance

> … the third respondent was placed in a position of trust and responsibility. He was basically the source from which all the information was obtained by the appellant as to how the staff was to be remunerated in terms of the number of hours of work actually performed …. This role … constituted a crucial and fundamental operational requirement in the appellant's business.[132]

5 Concluding Remarks

Mischke[133] submits that linking the breakdown of the employment relationship to the employer's needs and necessities can be a useful guiding principle for cases involving dishonesty and other types of serious misconduct (for example insubordination, assault, harassment and so forth). This *Mutual Construction*-approach to deciding on the appropriateness of dismissal requires a consideration of the operational context of the misconduct as well as the operational implications or consequences thereof.

In essence this is what the Code of Good Conduct requires – an employer must indicate that the misconduct is of such a nature to make the relationship intolerable. This cannot be done simply by alleging the breakdown of the trust relationship, the employer must put enough material before a decision maker to persuade such person that having regard of the totality of circumstances (including factors relating to the employee and the employer) the sanction of dismissal was appropriate and fair. The employer must satisfy the onus that dismissal was fair and the decision maker reviewing that decision must be satisfied that having regard of the facts of the case the dismissal was indeed fair. In this context, fairness must require a consideration of factors pertaining to both the employer and employee.

In a discussion of this contribution it was justly proposed to me that what *Edcon Ltd v Pillemer NO (Reddy)*[134] might then suggest is that an employer should not take for granted that certain kinds of misconduct, especially those involving dishonesty, necessarily imply that the

130 Par 37.
131 *Ibid*.
132 Par 36.
133 "The breakdown of trust: Operational perspectives on the appropriate sanction" 2010 *Contemporary Labour Law* 71 76.
134 [2010] 1 BLLR 1; 2009 30 *ILJ* 2642 (SCA).

relationship of trust and confidence has been destroyed.[135] This can be summarised by stating that up to the *Edcon* case,[136] the courts appear to have accepted this, and were prepared to entertain an argument to this effect based not on the basis of any evidence on this issue specifically placed before the arbitrator but on the basis of inferences that might be drawn from certain types of misconduct. After the *Edcon* case[137] employers are now required to table evidence at the arbitration hearing that addresses this issue, and of course, the commissioner must factor the evidence into any assessment of whether the decision to dismiss was fair. It therefore seems that after the *Edcon* case[138] the substantive law has not changed much at all.

135 I wish to thank A van Niekerk for commenting on an earlier draft of this contribution.
136 *Ibid*.
137 *Ibid*.
138 *Ibid*.

Student/learner allegations of teacher sexual misconduct: A teacher's right to privacy and due process

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OPSOMMING

Student/Leerder bewerings van seksuele wangedrag deur onderwysers: 'n Onderwyser se reg op privaatheid en administratiewe geregtigheid

Veel is op die spel wat betref die seksuele wangedrag van opvoeders in die VSA en Suid-Afrika. Albei lande verwag van veral opvoeders om die misbruik van kinders by die onderskeie maatskaplike dienste en wetstoepassers aan te meld: die versuim hiervan kan in die VSA lei tot die herroeping van onderriglisensies. Hierdie artikel fokus op (i) die mate waartoe lede van die publiek daarop geregtig is om die name van aangeklaagde opvoeders te ken, (ii) wie seksuele klagte behoort te ondersoek, en (iii) op watter privaatheid opvoeders tydens die ondersoek aanspraak kan maak. Hierdie saak word vanuit 'n VSA en RSA regsvergelykende perspektief aangespreek, met spesifieke verwysing na die feiteondersoek-proses en Skoolbeheerliggame se beheeruitoefeningsrol in die Suid-Afrikaanse openbare onderwyssektor, en skool amptenare se rol in die VSA. Uit die bespreking van hoe die VSA tot onlangs hierdie dilemma aangespreek het, blyk dit dat opvoeders geregtig behoort te wees op beskerming teen die skade wat ongestaafde bewerings van seksuele wangedrag hulle reputasies kan aandoen. Van die aanbevelings wat gemaak word om die Suid-Afrikaanse situasie te remedieer is dat die feiteondersoek-proses na aanleiding van 'n klag van seksuele wangedrag onberispelik bestuur moet word, en dat regsprekers in laer howe een of ander bewusmaking moet ondergaan ten opsigte van basiese feite-ondersoek flaters wat hulle op hierdie vlak begaan.

1 Background

Whether investigations of alleged teacher sexual misconduct are conducted by school officials, law enforcement or social services, the issues in the paper are (1) the extent to which members of the public are entitled to know the names of teachers against whom allegations of sexual misconduct have been made, (2) who should investigate sexual misconduct complaints, and (3) what privacy expectation teachers have during the investigation. The issue will be addressed from a comparative perspective between the United States and South Africa, with specific reference to the fact-finding process and School Governing Bodies' governance role in South African public education and school officials' role in the United States.

In the United States this issue is complicated by the fact that, in addition to investigations conducted by social service and law enforcement agencies, school boards or school administrators also generally conduct investigations and, while some allegations result in a finding of teacher misconduct, most either find the charges to be false or unsubstantiated for lack of evidence. The recent decision of the Supreme Court of Washington in *Bellevue John Does v Bellevue School District No 405*[1] addresses whether these investigations by school personnel are adequate for finding and punishing abusive teachers, and if not, what options need to be considered "to assure that [school] children … will not continue to suffer at [the] hands [of predatory teachers]".[2] Whether the names of all United States teachers against whom charges of sexual misconduct have been made, regardless of the outcome of investigations, should be revealed presents a difficult balancing question between a teacher's privacy interest in his/her identity and the public's interest in schools that are free from sexual misconduct of publically paid teachers.

The stakes are high in the United States and South Africa regarding teacher sexual misconduct. Teachers found to have engaged in such misconduct are subject to criminal prosecution, revocation of their teaching credentials, and discharge from employment. Both countries require teachers and other school personnel to report suspected child abuse to social service or law enforcement agencies and failure to do so in the United States, can result in revocation of teaching or administrative licenses.

South Africa has recently adopted a Children's Act[3] which aims at, among other things, "to give effect to … constitutional rights of children …" such as keeping them safe from "maltreatment, neglect, abuse or degradation", advancing their well-being[4] and ensuring that their best interests are regarded as of paramount importance in all relevant matters.[5] Moreover, the Criminal Law (Sexual Offences and Related Matters) Amendment Act (Criminal Law Amendment Act)[6] sets out to "provide adequate … effective protection to the victims of sexual offences" in order to minimize ensuing victimization and traumatisation.[7] While both these Acts are clearly timeous reactions to an increased incidence of sexual offences specifically against women and children, three pertinent questions that now need to be raised are (1) whether the legal system offers those accused of sexual offences,

1 189 P3d 139, 155 1234 Ed Law Rep 1007 Wash 2008.
2 *Idem*.
3 38 of 2005.
4 *Idem* s 2(b), 2(b)(iii) and 2(b)(i).
5 *Idem* s 2(b)(iv), 7(1) and 9. See also s 28(2) of the Constitution of the Republic of South Africa, 1996.
6 32 of 2007.
7 *Idem* Preamble.

protection from false and/or unsubstantiated accusations;[8] (2) how the "weighting effect"[9] or balancing should apply to determining an appropriate balance between a teacher's right to privacy and the public's interest in schools that are free from sexual offences; and (3) the role of the fact-finding process in determining the credibility of witness testimony.[10]

This presentation will address teacher misconduct and privacy by exploring the United States and South African approaches to the public's right to know whether those persons responsible for the education of their children have been charged with sexual misconduct, the extent to which investigations by schools or other pubic agencies should be appropriate vehicles for investigating allegations without the need for disclosing teacher names, and what privacy expectation teachers have during the investigation.

2 The United States Experience

While at school, United States students are protected from employee abuse by a comprehensive network of state statutes and regulations that can result in criminal sanctions, civil damages,[11] and professional discipline[12] where an investigation has produced evidence of sexual abuse.

8 See, for example, the unreported case of *HK van Niekerk v The State* Case No A215/2007 TPD and the District Court Kimberley case of *S v Du Plessis* Case No ASOC 122/2004: both of them teachers who were eventually found innocent of the sexual charges learners brought against them.

9 *S v Dodo* (*Dodo*) 2001 1 SACR 594 CC 595.

10 See *Vilakazi v S* [2008] 4 All SA 396 (SCA); *S v B* 2006 1 SACR 311 SCA at 316.

11 The issue of civil damages presents two separate aspects in the US: the first aspect is whether a teacher can sue school officials or the school board where personally identifiable information has been released about the teacher without consent. See, in this regard, Prosser *Privacy* 1960 *Cal L Rev* 383 398, describing a private facts tort as an extension of defamation, except that the private facts tort punishes the publication of truthful non-newsworthy matter that is damaging to a person's reputation. The second aspect of civil damages is whether the school district is liable in damages for teacher sexual misconduct with students. See McQuillin *The Law of Municipal Corporations 16B* (2011) par 13.25, indicating that where there is no conspicuous, plain, and clear reason to exclude liability coverage for teachers' criminal acts of sexual misconduct with students, the teacher is covered by the district's policy to the extent that the teacher is considered to have committed a "wrongful act" under the school board's liability policy.

12 Beckham *Meeting legal challenges* (1996) 70-73; Thomas, Cambron-McCabe and McCarthy *Public school law – teachers' and students' rights* (2009) 415-418, indicating that inasmuch as teachers are viewed as student role models the threshold for determining when a teacher acts immorally is fairly low and acts of moral turpitude, criminal convictions, and sexual misconduct with students constitute the typical grounds for disciplinary action on the grounds of immorality). But see *Matter of Renewal of Teaching Certificate of Thompson* 893 P2d 301, 99 Ed Law Rep 1108 Mont 1995,

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These sanctions, though, have not always been successful in preventing student sexual abuse and, among a comprehensive compilation by the United States Department of Education of student sexual misconduct studies,[13] one such study reported that 9.6 percent of all children in grades 8-11 have been subjected to educator sexual misconduct.[14] From a broader perspective, "[m]ore that 4.5 million students are subject to sexual misconduct by an employee of a school sometime between kindergarten and 12th grade."[15]

As pointed out before, the issue of this paper concerns itself with the extent to which members of the public, including the media and parents, are entitled to know the names of teachers against whom allegations of sexual misconduct have been made. While some investigations do in fast result in a finding of teacher misconduct, most either find the charges as false or unsubstantiated for lack of evidence.

The recent decision of the Supreme Court of Washington in *Bellevue*[16] addresses whether these school official investigations are adequate for finding and punishing abusive teachers or not. Moreover, the decision also point out that teachers' privacy interests in their identity and the public's interest in schools that are free from sexual misconduct of publically paid teachers need to be balanced when looking at whether the names of teachers against whom charges of sexual misconduct have

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where the board of education's order denying the renewal of a teaching certificate on the grounds of the moral unfitness of a teacher accused of and acquitted on criminal charges of sexual misconduct with students was clearly in violation of teacher's due process rights, and the trial court properly reversed the board's order, where the decision of the board was clearly erroneous and unsupported by substantial evidence.

13 US Department of Education, Office of the Under Secretary, Policy and Program Studies Service "Educator Sexual Misconduct: A Synthesis of Existing Literature" Washington DC Doc # 2004-09 2004. Report is available at: www.ed.gov/rschstat/research/pubs/misconduct

14 See Shakeshaft "Educator sexual abuse" 2003 *Hofstra Horizons* 10-13; also an analysis of the Shakeshaft data by the American Association of University Women reported in *Educator Sexual Misconduct*, where students were asked to respond to the following kinds of teacher sexual abuse:
"Made sexual comments, jokes, gestures, or looks; Showed, gave or left you sexual pictures, photographs, illustrations, messages, or notes; wrote sexual messages/graffiti about you on bathroom walls, in locker rooms, etc.; spread sexual rumors about you; said you were gay or a lesbian; spied on you as you dressed or showered at school; flashed or "mooned" you; touched, grabbed, or pinched you in a sexual way; intentionally brushed up against you in a sexual way; pulled at your clothing in a sexual way; pulled off or down your clothing; Blocked your way or cornered you in a sexual way; forced you to kiss him/her; forced you to do something sexual, other than kissing."
The result of this survey was that "9.6 percent of all students in grades 8 to 11 report[ed] contact and/or noncontact educator sexual misconduct that was *unwanted*." *Educator Sexual Misconduct supra*. Of this number, "6.7 percent reported physical sexual abuse." *Idem* 18.

15 *Idem* 18.

16 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.

been brought should be made public even before the investigations have been completed.

2 1 *Bellevue*: Facts and Court Decisions

The majority and dissenting opinions in *Bellevue*[17] present dramatically different perspectives as to the appropriateness of teacher sexual misconduct investigations by school officials and as to whether teachers should have any privacy interests regarding conduct that occurs during their employment responsibilities.

2 1 1 Facts and Trial Court Decision

The *Seattle Times* newspaper applied under the state's Public Disclosure Act (PDA)[18] (recodified as the Public Records Act (PRA))[19] for "seeking copies of all records for three school districts relating to allegations of teacher sexual misconduct in the preceeding 10 years."[20] Washington's PRA defines a public record broadly as

> any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics.[21]

The PRA protects an employee's privacy to the extent that any disclosure of employee information "(1) [w]ould be highly offensive to a reasonable person, and (2) is not of legitimate concern to the public."[22] To the degree that making information public would represent "an unreasonable invasion of personal privacy … an agency *shall delete identifying details* in a manner consistent with this chapter when it makes available or publishes any public record."[23] However, the Washington Code accords a "good faith" exemption to any public agency or employee that releases information while attempting to comply with the provisions of this chapter.[24] The Washington Code goes so far as to require that, except for pending civil or criminal investigations or charges or a contrary request from the employee, "[a]ll information determined to be false and all such information in situations where the employee has been fully exonerated of wrongdoing, shall be promptly destroyed."[25]

Pursuant to the *Seattle Times*' request, the three school districts identified 55 current and former teachers who fitted the profile and, pursuant to the PRA, they notified the teachers of the request. Of the 55 teachers, 37 responded with a lawsuit alleging that "the release of

17 *Idem*.
18 Rev Code of Wash, ch 42.17.
19 Rev Code of Wash, ch 42.56. A change in the name from PDA to PRA did not change the statutory content as affecting this case.
20 *Bellevue John Does v Bellevue School District No 405* 189 P3d 139 143.
21 Rev Code of Wash ch. 42.56.010(2).
22 *Idem* ch 42.56.050.
23 *Idem* ch 42.56.070 (1) (emphasis added).
24 *Idem* ch 42.56.060.
25 *Idem* ch 41.06.450(1)(b), (2)(a) and (b).

records identifying them with accusations of sexual misconduct would be an invasion of privacy."[26] The school districts released to the newspaper the unredacted records of the 18 teachers who did not join the lawsuit,[27] in addition to having earlier released

> numerous records [regarding the 37 teachers] documenting the nature of the allegation in each case [against the teachers], the grade level[s] [they taught], the type of investigation conducted [by the school district], and any disciplinary action taken [by the district]… [but without] disclosure of [the 37 teachers'] real names.[28]

Against a backdrop of PRA statutory policy that "free… open examination of public records is in… public interest, even [if] such examination may cause inconvenience or embarrassment to public officials"[29] and after considering documentary evidence introduced by the plaintiff teachers, the trial court ordered the disclosure of 22 of the 37 teachers' records where "alleged misconduct was substantiated, [where the misconduct had] resulted in some form of discipline, or [where] the school district's investigation [had been] inadequate."[30] Twelve of the 22 teachers sought review of the order for the disclosure of their names and the *Seattle Times* was permitted to intervene "seeking release of identifying information for the 15 [of the 37] prevailing John Does."[31]

2 1 2 Appeals Court Decision

The Washington appeals court held that the names of all but three teachers had to be disclosed to the *Seattle Times*, including those in the group of 15 who had been excluded from disclosure by the trial court, holding that non-disclosure did not apply to "unsubstantiated [allegations] or [those] determined not to warrant discipline"[32] or to teachers who had received "letters of direction."[33] In effect, the appeals court limited non-disclosure only to those fact situations where an investigation had occurred and "an allegation against a teacher [was] plainly false."[34] For the three cases where nondisclosure was not required under the PRA, the appeals court found those cases to involve

26 *Bellevue John Does 1-11 v Bellevue Sch Dist No 405* 120 P3d 616, 620 202 Ed Law Rep 346 Wash Ct App 2005.
27 *Bellevue John Does v Bellevue School District No 405* 189 P3d 139 143.
28 *Bellevue John Does 1-11 v Bellevue Sch Dist No 405* 120 P3d 621.
29 Ch 42.56.550 (3) PDA.
30 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.
31 *Ibid.*
32 *Bellevue John Does 1-11 v Bellevue Sch Dist No 405* 120 P3d 616 620.
33 *Idem* 623-24. In Washington, "[a] counseling letter, or 'letter of direction', is a practice a district may use to respond when it views a teacher's conduct as inappropriate but not serious enough to warrant a reprimand or other discipline." *Idem* 621.
34 *Idem* 627.

reports that were "blatant fabrication"[35] or "patently false."[36]

2 1 3 Supreme Court Majority Decision

The Supreme Court of Washington, in a complicated and divided 5-3 opinion, partly reversed the appeals court decision. In effect, this court had to establish whether "the identities of teachers who are the subjects of allegations" and information in letters of direction were "personal information" under the PRA "to the extent that disclosure would violate [the teachers'] right to privacy."[37] In its interpretation of the PRA, the majority decision firstly observed that

> the public lacks… legitimate interest in… identities of teachers [subjected to] unsubstantiated allegations of sexual misconduct because [their] identities do not aid in effective government oversight by… public and… teachers' right to privacy [is independent of] the quality of… school districts' investigations.[38]

Secondly, the majority opined that

> the [PRA] mandates disclosure of letters of direction… [but] where a letter simply… guide[s] future conduct, does not mention substantiated misconduct, and a teacher is not disciplined or subject to any restriction, the name and identifying information of the teacher should be redacted.[39]

Moreover, the court held that "teachers' identities" and letters of direction "contain[ing] information regarding the school districts' criticisms and observations of the DoE employees that relate to their competence as education professionals," constituted "personal information"[40] under the statute, and were therefore subject to the

35 A complaint involving a teacher "sitting out in the hallway with a middle school girl on his lap turned out to be a blatant fabrication by an unruly student whose credibility was completely undermined by an immediate investigation." *Idem* 628.

36 Two complaints involved rape, one an "accusation that the teacher was guilty of violent rape, kidnapping, and satanic torture[,] was completely implausible [because it lacked any] corroborat[ion] by physical evidence, [and] no one reading the file would reasonably believe that the allegations against [the teacher]were anything but fabrications". *Idem* 627. A second complaint concerning "an individual with a well documented history of psychiatric problems [that] was purportedly based on a memory suppressed for 15 years ... [and during the investigation produced no] corroborative evidence ... [but did reveal that] ... [t]he accuser and her mother both admitted to the investigator that the police report had been filed with the thought of getting money from the teacher." *Idem* 627-28.

37 Rev Code of Wash ch 42.56.230(2): "Personal information in files maintained for employees, appointees, or elected officials of any public agency to the extent that disclosure would violate their right to privacy."

38 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.

39 *Idem* 153.

40 *Idem*. The court found this definition similar to other states within the Ninth Circuit. *See* for example Alaska Stat 40.25.350(2) 2006 ("information that can be used to identify a person and from which judgments can be made about a person's character, habits, avocations, finances, occupation, general reputation, credit, health, or other personal characteristics"); Cal Civ Code 1798.3(a) West 2005: "any information that is maintained by an agency that identifies or describes an individual, including, but not limited to, his or her

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statutory limitation on invasion of privacy. The *Bellevue*[41] Supreme Court was constrained by two of its earlier opinions reaching opposite results regarding disclosure, the first, *Brouillet v Cowles Publishing Co*,[42] deciding that the public had a legitimate interest in information about the revocation of a teacher's certification involving "the extent of *known* sexual misconduct in schools,"[43] and the second, *Dawson v Daly*[44] that disclosure of a deputy prosecutor's performance evaluation was not required under the PRA because it would have violated the prosecutor's right to privacy.[45]

In both of these decisions, the Washington Supreme Court had relied on the definition of "invasion of privacy" in the Restatement of Torts:

> [o]ne who gives publicity to a matter concerning the private life of another is subject to liability to the other for invasion of privacy, if the matter publicized is of a kind that (a) would be highly offensive to a reasonable person and (b) is not of legitimate concern to the public.[46]

However, in *Brouillet*, the supreme court had never reached the question as to "whether teachers have a right of privacy in *unsubstantiated* allegations of sexual misconduct,"[47] and in *Dawson*, whether disclosure of a performance evaluation "would violate the prosecutor's right of privacy [where] it would be highly offensive and the public [did] not have a legitimate concern in such information."[48]

In *Bellevue*, the Supreme Court addressed the unanswered question from *Brouillet*, holding that "unsubstantiated or false accusation[s] of sexual misconduct [do not involve] action taken by an employee in the course of performing public duties [and thus]… are matters concerning the teachers' private lives."[49] In essence, the Supreme Court determined that where "the fact of the allegation, not the underlying conduct … lacks any evidence that misconduct ever occurred," the court refused to permit "the teacher's performance or activities as a public servant … [to be] held

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name, social security number, physical description, home address, home telephone number, education, financial matters, and medical or employment history."

41 *Bellevue John Does v Bellevue School District No 405* 189 P3d 139.

42 791 P2d 526, Ed Law Rep 638 Wash 1990.

43 *Idem* 147 (emphasis added), citing *Brouillet v Cowles Publishing Co* 791 P2d 526, 532, 530 Ed Law Rep 638 Wash 1990 (holding that disclosure of teacher records was permissible as "effective law enforcement" under state statute because revocation of a teacher's license involves the "imposition of sanctions for illegal conduct.")

44 845 P2d 995.

45 *Idem*: "if public employees were aware that their performance evaluations were freely available to their co-workers, their neighbors, the press, and anyone else who cares to make a request under the act, employee morale would be seriously undermined."

46 Restatement (second) of torts par 652D 1977.

47 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 147 (emphasis added).

48 *Ibid.*

49 *Idem* 147-48.

up to hatred and ridicule in the community."[50] This court found the appeals court's distinction between reportable "unsubstantiated" claims and unreportable "patently false" claims to be a "vague and impractical" one that placed "unworkable [and] time consuming … [burdens] on agencies and courts … likely to lead to radically different methods and conclusions."[51]

In holding that "[w]hen an allegation is unsubstantiated, the teacher's identity is not a matter of legitimate public concern," the Supreme Court of Washington rejected the *Seattle Times* argument that "the public has a legitimate concern in monitoring the school districts' investigations of sexual misconduct and the identity of the accused is imperative to the effectiveness of such monitoring."[52] The court refused to make "the quality of a school district's investigation" a relevant factor in determining teacher privacy because "the accused [teacher] has no control over the adequacy of the investigation."[53]

The *Bellevue* majority opined that even in the case where school districts were conducting

> less than acceptable investigations and permit teachers (whose reputations have not been cleared by thorough investigations) to avoid public scrutiny of their alleged misconduct… the public can [still] access documents related to the allegations and investigations (*subject to redactions*), thus maintaining the citizens' ability to inform themselves about school district operations.[54]

Similarly, the public is entitled only to redacted letters of direction in teacher personnel files where the letter "does not identify unsubstantiated misconduct and the teacher is not disciplined or subjected to any restriction."[55] Even with redactions of teacher identities, the public's interest is still protected "in overseeing school districts' responses to allegations…[by] giv[ing] citizens a complete picture of a school district's investigations and accompanying procedures."[56]

2 2 Analysis and Implications of *Bellevue*

Bellevue specifically addresses the difficult policy question of how much information about sexual misconduct complaints involving teachers should be disclosed. The policy reasons against disclosure are arguably more persuasive where allegations of sexual misconduct have been found to be false, but one has to assume that even in such cases the investigation of those allegations was adequate. Thus, for purposes of this paper, all allegations in the United States - those found to be false, substantiated, and unsubstantiated - will be included together since,

50 *Ibid.*
51 *Idem* 149.
52 *Idem* 150
53 *Idem* 150-51.
54 *Idem* 151 (emphasis added).
55 *Idem* 152.
56 *Idem* 153.

whatever differing privacy interests may be asserted by teachers, and those privacy interests depend arguably on the adequacy of the investigations.

Although issues concerning teacher privacy and disclosure of information are state specific,[57] the overarching issue regardless of current state law, is whether teachers *should have a protectable privacy interest at all* in complaints about their performance as a public employee. Whether information requested for disclosure should be denied as an invasion of privacy is the threshold issue in all jurisdictions, although courts do not reach the same conclusions.[58] Generally, courts have held that information regarding teacher sexual misconduct can be revealed as long as the teacher's name is redacted.[59] However, as suggested by the dissent opinion in *Bellevue*, redacting information about teacher identities whenever a student claim cannot be substantiated may only serve to send the message to the public that when "predatory teachers … go undetected, … children will continue to suffer at their hands."[60]

Bellevue also, among others, highlights two policy questions related to allegations of teacher sexual misconduct: (1) whether school officials or board members are the appropriate persons to investigate allegations of teacher sexual misconduct and to make decisions regarding the substantiated or unsubstantiated results of such investigations; and (2) whether sexual misconduct charges related to teacher performance of their public educational duties are (or should be) protected by privacy.

2 2 1 The Investigatory Role of School Officials or School Boards

An appellate brief filed on behalf of thirty of the teachers in this case began with a plea that pointed out that it was vital that the Supreme Court of Washington shielded the identity of teachers "against whom false allegations are made," but then the brief subtly expanded its claim to

57 See *Stern v Wheaton-Warrenville Community Unit School Dist 200*, 894 NE2d 818 237 Ed Law Rep 509 Ill App Ct 2008, in holding that the details of a superintendent's employment contract were not exempt public records under state law, the court observed that "*the disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy*" (emphasis in original); *Anonymous v Board of Educ for Mexico Cent School Dist* 616 NYS2d 867 4 Ed Law Rep 883 NY Sup Ct 1994, holding that a settlement agreement disposing of charges of misconduct against a teacher was subject to disclosure under the Freedom of Information Law.

58 For a comprehensive discussion of cases discussing the balance between disclosure and invasion of privacy, see Nadel "What constitutes personal matters exempt from disclosure by invasion of privacy exemption under state freedom of information Act[s]" 2008 *ALR* 666.

59 See for example, *Booth Newspapers Inc v Kalamazoo School Dist* 450 NW2d 286 58 Ed Law Rep 295 Mich Ct App 1989, awarding partial attorney fees to a newspaper that prevailed in securing disclosure of information about allegations of sexual misconduct even though the teacher's name could be redacted.

60 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 154.

read that no legal public interest existed in knowing the identity of teachers in cases of "no finding of misconduct and allegations remain unsubstantiated or false after an adequate investigation of those allegations."[61] Indeed, one of the core issues in this discussion is how the categorization following an investigation should affect disclosure of teachers' identities.

In the three school districts involved in this case, a person in each was designated as personally responsible for scrutinizing any charges of teacher misconduct and "imposing appropriate discipline where allegations… [were] substantiated and issuing letter[s] of direction when allegations [were] not."[62] The advantage of such a letter, for both the school district and the employee, was that it did not amount to a finding of misconduct or that the employee had transgressed a District policy. Therefore its significance as "[an] evaluative tool [was] … [that] the employee… avoid[ed] [the] time-consuming grievance process"[63] that is normally associated with employee discipline.

Yet the school districts' position in *Bellevue* was that:

> [r]eleasing letters of direction would harm the public interest in efficient government administration by interfering with the employer's ability to give candid advice and direction to its employees and would ... chill employer-employee communications ... if all written communications between the employer and employee were subject to disclosure.[64]

The teachers' position in *Bellevue* was that there was no public interest in knowing the identity of teachers where "*an adequate or extensive investigation …* revealed no finding of misconduct [or] imposed [no] discipline."[65] However, the adequacy of an investigation and the recommendations of the investigator are two quite different matters and, to follow the reasoning of the teachers in *Bellevue*, the latter can be emphasized at the expense of the former. Thus, if school officials conducting an investigation choose to frame their evaluative comments as "*concerns* about [an employee's] handling of specific incidents at the schools ... [or] shortcomings and performance criticisms [without] ... discussion of specific instances of *misconduct*,"[66] the public, even though no consideration has been given to the adequacy of the

61 Appellate Brief of Amicus Curiae Washington Education Association Feb 4, 2005, 2005 WL 5288867 *1 (hereinafter referred to as WEA Appellate Brief).
62 *Idem* *3.
63 *Ibid*.
64 *Idem* *4.
65 *Idem* *5 (emphasis added).
66 *Brown v Seattle Public Schools* 860 P2d 1059, 1063 86 Ed Law Rep 475 Wash Ct App 1993, dealing with a request for evaluation records of a school principal under the prior PDA, not involving sexual misconduct but still involving the same public interest issue.

investigation, should have no right to disclosure.[67]

The trial court in *Bellevue* had refused to defer to the school district's investigation and after "an *in camera* review of the records … the trial court [had] order[ed] disclosure o[f] the identity of [those] teacher[s] … [where] there [had] not [been] an adequate investigation,"[68] a position affirmed by the appeals court.[69] On appeal, the Supreme Court of Washington in *Bellevue* reversed and refused to make inadequate investigations the basis for unredacted disclosure of teacher identities,[70] reasoning that school districts could be sued under separate lawsuits for negligent retention or supervision[71] or breach of its supervisory duty to investigate allegations of sexual abuse,[72] or school districts could be subject to "significant penalties and attorney fees … if the [school district] fail[ed] to comply with the [PRA]."[73]

The dissent opinion in *Bellevue* had little confidence in allowing school officials to "control the scope and depth of its investigation,"[74] adopting what in essence was a "foxes guarding the henhouse" position that such self-investigation would serve to erode public trust and leave the public with the perception that "the school board is not responsive to the

67 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 158 Madsen J dissenting: "the majority leaves school districts free to control whether an accused teacher's identity must be released by controlling the scope and depth of its investigation."

68 WEA Appellate Brief *15 and 16. The trial court in *Bellevue* conducted an *in camera* review of all the records sought by *the Seattle Times* and on the basis of that review decided to disclose teachers' records where either there had been substantiated evidence of misconduct or an inadequate investigation. *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 143.

69 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 143.

70 *Idem* 151: "the identities of teachers who are subjects of unsubstantiated complaints should not be disclosed, regardless of the quality of the investigation."

71 See for example, *Peck v Siau* 827 P2d 1108 73 Ed Law Rep 859 Wash Ct App 1992 holding that a school district could not be held liable to a high school student with whom the school librarian had sexual contact, on the theory of negligent supervision of the librarian, absent showing that the district knew, or in exercise of reasonable care should have known, that the librarian constituted a risk of danger to the students. See generally, Miller "Liability, under state law claims, of public and private schools and institutions of higher learning for teacher's, other employee's, or student's sexual relationship with, or sexual harassment or abuse of, student" 2001 *ALR* 86.

72 See for example, *Christensen v Royal Sch Dist No 160* 124 P3d 283 287 204 Ed Law Rep 385 Wash 2005, rejecting a school's claim that a contributory defense should be permitted to an eighth grade student who had sexual contact with a teacher, reasoning that "children do not have a duty to protect themselves from sexual abuse by their teachers" and if the student's lies frustrated the school's investigation, that would relate to the breach of a school's duty to supervise its students.

73 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139 151.

74 *Idem* 158 (Madsen J dissenting).

taxpayers, and the school board is hiding something."[75] In its appellate brief, the *Seattle Times* cited an unreferenced six-week nationwide study that found "at a minimum, hundreds of cases involving sexual abuse of students are unfolding publicly." The study concluded that school officials "have fallen short in their duty to keep students safe," resulting in multimillion-dollar jury verdicts for victims or in costly out-of-court settlements.[76]

Some courts have called into question the adequacy of internal investigations of teacher sexual misconduct, particularly where those investigations substitute for reporting the alleged misconduct to social services.[77] However, even if school districts forgo investigation of sexual misconduct complaints by referring all complaints to social welfare agencies as required under state child abuse statutes,[78] such referrals do not necessarily require disclosure of the teacher's identity (including teacher name, certificate/license number, and schools taught at)[79] if the investigation does not substantiate that sexual misconduct occurred, or if the result generates a "letter of direction" that allegedly is not based on a finding of sexual misconduct. In other words, if a social service agency investigation does not produce a substantiated finding of child abuse,[80] the public is likely to discover the names of teachers against whom complaints of sexual misconduct have been made only if a student is willing to pursue a lengthy, costly, and cumbersome lawsuit for negligent hiring, supervision or retention.

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75 See Stuart "Citizen teacher: damned if you do, damned if you don't" 2008 *U Cin L Rev* 1331, applying the foxes and henhouse argument to school boards after *Garcetti v Ceballos* 547 US 410 2006. The latter allows boards to retaliate and, thus, control teacher speech where that speech is part of a teacher's job.

76 Appellate Brief of Seattle Times, 2004 WL 5252059 *3-4 Wash.

77 See *Yates v Mansfield Bd of Educ* 808 NE2d 861 Ohio 2004, where a school principal conducted the internal investigation of a student's complaint of coach sexual harassment, determining that the student was lying, but the case was remanded in subsequent damages lawsuit for negligent supervision and retention as to whether the principal had a duty under the state's child abuse reporting statute to report the alleged harassment to social services under a "knew or reasonably suspected" standard.

78 See http://childwelfare.gov/systemwide/laws_policies/search/, the United States Department of Health and Human Services National Clearinghouse on Child Abuse and Neglect Information listings of each state's mandatory reporting statutes, what professions are required to report, and which states recognize an exception to mandatory reporting due to privileged communications; Veilleux "Validity, construction, and application of state statute requiring doctor or other person to report child abuse", 2005 *ALR* 782.

79 See *Seattle Times Appellate Brief* *14.

80 See, for example, West's Ann Cal Penal Code par 11165.12 defining the following results of a social services investigation:
"(a) 'Unfounded report' means a report that is determined by the investigator who conducted the investigation to be false, to be inherently improbable, to involve an accidental injury, or not to constitute child abuse or neglect.
(b) 'Substantiated report' means a report that is determined by the

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More troublesome, though, is that even if parents can pursue these negligence claims, actions against state officials for inadequate investigations may be blocked by state immunity statutes.[81]

2 2 2 Privacy Rights of Teachers

From the teachers' perspective, the core issue is the extent to which teachers charged with sexual misconduct are government actors subject to public scrutiny or citizens entitled to have their identities shielded from such scrutiny as long as those allegations are not substantiated.[82] The teachers in *Bellevue* argued that the purpose of the State of Washington's PRA was

> to monitor government, … not to scrutinize individual …, [and the effort to gain access to teacher records] relating to [other than] actual misconduct … constitute[d] scrutiny of individuals, not of government.[83]

For the plaintiff teachers in *Bellevue* the conflict focused on the extent to which teachers in public schools retain the privacy rights of a citizen while they perform their contracted responsibilities in classrooms and other school venues. While the answer to this question is framed to a large extent in a localized context by a state's statutory and common law, it also invokes in the larger context a public policy consideration of the quality of education, a topic discussed in the next section.

The Supreme Court of Washington majority rested its *Bellevue* decision on the privacy rights of teachers' "personal information" under the state's PRA.[84] Appellate briefs on behalf of the teachers claimed broadly that public disclosure of an accusation of sexual misconduct, especially if unsubstantiated or false, would be highly offensive under state law because such release would taint a professional teacher's career and shed doubts on the character of the accused teacher.[85] The argument contrary to the *Bellevue* majority is that complaints of teacher sexual misconduct have to be disclosed because "a teacher's conduct with his or her students … on the job is not a private matter … [nor does it] relate to 'the intimate details of one's personal and private life."[86]

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investigator who conducted the investigation to constitute child abuse or neglect, based upon evidence that makes it more likely than not that child abuse or neglect, as defined, occurred.
(c) 'Inconclusive report' means a report that is determined by the investigator, who conducted the investigation not to be unfounded, but the findings are inconclusive and there is insufficient evidence to determine whether child abuse or neglect . . . has occurred."

81 See for example, *BT v Santa Fe Pu Schs* 506 FSupp2d 718 225 Ed Law Rep 300 DNM 2007

82 See the Reply Brief of Appellant Bellevue John Doe Np 11 (May 28 2004) *3 (hereinafter referred to as "Reply Brief of John Doe #11").

83 *Idem* *11.

84 *Bellevue John Does v Bellevue Sch Dist No 405* 189 P3d 139.

85 See *WEA Appellate Brief* *9; *Reply Brief of John Doe #11* *4.

86 Supplemental brief of respondent *Seattle Times* Company Feb 2 2007 *2 (hereinafter referred to as "*Sup. Seattle Times Brief*"). See *Spokane Police*

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Courts have taken three approaches to disclosing education-related information regarding sexual misconduct: (1) Some courts have rationalised disclosure of personal identities where such disclosure would not only "encourage… the public [to] evaluate the expenditure of public funds and the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public;"[87] (2) however, even when ordering disclosure, other courts have taken the *Bellevue* majority approach that complaint or grievance records are discoverable only after individual identity material has been redacted;[88] and, (3) yet other courts have adopted the *Bellevue* trial court approach that information can be disclosed after an *in camera* hearing to determine if disclosure would constitute an invasion of privacy.[89]

Privacy in its broadest meaning is the protection of an individual's interest in making decisions free of government interference.[90] The United States Supreme Court has recognized that the Liberty Clause of the Fourteenth Amendment[91] protects "a right of personal privacy"[92] that includes "the interest in independence in making certain kinds of important decisions."[93] However, the right to make decisions without government interference is not without limits. For public school teachers, their expectation of privacy, one can argue, is diminished by the reality that they have been employed to instruct students, most of whom are

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Guild v Washington State Liquor Control Bd 769 P2d 283 Wash 1989, holding that an investigative report regarding the investigation of liquor law violations on policy guild property had to be disclosed, because under state law it would not be highly offensive to a reasonable person and was not of legitimate concern to the public.

87 See *Athens Observer Inc v Anderson* 263 SE2d 128 130 Ga 1980, upholding the disclosure of a consultant's evaluative report of the mathematics department with comments on the faculty, because the public policy was not only to encourage public access to such information in order that the public could evaluate the expenditure of public funds in the efficient and proper functioning of its institutions, but also to foster confidence in government through openness to the public.

88 See *United Federation of Teachers v New York City Health and Hospitals Corp* 428 NYS2d 823 NY Sup Ct 1980, upholding under the state Freedom of Information Act, the disclosure of grievances and decisions rendered on grievances filed by registered nurses represented by competing union, but only after all personal identifying details were redacted and deleted from the records.

89 See *News and Observer Pub Co v State ex rel Starling* 309 SE2d 731-732 NC Ct App 1983, upholding the trial courts disclosure of an investigative report of a school superintendent after balancing the interests of disclosure and confidentiality, reasoning that the public's interest prevailed "as to how the official is functioning who is entrusted with responsibility for the day-to-day operations of the Wake County Public Schools".

90 See for example, *Littlejohn v Rose* 768 F2d 765 26 Ed Law Rep 955 6th Cir 1985, cert. denied, 475 US 1045 1985, where a non-tenured teacher's privacy right might have been violated if the school board's non-renewal decision was based on her divorce.

91 US Const amend XIV par 1 ("[No] State shall ... deprive any person of life, liberty or property without due process of law").

92 *Roe v Wade* 410 US 113 152 1973.

93 *Whalen v Roe* 429 US 589, 599-600 1977.

minors required under state compulsory attendance laws to attend school.

3 A Perspective on the Law in South Africa

There is a world-wide concern and growing awareness of the particular vulnerability of children and of the fact that child abuse, including sexual exploitation of children, is a serious and ever-escalating problem. In South Africa, unfortunately, the extent of this problem is truly appalling.

In accordance with this, according to the objectives of the Criminal Law Amendment Act,[94] all complainants of sexual offences are afforded the maximum and least traumatizing protection the law can provide which, among other things, include guarding against the possible secondary victimization of these complainants and their families.[95] While this would then serve as legislation aimed at safeguarding the constitutional rights of especially young complainants by considering their best interests to be of paramount importance,[96] the question arises as to how, for example, a teacher's right to privacy[97] is balanced against the public's interest in having schools free from, among other things, the sexual misconduct of publically paid teachers.[98]

Reciprocating the protection granted to complainants of sexual offences, one would thus expect to see that the persons accused of such transgressions are afforded protection from false or unsubstantiated accusations, while at the same time taking note of the fact-finding process after a learner has filed a complaint of sexual misconduct against a teacher.

3 1 The Panoply of Constitutional Rights in South Africa

The fundamental rights are prefaced at the beginning of both the Constitution[99] and the Bill of Rights[100] with the three seminal values of human dignity, equality and freedom. The former of these three, human dignity, which is expounded as everyone's "inherent dignity and the right to have [it] respected and protected,"[101] appears to be central[102] to a

94 S 2 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act 32 of 2007.
95 *Idem* s 2(d).
96 S 28(2) of the Constitution of the Republic of South Africa, 1996.
97 *Idem* s 14; see also ss 9, 10, 12 and 33.
98 S 17(1)(b) and (c) of the Employment of Educators Act 76 of 1998, which point out certain dismissal of educators who have been found guilty of acts of sexual assault on and/or sexual relationships with learners.
99 S 1(a) of the Constitution of the Republic of South Africa, 1996 provides "The Republic of South Africa is a democratic state founded on human dignity, the achievement of equality and the advancement of human rights and freedoms."
100 *Idem* s 7(1) which also describes the Bill of Rights as "a cornerstone of democracy."
101 *Idem* s 10.
102 See *S v Makwanyane* 1995 6 BCLR 665 CC 722-23.

society founded on democracy.[103] At the same time, it is the only one of the three seminal values which does not have a direct counterpart in the United States Constitution. While the wide-ranging exact grants of fundamental rights in the South African Constitution would seem to invite numerous legal challenges,[104] the number of cases which address concerns in education law to date has been fairly limited and the number of cases dealing with teachers' privacy rights even more so.

3 1 1 A Teacher's Right to Human Dignity[105]

In a disconcerting case, it took a female teacher of the public Orkney High School four years, six months and fifteen days to be able to hold her head high after having been accused of the indecent assault of a fifteen-year-old schoolboy. The learner accused his teacher in 2003 of having fondled him, having played with his genitals and having had sex with him on a desk in the classroom. She was accordingly found guilty on two accounts of indecent assault.[106]

On appeal, the High Court[107] pointed out (1) that it was confronted with two mutually exclusive versions of the events[108] and that it had to adjudicate the reliability of the complainant and the appellant separately,[109] (2) that a Court had to acquit accused persons if any reasonable possibility existed that their testimony could be true,[110] and (3) that the complainant was a single witness[111] of a young age and that the case revolved around accusations of sexual misconduct.[112] The latter three factors traditionally call on a court to evaluate the factual position of such a case extremely carefully.[113]

Contrary to the original court proceedings that found the complainant to be a trustworthy and reliable witness based solely on the fact that the Magistrate thought that he fitted the psychic profile of a molested child,[114] the High Court stated that the available evidence of parental violence and threats[115] against him sounded a warning to be wary of his testimony.[116] At the same time, the Court referred to the possibility that the complainant never intended to accuse the teacher of sexual relations,

103 Preamble to the Constitution of the Republic of South Africa, 1996.
104 See Mawdsley and De Waal "Symbolism in education: a comparative legal analysis of symbolism, language and culture in the United States and South Africa" 2008 *De Jure* 561-579.
105 S 10 of the Constitution of the Republic of South Africa, 1996.
106 Sentence was handed down by the regional court at Klerksdorp in 2003.
107 *HK van Niekerk v The State* Case No A215/2007 TPD.
108 *Idem* par 3.
109 *Idem* par 7. See also par 15.
110 *Ibid.*
111 *Idem* par 8.
112 *Idem* par 8. *See* also par 4.
113 *Ibid.*
114 *Idem* par 16.
115 *Idem* paras 9 and 23.
116 *Idem* paras 24-25. *See* also par 22.

but merely originally mentioned her touching him inappropriately to stay out of trouble.[117]

In reflecting on the fact-finding process of the regional court,[118] the High Court opined that the Magistrate's criticism of the appellant's trustworthiness simply because she had appointed a private investigator to help her with her defence and was not fully forthcoming in this regard, was unjustified.[119] Moreover, the High Court remarked that the regional court's critique on the appellant's testimony was mostly unjustified and thus did not reflect negatively on her trustworthiness,[120] indicating that the Court could not reject her version as not reasonably possibly true.[121] Finally the High Court found that there were a number of improbabilities in the complainant's testimony,[122] and that Van Niekerk's testimony deserved the benefit of the doubt.[123]

Van Niekerk's appeal against the guilty conviction was upheld, she was found not guilty and the sentence handed down by the court *a quo* was set aside.[124] Moreover, although Van Niekerk has since left education apparently due to medical reasons,[125] she refers openly to the humiliation and trauma which she suffered[126] before winning her appeal on two charges of indecent assault.

This High Court judgment is reminiscent of the fact that teachers at public schools are also entitled to having their innate dignity revered and looked after,[127] and that the investigation into the credibility of witness testimony needs a careful fact-finding process after a complaint of sexual misconduct has been filed, in order to offer protection from false or unsubstantiated accusations to the accused teacher.

3 1 2 A Teacher's Right to Equal Protection and Benefit of the Law[128]

In *S v Marais*[129] a male teacher was accused of two accounts of indecent assault on a nineteen-year-old female learner. On the first charge of the teacher's approaching her and rubbing his genitals against her arm while

117 *Idem* par 25. See also par 11.
118 *Idem* paras 21, 22, 30 and 32.
119 *Idem* paras 18 and 34.
120 *Idem* paras 34-36.
121 *Idem* par 36.
122 *Idem* par 21.
123 *Idem* par 37.
124 *Idem* paras 1 and 37(2).
125 *Beeld* (2002-01-15) 4.
126 *Ibid.* The female educator, Van Niekerk, described the four years as being an ordeal and of having been literally stripped naked in court; see also s 10 of the Constitution of the Republic of South Africa, 1996, which recognizes human dignity both as a human attribute and a fundamental right.
127 S 10 of the Constitution of the Republic of South Africa, 1996.
128 *Idem* s 9(1).
129 Regional court held at Kimberley, Case No ASOC 122/2204.

she was writing a test,[130] the complainant's original statement in court was inconclusive as to which part of the teacher's body was involved in the alleged assault, since she reported not being able to remember clearly.[131] However, contrary to this testimony, during cross-examination led by her legal representative, she firmly recollected that the teacher had rubbed his genitals against her arm.[132]

When her female friend who sat in front of her in the class during the test gave evidence, new facts were mentioned concerning the first charge[133] and the court found her testimony not to be the truth.[134] However, the Court found the complainant's boyfriend to be the most credible witness of the three, based on the fact that (1) he suggested that the complainant speak to his mother, a teacher, about the incident,[135] and (2) he admitted to the court that he would not have handled the incidents as the complainant did.[136]

On the second charge of the teacher having touched her genitals,[137] the complainant's original statement in court contained testimony to the fact that he had touched her breasts over her jacket and proceeded to touch her genitals over her jeans.[138] Yet during cross-examination led by her legal representative, she indicated this as having occurred when he placed his hands inside her jacket.[139]

Turning to the matter at hand, the regional court first of all referred to the duty that the State has to prove the case beyond a *reasonable* doubt and not beyond *every inkling* of doubt.[140] In the second case, the court stated that accused persons do not have the responsibility to prove their innocence themselves,[141] and in the last instance, the Court pointed out that clear verdicts of criminal cases relied on considering all probabilities and improbabilities.[142]

As was the case with *Van Niekerk* above,[143] the regional court pointed out the care that had to be taken with the complainant's testimony in this

130 *Idem* par 2.
131 *Idem* par 6.
132 *Idem* paras 6-7.
133 *Idem* paras 7, 10 and 11.
134 *Idem* paras 10-11 and 15.
135 *Idem* paras 8-9.
136 *Idem* paras 14-15.
137 *Idem* par 2.
138 *Idem* paras 7-8.
139 *Idem* par 8.
140 *Idem* par 3. The regional court referred to *S v Tsele* 1998 2 SASV 178 A 182 E where the Appellate Division reminded everyone of the duty the State has to prove guilt beyond a reasonable doubt and not beyond any inkling of doubt.
141 *S v Alex Carriers* 1998 3 SA 79 T, where the Provincial Court stated that it was not necessary for the accused person/s to push the wall of guilt over the side of the State.
142 *Idem* par 4.
143 *HK van Niekerk v The State* Case No A215/2007 TPD.

matter, since she was a single witness.[144] While the court reminded everyone that it can pronounce a judgment of guilt based on the evidence of an only witness,[145] it also commented on having to search for guarantees of reliability when considering accepting the evidence of a single witness[146] and being confronted with two sets of facts in this case.[147]

Due to the many inconsistencies and improbabilities in the statements of the two state witnesses and the learner,[148] as well as questionable honesty on the side of the complaining learner,[149] the court decided that since it could not be proven beyond a reasonable doubt that the accused was guilty, he was found to be innocent.[150]

This court judgment therefore serves as a reminder that also teachers are entitled to be presumed innocent until proven guilty,[151] and that the fact-finding process can be managed carefully even at regional court level.

3 1 3 A Teacher's Right to Freedom and Security[152]

In 2002 two schoolgirls charged the principal of Brooklyn Heights Primary School in Crossmoor, Chatsworth, with rape and indecent assault and he was thus immediately suspended from his position. Four years later, the suspended principal was acquitted of all charges.[153] He prepared documentation to enable the Department of Education to reinstate him towards the end of 2006 and started the process of suing the parents of the two girls who accused him for R5 million.

A case dealing with sexual offences in a context other than education, *S v Fhetani*[154] concerned itself with looking at whether the Venda High Court had facts before it to "establish that the appellant was guilty of rape."[155] The appellant was 23 years old at the time of the original trial, completing Grade 12 at school,[156] and he was only 15 years old when the offence was committed.[157] He was arraigned in the Venda High Court on a charge of rape, or alternatively unlawful sexual intercourse

144 *Idem* par 8.
145 S 208 of the Criminal Procedure Act 51 of 1977.
146 *Ibid.*
147 *HK van Niekerk v The State* Case No A215/2007 TPD paras 4-5.
148 *Idem* par 10.
149 *Idem* par 9.
150 *Idem* paras 15-17.
151 S 35(3)(h) of the Constitution of the Republic of South Africa, 1996; *S v Dodo* 2001 1 SACR 594 CC paras 386 and 403.
152 S 12 of the Constitution of the Republic of South Africa, 1996.
153 Hurt and Ndlovu JJ, sitting in the Pietermaritzburg High Court in October 2006, found the story against the suspended principal to have been fabricated.
154 [2007] ZASCA 113.
155 *Idem* par 3
156 *Idem* par 9.
157 *Ibid.*

with a girl younger than 16 years, and he pleaded guilty to the alternative charge.[158]

On appeal, the Supreme Court questioned the fact-finding process of the trial court, pointing out that the latter had been "under the impression that there were facts" that proved that the appellant was guilty of rape and therefore "sentenced him accordingly".[159] However, the trial court had erred since "no evidence was led at the trial"[160] and it had "impermissibly relied" solely on the synopsis of important facts to reach its findings.[161] Such a synopsis does not represent evidence or admitted facts, but merely serves the purpose of bringing the accused person up to date with the substantial facts on which the prosecution relies.[162]

In this case, the trial court's "misdirections"[163] and its incorrect approach in assessing the punishment,[164] led to it handing down "an excessively disproportionate sentence."[165]

At the time of the appeal, the appellant had in actual fact already served five years in prison, because although bail was granted, it was set at "an exorbitant amount of R10,000."[166] The reasons offered to the court for the delay in conducting the appeal, were seen to be "unsatisfactory" and "unacceptable."[167] Moreover, since the chief reason offered was linked to the availability and service provided by attorneys of the Legal Aid Board, the Supreme Court of Appeal reminded everyone that making legal representation available to those who cannot pay for it themselves, was "discharging one of the most important constitutional obligations imposed on the state."[168]

In the final instance, this court pointed out that lawyers who were appointed by the Legal Aid Board and who delivered sub-standard service, were violating accused persons' rights and not fulfilling their obligation to the person appropriately.[169] With reference to this case, the outcome of the questionable fact-finding process and the delays was that the appellant had served an "unjustifiably excessive time in prison,"[170]

158 *Idem* par 2.
159 *Idem* par 3.
160 *Idem* par 4.
161 *Ibid*.
162 *Ibid*, referring to *S v Van Vuuren* 1983 1 SA 12 A 21E.
163 *Idem* par 9.
164 *Idem* paras 5, 8 and 11.
165 *Idem* par 5.
166 *Idem* paras 10-12.
167 *Idem* par 14.
168 *Idem* par 15; see also s 35(3)(g) of the Constitution of the Republic of South Africa, 1996.
169 *Idem* par 15.
170 *Ibid*.

depriving him of his right to freedom and security.[171]

These two matters point to the role of the fact-finding process in determining the credibility of witness testimony, so that teachers are protected from false or unsubstantiated accusations. and underline the guaranteed right of also teachers "not to be treated … in a … degrading way."[172]

In *Vilakazi v S*,[173] the Supreme Court of Appeal referred to the fact-finding process in prosecuting rape as presenting unusual intricacies that called for "the greatest care to be taken,"[174] especially where the complainant was young. According to the court, prosecutors needed to execute "thoughtful preparation, patient and sensitive presentation of … available evidence, and [pay] meticulous attention to detail.[175] At the same time, the judicial officers who tried these cases had to have a precise understanding and do a cautious analysis of all the evidence.[176]

The Supreme Court of Appeal expressed four specific concerns that are relevant to taking cognisance of accused persons' privacy rights: Firstly, the complainant's evidence was presented with little care for comprehensiveness and truth,[177] resulting in the evidence being subjected to only slight analysis and the sentencing itself being handed down automatically.[178] Secondly, simply discarding the evidence which accused persons present to prove them free from guilt does not end the enquiry into a criminal case.[179] Thirdly, the Supreme Court of Appeal referred to what it termed "ordinary logic of reasoning,"[180] indicating that a court would be vindicated for accepting uncontested evidence. However, when no evidence is presented, the burden which rests on the State accumulates to the advantage of the accused[181] since "the gap in the evidence could not be filled by an inference drawn against the accused. That is… a consequence of… inferential reasoning."[182] Finally, the Supreme Court of Appeal voiced its concern at the fact that the appellant in this case had been imprisoned on the day of the alleged crime and had remained imprisoned ever since then, that he had not been brought to trial swiftly, and that this was "most unjust."[183]

171 *Idem* paras 1 and 16: the sentence of 15 years' imprisonment was set aside, a three years' term was handed down and so he was released from prison immediately, since he had already served five years there.
172 S 12(1)(e) of the Constitution of the Republic of South Africa, 1996; see also *S v Fhetani* 2007 ZASCA 113 par 6.
173 2008 SCA 87 RSA.
174 *Idem* par 21.
175 *Ibid*.
176 *Ibid*.
177 *Idem* paras 22 and 50.
178 *Idem* par 22.
179 *Idem* par 47.
180 *Idem* par 48. See also *R v Blom* 1939 AD 188 AT 202-03.
181 See also *R v M* 1946 AD 1023 1027; *S v Khubeka* 1982 1 SA 534 W 537E; *S v Ipeleng* 1993 2 SACR 185 T 189b-i.
182 *Vilakazi v S* 2008 SCA 87 RSA par 48.
183 *Idem* par 60.

In a different case,[184] the Supreme Court of Appeal pointed out that the 11-year-old complainant's version concerning the rape which she accused a 39-year-old teacher of committing was "entirely uncorroborated,"[185] that the court had no reason to reject the evidence given by the appellant and the defence witness, and that guilt had not been proven.[186]

The trail court had "committed a number of misdirections" while the Magistrate mentioned the variation between the complainant and appellant's testimony on whether sexual intercourse occurred and whether the incident had taken place on a school day or a Sunday, the Magistrate erred in failing to notice (1) the various versions concerning the sequence of events of the day in question;[187] (2) whether the witness for the defence had been at the appellant's house at all on that day;[188] and (3) that no responsibility rests on the appellant to advance reasons why State witnesses would falsely implicate them.[189]

In the last instance, the trial court declared the appellant as not making "a good impression"[190] as a witness, based on his being evasive in cross-examination and answering what had not been asked, yet "[n]either of the criticisms levelled by the magistrate at the appellant's evidence appear from the record, as the State's counsel on appeal was constrained to concede."[191] Further, the trial court ignored the evidence of the witness for the defence completely since he and the appellant were friends and the court found it strange that the witness remembered what the complainant was eating when he arrived at the house.[192] The Supreme Court of Appeal pointed out that the Magistrate "was not entitled to disregard" his testimony.

By the time the appeal was granted and the conviction and sentence were set aside, this appellant had already been in custody for four and a half years.[193]

3 1 4 1 *The Importance of Weighing the Evidence*

The case of *S v Gentle*[194] refers to weighing evidence and reminds everyone in the first place that substantiating the facts "on the issues in dispute" would imply that other evidence reinforces the evidence offered by the complainant, causing the evidence presented by the accused to be regarded as less credible, less plausible. In the second place, if a

184 *Nonyane v S* 2006 SCA 23 RSA.
185 *Idem* par 6(2).
186 *Idem* paras 7 and 8.
187 *Idem* paras 3 and 6(1).
188 *Idem* par 6(1).
189 *Idem* par 6(5). See *S v Ipeleng* 1993 2 SACR 185 T 189b-i.
190 *Nonyane v S* 2006 SCA 23 RSA par 6 (3).
191 *Idem* par 6(3)(a) and (b).
192 *Idem* at par 6(4).
193 *Idem* at par 1.
194 2005 1 SACR 420 SCA 422.

complainant's evidence disagrees considerably from that of the State witnesses, for example, the Court needs to scrutinize the differences seriously[195] to establish whether the complainant's evidence is trustworthy or not.[196]

The Supreme Court of Appeal opined that the trial court had "committed a number of misdirections,"[197] yet chose to focus only on the following two specific ones:"[198] the Magistrate was at fault for having relied on the co-accused's evidence to discredit the appellant's version, since the former's testimony "was patently unsatisfactory;"[199] and although the Magistrate found the complainant's testimony reliable, the medical evidence proved the contrary.[200] The outcome of the first misdirection was that "inadmissible material"[201] was considered, leading to the trial court's wrongful discrediting the appellant's version of the events. The outcome of the second misdirection was that the trail court made an incorrect finding concerning the reliability of the complainant.[202]

Furthermore, the fact that the complainant's evidence agrees with that of other State witnesses "on issues not in dispute" does not provide substantiation. What is necessary is plausible, trustworthy proof which then renders the complainant's version more probable than that of the accused person.[203]

The Supreme Court of Appeal reached the conclusion that the "onus of proof"[204] of the appellant's guilt had not been satisfied, since the complainant's account of the issue in dispute was found to be incongruous and untrustworthy,[205] and her evidence was found to be "patently unsatisfactory, and … uncorroborated."[206]

In this regard the Supreme Court of Appeal set aside both the conviction and the sentence.

This case is reminiscent of the weighting effect which was pointed out above, and which occurs when balancing, for example, a teacher's right to privacy against other parties' interest in maintaining schools that are free from sexual offences. It also emphasizes the role of the fact-finding process in determining the credibility of witness testimony.

195 *Idem* 430.
196 *Idem* 421-22 and 431.
197 *Idem* 427.
198 *Ibid.*
199 *Ibid.*
200 *Ibid.*
201 *Idem* 428.
202 *Ibid.*
203 *Idem* 422.
204 *Idem* 423, 428 and 434.
205 *Idem* 421-23 and 428-30.
206 *Idem* 422 and 434.

3 1 4 2 *The Importance of Being Aware of Inherent Probabilities*

In *Monageng v S*[207] a 37-year-old man lost his appeal against both his conviction of the rape of his fifteen-year-old cousin, and the sentence of 18 years' imprisonment. His version was not seen to be reasonably possibly true and therefore the court rejected it. Furthermore, the sentencing court did not hand down a "shocking, startling or disturbingly inappropriate" sentence.[208] At the same time, the Supreme Court of Appeal found the single child witness "satisfactory", her version "credible" and she had "no reason to falsely implicate the appellant."[209]

This court made it clear that examining available evidence asked for (1) balancing all the aspects which indicated the accused persons' guilt against all the aspects which pointed towards their innocence, while (2) accurately considering "inherent strengths and weaknesses, probabilities and improbabilities on both sides,"[210] and then (3) deciding if the scales were tipped so profoundly that any reasonable doubt concerning the accused person's guilt was eliminated.

Finally, the Supreme Court of Appeal pointed out that while it was acceptable for courts to test an accused person's evidence against the possibilities of it happening just like that, it was unacceptable for courts to establish blame "on a balance of probabilities."[211]

With this judgment, everyone is reminded of the fact that single child witnesses can be trustworthy and that their reliable evidence can eliminate any reasonable doubt concerning an accused person's guilt.

3 1 4 3 *School Governing Body's Involvement Questioned*

With reference to the *Van Niekerk* case,[212] the learner's mother testified that she and her husband had been worried not only about their son's weak academic progress, but also the fact that he had been skipping school. Both of them went to see the principal on several occasions to voice their concern.[213]

However, the principal assured them that their son was participating in sports and that he was satisfied with the circumstances at school,[214] without consulting with any of the teachers or pulling any of his school records.

Based on the facts of the case not enough was done to investigate these parental concerns, since from the evidence presented in court, the

207 590/06 2008 ZASCA 129.
208 *Idem* par 3.
209 *Idem* par 10.
210 *Idem* par 13; see also *S v Chabalala* 2003 1 SACR 134 SCA par 15.
211 *Monageng v S* 590/06 2008 ZASCA 129 par 14. See *R v Mambo* 1957 4 SA 727 A 738A; *S v Phallo* 1999 2 SACR 558 SCA par 10 and 11.
212 *HK van Niekerk v The State* Case No A215/2007 TPD.
213 *Idem* par 9.
214 *Idem* par 10.

principal who is an official member of the School Governing Body,[215] did not take up these two matters at all and did not report back to the parents. It is thus concluded that the School Governing Body did not investigate or react to the learner's skipping school for two weeks[216] or his regularly skipping school[217] which the mother testified to.

Everyone is reminded of the fact that the governance of schools is vested in their School Governing Bodies,[218] that they assume a position of dependence towards the school they serve[219] which clearly involves the execution of a function in which the public has a very material and direct interest, and that the principals report to them on matters regarding the professional management of the school.[220] It is therefore clear that School Governing Bodies would rely on the fact that principals run their schools effectively, including showing concern for the well-being of, among other people, their learners and educators.

While principals are charged with the professional management of their school,[221] they represent the Head of the Provincial Department as non-elected members of their School Governing Body[222] and also support the School Governing Body in managing learner disciplinary issues.[223]

This serves as an example of the vital role that school principals and their School Governing Bodies play in following up concerns voiced by parents and other interested parties. The principal as a representative of the employer may be compelled to investigate alleged learner misconduct and initiate School Governing Body action. It remains an open question whether, if immediate attention had been paid to the parents' repeated visits on behalf of their son, this court case[224] could perhaps have been prevented.

4 The Way Forward: Recommendations for South Africa

The South African and United States case law referred to in this paper reflected on several issues related to (1) the disclosure of teacher identities once learners and students have lodged complaints of sexual misconduct, (2) who should investigate sexual misconduct complaints, (3) and what privacy expectations teachers have during such

215 Ss 23(1)(b) and 24(1)(j) of the South African Schools Act 84 of 1996.
216 *HK van Niekerk v The State* Case No A215/2007 TPD par 21.
217 *Idem* par 23.
218 S 16(1) of the South African Schools Act 84 of 1996.
219 *Idem* s 16(2)
220 *Idem* s 16A(2)(c).
221 *Idem* s 16(3).
222 *Idem* s 16A(1)(a).
223 *Idem* s 16A(2)(d).
224 *HK van Niekerk v The State* Case No A215/2007 TPD.

investigations. Unquestionably, teachers have a great deal at stake when they are alleged to have been involved in sexual misconduct, especially considering that complainants can bring such charges anonymously and maliciously.

Offering a quick solution to the complicated balancing act between teachers' privacy rights and the public's interest in schools that are free from sexual offences is easier said than done. However, to protect South African teachers from the damage that unsubstantiated allegations of sexual misconduct could cause to their reputations, decisive steps must be taken and lessons need to be gleaned from foreign jurisprudence such as the United States.

In the United States, the first obvious solution would be to merely eliminate the statutory privacy protection that exists in most states. However, as is reflected in this article, public policy has favoured protecting teachers from the damage that unsubstantiated allegations of sexual misconduct could cause to their reputations, even at the risk of inadequate school officials' investigations.

Another possible resolution of the United States dilemma concerning the adequacy of school officials' investigation of sexual misconduct allegations might be to remove this function completely from the local level and to transfer it to the state department of education. All investigations would then become matters of professional responsibility and while parents would not necessarily have access to the names of all teachers charged with sexual misconduct, the identities of sanctioned teachers, including those who receive "letters of admonishment" or who enter into consent agreements would be public knowledge. At the very least, it would remove the wall of silence that *Bellevue* sanctions under its state privacy Act for all but the relatively few allegations of sexual misconduct where a finding of abuse has been made.

To remedy the South Africa situation, the following strong recommendations are made:

a.The fact-finding process after a complaint of sexual misconduct has been filed must be managed smartly.
b.Magistrates must undergo some form of in-service training to make them aware of the basic fact-finding errors they frequently commit at this level.
c.Respecting and protecting the human dignity of all people, including teachers, must take up the central role that the Constitution affords it.
d.Accused teachers must remain innocent until reliable evidence proves their guilt beyond a reasonable doubt.
e.A teacher's right to privacy must be weighed with careful consideration against the public's interest in maintaining schools free from sexual offences.

Only when these vital issues have been addressed will South African teachers experience the advancement of their human rights and freedoms.

Tacit choice of law in the Hague Principles on Choice of Law in International Contracts

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OPSOMMING

Stilswyende Regskeuse in die "Hague Principles on Choice of Law in International Contracts"

Die onderhawige artikel bevat die voorlegging wat insake stilswyende regskeuse aan die werkgroep gemoeid met die opstel van die *Hague Principles on Choice of Law in International Contracts* gemaak is. Aandag word aan die verskillende kriteria vir stilwyende regskeuse in verskeie internasionale instrumente en nasionale regstelsels bestee. Daar word aangevoer dat relatief streng vereistes vir 'n stilwyende regskeuse gestel moet word om regsonsekerheid en die omseiling van die objektiewe internasionaal-privaatregtelike norme te voorkom. Die prosedurele element wat in hierdie verband in sekere kodes gevind word, moet vermy word in die tersaaklike aanwysingsregtelike konteks. Die moontlike bronne vir 'n stilswyende regskeuse word bespreek en dit blyk dat die kontraktuele bedinge asook die omstandighede van die geval in hierdie verband 'n rol mag speel. Die outeurs doen aan die hand dat die keuse van 'n forum nie as sodanig 'n stilwyende regskeuse daarstel nie. Met inagneming van die voorafgaande ontleding, is sekere voorstelle oor 'n juiste formulering van die toets vir 'n stilwyende regskeuse gemaak. Daar word aangedui welke wysigings deur die werksgroep aangebring en op welke formulering voorlopig ooreengekom is. Die voorgestelde reël kan soos volg vertaal word: "'n Kontrak word beheers deur die regstelsel of regsreëls wat deur die partye gekies is. Die keuse of enige wysiging daarvan moet uitdruklik gemaak word of duidelik blyk uit die bedinge van die kontrak of uit die omstandighede. 'n Ooreenkoms tussen die partye om jurisdiksie aan 'n hof of arbitrasietribunaal in 'n sekere staat te verleen, kom nie as sodanig op 'n keuse van die reg van daardie staat neer nie."

1 Introduction

During 2009, the Hague Conference on Private International Law[1] appointed a working group to draft the provisionally so-called *Hague*

* Member of the working group drafting the Hague Principles on Choice of Law in International Contracts for the Hague Conference on Private International Law.

1 See http://www.hcch.net/.

Principles on Choice of Law in International Contracts.[2] The working group met twice, during January and November 2010, and has conditionally agreed on some of the provisions of the future instrument.

The purpose of the *Hague Principles* may be understood from the proposed preamble, which is partially inspired by the preamble to the UNIDROIT *Principles of International Commercial Contracts* of 2004.[3] In terms of the proposed preamble, the *Hague Principles* "may be applied by the courts[4] in disputes involving international commercial contracts and by arbitral tribunals in international commercial arbitration".[5] They may also be used "as a model for national, regional, supranational[6] and international instruments", "to interpret and supplement domestic private international law rules, as well as regional, supranational and international instruments" and, finally, "in the development of private international law rules by the courts and arbitral tribunals".[7]

The current article contains, in paragraphs 2–9, the proposals made to

2 See in general, *Bureau permanent de la Conférence de La Haye de droit international privé* (Pertegás, Radic *et al*) "Choix de la loi applicable aux contrats du commerce international: des principes de La Haye" 2010 1 *Revue critique de droit international privé* 83 (available at www.hcch.net/catalogue/i0035.pdf).

3 "These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like. They may be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments. They may be used to interpret or supplement domestic law. They may serve as a model for national and international legislators." The full text of the UNIDROIT *Principles* may be found at http://www.unidroit.org. The first edition appeared in 1994 and the third edition is expected to be approved by the governing council of UNIDROIT during 2011. No changes in the preamble are expected in the 2011 edition.

4 Although the courts are usually bound by the *lex fori*'s private international law, there are jurisdictions where the courts have wide-ranging powers of adopting the rules and principles of international instruments. See s 173 of the Constitution of the Republic of South Africa, 1996.

5 Commercial arbitral tribunals are often not bound by the *lex fori*'s private international law. See art 28(2) of the UNCITRAL *Model Law on International Commercial Arbitration* (1985/2006): "Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable."

6 The word "supranational" is used here to refer to instruments of regional or international organisations with binding legislative powers. The European Union would be the primary example. See Anderson *et al* (eds) *Collins English Dictionary* (2006) *sv* "supranational": "beyond the authority or jurisdiction of one national government". As an example, the editors indeed refer to "the supranational institutions of the EU".

7 The wording used here is based on the first author's proposal for a preamble to the Hague Principles, taking into account amendments proposed by Mr Andrew Dickinson and Prof Lauro Gama E Souza Jr and as accepted by the working group.

the working group in respect of tacit choice of law by the parties.[8] Paragraph 10 concludes the article with the commentary and the provisional formulation accepted by the working group.

2 General Principle of Party Autonomy; Express Choice of Law

The articulation of a test for a tacit choice of law depends on the accompanying formulation of the general principle of party autonomy and the specific rule for an express choice of law.

The first part of article 3(1) of the *Rome I Regulation* of 2008[9] reads: "A contract shall be governed by the law chosen by the parties." There seems to be no reason for the imperative form here. The *Hague Principles* should read in its corresponding provision: "A contract is governed by the law chosen[10] by the parties." If this formulation is accepted, the express choice of law may be referred to as follows: "The choice must be made expressly …"[11]

Instead of "must be made expressly", one could use "must be express"[12] or "must be expressed",[13] but "must be made expressly" is

8 The proposal was drafted by the first author of this article. It *inter alia* draws on research performed for the purposes of a report to the European Commission on the revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980) (hereinafter "the Rome Convention"), published as Neels and Fredericks "Revision of the Rome Convention on the Law Applicable to Contractual Obligations (1980): perspectives from international commercial and financial law" 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 (reprinted in 2006 *TSAR* 121).

9 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the *Law Applicable to Contractual Obligations* (hereinafter "the *Rome I Regulation*" or "*Rome I*").

10 An alternative for "chosen" would be "designated": see *eg* art 35(1) of the UNCITRAL *Arbitration Rules* (1976/2010). *See* art 8(2) of the protocol to the UNIDROIT *Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment* (Cape Town, 2001): "The parties to an agreement, or a contract of sale, or a related guarantee contract or subordination agreement may agree on the law which is to govern their contractual rights and obligations, wholly or in part."

11 See art 3(1) of the *Rome I Regulation*.

12 See art 7(1) of the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods (1986) (hereinafter "the 1986 Hague Convention"); art 7 of the Inter-American Convention on the Law Applicable to International Contracts (Mexico City, 1994) (hereinafter "the Mexico City Convention"); art 1(2) of the International Chamber of Commerce's *Draft Recommendation on the Law Applicable to International Contracts* of 1981 (see the appendix to Lando "Conflict-of-law rules for arbitrators" in Bernstein, Drobnig and Kötz (eds) *Festschrift für Konrad Zweigert zum 70.Geburtstag* (1981) 157 173-78); s 7(2) of the Oregon *Conflicts Law Applicable to Contracts*; art 34 of the Puerto Rico *Projet* (see Puerto Rican Academy of Legislation and Jurisprudence (reporters Symeonides and von Mehren) "*Projet* for the codification of Puerto Rican private international

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clearly the more elegant variation. Of course, if "shall" is used in the provision corresponding to the first part of article 3(1) of the *Rome I Regulation*, the word "shall" must also be employed in the reference to an express choice of law.

One should not refer to "an express clause" in this regard, as the *Convention sur la loi applicable aux ventes à caractère international d'objets mobiliers corporels*[14] does, as this implies the existence of a written contract and there is no reason why the Hague Principles should be limited to written contracts only.

3 No Explicit Reference to Tacit or Implied Choice of Law

A true or real choice of law which is not made expressly, is in some legal systems referred to as a tacit choice of law[15] and in others as an implied choice of law.[16] An explicit reference to implied or tacit choice[17] should therefore be avoided.

4 Level of Strictness of Criteria for a Tacit / Implied Choice of Law

The Rome Convention of 1980 requires the tacit or implied choice to be "demonstrated with reasonable certainty".[18] The Turkish *Private International Law Act of 2007* also uses the phrase "reasonable certainty"

law", appendix to Symeonides "Codifying choice of law for contracts: the Puerto Rico *Projet*" in Nafziger and Symeonides (eds) *Law and Justice in a Multistate World. Essays in honor of Arthur T von Mehren* (2002) 419 435-37).

13 See art 3(1) of the Rome Convention.

14 (The Hague, 1955) (hereinafter "the 1955 Hague Convention"). See art 2, second sentence: "Cette désignation doit faire l'objet d'une clause expresse, ou résulter indubitablement des dispositions du contrat."

15 See *eg* Forsyth *Private International Law. The Modern Roman-Dutch Law including the Jurisdiction of the High Courts* (2002) 303-04; Kropholler *Internationales Privatrecht* (2006) 460; Strikwerda *Inleiding tot het Nederlandse Internationaal Privaatrecht* (2008) 166; Sykes and Pryles *Australian Private International Law* (1991) 108 (but see Mortensen *Private International Law in Australia* (2006) 393-95).

16 See *eg* Collins (ed) *Dicey, Morris and Collins on the Conflict of Laws 2* (2006) 1573-77; Diwan and Diwan *Private International Law. Indian and English* (1998) 512-13; Pitel and Rafferty *Conflict of Laws* (2010) 274-75; Xiao and Long "Contractual party autonomy in Chinese private international law" 2009 *Yearbook of Private International Law* 193 198-99.

17 As found in art 6(1) of the Hague Convention on the Law Applicable to Trusts and on their Recognition (1985) and in art 25(1) of the South Korean *Private International Law Act of 2001*.

18 Art 3(1): "A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case…." *See* art 3111 of the

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in this regard.[19] However, the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 requires the tacit or implied choice to be "clearly demonstrated".[20] This much stricter test is also used in the Oregon *Conflicts Law Applicable to Contracts of 2001*,[21] the Puerto Rico *Projet*[22] and the *Rome I Regulation*.[23] Similar terminology is used in the Russian Civil Code of 2001.[24] The 1994 Mexico City Convention's provision that the tacit or implied agreement must be "evident"[25] and the provision in the International Chamber of Commerce's *Draft Recommendations on the Law Applicable to*

Quebec Civil Code of 2000: "L'acte juridique, qu'il présente ou non un élément d'extranéité, est régi par la loi désignée expressément dans l'acte ou dont la désignation résulte d'une façon certaine des dispositions de cet acte." Art 21(a) of the UN Convention on Independent Guarantees and Stand-by Letters of Credit (1995) merely uses the word "demonstrated".

19 Art 24(1): "Obligations arising from contracts shall be governed by the law explicitly chosen by the parties. Choice of law that may be understood with reasonable certainty from the provisions of the contract or the relevant circumstances shall also be valid" (translation in 2007 *Yearbook of Private International Law* 583). See art 25(1) of the South Korean *Private International Law Act*: "A contract shall be governed by the law expressly or impliedly chosen by the parties, provided that an implied choice may be acknowledged only when it is reasonable to do so in the light of the terms of the contract or the circumstances of the case" (translation in 2003 *Yearbook of Private International Law* 315).

20 Art 7(1): "A contract of sale is governed by the law chosen by the parties. The parties' agreement on this choice must be express or be clearly demonstrated by the terms of the contract and the conduct of the parties, viewed in their entirety…."

21 S 7(1): "[T]he contractual rights and duties of the parties are governed by the law or laws that the parties have chosen …"; s 7(2): "The choice of law must be express or clearly demonstrated from the terms of the contract …".

22 Art 34: "Contractual obligations are governed by the law or laws chosen for that purposes by the parties. The choice must be express or must be demonstrated clearly from the provisions of the contract or from the conduct of the parties…."

23 Art 3(1): "A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case…." It was suggested before that "clearly demonstrated" would be an improvement on "demonstrated with reasonable certainty" – see Neels and Fredericks 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 179. *See* art 2, second sentence of the 1955 Hague Convention; art 116(2) of the Swiss *Private International Law Act*: "Die Rechtswahl muss ausdrücklich sein oder sich eindeutig aus dem Vertrag oder aus den Umständen ergeben …"; art 3540 of the Louisiana *Civil Code* of 1991: "All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties …"; and art 3111 of the Quebec *Civil Code*.

24 Art 1210(2): "An agreement of parties as to the selection of law to be applicable shall be expressly stated or clearly ensue from the terms and conditions of the contract or the complex of circumstances of the case" (translation in 2002 *Yearbook of Private International Law* 349).

25 Art 7: "The contract shall be governed by the law chosen by the parties. The parties' agreement on selection must be express or, in the event that there is no express agreement, must be evident from the parties' behavior and from the clauses of the contract, considered as a whole …".

International Contracts of 1981 that the tacit or implied agreement "must appear clearly",[26] have approximately the same meaning. Alternatives on the same level would be "demonstrated with substantial certainty" or "demonstrated with considerable certainty".

A strict test for the existence of tacit or implied agreements is supported – to allow readily deduced tacit or implied agreements leads to unpredictability of decision and legal uncertainty and undermines the conflicts rule that applies in the absence of a choice of law.[27] It may therefore be considered to use an even stricter formulation than these in the examples cited, namely that the tacit or implied agreement must be "manifestly clear".

5 Procedural Element

The word "demonstrated" is used in various codes in formulating the criterion for a tacit or an implied choice. These include the Rome Convention,[28] the 1986 Hague Convention,[29] the Oregon *Conflicts Law Applicable to Contracts*,[30] the Puerto Rico *Projet*[31] and the *Rome I Regulation*.[32] However, the word "demonstrated" has a procedural connotation which does not seem warranted in a choice-of-law context. It is therefore suggested that the word "demonstrated" be avoided. One should rather use the phrases "evident from", "appear clearly from" or "manifestly clear from".

6 *Indiciae* of a Tacit / Implied Choice of Law

The existence of a tacit or an implied agreement may be inferred from various sources.[33] Some codes refer here to the provisions of the contract only.[34] Some refer to both the provisions (terms) of the contract[35] and the conduct or behaviour of the parties.[36] Some refer to the provisions of

26 Art 1(1): "The law chosen by the parties shall govern the contract …"; art 1(2): "The choice of law must be express or must appear clearly from any indications in the contract or from the behaviour of the parties."
27 Neels and Fredericks 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 179.
28 Art 3(1).
29 Art 7(1).
30 S 7.
31 Art 34.
32 Art 3(1).
33 See *eg* Nygh *Autonomy in International Contracts* (1999) 113-20.
34 Art 2 of the 1955 Hague Convention; sec 7 of the Orgeon *Conflicts Law Applicable to Contracts*; art 3111 of the Quebec *Civil Code*.
35 The Mexico City Convention uses the term "clauses of the contract" in art 7 but this limits the sources to a written contract. The ICC *Draft Recommendation on the Law Applicable to International Contracts* refers to "any indications in the contract" (art 1(2)).
36 Art 7(1) of the 1986 Hague Convention; art 1(2) of the ICC *Draft Recommendation on the Law Applicable to International Contracts*; art 7 of the Mexico City Convention; art 34 of the Puerto Rico *Projet*.

the contract and the circumstances (of the case).[37] There seems to be no reason to limit the source of a tacit or an implied choice of law to the provisions of the relevant contract without taking note of the circumstances of the case. The conduct of the parties is included in the phrase "the circumstances of the case". The reference should therefore be to both the provisions of the contract and the circumstances of the case.

The word "or" should be used to link the reference to the contractual provisions and the circumstances of the case in order to make it clear that a tacit or an implied choice may be inferred from either the contract or the specific circumstances.[38] For the same reason, phrases as "viewed in their entirety"[39] and "considered as a whole"[40] should be avoided.

7 Forum Selection

As courts and arbitral tribunals sometimes confuse choice of forum and choice of law, it may be useful to add a provision addressing the role of forum selection in determining a tacit or an implied choice of law.

According to the Mexico City Convention, "[s]election of a certain forum by the parties does not necessarily entail selection of the applicable law".[41] According to the Convention, forum selection on its own *may* therefore, depending on the particular circumstances, indicate a tacit or an implied choice of law.

According to recital 12 of the *Rome I Regulation*,

> [a]n agreement between the parties to confer on one or more courts or tribunals of a Member State exclusive jurisdiction to determine disputes under the contract should be one of the factors to be taken into account in determining whether a choice of law has been clearly demonstrated.

The reference to a member state is unexpected as *Rome I* also determines that a law specified by the Regulation shall be applied whether or not it is the law of a member state.[42] The recital, also unexpectedly, only refers to conferring *exclusive* jurisdiction as one of the relevant factors.

Choice of forum and choice of law are, in principle, separate issues. A forum may be chosen, for instance, for its neutrality or expertise and not

37 Art 3(1) of the Rome Convention; art 3(1) of the *Rome I Regulation*; art 24(1) of the Turkish *Private International Law Act*; art 25(1) of the South Korean *Private International Law Act*; art 1210(2) of the Russian *Civil Code*; art 116 of the Swiss *Private International Law Act*.

38 *Contra* art 7(1) of the 1986 Hague Convention and art 7 of the Mexico City Convention where the word "and" is employed.

39 Art 7(1) of the 1986 Hague Convention.

40 Art 7 of the Mexico City Convention.

41 Art 7.

42 Art 2.

for its domestic law.[43] The authors therefore agree with GEDIP[44] that a choice of forum should not on its own indicate the existence of a tacit or an implied choice of law.[45] Of course, conferring either exclusive or non-exclusive jurisdiction on a court or an arbitral tribunal may nevertheless be one of the factors to be taken into account to determine the existence of a tacit or an implied choice of law.

8 Consumer Protection and *Renvoi*

As the *Hague Principles* will deal with international commercial contracts only, the consumer protection provision in the Oregon *Conflicts Law Applicable to Contracts* does not seem to be necessary.[46] If *renvoi* is excluded by a general provision,[47] exclusion in this particular context, as was done in the 1955 Hague Convention,[48] is also superfluous.

9 Proposals

Taking all the above considerations into account, the following formulations, in order of preference, were proposed:

a. A contract is governed by the law chosen by the parties. The choice must be made expressly or be manifestly clear from the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

b. A contract is governed by the law chosen by the parties. The choice must be made expressly or appear clearly from the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

43 *See* Sykes and Pryles 116.

44 *Groupe européen de droit international privé* or the European Group for Private International Law (EGPIL): see http://www.gedip-egpil.eu/.

45 GEDIP "Third consolidated version of a proposal to amend articles 1, 3, 4, 5, 6, 7, 9, 10*bis*, 12 and 13 of the Rome Convention of 19 June 1980 on the Law Applicable to Contractual Obligations, and article 15 of Regulation 44/2001/EC (Brussels I)" (Vienna, 2003) www.gedip-egpil.eu/documents/gedip-documents-20vce.html: "In particular, the choice of a court or the courts of a given State shall not in itself be equivalent to a choice of the law of that State." *Contra* the traditional common-law position: see *eg* Collins 1575-76; See Nygh 116-18.

46 See the last sentence of s 7(2): "In a standard-form contract drafted primarily by only one of the parties, any choice of law must be express and conspicuous."

47 As was done in eg art 15 of the Rome Convention, art 15 of the 1986 Hague Convention, art 17 of the Mexico City Convention and art 20 of the *Rome I Regulation*.

48 See art 2, first sentence: "La vente est régie par la loi *interne* du pays désigné par les parties contractantes" (own italics).

c. A contract is governed by the law chosen by the parties. The choice must be made expressly or be evident from the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

d. A contract is governed by the law chosen by the parties. The choice must be made expressly or be clearly demonstrated by the provisions of the contract or the circumstances of the case. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.

10 Decisions of the Working Group

At the commencement of the discussion on the formulation of a criterion for implied or tacit choice of law, the following formulation of the principle of party autonomy had provisionally been agreed upon: "A contract is governed by the law chosen by the parties."

The working group was of the opinion that the formulation in paragraph 9.1 above (using the phrase "manifestly clear") is too strict. Members agreed that the word "demonstrated" in paragraph 9.4 has an inappropriate procedural connotation but argued that the same applies to "evident" in paragraph 9.3. Paragraph 9.2 was accordingly used as point of departure.

The working group deleted the words "of the case" to avoid the phrase being interpreted as referring to the specific dispute before the court or arbitral tribunal. The words "or any modification of the choice" were added after discussion of a related issue. The working group also added the phrase "or rules of law" after the almost unanimous decision that parties must be able to directly[49] choose non-state law to govern their contract,[50] for example the UNIDROIT Principles of International Commercial Contracts.[51] The principle in the last sentence of the proposed formulations was virtually undisputed.

The following rule was accordingly provisionally accepted to become part of the Hague Principles:

A contract is governed by the law or rules of law chosen by the parties. The choice or any modification thereof must be made expressly or appear clearly from the provisions of the contract or the circumstances. An agreement between the parties to confer jurisdiction on a court or an arbitral tribunal in

49 Ie not *via* incorporation by reference in terms of the proper law of the contract.

50 See for support of this view eg Neels and Fredericks 2004 1 *EUREDIA Revue européenne de droit bancaire et financier / European Banking and Financial Law Journal* 173 175-79.

51 *Idem* 178-79. The formulation is sufficiently wide as to include the choice of a religious or indigenous legal system.

a given state to determine disputes under the contract, is not in itself equivalent to a choice of the law of that state.[52]

52 The accepted version was edited by the current authors by substituting "thereof" for "of the choice" and by deleting a second "must" before the word "appear".

Judicial notice: Discrimination and disadvantage in the context of affirmative action in South African workplaces

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OPSOMMING

Geregtelike Kennisname: Diskriminasie en Benadeling in die Konteks van Regstellende Aksie

Die artikel ondersoek die vraag of onbillike diskriminasie en die gepaardgaande benadeling van sekere groepe in Suid-Afrika, bewys moet word en of die leerstuk van geregtelike kennisname voldoende is in die konteks van regstellende aksie. Die begrippe en terminologie in die Grondwet van die Republiek van Suid-Afrika, 1996, sowel as gewone wetgewing wat die Grondwet aanvul - die Wet op Gelyke Indiensneming 55 van 1998 en die Wet op die Bevordering van Gelykheid en Voorkoming van Onbillike Diskriminasie 4 van 2000 - word ontleed en uitgelê. Die artikel stel voor dat die land se geskiedenis van onbillike sistemiese diskriminasie gegrond op kolonialisme, apartheid en patriargale praktyke, so welbekend en berug is dat die leerstuk van geregtelike kennisname van toepassing is op regstellende aksie. Voorts, omdat sodanige geskiedenis, die tradisionele oorsake daarvan en uitwerking op swart persone en vroue breedvoerig en volledig gedokumenteer is, word aan die hand gedoen dat die toepassing van die leerstuk kan meehelp om sodanige persone te integreer in die Suid-Afrikaanse werkplek en breër samelewing. Hierdie benadering neem die huidige aspirasies en verwagtinge van die Suid-Afrikaanse bevolking in ag en maak 'n bydrae om die verlede te genees. So 'n benadering ondersteun verder die begrip van substantiewe gelykheid ('n groeps-gebaseerde begrip) en voldoen aan die Grondwet se waarde-gebasseerde metodologie van uitleg. Dit sal ook bydra tot die langtermyn doelwit om 'n nie-rassige en nie-seksistiese samelewing daar te stel. Dit is dus nie nodig om historiese diskriminasie en benadeling te bewys nie omdat sodanige diskriminasie en benadeling nie kontensieus is as 'n sosiale feit nie; dit is inteendeel 'n vraag van kennisname van die geskiedenis omdat dit wyd en volledig gedokumenteer is. Die saak van *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) wat verg dat benadeling in die konteks van regstellende aksie "aangetoon" moet word, word ondersteun slegs in soverre inligting voor die hof geplaas word by wyse van byvoorbeeld boeke en verslae. Indien dit nie gedoen word nie, kan die hof uit eie beweging geregtelik kennis neem van onbillike historiese diskriminasie en benadeling. Ten laaste, sou die opvoedkundige, sosiale en ander ekonomiese werklikhede met betrekking tot ras en geslag verander in Suid-Afrika, sal die toepassing van die leerstuk van geregtelike kennisname heroorweeg moet word. Dit sal ook die geval wees waar *nuwe* diskriminasie en benadeling voorkom en nie goed gedokumenteerd is nie.

1 Introduction

This article looks into the question of whether discrimination and its resultant disadvantage have to be proven or whether taking judicial notice thereof would be sufficient in the context of affirmative action in South African workplaces. In order to do this, it is necessary to explore the historical context against which affirmative action has been adopted in South Africa, to clarify terms and phrases used in the Constitution and to supplement the latter by ordinary legislation and Constitutional Court jurisprudence, all of which need to be interpreted. The only case on affirmative action to have reached the Constitutional Court will also be explored. Lastly, the concept of judicial notice will be investigated and applied to the concepts of discrimination and disadvantage.

2 Historical Overview

In South Africa, colonialist and apartheid laws, policies and practices – which were racist and patriarchal – provided for separate societies for blacks, whites, Indians and coloureds. Segregated land ownership, segregated, zoned living areas for the black urban population, and later, self-governing territories and homelands for the black rural population, pass laws for blacks, racial classification, the prohibition of marriage between whites and people of other races, separate and unequal education systems, health services and public amenities, and separate labour systems with job reservation for whites and wage differentiations between white and black and between the sexes, were at the order of the day.[1] Disabled people were kept dependant and discriminatory legislative provisions existed against them as well.[2]

This history of systemic discrimination and its resulting inequality and entrenched disadvantage for (a majority) blacks, coloureds and Indians,

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1 See the Native Land Act 27 of 1913; the Natives (Urban Areas) Act 21 of 1923, later the Natives (Urban Areas) Consolidation Act 25 of 1945; the Native Trust and Land Act 18 of 1936; the Group Areas Act 41 of 1950, later the Group Areas Act 77 of 1957; the Population Registration Act 30 of 1950; the Reservation of Separate Amenities Act 49 of 1953; the Prohibition of Mixed Marriages Act 55 of 1949; the Immorality Act 23 of 1957; the Promotion of Bantustan Self-government Act 46 of 1959 replaced by the National States Citizenship Act 26 of 1970; the Constitution of Bantu Homelands Act 21 of 1971; the Status of the Transkei Act 100 of 1976; the Status of Bophuthatswana Act 89 of 1977; the Status of Venda Act 107 of 1977; the Status of Ciskei Act 110 of 1981; the Native Labour Regulation Act 15 of 1911; the Black Labour Relations Regulation (Black Labour and Settlement of Disputes) Act 48 of 1953; the Black Labour (Settlement of Disputes) Amendment Act 59 of 1955; the Mines and Works Act 12 of 1911; the Wage Act 27 of 1956, later the Wage Act 44 of 1937, and still later the Wage Act 5 of 1957; the Public Service Act 54 of 1957, later the Public Service Act 111 of 1984; the Unemployment Insurance Act 53 of 1946, later the Unemployment Insurance Act 30 of 1966.

2 Thompson "Legislating Affirmative Action: Employment Equity and Lessons from Developed and Developing Countries" in Adams (ed) *Affirmative Action in a Democratic South Africa* (1993) 21 23.

women and the disabled, was (and still is) well-known – locally and internationally. Moreover, the country's history of colonialism and apartheid and its effects have been documented extensively, exhaustively and widely.[3]

Further, apartheid has been widely condemned. For example, the United Nations (UN) declared apartheid and its impact a "crime against humanity" and a negation of the UN Charter. Expressions of censure culminated in the adoption of the International Convention on the Suppression and Punishment of the Crimes of Apartheid in 1973 and the expulsion of South Africa from the UN and its agencies.[4]

3 Constitution

Only after many years of both international as well as national pressure, was a democratic constitutional order adopted, under which a commitment was made to achieving the objective of equality. The new Constitution[5] – forming the basis of the legal system of South Africa – incorporated a notion of substantive equality in its Bill of Rights.[6] This notion recognises that opportunities are determined by individuals' social and historical status, including race and gender, as part of a group

3 See Liebenberg (ed) *The Constitution of South Africa From a Gender Perspective* (1995); Butler *Democracy and Apartheid: Political Theory, Comparative Politics and the Modern South African State* (1998); Maylam *South Africa's Racial Past: The History and Historiography of Racism, Segregation, and Apartheid* (2001); Beck *The History of South Africa* (2000); Roberts *South Africa 194894: The Rise and Fall of Apartheid* (1996); Gann and Duignan (eds) *Colonialism in Africa, 18701960 , The History and Politics of Colonialism, 18701914* (1969); *The History and Politics of Colonialism, 19141960* (1970); Jacobs *Environment, Power, and Injustice: A South African History* (2003); Perry *Apartheid: A History* (1992); Coleman (ed) *A Crime against Humanity: Analysing the Repression of the Apartheid State*; Worden *The Making of Modern South Africa: Conquest, Segregation, and Apartheid* (2000); O'Regan "Addressing the Legacy of the Past: Equality in the South African Constitution" in Loenen and Rodrigues (eds) *Non-Discrimination Law: Comparative Perspectives* (1999) 13 14; Thompson (ed) *A History of South Africa* (2001); The Complete Wiehahn Report Parts 1-6 and the White Paper on each Part with Notes by Professor NE Wiehahn chaired by Professor NE Wiehahn (1982); International Labour Conference 73rd Session 1987 Special Report of the Director-General on the Application of the *Declaration concerning Action against Apartheid in South Africa* International Labour Organisation (1987); International Labour Conference 77th Session 1990 Special Report of the Director-General on the Application of the *Declaration concerning Action against Apartheid in South Africa and Namibia* International Labour Organisation (1990); International Labour Conference 79th Session 1992 Special Report of the Director-General on the *Application of the Declaration concerning Action against Apartheid in South Africa* International Labour Organisation (1992).

4 Preamble, Art 1 UN GA Res 3068 (XXVIII), 28 UN GAOR Supp (No 30) at 75, UN Doc A/9030 (1974), 1015 UNTS 243, entered into force 1976-07-18 in accordance with article XV.

5 Constitution of the Republic of South Africa, 1996.

6 *Idem* s 9.

or groups.[7] It acknowledges that discriminatory acts do not occur in isolation – they are part of patterns of behaviour towards groups, such as women and blacks – which results in "disadvantage" for such groups.[8] Such disadvantage may be of social, economic, political and/or educational nature.[9] The notion further holds that, as the prohibition of unfair discrimination is insufficient to achieve true equality, affirmative action measures are needed.[10] Such measures distribute social goods in a group-based way on the basis of, for example, race and sex, and seek to correct imbalances where factual inequalities and disadvantages exist. Affirmative action is thus a temporary means to promote equality.[11]

The Constitution in its preamble – an important source of interpretation in that it indicates the fundamental mischief it wants to remedy[12] – explicitly recognises the injustices of the South African people's past and sets out to heal the divisions of the past though it does not elaborate on these injustices and divisions.

To "recognise" means to "identify, acknowledge, accept, admit, realize, be aware of, be conscious of, appreciate, be cognisant of ..." To recognise the injustices of the past in the Constitution points to the significance thereof.

The Constitution further sets out to establish a society based on democratic values, social justice and human rights.[13] The achievement of equality, non-racism and non-sexism are founding values of the country.[14] The Bill of Rights affirms the values of human dignity, equality and freedom.[15] With regard to equality, it is stated that equality includes the full and equal enjoyment of all rights and freedoms.[16] In an endeavour to promote the achievement of equality, unfair discrimination

7 In contrast to formal equality which views individual ability and merit as the only relevant factors required to achieve success in society. See Fredman *Women and the Law* 1997 383; McGregor "The Nature of Affirmative Action: A Defence or a Right?" 2003 *SA Merc LJ* 421 422-23; De Waal and Currie *The Bill of Rights Handbook* (2005) 232-34; Du Toit et al *Labour Relations Law A Comprehensive Guide* (2006) 573-75; *Dudley v City of Cape Town* 2004 25 *ILJ* 305 (LC); *Dudley v City of Cape Town* 2008 29 *ILJ* 2685 (LAC).

8 Banton *Discrimination* (1994) 8.

9 Faundez *Affirmative Action: International Perspectives* (1994) 34.

10 Davis et al *Fundamental Rights in the Constitution: Commentary and Cases* (1997) 59; Adam "The Politics of Redress: South African Style Affirmative Action" (1997) *The Journal of Modern African Studies* 231 231-34; UNESC Prevention of Discrimination The Concept and Practice of Affirmative Action Final Report submitted by Mr Marc Bossuyt, Special Rapporteur, in accordance with Sub-Commission Resolution 1998/5 17 June 2002 par 33.

11 See the authorities cited in note 8 *supra* and note 35 *infra* for a further discussion on the nature of affirmative action.

12 See Du Plessis *Re-interpretation of Statutes* (2002) 118.

13 Preamble to the Constitution of the Republic of South Africa, 1996.

14 *Idem* s 1.

15 *Idem* s 7.

16 *Idem* s 9(2).

is prohibited on a non-exhaustive list of grounds[17] and provision is made for affirmative action through[18] "... legislative and other measures, designed to *protect or advance* persons, or categories of persons, *disadvantaged by unfair discrimination* ..." (own emphasis).

The Constitution thus authorises affirmative action in a broad manner. The beneficiaries of affirmative action measures are those persons, or categories of persons "disadvantaged by unfair discrimination." The *cause* of such disadvantage is clearly unfair discrimination, but neither the cause(s) nor the effects are further elaborated on in the Constitution itself. In other words, the Constitution does not offer a clearly articulated statement recognising the nature of disadvantage that needs to be remedied, neither does it specify the nature of the unfair discrimination (the grounds on which it has occurred) which have caused such disadvantage. Moreover, the Constitution is silent on proving disadvantage and/or its cause(s).[19]

Other laws are thus required to supplement and expand the basic constitutional framework. These laws must be interpreted as part of the broader constitutional legal basis.[20]

In this regard, the Constitution propagates a value-based methodology of interpretation and states that the values that underlie an open and democratic society, based on human dignity, equality and freedom, must be promoted.[21] When interpreting any legislation, the spirit, purport and objects of the Bill of Rights, must be promoted.[22]

Besides ordinary laws, the Constitutional Court, of course, also plays an important role in expanding and interpreting the Constitution.

3 1 Supplementing the Constitution

3 1 1 Ordinary legislation

3 1 1 1 *Introduction*

Ordinary legislation, such as the Promotion of Equality and Prevention of Unfair Discrimination Act[23] (PEPUDA) and the Employment Equity Act[24] (EEA) – both associated with the socio-economic transformation of the country – expand the basic constitutional framework and clarify the

17 *Idem* s 9(3). In other words, besides the listed grounds namely race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth, other analogous grounds may also exist.
18 *Idem* s 9(2).
19 *Idem* s 9(5). The Constitution does provide for a test in the context of proving a claim for unfair discrimination.
20 Bekink *Principles of South African Constitutional Law (A Student Handbook)* (2003) 107.
21 S 39(1)(a) of the Constitution of the Republic of South Africa, 1996.
22 *Idem* s 39(2).
23 4 of 2000.
24 55 of 1998.

nature of the injustices and divisions of the past, and the terms "disadvantage" and "unfair discrimination," as found in the Preamble and in section 9(2) of the Constitution respectively. Only these two acts will be discussed.

3 1 1 2 *Promotion of Equality and Prevention of Unfair Discrimination Act*

The PEPUDA, in a detailed manner, acknowledges the pain and suffering of a great majority of South African people and wants to eradicate social and economic inequalities which were generated by colonialism, apartheid and patriarchy.[25] It aims to promote *de jure* and *de facto* equality and equality in terms of outcomes.[26] It particularly mentions the advancement of[27]

> *historically disadvantaged individuals, communities and social groups* who were dispossessed of their land and resources, deprived of their human dignity and who continue to endure such consequences ... (own emphasis).

Its reach, however, goes wider than that of historically disadvantaged people in that it targets people disadvantaged by both *past* and *present* unfair discrimination.[28] As a guiding principle in the application of the Act, it states that the existence of systemic discrimination and inequalities must be *recognised* and *taken into account*, particularly in respect of[29]

> ... *race, gender and disability in all spheres of life* as a result of past and present unfair discrimination, brought about by *colonialism, the apartheid system and patriarchy* ... (own emphasis).

To recognise systemic discrimination and its resultant disadvantage for certain groups in legislation, carries a certain weight as the latter is generally viewed as an expression of the will of the people through their democratically elected representatives.

The Act places a duty and responsibility on the state, institutions performing public functions and all people to promote equality in respect of race, gender and disability.[30] Very importantly, it *prioritises* the promotion of equality in respect of these very same grounds.[31]

Unlike the Constitution then, the PEPUDA names the injustices and divisions of the past (in the Preamble of the Constitution) namely the unfairly discriminatory systems of colonialism, apartheid and patriarchy and the discriminatory grounds on which these systems were practised. It makes clear the wide reach of the disadvantage these systems have

25 Preamble PEPUDA. PEPUDA does not apply to any person to whom and to the extent to which EEA applies (s 5(3)).
26 S 1 PEPUDA.
27 *Idem* preamble.
28 *Idem* s 3(1).
29 *Idem* s 4(2).
30 *Idem* s 28(3)(a).
31 *Ibid*.

caused in respect of race, gender and disability, as extending to *all* spheres of life.

Similar to the Constitution, the PEPUDA is silent on proving "disadvantage," a test for "disadvantage" or its causes, in the context of affirmative action. However, the Act articulates in detail the past systems of colonialism, apartheid and patriarchy to have unfairly discriminated against and disadvantaged people on the basis of race, sex and disability.[32]

3 1 1 3 *Employment Equity Act*

The EEA,[33] similar to the PEPUDA, *recognises* in a fairly detailed manner that "as a result of *apartheid and other discriminatory laws and practices*" [34] (own emphasis), there are disparities in employment, occupation and income within the labour market. These disparities, it states, created pronounced disadvantages for black people, women, and people with disabilities[35] and those are the beneficiaries of affirmative action under the EEA.[36] In 2007, South African people of Chinese descent have been declared to fall within the ambit of the definition of "black people" for purposes of the EEA.[37]

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32 See par 3 1 1 1 *supra*.

33 The affirmative action provisions of the EEA apply to people from designated groups only (see ss 1 4(2)). The EEA aims "to achieve equity" in the workplace by implementing affirmative action measures to redress the disadvantages in employment experienced by designated groups in order to ensure their equitable representation in all occupational categories and levels in the workforce (s 2). The Act gives some definition of affirmative action measures as follows: "Affirmative action measures are ... designed to ensure that suitably qualified people from designated groups have equal employment opportunities and are equitably represented in all occupational categories and levels in the workforce of a designated employer" (s 15(1)). Affirmative action measures are thus a tool or a means to attain the end of "equitable representivity" in the workplace. It is part of a broader strategy in the effort to promote the achievement of equality as set out in the Constitution and it is a defence to unfair discrimination (s 6(2)(a)); Van Niekerk (ed) *Law@work* (2008) 135ff; 151ff). The Labour Court stated in *Dudley v City of Cape Town* 2004 25 *ILJ* 305 (LC); *Dudley v City of Cape Town* 2008 29 *ILJ* 2685 (LAC) that affirmative action does not provide an individual employee with a right to be appointed or promoted and cannot give rise to a claim of enforcement under chapter III of the EEA.

34 Preamble EEA.

35 *Idem* s 1 EEA. "Black people" is a generic term for Africans, Coloureds, and Indians, whereas "people with disabilities" connotes people with a long-term or recurring physical or mental impairment that substantially limits their prospects of entry into, or advancement in, employment.

36 *Idem* s 1 EEA.

37 *Chinese Association of South Africa v Minister of Labour* case no 59251/2007 (TPD). During the 18th and19th centuries large numbers of Chinese people were imported to work in mines in South Africa (Thompson *A History of South Africa* xxi). Before 1994, Chinese people were classified as "coloureds" but were not included under any of government's benefit programmes after 1994. This led to the Chinese Association of South Africa

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Again, to *recognise* unfair discrimination and its resultant disadvantage in legislation is important as legislation is generally viewed as an expression of the will of the people.

The EEA thus clearly articulates that the discriminatory system of apartheid (though it recognises that other such laws and practices also existed) basically caused economic disadvantage to blacks, women and the disabled in the workplace.

Similar to the Constitution, the EEA is silent on proving "disadvantage," a test for "disadvantage" or its causes, in the context of affirmative action.[38] However, the Act recognises and articulates in detail, the past system of apartheid to have unfairly discriminated against people on the basis of race, sex and disability. The Act also clearly articulates the resulting disadvantage of these systems on groups possessing these characteristics.

3 1 2 Constitutional Court Jurisprudence

3 1 2 1 *Clarifying Discrimination and Disadvantage*

The Constitutional Court has made clear that the achievement of equality goes to the bedrock of our constitutional architecture.[39] It also clarified the historical injustices of the past, the nature of disadvantage suffered, the discriminatory systems which have caused such disadvantage and the discriminatory grounds on which these systems had operated. In

lobbying for Chinese people to be classified as a designated group in terms of the EEA and to benefit from affirmative action measures. See eg Letter Chinese Association of South Africa to the Parliamentary Portfolio Committee on Labour to the Department of Labour [undated]. After public hearings by the Portfolio Committee it was recommended that an amendment to the EEA be drafted to ensure that South African citizens of Chinese descent would be recognised as historically disadvantaged (see Letter Parliamentary Portfolio Committee on Labour to Department of Labour dated 19 May 2004; Report of the Parliamentary Portfolio Committee on Labour on public hearings on employment equity held during May 2003 [undated]). After informal discussions between business, labour and government, it was, however, decided that the issue was of a political nature and could not be supported (see McGregor *The Application of Affirmative Action in Employment Law with specific reference to the Beneficiaries: A Comparative Study* unpublished LLD thesis UNISA [2005] 56). Since then the Chinese Association has brought a successful application to the (then) TPD for an order to declare Chinese people "disadvantaged." See also fn 36.

38 It is arguable that it may be inferred from this silence in the PEPUDA and the EEA that the legislator has not deemed it necessary for disadvantage and/or its causes to be shown in a historical context. Both laws, like the Constitution, provide for a test in the context of a claim for unfair discrimination (see ss 13 and 11 respectively).

39 See eg *Brink v Kitshoff* 1996 4 SA 197 (CC) par 40; *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) par 74; *Bel Porto School Governing Body v Premier, Western Cape* 2002 3 SA 265 (CC) par 6; *Satcwell v President of the Republic of South Africa* 2002 6 SA 1 (CC) par 17; *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 22.

interpreting the Constitution, the Constitutional Court emphasised historical racial discrimination as follows:[40]

> The policy of apartheid systematically discriminated against black people in *all aspects of social* life. ... [T]he most visible and most vicious pattern of discrimination has been racial ... . The deep scars of this appalling programme are still visible in our society (own emphasis).

And[41] "[o]ur Constitution recognises ... decades of systematic *racial discrimination* entrenched by the apartheid legal order ..." (own emphasis).

Moreover, the Constitutional Court recognised that disadvantage due to discrimination based on sex, though not as visible, or as widely condemned as discrimination on grounds of race, has nonetheless resulted in "... *deep* patterns of disadvantage" (own emphasis).[42]

Very importantly, the Court has further widened the scope of disadvantage beyond the abovementioned traditional or common disadvantage based on race and gender found in the country. It pointed out that, besides uneven race, class and gender attributes[43]

> ... there are *other* levels and forms of social differentiation and systemic under-privilege, which still persist. The Constitution enjoins us to dismantle them and to prevent the creation of *new* patterns of disadvantage (own emphasis).

The wording in the preamble and section 9(2) of the Constitution then primarily relates to disadvantage resulting from unfair discrimination on the grounds of race and sex, but it is not limited to these. It may include *other* or *new* disadvantage with an objective existence, caused by unfair discrimination. This may include discrimination on any of the listed grounds as set out in subsection 9(3) of the Constitution or on unspecified grounds.[44]

4 *Van Heerden* Case

The case of *Minister of Finance v Van Heerden*[45] is the only case on affirmative action that has reached the Constitutional Court so far, and since it revolved around a test for affirmative action, the Court touched on the notion of disadvantage.

The matter involved the rules of the Political Office-Bearers Pension Fund for members who entered Parliament after the new constitutional order, in terms of which three different categories of members with

40 *Brink v Kitshoff* 1996 4 SA 197 (CC) par 41.
41 *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism & others* 2004 4 SA 490 (CC) par 74.
42 *Brink v Kitshoff* 1996 4 SA 197 (CC) par 44.
43 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 27. See also *Hoffmann v SA Airways* 2000 21 *ILJ* 2357 (CC).
44 See par 3 *supra*.
45 2004 6 SA 121 (CC).

differentiated employer contributions (favouring new parliamentarians for a short period) were created. The applicants (the Minister of Finance and the Fund) successfully appealed against an order of the High Court which found that the rules of the Fund were unfairly discriminatory and unconstitutional.

The classification by the applicants of the Fund as an affirmative action measure[46] – though this was not fully argued – was accepted by a majority in the Constitutional Court. In essence, the court held that affirmative action measures that "properly fall" within the requirements of section 9(2) of the Constitution were not presumptively unfair and established a three-pronged rationality test to determine this: Do the measures target people or categories of people who had been disadvantaged by unfair discrimination; are such measures designed to protect or advance such people or categories of people; and do they promote the achievement of equality?[47]

This discussion focuses only on disadvantage as found in the context of the first leg of the three-pronged test. In this regard, the Court held that "[t]he beneficiaries [of affirmative action measures] must *be shown* to be disadvantaged by unfair discrimination" (own emphasis).[48]

The Court held that the measures of redress must favour a group or category designated in section 9(2), that is, people disadvantaged by unfair discrimination.[49] In this case, the Minister and the fund submitted that the differentiated contribution scheme was set up to promote the attainment of equality between previous pension fund members and new members who were in the past excluded from parliament on account of race and/or political affiliation. This objective they would advance by identifying separate indicators of need for increased pensions for new parliamentarians. On the facts, however, it was clear that not all new parliamentarians belonged to the class of people prejudiced by past disadvantage and unfair discrimination. It appears that the Court relied on the evidence led in the court *a quo*.[50]

However, an "overwhelming majority" of parliamentary members were excluded from parliamentary participation by past apartheid laws

46 *Idem*. See the minority judgements of Mokgoro J (paras 97; 98; 105) and Ngcobo J (par 108) who did not agree that the fund constituted an affirmative action measure.
47 *Idem* par 37.
48 *Idem* par 38.
49 *Ibid*.
50 *Idem*. See note 53 of the judgement where the Court referred to the "uncontested evidence" by an administrator of the fund before the High Court that the *overwhelming majority* of members of Parliament were excluded from parliamentary participation by past apartheid laws on account of race, political affiliation or belief, and were thus disadvantaged by unfair exclusion.

on account of race, political affiliation or belief.[51] The evidence that a small minority of people who had not been disadvantaged by apartheid but who also benefited from the differential pension contribution scheme was insufficient to undermine the legal efficacy of the scheme.[52] The court stated that it was often difficult, impractical or undesirable to devise an affirmative action scheme with "pure" differentiation demarcating precisely the targeted classes.[53] Within each scheme, there may be exceptional or hard cases, or windfall beneficiaries.[54]

5 Judicial Notice

The question whether a court should take judicial notice of a fact, is one of law and is decided by the court.[55] The South African law of evidence makes provision for this doctrine and allows a judicial officer to accept the truth of certain facts which are known to him or her, even though no evidence was led to prove these facts.[56] This may happen in two situations: where facts are so well-known so as not to be the subject of reasonable dispute, (that is, general knowledge which requires no

51 *Ibid*.
52 *Idem* par 39.
53 *Idem* par 40.
54 *Ibid*. Mokgoro J in a minority judgement did not find it necessary to decide the correctness of the test that the *majority* of members of a category must be people designated as disadvantaged by unfair discrimination (paras 86, 88, 89). She further pointed out that apartheid has categorised people and attached consequences to those categories and in accordance with a person's membership of a group (with no relevance to the circumstances of individuals). Recognising this she stated s 9(2) now allows for affirmative action measures which target "whole" categories of people to be advanced on the basis of membership of a group. In order to benefit from a measure enacted in terms of s 9(2) it is sufficient for a person to be a member of a group previously targeted by the apartheid state for unfair discrimination. On this understanding of s 9(2) she argued it is then clear that the state need not show that each individual member of the advanced group actually suffered past disadvantage, as long as an individual was part of a group targeted (paras 85-86). For arguments why individual members of a favoured category may benefit under affirmative action measures even though they have not been disadvantaged see also Dupper "In Defence of Affirmative Action" 2004 *SALJ* 187 204-05; McGregor "The concept of 'Disadvantage' and Affirmative Action" 2002 *SA Merc LJ* 808 812; *Auf der Heyde v University of Cape Town* 2000 8 BLLR 877 (LC); *Stoman v Minister of Safety & Security* 2002 23 *ILJ* 1020 (T). India, for example, and on the other hand, makes provision for this. Individual people who do not share the group characteristics of social, economic or educational backwardness among certain backward classes, the so-called "creamy layer," are not entitled to benefit under affirmative action measures.
55 Schwikkard and Van der Merwe *Principles of Evidence* (2009) 481-82.
56 *Idem* 481. Other possibilities in this regard include rebuttable presumptions and presumptions of fact. A rebuttable presumption is a rule of law compelling the provisional assumption of a fact (Zeffert, Paizes and Skeen *The South African Law of Evidence (formerly Hoffmann and Zeffert)* (2003) 170; Schwikkard and Van der Merwe 478-79).They are provisional in the sense that the assumption will stand unless it is destroyed by countervailing

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external evidence) or where facts can be readily ascertainable by accurate sources so that evidence to prove them would be completely unnecessary (or even absurd).[57] The reasons for the existence of the doctrine of judicial notice are twofold. First, it expedites cases in the sense that much time would be wasted if every fact which was not admitted had to be the subject of evidence.[58] Second, the doctrine tends to produce uniformity of decision on matters of fact (where a diversity of findings may sometimes be embarrassing).[59]

In some instances, a court may take judicial notice of some facts without any enquiry, that is, without consulting any specific source, whereas in other instances judicial notice may only take place with reference to a source of indisputable authority. The distinction between the two is that in the former instance, evidence may generally not be led to refute facts which have been properly noticed, while in the second instance, evidence may generally be led concerning the disputability or indisputability of the source.[60]

The former encompasses facts that are "reasonably known among reasonable informed and educated people".[61] This knowledge must be *notorious* and not the result of personal observation.[62] The letter entails facts which are not generally known but easily ascertainable from sources such as surveys of governmental or other reliable authority.[63]

The South African courts have used books to establish historical facts. This may be done at the court's own initiative, or the court may be referred to them.[64] In *Consolidated Diamond Mines of South West Africa v Administrator of South West Africa,*[65] the court stated that

> ... the early history of the Sperrgebiet, [in respect of exclusive prospecting and mining rights] closely bound up as it is with the establishment of German sovereignty in South-West Africa, is really a matter of *general historical knowledge of which the Court, ... might probably have informed itself from history books and have taken judicial cognisance* ... . We have indeed been referred by counsel to a book ... which is said to be of recognised historical

evidence. In other words a fact is presumed unless the contrary is proved by the party against whom the presumption operates (Zeffert, Paizes and Skeen 170-71). Presumptions of fact may be described as "merely frequently recurring examples of circumstantial evidence" or "a mere inference of probability which the court may draw if on all the evidence it appears to be appropriate" (Schwikkard and Van der Merwe 478-80; Zeffert, Paizes and Skeen 168-69). These presumptions appear to be less appropriate in the context of affirmative action because the South African history is notoriously known and has been documented well.

57 Schwikkard and Van der Merwe 479; Zeffert, Paizes and Skeen 715.
58 Schwikkard and Van der Merwe 480-81.
59 *Ibid.*
60 *Ibid.*
61 *Ibid.*
62 *Idem* 481.
63 *Idem* 479.
64 *Ibid.*
65 1958 4 SA 572 (AD) 609ff.

> accuracy. As, however, the relevant information has been put before us in affidavits filed on behalf of the appellant and the respondents do not deny the facts but merely dispute certain inferences and certain conclusions of law we are asked to draw of them, it is unnecessary for us to travel beyond the record (own emphasis).

The courts have also taken judicial notice of facts of a sociological character.[66] For example, in *Moller v Keimoes School Committee*[67] the Appellate Division took judicial notice of the early history of South Africa and of attitudes of early settlers on racial issues.

> As a matter of *public history,* we know that the first civilised legislators in South Africa came from Holland and regarded the aboriginal natives of the country as belonging to an inferior race, who the Dutch, as Europeans, were entitled to rule over, and whom they refused to admit to social or political equality. We also know that, while slavery existed, the slaves were blacks and that their descendants, who form a large proportion of the coloured races of South Africa, were never admitted to social equality with the so-called whites. Believing ... that intimacy with the black or yellow races would lower the whites without raising the supposed inferior races in the scale of civilisation, they condemned intermarriage or illicit intercourse between persons of the two races. ... the vast majority of Europeans have always condemned such unions, and have regarded the offspring of such unions as being in the same racial condition as their black parents ... these prepossessions, or, ... prejudices, have never died out, and are not less deeply rooted at the present day among the Europeans in South Africa, whether of Dutch or English or French descent (own emphasis).

Where the disadvantage of a particular group, or a mixed group, and/or its causes are truly contentious as social fact/s, that group's alleged disadvantage should not be accepted as a legal fact,[68] and the doctrine of judicial notice cannot be used in such circumstances. The same will be true for new disadvantage. Convincing evidence may have to be produced on the nature of such disadvantage and its causes simply because such new disadvantage and its causes may not be well-known or well-documented as yet and is unclear as a social fact.

6 Analysis

Flowing from the above, it is submitted that South Africa's history of past discrimination of colonialism, apartheid and patriarchy and its resultant disadvantage for certain groups are sufficiently notorious to form a proper subject for judicial notice: it is a matter of historical knowledge. Moreover, this history – its traditional or common causes and effects on blacks, women and the disabled in particular – have been documented extensively and widely in reputable books and reports.[69]

66 Zeffert, Paizes & Skeen 724.
67 1911 AD 635 643.
68 Peirce "A Progressive Interpretation of Subsection 15(2) of the Charter" 1993 *Saskatchewan LR* 263 288-95 from which ideas have been borrowed.
69 See note 3 *supra*.

It appears that the Constitution, in fact, paved the way for using the doctrine of judicial notice by recognising the injustices of the past. The PEPUDA and the EEA – which expand on the Constitution – have recognised this in greater detail by naming the discriminatory systems of colonialism, apartheid and patriarchy and the social and economic nature of the disadvantage it has caused for blacks, women and the disabled. It could never have been the intention of the legislator to require a showing of, or proving disadvantage, and/or its causes for these groups against the background of this notorious and well-documented history.

It appears true that is unnecessary and wasteful to prove historical discrimination, for this exacerbates conflict and division.[70] It focuses on the wrongs of the past and promotes an unhealthy social ethic, namely the endeavour to prove that one is a victim. Further, the author agrees that deeming blacks not to have suffered disadvantage unless they can prove the contrary, appears to be "fundamentally misplaced."[71] This is so because South Africa's past policy of apartheid has been branded as "a crime against humanity"[72] and its devastating effect on black communities has been documented so amply as to require no additional proof.[73] Another valid argument is that by proving disadvantage, it may be counterproductive to the present transforming society.

7 Conclusions

The fundamental mischief which the Constitution seeks to remedy in this regard is the previous, widely condemned, discriminatory system/s and their resultant entrenched disadvantage for certain groups. This it does by recognising the injustices of the past and setting out to heal the divisions of the past mentioned in the preamble of the Constitution.[74] The Constitution further broadly authorises affirmative action measures for people disadvantaged by unfair discrimination in section 9(2).[75] These provisions have been supplemented and expanded on in detail in ordinary legislation (the PEPUDA and the EEA) and by the Constitutional Court to mainly encompass traditional disadvantage caused by unfair discrimination based on the grounds of race, sex and disability, as practised by the systems of colonialism, apartheid and patriarchy, but also to include new disadvantage caused by unfair discrimination.[76]

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70 Rycroft "Obstacles to Employment Equity?: The Role of Judges and Arbitrators in the Interpretation and Implementation of Affirmative Action Policies" 1999 *ILJ* 1411 1423.

71 Du Toit "When does Affirmative Action in Favour of Certain Employees become Unfair Discrimination against Others?" paper presented at a conference on Equality – Theory and Practice in South Africa and Elsewhere at the University of Cape Town January 2001 1 13.

72 *Ibid*; par 3 *supra*.

73 *Ibid*.

74 See par 3 *supra*.

75 *Ibid*.

76 See paras 3 1 1 1 – 3 1 3; 3 1 2 1 *supra*.

Neither the Constitution, nor the PEPUDA or the EEA, have expanded on a requirement for proving disadvantage and its causes. In this regard it has been mooted that the country's history of past discrimination of colonialism, apartheid and patriarchy and its resultant disadvantage for specific groups are sufficiently notorious to form a proper subject for judicial notice: It is not contentious as a social fact – it is a matter of historical knowledge. Moreover, this history – its traditional or common causes and effects on blacks and women – has been extensively and widely documented.[77] Using the doctrine of judicial notice in this context is apposite where a majority black people and women, who have been unfairly discriminated against, disadvantaged and deprived of their dignity, must now be advanced and integrated[78] into the new South African order.

Such an approach will have regard to contemporary aspirations and expectations of the South African population[79] and will contribute to healing the divisions of the past, a vision expressed in the preamble to the Constitution.[80] It will also foster the notion of substantive equality – a group-based notion[81] – against the background of centuries of systemic racial discrimination and patriarchal subordination. Such a construction makes sense from an historical, socio-economic and legal perspective and complies with the Constitution's value-based interpretation methodology.[82] It will contribute to achieving the long term goal of a non-racial, non-sexist South African society in which each person will be recognised and treated as a human being of equal worth and dignity.[83]

In essence, it is not necessary to prove historical discrimination and disadvantage. The majority approach in the *Van Heerden* case that disadvantage must be "shown" is supported only in so far as information needs to be put before the courts by way of reference to books, reports and/or employment equity plans. If this is not done, the court may take judicial notice out of its own accord of unfair discrimination and disadvantage.

However, as educational, social and economic realities between the races, intra-racially and between the genders change in South Africa, the concept of judicial notice for these concepts will have to be revisited.

77 See note 3 *supra*.
78 See Dupper 2004 SALJ 187 214-215.
79 See *S v Gqozo* (2) 1994 1 BCLR 10 (Ck).
80 See par 3 *supra*.
81 See *S v Gqozo* (2) 1994 1 BCLR 10 (Ck).
82 See note 8 *supra*.
83 *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) par 44.

Host communities and competing applications for prospecting rights in terms of the Mineral and Petroleum Resources Development Act 28 of 2002

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OPSOMMING

Gasheer gemeenskappe en mededingende aansoeke vir prospekteerregte ingevolge die "Mineral and Petroleum Resources Development Act" 28 of 2002

Die verskillende bepalings van die "Mineral and Petroleum Resources Development Act" 28 of 2002 ("die wet") omtrent die toekenning van gewone prospekteerregte of 'n preferente regte om te prospekeer word in hierdie bydrae bespreek. 'n Gewone prospekteerreg word deur die Minister, by aansoek aan 'n applikant, toegeken indien aan die vereistes van artikel 17 van die Wet voldoen word. Artikel 104(1) van die Wet daarenteen maak voorsiening vir die aansoek deur en toekenning van 'n preferente propekteerreg aan 'n tradisionele gemeenskap (soos omskryf in die wet) om op gemeenskapgrond te prospekteer. Hierdie bepalings het die grondslag gevorm van 'n ongeraporteerde beslissing van die Transvaalse Afdeling van die Hooggeregshof in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd* (39808/2007 (TPD) (18-11-2008) Die beslissing het gehandel het oor die bepaling van regsvoorkeur by mededingende prospekteeraansoeke wat na mekaar ten aansien van die Bengwenyama tradisionele gemeenskapsgrond ingedien is. 'n Poging is in die saak aangewend om *ex post facto* die een prospekteeraansoek in te klee as 'n aansoek vir 'n preferente prospekteerreg deur die tradisionele gemeneenskap. Daar word geargumeenteer dat die hof se beslissing rakende die verskil en verhouding tussen die twee soorte prospekteerregte en die toepassing van die "first come, first served principle" ingevolge artikel 9(1)(b) Wet juis was. Daar word voorts aangevoer dat die feite van die *Bengwenyama Minerals* beslissing die tekortkoming van die huidige artikel 104 van die Wet, om die belange van 'n tradisionele gemeenskap te beskerm, aantoon indien iemand anders aansoek doen vir 'n gewone propekteerreg. Daar word ook uitgewys dat die voorgestelde 2008 wysigings van die Wet ook nie ver genoeg strek om deelname in prospektering en benutting van mineraalbronne deur 'n tradisionele gemeenskap te verseker nie. Die slotsom word bereik dat die huidige wetgewing dringend gewysig behoort te word om die belange van tradisionele gemeenskappe te beskerm.

> She is sitting there and smiling, especially at those who are 'more disadvantaged than others' (staring with rusted pans in their hands from shacks on the riverbanks). The Kliptonian transfer of mineral wealth to the people remains the biggest myth of them all.[1]

1 Introduction

The Mineral and Petroleum Resources Development Act 28 of 2002 (hereafter "MPRDA") has brought about a fundamental shift as regards the nature of rights to minerals (from common law to statutory law rights), the role of the state as (a) custodian of all minerals, (b) converter from old to new order mineral rights, and (c) being responsible for Black Economic Empowerment within the allocation of new order rights, and the granting of prospecting rights, preferential rights[2] to prospect, mining rights and mining permits. In this article, an overview is given of the relevant provisions of the MPRDA in section 2, with a specific focus on prospecting rights and preferential rights to prospect. These provisions formed the basis of the unreported decision of the Transvaal Provincial Division of the High Court of South Africa in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*[3] (hereafter "Bengwenyama decision"). The appeal in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) and others (Bengwenyama-ye-Maswazi Royal Council intervening)*[4] to the Supreme Court of Appeal failed because the court agreed with the decision and reasoning of the court *a quo*. Since the preparation of this article, the appeal was recently upheld by the Constitutional Court in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd*.[5] Due to the fact that the decisions of (a) the court *a quo* as confirmed by (b) the Supreme Court of Appeal are miles apart from the decision of the Constitutional Court, we are of the opinion that a 'reporting' and discussion of the unreported decision of the court *a quo* is warranted. A separate discussion of the decision in the Constitutional Court will in due course be submitted for publication. Our present discussion will thus mainly focus on the decision of the court *a quo* with brief reference to the decision of the Supreme Court of Appeal.

Section 3 of the article gives an overview of the facts, with specific reference to (subsequent) applications by two companies, their arguments, the manner in which the so-called priority provision in the MPRDA was interpreted by the court, the distinction between preferential rights to prospect and prospecting rights, and the nature of the right awarded to one of the companies. This is followed by a critical discussion of the case (section 4), the relevant provisions of the MPRDA and proposed further amendments to the current statutory framework in

1 From the sketch of the "Bridge on the river kwaito" in 2002 *Obiter* 250 280.
2 The term 'preferent right' is used in the MPRDA. Unless we quote from the statute or decision, the term 'preferential right' will rather be used.
3 39808/2007 (TPD) (Unreported 18-11-2008).
4 2010 3 All SA 577 (SCA) 29.
5 2010 ZACC 26.

order to safeguard the interests of communities occupying communal (traditional) areas (section 5) and the first come, first served principle (section 6). This is followed by the conclusion (section 7).

2 The Relevant Provisions of the MPRDA

The MPRDA provides, amongst others, for the equitable access to the nation's mineral and petroleum resources, as well as the sustainable development thereof. Rights to minerals are statutory rights created in terms of the MPRDA and should be distinguished from mineral rights which existed prior to the introduction of the MPRDA (i.e. common law rights to minerals).[6] These statutory rights to minerals are categorised into reconnaissance permissions, prospecting rights, permissions to remove minerals, mining rights and mining permits.[7] Prospecting rights and mining rights are statutory limited real rights,[8] whilst the other rights seem to be contractual in nature.[9]

In a mineral law system where rights to minerals are allocated by the state to applicants, allocation of rights may either take place on a first come, first served basis or on the basis of merit. In accordance with the MPRDA, applications for rights to minerals are dealt with on a first come, first served basis.

Section 9(1)(b) of the MPRDA provides for the process that has to be followed in the event that the Regional Manager receives more than one application for a prospecting right, a mining right or a mining permit in respect of the same mineral and land. Applications received on different dates must be dealt with in order of receipt. The processing of applications in order of receipt (the so-called "first come, first served principle") in terms of section 9(1)(b) is, however, subject to the exception that if more than one application in respect of the same mineral and land is received on the same day, such applications must be regarded as having been received at the same time.[10] However, section 9(2) stipulates that when the Minister of Minerals and Energy (hereafter "the Minister") considers applications that were received on the same date by the Regional Manager, the Minister must give preference to applications from historically disadvantaged persons.[11] There is a *lacuna*

6 See Badenhorst "Mineral Rights: 'Year Zero' cometh?" 2000 *Obiter* 119.
7 S 3(2).
8 S 5(1).
9 See, in general, Badenhorst "Nature of New Order Rights to Minerals: a Rubikian exercise since passing the Mayday Rubicon with a Cubic Circonium" 2005 *Obiter* 505.
10 s 9(1)(a).
11 s 9(2). The category of "historically disadvantaged persons" is defined in s 1 MPRDA and is (a) a person(s) or community disadvantaged by unfair discrimination before the present Constitution took effect; (b) an association of which the majority of its members are historically disadvantaged persons; or (c) a juristic person owned or controlled by historically disadvantaged

continued on next page

in the provisions of section 9, as the section does not determine how applications received on the same day from (a) applicants who all fit in the "historically disadvantaged persons" category, or (b) applicants none of whom fit in the "historically disadvantaged persons" category, must be dealt with.[12] Although section 9 also deals with applications for mining permits or mining rights, the discussion that follows will focus mainly on prospecting rights granted in terms of the MPRDA.

2 1 Prospecting Rights

A prospecting right[13] is a right granted by the Minister if the requirements of section 17(1) are met upon application in terms of section 16 of the MPRDA. These requirements are as follows: (a) the applicant must have access to financial resources and must have the technical ability to conduct the proposed prospecting operation optimally in accordance with the prospecting work programme; (b) the estimated expenditure must be compatible with the proposed prospecting operation and duration of the prospecting work programme; (c) the prospecting must not result in unacceptable pollution, ecological degradation or damage to the environment; (d) the applicant must have the ability to comply with the provisions of the Mine Health and Safety Act 29 of 1996; and (e) the applicant must not be in contravention of any relevant provision of the MPRDA. A prospecting right may be subject to stipulated terms and conditions and is valid for a specified period, which period may not exceed five years.[14] The Minister has delegated its power to grant or refuse an application for a prospecting right to the Deputy Director-General of Mineral Development.[15]

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persons. The deemed simultaneous receipt of applications by the Regional Manager is therefore tempered by s 9(2) which compels the Minister, when considering applications, to give preference to an application (included in the batch of "simultaneous applications") from an historically disadvantaged person.

12 Dale *et al South African Mineral and Petroleum Law* par 112.4. Applications which simultaneously comply with the initial requirements in Western Australia are resolved by resorting to a ballot system (see a 105A(3) of the Mining Act 1978). These so-called 'same time applications' happen if applications are lodged by mail or by courier delivery and two or more applications for the same land are by the same post or courier delivery (Hunt *Mining Law in Western Australia* (2009) 264). In *Hot Holdings v Creasy* (unreported WASC FC 27 September 1996 (cited by Hunt 264)) the Western Australian Supreme Court decided that the words "at the same time" do not mean "at precisely the same millisecond".

13 S 1 of the MPRDA defines "prospecting rights" as follows: "the right to prospect granted in terms of s 17 (1)". (All further references in this article to a "prospecting right" would be to such a prospecting right as applied for in the normal course of events).

14 S 17(6).

15 S 103(1) of the MPRDA; Delegation of Powers by the Minister of Minerals and Energy to Officers in the Department of Minerals and Energy of 12 May 2004. As to the delegation of powers in the MPRDA, see Badenhorst and Mostert *Mineral and Petroleum Law of South Africa* (2004) (Revision service 6) chapter 2.2.5.

2 2 Preferential Rights to Prospect or Mine

Apart from a prospecting right, section 104(1) of the MPRDA also provides for the granting of a "preferent right to prospect or mine". The term "preferent right" is not defined in the MPRDA and its content is unclear.[16] A community may apply for such a preferential prospecting right in respect of land which is registered or is to be registered in its name. A "community" is defined in section 1 of the MPRDA as "a coherent, social group of persons with interests or rights in a particular area of land which the members have or exercise communally in terms of an agreement, custom or law".

Section 104(2) provides that

> [t]he Minister must grant such a preferent right if the community can prove that-
>
> (a) the right shall be used to contribute towards the development and the social upliftment of the community concerned;
>
> (b) the community submits a development plan, indicating the manner in which such right is going to be exercised;
>
> (c) the envisaged benefits of the prospecting or mining project will accrue to the community in question; and
>
> (d) the community has access to technical and financial resources to exercise such right.

A preferential prospecting right is valid for five years and can be renewed for another five years.[17] The terms and conditions of the preferential prospecting right are determined by the Minister.[18] A preferential prospecting right may, however, not be granted in respect of land if another right to minerals has been granted in respect of such land.[19] The power to grant a preferential right prospecting right to a community has been retained by the Minister.

3 Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd[20]

The *Bengwenyama* decision *inter alia* dealt with competing applications for prospecting rights in terms of the MPRDA. An (unsuccessful) attempt was made by the applicants to *ex post facto* clothe their application as an application for a preferential prospecting right by the community. The applicants thereby purported to indicate that they acted in the interest of the community. The need to protect the interests of "communities" for

16 Dale *et al* par 489.2. (This preferential right to prospect in terms of the s 104 of the MPRDA will hereafter be referred as a preferential prospecting right in contradistinction from an ordinary prospecting right in 2.1 above).
17 S 104(3)(a).
18 S 104(3)(b).
19 S 104(4).
20 39808/2007 (TPD) (Unreported 18-11-2008).

purposes of the MPRDA (or so-called "host communities") on mining land has recently been highlighted by Nthai.[21] The court found that the community had submitted an application for a prospecting right (which resulted in the 'first come, first served principle' applying to their application) and not an application for a preferential prospecting right. This case is indicative of the insufficient protection of communities provided for by the MPRDA, notwithstanding the broad-based black economic empowerment (BBBEE) provisions of the MPRDA.[22] If a community is ill-advised to submit an application for a prospecting right (instead of an application for a preferential prospecting right), and that application competes with other applications submitted by non-community entities, the special provisions in section 104 of the MPRDA that favour communities do not apply. (The only other BBBEE provision favouring "applications from historically disadvantaged persons" is contained in section 9(2), which was not relevant to the case.)

3 1 The Parties to the Dispute

The first applicant is Bengwenyama Minerals (Pty) Ltd (hereafter "Bengwenyama Minerals"), a limited liability company. The second applicant is the Bengwenyama-ye-Maswati Tribal Council (hereafter "the Tribal Council") and the third to the fourteenth applicants are the trustees (for the time being) of the Bengwenyama-ye-Maswazi Trust (hereafter "the Trust").

A prospecting right was granted to the first respondent, Genorah Resources (Pty) Ltd (hereafter "Genorah"), in respect of the five farms.[23] The second to the fifth respondents are respectively the Minister, the Director-General of the Department of Minerals and Energy (hereafter "the Department"), the Regional Manager, Limpopo Region and the Deputy Director-General of the Department. The Court granted leave to the Bengwenyama-ye-Maswazi Royal Council (hereafter "the Royal Council") to intervene on behalf of the Bengwenyama-ye-Maswazi community.[24]

3 2 The Application for Prospecting Rights by Genorah Resources (Pty) Ltd

On 8 February 2006, Genorah applied to the Regional Manager for a prospecting right in respect of five adjoining farms (De Kom 252 KT, Eerstegeluk 327 KT, Garatouw 282 KT, Hoepakrantz 291 KT and Nooitverwacht 324 KT in the magisterial district of Sekhukhuneland, Limpopo Province) (hereafter "five farms").[25] The Regional Manager

21 "Host communities and mining projects in South Africa: Towards an equitable mineral regulation" 2009 *Obiter* 120.
22 See Badenhorst "Saving the pieces of the mineral law system: keeping the baby and the bathwater" 2003 *Obiter* 46; Badenhorst and Mostert *Mineral and Petroleum Law* chapter 23.4.
23 See par 3 2 of this article.
24 Par 2.
25 Par 6.3.

informed Genorah on 20 February 2006 that its application was accepted as it complied with section 16(2) of the MPRDA and that six copies of an environmental management plan had to be submitted by not later than 21 April 2006.[26] The Deputy Director-General signed an approval of the granting of the prospecting rights in favour of Genorah on 28 August 2006, and granted a power of attorney to the Regional Manager: Limpopo Region to sign the prospecting right in favour of Genorah in respect of the five farms.[27] The Regional Manager informed Genorah on 8 September 2006 that the Deputy Director-General had approved the granting of the prospecting right and that it had to be notarially executed within a period of sixty days.[28] The Regional Manager attended to the notarial execution of the granting of the prospecting right in respect of the five farms by the Minister to Genorah on 12 September 2006.[29] Genorah furnished financial guarantees in respect of the environmental rehabilitation of the mined areas on 15 September 2006.[30]

The Bengwenyama-ye-Maswazi community has been entitled to occupation of the farm Nooitverwacht for more than a century. The farm Eerstegeluk was still, in terms of Government Notice No. R 9 of the then Lebowa Government, defined to fall within the area of jurisdiction of Roka-Pasha Phokwane Local Government. According to the court, there was, however, a recommendation that these two farms had to be restored to the Bengwenyama-ye-Maswazi community.[31]

3 3 The Subsequent Application for Prospecting Rights by Bengwenyama Minerals

On 14 July 2006, Bengwenyama Minerals submitted its application for a prospecting right. The application form indicated Bengwenyama Minerals as the applicant for the rights.[32] The Regional Manager informed Bengwenyama Minerals by registered mail on 27 July 2006 that its application for a prospecting right had been accepted in terms of section 16 of the MPRDA. It was also informed that its environmental management plan was to be submitted by not later than 26 September 2006, and that there were five earlier applications with regard to the same minerals and the same land (one of which was the application of Genorah). Bengwenyama Minerals was further informed that its application was to be "processed in accordance with the provisions of Section 9 of the Act", which section deals with the order of processing applications.[33] During December 2006, Bengwenyama Minerals was advised that its application for a prospecting right had been refused.[34]

26 Par 6.4.
27 Par 6.8.
28 Par 6.9.
29 Par 6.10.
30 Par 6.12.
31 Par 6.1. It seems as though this recommendation did not have a bearing on the outcome of the case.
32 Par 6.6.
33 Par 6.7.
34 Par 6.13.

The attorney for Bengwenyama Minerals then addressed a letter to the Minister (dated 13 February 2007). In the letter, it was stated that Bengwenyama Minerals applied for a prospecting right in terms of section 16(1) of the MPRDA on 10 May 2006. Dealing with the merits of the competing application (Genorah's application) and relying on section 47 of the MPRDA,[35] Bengwenyama Minerals' attorney urged the Minister to cancel or suspend Genorah's prospecting right.[36] In a letter dated 9 March 2007, Bengwenyama Minerals (a) urged the Minister to uphold its "appeal" (against the award of the prospecting right to Genorah), (b) referred specifically to section 104 of the MPRDA (which provides for applications by communities for a preferential prospecting or mining right), and (c) stated that additional grounds that were relevant to their claim, had come to light.[37]

3 4 The Application for Review and Setting Aside of the Award of a Prospecting Right

An application was made to the court by Bengwenyama Minerals for the review and setting aside of the decision by the Minister in terms of section 17 of the MPRDA to award a prospecting right in respect of the farms Nooitverwacht and Eerstegeluk to Genorah during September 2006. Simultaneously Bengwenyama Minerals applied to the court for a directive that this prospecting right be awarded to it, or, alternatively, that its application for the right be considered.[38]

3 5 The Parties' Arguments

The Tribal Council and the trustees of the trust argued that they represented the Bengwenyama-ye-Maswazi community and, more specifically, that the community had decided to use Bengwenyama Minerals as a vehicle to exercise its mineral rights in terms of the MPRDA. They alleged that the Bengwenyama-ye-Maswazi community would benefit if Bengwenyama Minerals could obtain the prospecting rights. The applicants alleged that the position of Bengwenyama Minerals was different from that of Genorah. They maintained that Genorah had applied for the prospecting rights purely for its own gain. In addition, they argued that the community would be prejudiced if its own application were to be unsuccessful.[39]

The applicants further contended that Bengwenyama Minerals' application was brought in terms of section 104 of the MPRDA and that it was therefore entitled to preferential treatment in terms of the MPRDA. This contention was denied by all the respondents.[40]

35 S 47 deals with the Minister's power to suspend or cancel rights, permits and permissions.
36 Par 6.15.
37 Par 6.16.
38 Par 1.
39 Par 4.
40 Par 5.2

The validity of the granting of the prospecting right to Genorah was also attacked on the basis of Genorah's application not complying with the environmental and notice requirements of the MPRDA.[41] It was also alleged that Genorah did not comply with the requirements as set out in the MPRDA regarding consultations with the Bengwenyama-ye-Maswazi community.[42]

Genorah alleged that the deponents to Bengwenyama Minerals' founding affidavit and one of their confirmatory affidavits are promoters and directors of Bengwenyama Minerals. As a result, these individuals stand to benefit from the granting of the prospecting right to Bengwenyama Minerals. Their membership of the Tribal Council and community was also challenged by Genorah.[43]

These arguments led Hartzenberg J at the outset to state as follows:

> The issues become very intricate because of allegations and counter-allegations that it is not really the Bengwenyama community …. that stands to benefit directly from the grant of such rights but only three individuals who were involved in the orchestration of the competing applications for the relevant rights.[44]

It seems as if Hartzenberg J early on sensed that the community was not really involved. Therefore, a preferential community application was, in fact, not before the court.

3 6 The Court's Findings

Amongst the issues that the court had to consider were the priority dispute between Bengwenyama Minerals and Genorah, and the attack on the validity of the Minister's decision to award a prospecting right to Genorah, and the award itself.[45]

3 6 1 The Priority Dispute Between Bengwenyama Minerals and Genorah

Bengwenyama Minerals argued that their application was different to the section 16 application of Genorah, in that their section 16 application was in fact a community application which enjoyed the special protection provided by section 104 of the MPRDA.[46] Although not directly related to the decision and the *ratio decidendi* therefore, the court mentioned that the Bengwenyama-ye-Maswazi community satisfied the requirements of the section 1 MPRDA definition of a community and

41 Par 5.4.
42 Par 5.3.
43 Par 4.
44 Par 4.
45 The issues between the parties related to amongst others: the authority of the officials who took the decision and awarded the right; the consultation requirements of the MPRDA; the environmental requirements of the MPRDA, and the provisions in the Promotion of Access to Information Act 3 of 2000 regarding the time period applicable to reviews (see par. 5).
46 Par 7.

consequently that "the community's claim to the right to become owner of the properties and its interest in respect of the possible exploitation of the mineral rights" were undisputed.[47]

3 6 2 The Difference Between Preferential Rights and Prospecting Rights

The court drew a clear distinction between a section 16 MPRDA application for a prospecting right and a section 104 MPRDA application for a preferential prospecting right, and stated that:

(a) Any person can apply for a prospecting right,[48] whilst a preferential prospecting right is only granted to a community.[49]

(b) The application for a prospecting right must be lodged at the office of (and directed to) the Regional Manager,[50] whilst an application by a community for a preferential prospecting right has to be lodged directly with the Minister.[51]

(c) The requirements for the granting of the respective rights differ[52] For instance:

(i) it is not necessary for the grantee of a prospecting right to show that its operation will contribute towards the development and social upliftment of the community, although it must submit an environmental management plan and indicate compliance with the Mine Health and Safety Act 29 of 1996;[53]

(ii) it is not necessary for a grantee of a preferential prospecting right to address the impact on the environment or compliance with the Mine Health and Safety Act 29 of 1996, but it must show that its operation will contribute towards the development and social upliftment of the community.[54]

(d) Although both rights can be granted for a maximum period of five years, a prospecting right is renewable once for three years,[55] whilst a preferential prospecting right can be renewed for further periods not exceeding five years;[56]

(e) Unlike a prospecting right, the MPRDA does not provide for a delegation of ministerial powers to grant a preferential prospecting right.[57]

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47 Par 6.2.
48 Par 8.
49 Par 9.
50 Paras 8 and 10.
51 Paras 9 and 10.
52 The requirements are set out in part 1 above and in paras 8 and 9 of the decision.
53 Par 10.
54 Par 10.
55 Ss 17(6) and 18(4). S 17 deals with the granting and duration of prospecting rights and s 18 deals with the application for renewal of prospecting rights.
56 S 104(3)(a). In par 9 the court states that the maximum period of renewal is five years ("can be renewed for a further maximum period of five years"). The court did not explicitly pronounce whether s 104(3) provides for successive renewal periods of a maximum of five years each, or only for a renewal or renewals that, in total, do not exceed five years.
57 Par 10.

This clear distinction between the two forms of application assisted the court in its eventual finding that Bengwenyama's application was not an application for a preferential prospecting right. The distinction drawn forms the crux of the decision by the court *a quo*.

The rationale behind the recognition by the legislature of a preferential prospecting right is stated as follows by the court:

> It seems as if the Legislature wanted to give some sort of preference to communities who live on land underlain by minerals, in the sense that if they can arrange for the exploration of the minerals in a way where they can benefit from it, they must be given the right to do so. Where they can persuade the Minister that they will be able to do so, in the not so distant future, section 104 empowers the Minister to protect their right to apply for a prospecting right for a period of time so that they can get their ducks in a row.[58]

The court explained that in the case of a community, section 104 of the MPRDA creates the opportunity to obtain a preferential prospecting right. If a preferential prospecting right is granted, the applications of other would-be applicants may not be considered before (a) the community has had an opportunity to arrange for the necessary financial assistance to prospect and mine for the minerals or (b) until it becomes clear that the community will not or cannot succeed with an application for the granting of a prospecting right.[59] According to the court, the granting of ministerial preference to the community does, however, not exempt the community from eventually submitting an application for a prospecting right and complying with the requirements of section 17(1) of the MPRDA before the community will actually be allowed to prospect.[60] Hartzenberg J held that:

> I do not believe that the Legislature had in mind that communities, exploring the minerals on the land on which they live, were to be exempt from the duty to protect the environment or to mine without complying with the requirements of the Mine Health and Safety Act.[61]

The court found that Bengwenyama Minerals' application was "definitely not an application for a preferential right" to prospect; "[i]t was an out-and-out application for a prospecting right".[62] As indicated before, this flows from the court's clear distinction between the two forms of applications. The court reasoned that it was understood by the Department as application for a prospecting right. When Bengwenyama Minerals was asked to submit an environmental management programme (as required by section 16 MPRDA), it did so.[63] The reliance on section 104 was only an "afterthought" to have come to the attention of Bengwenyama Minerals after it had learned that Genorah's section 16

58 Par 10.
59 Par 29.
60 Par 10.
61 Par 10.
62 Par 11.
63 Par 11.

MPRDA application for a prospecting right had been granted.[64] The court accordingly found that Genorah's application preceded Bengwenyama Minerals' application, and that, in terms of section 9 of the MPRDA, Genorah's application had to be dealt with before the application by Bengwenyama Minerals (according to the first come, first served principle).[65]

In light of the court's finding that the application of Bengwenyama Minerals was not a community application for a preferential prospecting right, the question of intervention by the Royal Council on behalf of the community (to show that neither application was for the benefit of the community) became academic.[66] Hartzenberg J explained that

> [i]t makes no difference whether the Kgosi supports the applicant or the first respondent or whether the fact that the Kgosi supports the one side or the other is conclusive of the question of where the support of the community lies. Likewise it is not relevant whether the Tribal Council has become defunct or whether the application to intervene could be brought in the name of the Royal Council without the active support of the Kgosi. It is also not necessary to decide whether the community will be better off if the first applicant mines the minerals and Maphanga and Mhlungu and the trust have an interest in the first applicant or whether the Genorah mines the minerals and Mhpahlele has an interest in Genorah.[67]

3 6 3 The Validity of the Prospecting Right Granted to Genorah

As part of its attack on the validity of (a) the decision by the Minister to award the prospecting right to Genorah, and (b) the award itself, it was alleged by Bengewenyama Minerals that there was no strict compliance by Genorah with the following sections of the MPRDA:

> (a) Section 39 of the MPRDA, in that the environmental management plan was only approved by the Department a number of months after the approval of the application for a prospecting right and Genorah did not pay the necessary moneys on the time prescribed by the MPRDA.[68]
>
> (b) Section 10 of the MPRDA, in that there was no proper notice to, and calling upon, interested and affected parties to submit comments within 30 days.[69]
>
> (c) Section 16(4)(b) of the MPRDA, in that there was no proper notification to, and consultation with, the community (as lawful occupier).[70]

At issue was whether strict compliance with the above provisions of the MPRDA is required. According to the court, the question is whether the legislature intended the provisions to be strictly complied with or not. It was suggested that regard must be had to the scope and object of the

64 Par 11.
65 Par 11.
66 Pars 12-13.
67 Par 13. See also par 49.1.
68 Pars 27 and 35.
69 Pars 27 and 37.
70 Pars 27 and 37.

MPRDA as a whole. A further enquiry was whether what was done, constituted compliance with the MPRDA.[71]

The court listed the objectives of the MPRDA and stated that the emphasis seemed to be on a system that awards mineral rights to entities that could and would be able to exploit the minerals for the benefit of the nation.[72] The court drew a distinction between actions by the Department that strictly need to be complied with (such as the sequence of applications), and other actions by the Department which are less mandatory (such as adherence to environmental requirements or consultations with interested parties).[73]

Even though the court regarded it as essential that the Department took proper steps to protect the environment[74] as far as possible by requiring an environmental impact assessment and the submission of an environmental management plan,[75] it held that the scheme of the MPRDA did not indicate that an environmental management plan, once approved, was cast in stone.[76] The measures related to protection of the environment are not static, because amendments to an environmental management plan are possible before and even after its approval.[77] Insofar as the granting of a prospecting right only becomes effective on the date on which the environmental management plan is approved, the legislature contemplated approval of the environmental management plan after approval of the application.[78] According to the court, non-compliance with the provision that the environmental management plan must be approved within 120 days will not automatically invalidate the approval of such plan outside said period. Genorah did submit its environmental management plan timeously and it was, in fact, the Department that approved the plan outside the 120 day period. The late approval by the Department was found not to have invalidated the granting of the prospecting right to Genorah. In addition, the late payment of fees did not vitiate the decision to grant and the granting of the prospecting right.[79]

In the view of the court, notice to interested parties and consultation may not be possible in certain circumstances. Section 105 of the MPRDA contemplates the situation where the landowner or lawful occupier cannot be traced. In such a case, it is unlikely that meaningful consultation can take place. In addition thereto, there may be circumstances where the registered owner is not really the interested

71 Par 28.
72 Par 28.
73 Par 30.
74 The court's reference to ecology is unfortunate. It would be impossible to "protect the ecology" in the strict sense of the word.
75 Par 35.
76 Par 36.
77 Par 36.
78 Par 36.
79 Par 36.

party (i.e. when the property had been sold but not yet transferred, or when a community is not yet the registered owner but has a *spes* to become the landowner as a result of a land claim).[80]

According to the court, the provisions of section 16(4) MPRDA are such that, if it is clear that there was communication between the applicant for a prospecting right and the landowner, and the landowner was aware of the applicant's intention to apply for a prospecting right, it is sufficient to constitute compliance with the provisions thereof. The court found that the landowner or occupier does not necessarily have to support the applicant's application.[81]

The court stated that, in respect of the farms Nooitverwacht (which is the property of the community) and Eerstegeluk (which lies within the area of jurisdiction of the Rhoka-Phasha Phokwane Local Government), there was compliance with the section 16(4) community consultation requirement in that the visit by Genorah to kgosi Nkosi and the Ga Phasha Tribal Authority, the community was made aware of Genorah's intention to apply for a prospecting right.[82]

According to the court, section 10 of the MPRDA does not prescribe a hearing simply because the community objected to the application. The court reasoned that section 10(2) provides for a referral to the Regional Mining Development and Environmental Committee in the case of an objection.[83] The object of section 10, according to the court, is to give interested parties notice about pending applications.[84] After examining the conflicting facts,[85] the court accepted that the section 10(1) MPRDA (read with regulation 3(3)(b)) notice was received and displayed by the magistrate[86] and that Bengwenyama Minerals was aware of the application.[87] To what extent the community was aware of the different applications is not clear from the judgment. It must, however, be borne in mind that Bengwenyama Minerals purported to have acted on behalf of the community by arguing that its application was a preferential community application.[88]

The court concluded that Genorah, in the ordinary course of events, openly brought its application for a prospecting right, as it was entitled to do. There were a number of other section 16 MPRDA applications, received by the Regional Manager after the one by Genorah. The application for a prospecting right by Bengwenyama Minerals was well down the line. The court held that it did not detect any improper conduct

80 Par 37.
81 Par 37.
82 Par 38.
83 Par 39.
84 Par 47.
85 Pars 41-46.
86 Par 46.
87 Par 47.
88 Par 49.1.

by either the Department or by Genorah and was satisfied that the granting of the rights by the Minister to Genorah was regular and that it would be wrong to set it aside.[89] The application was accordingly dismissed by the court.[90]

The Court correctly found that a different outcome to the decision would in any event not have made a difference to the members of the Bengwenyama-ye-Maswati community as such. In the words of Hartzenberg J:

> I am far from convinced that the position of individual members will be much different whether the exploitation of the minerals is done by Genorah as supported by Mr. Mphalele or by the first applicant as supported by Mr. Maphanga and Mr. Mhlungu. Individual members are prejudiced by this litigation, in that the actual mining and development are delayed.[91]

4 Commentary

The correctness of the decision by Hartzenberg J cannot be faulted. On appeal to the Supreme Court of Appeal in *Bengwenyama Minerals (Pty) Ltd v Genorah Resources (Pty) Ltd (formerly Tropical Paradise 427 (Pty) Ltd) and others (Bengwenyama-ye-Maswazi Royal Council intervening)*[92] it was confirmed that the court *a quo* correctly found that Bengwenyama Minerals' application did not constitute a community application for a preferential prospecting right.[93] The facts in this case illustrate the problems in applying section 104 of the MPRDA to a community who wishes to exploit its minerals. This may be due to one or more of the following general reasons, namely:

(a) The fact that a community may not be sufficiently informed and/or prepared to even bring a community application for a preferential prospecting right to the Minister;

(b) The non-existence or dysfunctionality of structures to represent the community (both as regards the lodging of an application and the entity to be consulted);

(c) Time constraints with regard to the creation of effective community structures;

(d) The representation of the community by individuals or groups who are not appropriately mandated or who are not part of the community;

(e) The provision of inappropriate legal and other advice to the community;

(f) The lack of funds on the part of the community;[94] and

89 Par 48.
90 Par 50.
91 Par 49.
92 [2010] 3 All SA 577 (SCA) 29.
93 Paras 15, 16, 18 and 34.
94 Par 13.

(g) The likelihood of the formal section 9(1) MPRDA submission of an application for a prospecting right by an individual applicant or applicants, whilst the community is still in the process of formulating its:

(i) section 104 community application for a preferential prospecting right to prospect or mine, or

(ii) section 9(1)(b) community application for a prospecting right.

The compliance by Genorah with the section 16(4)(b) notification and consultation with the land owner or lawful occupier was deemed by the court to have been sufficient. The MPRDA does not contain a minimum standard for sufficient consultation. The question arises whether the method and minimum content of such consultation, and the range of community governance entities to be consulted, should not be determined by means of subordinate legislation by the Minister. This would facilitate the realisation of the objects of the MPRDA, and specifically section 2(d), to:

substantially and meaningfully expand opportunities for historically disadvantaged persons, including women, to enter the mineral and petroleum industries and to benefit from the exploitation of the nation's mineral and petroleum resources.

The route of acquiring a section 104 community preferential prospecting right will be of no avail to a community if another party has submitted and been awarded a prospecting right. The intention of the legislature with regard to the granting of preferential prospecting rights is presumably to give the community preference if it applies before, or at the same time as, another party for the same right to prospect on the same land (provided it fulfils the requirements of the MPRDA).[95] This is unfortunately not stated explicitly in the MPRDA, and should by means of amendment legislation, be clearly indicated.

If the preferential prospecting right has been granted by the Minister, the 'first come, first served principle' contained in section 9(1) may not be applicable if such community subsequently applies for a (follow-up) prospecting right in terms of section 16.[96] In paragraph 10 of the judgement in the *Bengwenyama* case, the court made it clear that section 104 aims to protect a community's right to apply for a prospecting right for a specified period of time. This gives the community the opportunity to "get their ducks in a row". For a community's subsequent application for a prospecting right, the requirements of section 17(1) of the MPRDA must still be met. In particular, the applicant community has to satisfy the Minister that, amongst others, the prospecting will protect the environment and will comply with the provisions of the Mine Health and Safety Act 29 of 1996. Section 17(1) of the MPRDA does not provide for a less onerous standard of prescribed compliance with environmental and health and safety measures in terms of the MPRDA in the case of a

95 Dale *et al* par 489.
96 Dale *et al* par 489.

community being the applicant or when politically convenient.[97] (Although section 106(1) MPRDA empowers the Minister to exempt any organ of state from the provisions of, among others, section 16, compliance with section 17 cannot be exempted; in addition, an environmental management programme must in all cases be submitted by such an exempted organ of state).[98]

5 Proposed Amendments to the MPRDA

5 1 The Mineral and Petroleum Resources Development Amendment Act 49 of 2008

The Mineral and Petroleum Resources Development Amendment Act 49 of 2008 (hereafter "the Amendment Act") contains a number of important amendments as regards issues pertaining to communities and applications for preferential prospecting rights. The commencement date of the Amendment Act has not yet been promulgated.

A "community" is defined in section 1. According to the Amendment Act, a community is defined as:

> a group of historically disadvantaged persons with interest or rights in a particular area of land on which the members have or exercise communal rights in terms of an agreement, custom or law: Provided that, where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part

97 See in general Badenhorst and Du Toit "The Mineral Development Draft Bill, 2000 and the Environment" 2002 *Stell LR* 22 48-49. A more recent example of the Department treating a mining company in the words of George Orwell as "more equal than others" can be mentioned in passing. The Minister has in terms of s 106(1) MPRDA exempted the state owned African Exploration Mining Finance Corporation from the provisions of applying for a: (a) prospecting right, (b) right to remove minerals, (c) mining right or (d) mining permit (ss 16, 20, 22 and 27 respectively). (GN 1081 *Government Gazette* 31485 of 2008-10-10). This has led to an outcry by the organised mining industry as being a negation of the principle of equality before the law (Creamer "South Africa's State mining company gazetting 'concerning'–Chamber" (http://www.miningweekly.com/article/south-africas-state-mining-company-gazetting-concerning-chamber-2008-10-16) (accessed on 2009-11-18)) and withdrawal of the exemption by the department (GN 1081 in GG 34115 of 2011-03-14). The exemption also seems *ultra vires* the powers of the Minister in terms of s 106(1) MPRDA insofar as exemptions of state organs from compliance with application requirements are intended for such organs being involved in building of roads or construction of dams (and purposes related to such activities) but not the mining industry.

98 S 106(2). See the 2008 Amendment Act which, after commencement, will substitute the current s 106(2) MPRDA with the following:
"Despite subsection (1), the organ of state so exempted must submit relevant environmental reports required in terms of Chapter 5 of the National Environmental Management Act, 1998, to obtain an environmental authorisation."

> of the community directly affect (*sic*) by mining on land occupied by such members or part of the community.[99]

The 2008 definition differs from the previous (2002) definition in that the 2002 notion of a "coherent, social group of persons" is replaced in the Amendment Act with the notion of a "group of historically disadvantaged persons". The last-mentioned concept is therefore linked to the definition of a "historically disadvantaged person" in section 1 of the MPRDA (which has, except for (c) juristic person, not been amended). In order for a group of persons to qualify as a community, the requirements of the section 1 definition of a "historically disadvantaged person" will have to be met. These requirements are:

> (a) any person, category of persons or community, disadvantaged by unfair discrimination before the Constitution took effect;
>
> (b) any association, a majority of whose members are persons contemplated in paragraph (a);
>
> (c) any juristic person other than an association, in which persons contemplated in paragraph (a) own and control a majority of the issued capital or members' interest and are able to control a majority of the members' votes.

Paragraph (c) of the new definition of "juristic person", for purposes of "historically disadvantaged person", states as follows:

> 'historically disadvantaged persons' - para. (c)
>
> a juristic person, other than an association, which-
>
> (i) is managed and controlled by a person contemplated in paragraph (a) and that the persons collectively or as a group own and control a majority of the issued share capital or members' interest, and are able to control the majority of the members' vote; or
>
> (ii) is a subsidiary, as defined in section 1 (e) of the Companies Act, 1973, as a juristic person who is a historically disadvantaged person by virtue of the provisions of paragraph (c)(i).

In short, only a "group of historically disadvantaged persons" will be able to constitute a "community" for purposes of the (amended) MPRDA. This could mean that juristic persons (like Bengwenyama Minerals) could also qualify as a community if its shareholders and the juristic person are seen as a group. This may result in the exclusion of the true community, or the exclusion of the majority of the members of a community. A further amendment to the legislation should clarify this by determining that a certain minimum percentage of the adult members of a community either support the application, or are members of the juristic person that submits the application.

The proviso to the new definition of a "community" which forms part

99 The term "community" is amended and defined in s 1 of the Amendment Act.

of the new (2008) definition,[100] narrows the definition of "community" - for purposes of section 1 ("community") and section 16(4)(b) for purposes of section 1 ("community") negotiations or consultations and section 16(4)(b) consultations - to consist only of community members who are occupying land and are directly affected by mining. As a result, the bypassing of such community members during negotiations or consultations, as was the case in the *Bengwenyama* decision, would be more difficult in future. However, it is suggested that the subordinate legislation envisaged in the 2008 version of section 16(4)(b) should provide a clear framework on how this group of community members is defined. In addition, the rights of other community members not directly affected by the proposed mining operation (as well as of those who do not occupy any part of the land concerned, e.g. where a restitution beneficiary community has resolved not to occupy the restored land and has transferred the exclusive occupation and use to a strategic partner in terms of a business arrangement), need to be addressed by means of an appropriate policy and benefit-sharing arrangement.

5 2 Other Legislation Relevant to the Issue at Hand

A detailed discussion of the role of existing governance structures and the establishment of other governance structures that represent, and act on behalf of, communities such as the Bengwenyama-ye-Maswati community falls beyond the scope of this article. Some of these structures are provided for in the Communal Properties Associations Act 28 of 1996 (hereafter "CPAA") and the Traditional Leadership and Governance Framework Act 41 of 2003 (hereafter "TLGFA").

According to its Long Title, the objective of the CPAA is:

> To enable communities to form juristic persons, to be known as communal property associations in order to acquire, hold and manage property on a basis agreed to by members of a community in terms of a written constitution.

Section 8(6) determines that upon the registration of a Communal Property Association (hereafter CPA), the CPA is established as a juristic person, which may acquire rights and incur obligations in its own name in accordance with its registered constitution. In addition, it may acquire and alienate immovable property as well as the real rights attached to it.[101]

The TLGFA (commencement date 24 September 2004) provides for the establishment of a traditional council by every traditional community recognised by the Premier concerned. "At least a third of a traditional council must be women."[102] A traditional council must consist of (a)

100 "… where as a consequence of the provisions of this act, negotiations or consultations with the community is required, the community shall include the members or part of the community directly affect (*sic*) by mining on land occupied by such members or part of the community".

101 S 8(6)(C).

102 S 3(2)(B).

traditional leaders and other community members selected by the senior traditional leader in accordance with that community's customs, and (b) other democratically elected members (for a term of five years), who constitute 40 % of the members.[103] A traditional council has a number of prescribed functions,[104] amongst others, to perform "the functions conferred by customary law, customs and statutory law consistent with the Constitution."[105] Section 20 determines that national government or a provincial government may, through legislative or other measures, provide a framework determining the role for traditional councils in respect of, amongst others, land administration, economic development and the management of natural resources. In addition, the TLGFA also allocates certain community governance functions to the officially recognised kings, queens, senior traditional leaders, headmen and headwomen of every traditional community.[106]

On account of "traditional leadership" being a concurrent functional domain as determined in Schedule 4 (Part A) of the Constitution, the Limpopo Provincial Legislature enacted the Limpopo Traditional Leadership and Institutions Act 6 of 2005 (date of commencement 1 April 2006). This 2005 Limpopo provincial Act provides that organs of state that have allocated functions in terms of section 20 of the TLGFA, must inform the Premier of such allocation, and that the traditional council in question is accountable in general to the Premier, and specifically to the organ of state concerned in respect of functions allocated by such organ of state.[107] Functions related to the development of traditional communities and the community areas are allocated to officially recognised kings, queens, senior traditional leaders, headmen and headwomen.[108]

5 3 Recommendations

The above brief overview of community governance structures established or recognised by law (namely (a) traditional councils; (b) officially recognised kings, queens, senior traditional leaders, headmen and headwomen; and (c) communal property associations (CPAs)), indicates that there is sufficient precedent in South African law to propose that legislation (primary or subordinate) should provide for the incorporation of one or more of these structures in the list of entities to be consulted for purposes of giving effect to the objective and the substantive provisions of the MPRDA.

Alternatively, a right to negotiate could be created by the legislature in a favour of a community in similar vein as the recognition of the right of native title holders in Australia to negotiate with mining companies when

103 S 3(2)(C).
104 S 4(1).
105 S 4(1)(L).
106 S 11 read with ss 19 and 20.
107 S 18(3).
108 S 18(1).

a right to mine is created or extended by the state government.[109] In Australia, the negotiating parties[110] are obliged to negotiate in good faith[111] and may resort to arbitration after a period of six months.[112]

The 2008 Amendment Act amended section 104(1) by providing that a

> community who wishes to obtain the preferential right to prospect or mine in respect of any mineral and land which is registered or to be registered in the name of the community concerned, must in terms of section 16 or 22 lodge such application to the Minister.[113]

An application for a preferential prospecting right (or a preferential right to mine) will have to take place in accordance with the section 16 (and section 22)- application procedures and requirements for a prospecting right (or mining right). It is proposed that section 104(2) needs to be further amended by requiring, in addition to compliance with the section 104 requirements of a preferential prospecting right, compliance with the requirements for the granting and duration of a prospecting right[114] or a mining right.[115] This proposed amendment should also provide for the imposition of necessary conditions by the Minister in order to promote the rights and interests of the community if a third party lodges an application for a prospecting right or an application for a mining right relates to land that is occupied by a community. These should include conditions relating to the manner and content of community participation.[116] This proposed amendment would make it possible for the Minister to ensure that the rights and interests of the community are appropriately taken into account prior to and during prospecting or mining.

It is not entirely clear how the 2008 amendments will impact on section 9 of the MPRDA insofar as sections 9(1)(b) and 9(2) will only be amended by the substitution of the words "dates" and "date" for "days" and "day" respectively. It would seem that an application for a preferential prospecting right would not triumph over an application to prospect, which had been submitted at an earlier date in accordance with section 9.

It is proposed that a further amendment to section 9 should be enacted to make provision for the Minister to give priority status to a community application for a preferential prospecting right over an

109 S 26(1A) of the Native Title Act 1993 (Cth); Butt *Land Law* (2010) 1020; Gray et al *Property Law in New South Wales* (2007) 178.
110 The government is also included as a negotiating party.
111 S 31(2). Butt 1025.
112 S 35(1). Butt 1025.
113 S 74 of the Amendment Act; S 16 and 22 respectively deal with applications for prospecting rights mining rights.
114 See s 17.
115 S 74 of the Amendment Act. See s 23.
116 Ss 13(f) and 19(c) of the Amendment Act respectively.

application for a prospecting right submitted on an earlier date. It is further proposed that section 9 should also be further amended that to provide that the Minister must give priority status to a community application for a preferential prospecting right over an application for a prospecting right by a third party submitted on an earlier date. In the words of Dale *et al*: "It has become a matter of style for the Legislature to leave the legal consequences of section 104 to the reader's imagination".[117] As an alternative, consideration should be given to the introduction of a reconceptualised approach to ensure community participation, involvement, co-ownership of the prospecting or mining enterprise and sustainable benefits by the replacement of section 104 MPRDA and the relevant parts of section 9 MPRDA with a new provision. This proposed provision should, among others, compel any applicant (whether linked to the community or a third party) to follow a prescribed procedure as regards community consultation and participation with the view on attempting, in a *bona fide* manner, to establish a joint venture or a form of co-ownership in the enterprise concerned, failing which agreements that would ensure employment opportunities and significant substantial benefits to the community as a whole must be concluded as a precondition of the consideration of a section 16 or 22 MPRDA application. In addition, the divergent approaches regarding entities receiving section 16 and section 104 applications (the Regional Manager and the Minister respectively) should be reconsidered, especially as the 2008 version of section 104(2) imposes a number of stringent conditions on such section 104 applications.

6 Concluding Remarks

The relationship and distinction between a prospecting right (granted in terms of section 17 MPRDA) and a preferential prospecting right (in terms of section 104 MPRDA) are correctly analysed by the court in the *Bengwenyama* case. The application of the first come, first served principle in terms of section 9(1)(b) MPRDA to more than one application received on different days is also clearly illustrated in the decision. The 2008 amendments to section 104 will have the effect of reducing the Court's distinction between an application for a prospecting right and an application for a preferential right to prospect.

At present (prior to the commencement of the 2008 Amendment Act), a community who lives on land underlain by minerals and who wants to apply for a prospecting right, but who may not yet have their "ducks in a row", may make use of the procedure provided for in section 104 MPRDA in order to obtain a preferential prospecting right from the Minister. Such a preferential prospecting right will create a situation where the applications of other would-be applicants for prospecting rights may not be considered before (a) the community has had an opportunity to arrange for the necessary financial assistance to prospect

117 *South African Mineral and Petroleum Law* par 489.

for minerals, or (b) until it becomes clear that the community will not or cannot succeed with an application for prospecting rights in terms of section 16 MPRDA.

The facts of *Bengwenyama Minerals* decision, however, illustrate the weakness of the current (2002) section 104 MPRDA mechanism in protecting communities if someone else applies in due course for a prospecting right in terms of section 16 MPRDA. After all, anyone may apply for a prospecting right. One may argue that this is in line with a year zero starting-place for new applicants for mineral resources.

The 2008 amendment to section 104 MPRDA clarifies the application procedure and requirements for a preferential right to prospect or mine. The 2008 new definition of "community" is also an improvement by requiring the community to constitute of a group of historically disadvantaged persons. In addition, the 2008 amendments will make it possible for the Minister to promote the rights and interests of the community during prospecting or mining by imposing conditions when granting a prospecting right or mining right. It is suggested that the Department urgently considers promulgating the commencement of the amended section 104 MPRDA.

It is suggested that during the interim period (prior to the commencement of the 2008 Amendment Act), a community would be better served if it applies from the outset for a prospecting right in terms of section 16 MPRDA but with an indication that it also takes place in terms of section 104 MPRDA. Both the requirements of section 17(1) and 104(2) MPRDA will then have to be met. This is because a community which is overtaken in the rush by an applicant for a prospecting right is reduced by the first come, first served principle to mere a spectator of prospecting or mining activity on their land.

In conclusion, it is clear that even the amended (2008) section 104 MPRDA does not go far enough to ensure full community participation, involvement and sustainable receipt of benefits, and that a number of further amendments are urgently required. Furthermore, it is suggested that the development of a comprehensive mechanism to give substantive effect to the preferential right of the community to prospect or mine in the new rush for mineral resources should be a matter of the highest priority for the Department and Parliament.

Nelson Mandela Bay Metropolitan Municipality v Nobumba
2010 1 SA 579 (ECG)

Rekeninge vir munisipale dienste en die National Credit Act

1 Inleiding

Munisipaliteite (wat hulleself deesdae dikwels stadsrade noem) speel 'n belangrike rol in die lewens van die burgery. Jy kan nie 'n dak oor jou kop bou sonder dat die stadsraad die huisplanne goed gekeur het nie. Wanneer jy die dag die huis verkoop en oordrag wil gee, moet jy by die munisipale kantore 'n draai gaan maak om 'n klaringsertifikaat te bekom wat sertifiseer dat jou rekeninge op datum is. Wanneer 'n mens 'n geliefde ter ruste moet lê, is jou hoop gevestig op die plaaslike regering om 'n stukkie grond te verskaf. Hondeliefhebbers is afhanklik van die stadsvaders se besluite om oop areas vir parke beskikbaar te stel en in 'n wandelbare toestand te onderhou. Toegewyde onderdane sal mettertyd nie werk toe kan ry - selfs met 'n perd - indien sekere plaaslike owerhede in verskeie dele van die land nie spoedig begin om die slaggate in die paaie te herstel nie. Dit is net 'n handjievol stedelinge wat uit 'n boorgat lewe, sonder elektrisiteit klaarkom en self hulle afval iewers by 'n stortingsterrein besorg. Die res maak staat op die munisipaliteit om hierdie dienste te verskaf.

Die verhouding tussen stadsrade en die publiek word onder andere deur wetgewing en die reëls van die administratiefreg gereël. Dikwels gaan die stadsrade egter ook kontrakte met buitepartye aan vir die verskaffing van goedere en dienste of vir die daarstelling van infrastruktuur. Insgelyks sluit die rade kontrakte op groot skaal met sy eie belastingbetalers om aan hulle sekere dienste te verskaf waarvoor hulle periodiek gedebiteer word. Gegewe die omvang van plaaslike owerhede se aktiwiteite spreek dit vanself dat verskeie terreine van die privaatreg en die publiekreg ter sprake kan kom in die verhouding tussen hierdie owerhede en hulle onderdane of ander partye. Dit maak van stadsrade vanselfsprekende litigante. In onlangse tye, so wil dit vir my voorkom, haal die munisipaliteite al hoe meer die hofverslae. In Februariemaand se uitgawe van die 2010 *Suid-Afrikaanse Hofverslae* is daar 23 sake gerapporteer. In nie minder nie as ses van hierdie sake is 'n stadsraad/metropolitaanse munisipaliteit/plaaslike munisipaliteit/stad (om die verskillende name te gebruik soos wat hulle in die sake voorkom) een van die litigante. Een van hierdie ses sake is die onderwerp van hierdie bespreking. Uit die bespreking sal dit blyk dat stadsrade deesdae katvoet moet loop met wetgewing wat wesenlik

privaatregtelik van aard is maar wat 'n impak kan hê op die tipe dienste wat stadsrade verskaf en op die kontrakte wat hulle in dié verband aangaan. In die saak is sekere aspekte van die *National Credit Act* (34 van 2005) (die Nasionale Kredietwet) onder die loep geplaas. Die Nasionale Kredietwet het nie 'n amptelike Afrikaanse teks of naam nie. Die Afrikaanse terminologie wat hieronder gebruik word is my eie skeppings.

['n Nie-amptelike Afrikaanse vertaling van die Nasionale Kredietwet is beskikbaar by www.vra.co.za – red.]

2 Feite in die Saak

Die applikant in die saak ("die munisipaliteit") het 'n aansoek gerig tot die hooggeregshof om die beslissing van die respondent ('n landdros) te hersien. Daar is aangevoer dat die landdros se verkeerde interpretasie van die Nasionale Kredietwet 'n wesenlike regsdwaling was wat 'n growwe onreëlmatigheid daargestel het. Die landdros het 'n aansoek om summiere vonnis teen 'n skuldenaar van die munisipaliteit van die rol geskrap. Die eis was vir twee bedrae wat na bewering uitstaande was plus rente daarop. Die twee bedrae het betrekking gehad op munisipale belastings en dienste wat deur die munisipaliteit gelewer is. Die landdros het beslis dat die Nasionale Kredietwet op die skuld van toepassing is en dat die munisipaliteit nie die bepalings van artikels 129 en 130 van die wet nagekom het nie. Hierdie twee artikels vereis van 'n skuldeiser om eers 'n bepaalde kennisgewing aan 'n verbruiker te stuur en 'n sekere tyd af te wag voordat die eis in 'n hof afgedwing kan word (sien vir 'n volledige bespreking van die twee artikels Van Heerden in Scholtz *Guide to the National Credit Act* (2008) hfst 12; Otto en Otto *The National Credit Act Explained* (2010) par 44). Die applikant het in die aansoek om hersiening aangevoer dat dit vir die munisipaliteit van groot belang is of die Nasionale Kredietwet op die munisipaliteit se skuldinvordering van toepassing is. Om redes wat hieronder sal blyk is dit nie duidelik hoekom dit enigsins 'n kwessie kon wees of die wet (minstens ten dele) geld nie. Die hof het ook daarop gewys dat die toepaslikheid van die wet van groot belang is vir iedere munisipaliteit in die land (per regter Plasket par 4). Die munisipaliteit in die huidige saak stuur maandeliks 14,000 aanmanings uit aan mense wat nie betyds hulle rekenings betaal nie. Nie minder nie as 49% van die munisipaliteit se rekeninghouers betaal nie hulle skulde betyds nie en die uitstaande skulde beloop R900 miljoen. Die 14,000 maandelikse aanmanings verteenwoordig skulde van R180 miljoen.

Die hof het ter aanvang die statutêre en grondwetlike raamwerk waarbinne munisipaliteite funksioneer volledig uiteengesit (584 *et seq*). Dit is nie nodig om vir doeleindes van hierdie bespreking daarop in te gaan nie. Dit is voldoende om dit te stel dat munisipaliteite gelde mag neerlê en invorder vir dienste wat hulle lewer en dat hulle rente op uitstaande bedrae mag hef. Uit die aard van die saak sluit hulle ooreenkomste met verbruikers in hierdie verband en die vraag is watter impak die Nasionale Kredietwet op sulke kontrakte en op die afdwinging daarvan het. Ten einde hierdie vraag te beantwoord en die saak onder

bespreking binne die regte perspektief te plaas, is dit nodig om redelik breedvoerig sekere agtergrondinligting te verskaf.

3 Tersaaklike Bepalings van die Nasionale Kredietwet

Die Nasionale Kredietwet is van toepassing op kredietooreenkomste wat "at arm's length" gesluit is (a 4(1). Die konsep "at arm's length" word in negatiewe terme beskryf in a 4(2)(b). Sien vir die betekenis wat die howe in die verlede aan hierdie woorde geheg het *Commissioner, South African Revenue Service v Woulidge* 2002 1 SA 68 (SCA); *Hicklin v Secretary for Inland Revenue* 1980 1 SA 481 (A).).

Daar is vier kategorieë van kredietooreenkomste (a 8(1)):

(i) Die kredietfasiliteit ("credit facility").

(ii) Die krediettransaksie ("credit transaction").

(iii) Die kredietwaarborg ("credit guarantee").

(iv) Enige kombinasie van (i)-(iii).

Elkeen van hierdie tipe kredietooreenkomste word uiteraard in die wet omskryf. Die krediettransaksie het boonop agt verskyningsvorms (a 8(4)) wat elk op hulle beurt omskryf word in artikel 1 van die wet. Die hof het in die saak onder bespreking beslis dat die kontrakte wat die munisipaliteit met verbruikers aangaan vir die lewering van dienste net een van twee soorte kredietooreenkomste kan wees waarop die wet van toepassing is, te wete 'n "credit facility" of 'n "incidental credit agreement" (par 24). Daar kan nie fout gevind word met hierdie gevolgtrekking nie.

Die "incidental credit agreement" is 'n totaal nuwe begrip in die Suid-Afrikaanse reg. In Afrikaans kan daar na hierdie kredietooreenkoms verwys word as 'n *gebeurlikheidskredietooreenkoms.* (Hierdie benaming is vir die eerste keer gebruik in Nagel *Kommersiële Reg* (2006) par 20 05 (c).) Die gebeurlikheidskredietooreenkoms is een van die agt verskyningsvorms van 'n krediettransaksie (a 8(4)(b)). Ofskoon daar nie in vorige kredietwetgewing gebruik gemaak is van die begrip "kredietfasiliteit" nie, is dit natuurlik 'n geykte term en is dit wel deur die Woekerwet (73 van 1968) gereguleer as synde 'n geldleningstransaksie. Die kredietfasiliteit is dan ook een van die hoofkategorieë van 'n kredietooreenkoms in die nuwe Nasionale Kredietwet.

Die Nasionale Kredietwet omskryf "incidental credit agreement" in artikel 1 soos volg:

> Incidental credit agreement means an agreement, irrespective of its form, in terms of which an account was tendered for goods or services that have been provided to the consumer, or goods or services that are to be provided to a consumer over a period of time and either or both of the following conditions apply:

(a) a fee, charge or interest became payable when payment of an amount charged in terms of that account was not made on or before a determined period or date; or

(b) two prices were quoted for settlement of the account, the lower price being applicable if the account is paid on or before a determined date, and the higher price being applicable due to the account not having been paid by that date.

Die wesenskenmerke van 'n gebeurlikheidskredietooreenkoms is die volgende:

(a) Goedere of dienste word aan 'n verbruiker verskaf.

(b) 'n Datum word bepaal vir betaling van die prys.

(c) Rente, of 'n fooi of heffing is betaalbaar indien die prys nie op die vasgestelde datum betaal is nie *of* 'n hoër prys geld indien betaling nie aldus geskied nie.

Tipiese voorbeelde van gebeurlikheidskredietooreenkomste is geykte selfoonkontrakte en studentelenings. Volgens die standaard selfoonkontrak het die verbruiker 'n sekere tyd (bv 14 dae) om die rekening af te los waarna rente op die uitstaande bedrag gehef sal word. Wanneer 'n student by 'n universiteit inskryf word daar gewoonlik ooreengekom dat die studiegelde by wyse van twee of drie paaiemente op vasgestelde datums gedurende die jaar betaal sal word. Indien betaling nie betyds geskied nie sal rente voortaan gehef word. Kredietkaartfasiliteite wil op die oog af lyk of hulle ook onder die definisie van gebeurlikheidskredietooreenkoms tuisgebring kan word, maar dit sou nie korrek wees nie. 'n Kredietkaartfasiliteit val binne die omskrywing van kredietfasiliteit. (Sien vir 'n volledige motivering van hierdie standpunt Otto en Otto *The National Credit Act Explained* par 9 3 (c).)

Die Nasionale Kredietwet omskryf "credit facility" soos volg in artikel 8(3):

(A)n agreement, irrespective of its form…(in terms of which)

(a) a credit provider undertakes –

(i) to supply goods or services or to pay an amount or amounts, as determined by the consumer from time to time, to the consumer or on behalf of, or at the direction of, the consumer; and

(ii) either to –

(aa) defer the consumer's obligation to pay any part of the cost of goods or services, or to repay to the credit provider any part of an amount contemplated in subparagraph (i); or

(bb) bill the consumer periodically for any part of the cost of goods or services, or any part of an amount, contemplated in subparagraph (i); and

(b) any charge, fee or interest is payable to the credit provider in respect of

(i) any amount deferred as contemplated in paragraph (a)(ii)(aa); or

(ii) any amount billed as contemplated in paragraph (a)(ii)(bb) and not paid within the time provided in the agreement.

Die wesenskenmerke van 'n kredietfasiliteit is die volgende:

(a) Goedere of dienste word gelewer *of* 'n sekere bedrag word deur die kredietverskaffer betaal of voorgeskiet.

(b) Die verbruiker se betalingsplig is uitgestel *of* hy ontvang periodieke rekenings.

(c) Rente, of 'n fooi of heffing is betaalbaar op die krediet wat verleen is.

Tipiese voorbeelde van kredietfasiliteite is oortrokke tjekrekenings en kredietkaartfasiliteite. 'n Kontrak tussen 'n vervaardiger van goedere en 'n handelaar waarvolgens die vervaardiger voorrade op krediet aan die handelaar lewer, welke skuld (byvoorbeeld) binne 90 dae afgelos moet word maar *ab initio* rentedraend is, sal ook 'n kredietfasiliteit daarstel.

Daar is ooglopende oorvleuelings tussen die woordomskrywings van kredietfasiliteit en gebeurlikheidskredietooreenkoms. In albei gevalle word goedere of dienste gelewer en rente gehef. Die tydstip vir betaling van rente verskil egter. In die geval van die gebeurlikheidskredietooreenkoms loop rente eers as betaling op 'n toekomstige datum nie geskied het nie. 'n Tipiese beding in 'n kontrak in hierdie geval sal byvoorbeeld lui: "Betaling moet geskied binne 30 dae nadat die kredietgewer sy rekening gelewer het. Rente teen 2% per maand sal gehef word op enige bedrae wat na sodanige tydperk verskuldig is." In die geval van die kredietfasiliteit word rente gehef "in respect of any amount deferred" met die klaarblyklike bedoeling dat rente van meet af gehef mag word. By beide tipe ooreenkomste word rekeninge gelewer maar daar is 'n verskil wat ook deur die hof in die saak onder bespreking uitgewys is (par 34): by kredietfasiliteite word *periodieke* rekenings gelewer terwyl dit nie die geval is by gebeurlikheidskredietooreenkomste nie. In laasgenoemde geval word 'n enkele rekening ("an account") getender. Dit verhoed uit die aard van die saak nie dat daar opvolgrekenings kan wees solank as wat die bedrag uitstaande is nie.

4 Belang van die Onderskeid tussen Kredietfasiliteit en Gebeurlikheidskredietooreenkoms

Die gebeurlikheidskredietooreenkoms geniet besondere aandag in die Nasionale Kredietwet. Dit sal aanstons duidelik word dat dit vir kredietverskaffers baie meer voordelig is om gebeurlikheidskredietooreenkomste aan te gaan as enige ander kredietooreenkoms waarop die wet van toepassing is. Nasionale Kredietwetgewing bevat gewoonlik woordomskrywings van die kontrakte waarop die wet van toepassing is. Dit word dan opgevolg met artikels in die wet wat spesifieke gevalle van die wet se trefwydte uitsluit. Die Nasionale Kredietwet volg dieselfde patroon behalwe ten opsigte van gebeurlikheidskredietooreenkomste. In die geval van gebeurlikheidskredietooreenkomste word daar nie van eksplisiete vrystellings gebruik gemaak nie. Die wet bepaal daarenteen watter artikels in die wet *inderdaad* op gebeurlikheidskredietooreenkomste van toepassing is. Die resultaat is natuurlik dieselfde – hierdie tipe ooreenkomste is in die finale instansie vrygestel van die bepalings wat nie uitdruklik daarop van toepassing verklaar is nie.

Artikel 5(1) van die wet bepaal watter hoofstukke, afdelings ("parts") van hoofstukke en individuele artikels wel geld. Soms gaan dit nog met 'n kwalifikasie ook gepaard. Indien 'n mens moeisaam artikel 5(1) ontleed dan blyk dit dat 133 van die wet se 173 artikels op gebeurlikheidskredietooreenkomste van toepassing is. Dit klink nie aardskuddend nie, maar dit is. Die feit is dat die 40 artikels wat nie geld nie van die belangrikste en mees ingrypende bepalings in die wet verteenwoordig. Die feit dat hulle nie geld nie maak die lewe vir verskaffers van gebeurlikheidskrediet aansienlik makliker as vir ander kredietverskaffers.

Dit is nie nodig om vir doeleindes van hierdie bespreking die volledige lys van "vrystellings" te verskaf nie. Dit sou meer gepas wees om dit in 'n afsonderlike bydrae te doen waarin die gebeurlikheidskredietooreenkoms as sodanig, en die wet se toepaslikheid al dan nie op sulke ooreenkomste, in besonderhede ontleed kan word. (Sien Otto "The incidental credit agreement" 2010 *THRHR* 637). Vir doeleindes van hierdie bespreking, en ter wille van opheldering van die huidige leser, sal daar volstaan word met enkele voorbeelde van vrystellings in die Nasionale Kredietwet. Dit word gedoen ten einde die saak onder bespreking, en veral die verreikende implikasies wat die saak vir kredietgewers soos munisipaliteite inhou, in perspektief te plaas.

Die volgende bepalings van die wet is onder andere nie op gebeurlikheidskredietooreenkomste van toepassing nie:

(a) Registrasie as Kredietverskaffer

Alle kredietgewers wat 100 kredietooreenkomste op hulle boeke het, of wat R500,000 of meer uitleen (ongeag die aantal kontrakte ter sprake) moet as kredietgewers by die Nasionale Kredietreguleerder registreer (a 40(1)). Versuim om te registreer is 'n ernstige saak. Kontrakte wat deur 'n ongeregistreerde kredietgewer gesluit word is nietig met verreikende gevolge (a 89(2)(d); a 89(5); *Cherangani Trade and Investment 107 (Edms) Bpk v Mason* ongerapporteerde saak no 6712/2008 (O)). Die enigste uitsondering is kredietgewers wat gebeurlikheidskredietooreenkomste aangaan. Hulle hoef glad nie te registreer nie (a 40(1)). Dit beteken onder andere dat die koste van registrasie en die administratiewe rompslomp wat daarop volg hulle gespaar bly. Volgens van Zyl (in Scholtz par 4 4 1) beteken dit onder andere dat sulke kredietgewers nie die verslagdoeningsvereistes van die wet (soos bepaal in reg 62) hoef na te kom nie.

(b) Vorm en Inhoud van Kontrakte

Die Nasionale Kredietwet bepaal dat 'n kredietgewer 'n dokument aan die verbruiker moet beskikbaar stel wat die ooreenkoms tussen die partye vervat (a 93(1)). Dit op sigself is nie 'n probleem nie want die deursnee kredietgewer sal gewoonlik 'n standaardkontrak beskikbaar hê. Indien die wet geld moet die kontrak egter in die vorm gegiet wees wat deur die regulasies kragtens die wet voorgeskryf is (a 93(2) en (3); regs

30 en 31). Hierdie voorskrifte is 'n el lank (sien Otto in Scholtz par 9 2 vir 'n volledige bespreking hiervan.) Artikel 93 geld egter nie ten opsigte van gebeurlikheidskredietooreenkomste nie en die omvattende vormvoorskrifte hoef insidentele kredietgewers dus nie te pla nie.

(c) Verbode Kontrakte en Bedinge

Artikel 89(2) van die wet verklaar sewe ooreenkomste as sodanig ongeoorloof. Artikel 90(2) verbied sowat 30 verskyningsvorme van bedinge *in* kredietooreenkomste - welke kredietooreenkomste self andersins geoorloof is (sien Otto in Scholtz par 9 3 vir 'n volledige bespreking hiervan. Die wet bevat drastiese bepalings om ongeoorloofde ooreenkomste en verbode bedinge in ooreenkomste te bestraf. Sien aa 89(5) en 90(4); *Cherangani Trade and Investment 107 (Edms) (Bpk) v Mason supra.*) Die verbiedinge in artikels 89 en 90 is nie op gebeurlikheidskredietooreenkomste van toepassing nie en die geldigheid van so 'n kontrak of enige beding daarin moet volgens algemene gemeenregtelike beginsels insake geoorloofdheid van kontrakte beoordeel word. Talle van die verbiedinge in artikels 89 en 90 is gewis nie gemeenregtelik taboe, of op sigself aanstootlik nie, hulle is uitsluitlik ongeoorloof op statutêre gronde.

(d) Prekontraktuele State en Kwotasies

Artikel 92(1) en (2) van die wet bepaal dat 'n kredietgewer glad nie eens 'n kredietooreenkoms mag aangaan nie tensy hy vooraf aan die verbruiker 'n kwotasie en 'n prekontraktuele staat verskaf het soos voorgeskryf. Die kwotasie is boonop bindend op die kredietgewer vir vyf dae (a 92(3)). Dit stel na my mening inderwaarheid 'n statutêre opsie daar met die verbruiker as opsiehouer. Die vereistes en gevolge van artikel 92 geld egter nie vir gebeurlikheidskredietooreenkomste nie.

(e) Roekelose Krediet en Oormatige Skuldbelading

Een van die belangrikste "vrystellings" in die wet insoverre dit gebeurlikheidskredietooreenkomste aangaan, is opgesluit in artikel 5(1)(d). Dié bepaal:

> Only the following provisions of this Act apply with respect to an incidental credit agreement…
>
> (d) Chapter 4, Part D, except to the extent that it deals with reckless credit…

Deel D van hoofstuk 4 van die wet reël "over-indebtedness and reckless credit." Dit is nuwe konsepte in die Suid-Afrikaanse kredietreg (sien vir 'n volledige bespreking daarvan, Van Heerden in Scholtz hfst 11; Otto en Otto *The National Credit Act Explained* pars 30 9 en 34 2; Kelly-Louw "The Prevention and Alleviation of Consumer Over-indebtedness" 2008 *SA Merc LJ* 200; Otto "Over-indebtedness and applications for debt review in terms of the National Credit Act: Consumers beware! *Firstrand Bank Ltd v Olivier*" 2009 *SA Merc LJ* 272; Vessio "Beware the provider of reckless credit" 2009 *TSAR* 274; Stoop "South African consumer credit policy: measures indirectly aimed at preventing consumer over-

indebtedness" 2009 *SA Merc LJ* 365. Die bepalings mbt skuldhersiening het tot heelwat regspraak in 'n kort tydjie aanleiding gegee. Vgl oa *Firstrand Ltd v Olivier* 2009 3 SA 353 (SEC); *Standard Bank of SA Ltd v Panayiotts* 2009 3 SA 363 (W); *Standard Bank of SA Ltd v Hales* 2009 3 SA 315 (D & C); *National Credit Regulator v Nedbank Ltd* 2009 6 SA 295 (GNP); *BMW Financial Services South Africa (Pty) Ltd v Donkin* 2009 6 SA 63 (KZD); *Absa Bank Ltd v Kritzinger; Standard Bank of South Africa Ltd v Pienaar* ongerapporteerde saak no 6474/2009 (WCC); *Firstrand Bank Ltd v Bernardo* ongerapporteerde saak no 608/2009 (ECP).); *Firstrand Bank Ltd v Seyffert* 2010 6 SA 429 (GSJ); *Collet v Firstrand Bank Ltd* [2011] ZASCA 78; *Nedbank Ltd v National Credit Regulator* 2011 3 SA 581 (SCA). Die lys is nie volledig nie.)

'n Kredietgewer moet 'n evaluering van 'n verbruiker se kredietwaardigheid doen voordat 'n kredietooreenkoms aangegaan word. Dit is om die toestaan van roekelose krediet te voorkom (a 81). 'n Kredietgewer wat roekelose krediet toestaan loer in die roer se loop. 'n Hof wat bevind dat roekelose krediet verleen is mag die verbruiker se regte en verpligtinge in die geheel of gedeeltelik tersyde stel, of die kontrak opskort (a 83(2)). Indien die roekelose krediet tot oormatige skuld vir die verbruiker gelei het, mag die hof die kredietooreenkoms opskort en die verbruiker se skulde herskeduleer (a 83(3)). Hierdie bepalings is, luidens artikel 5(1)(d), nie op gebeurlikheids- kredietooreenkomste van toepassing nie. Indien 'n verbruiker se jas vasdraai en sy skuldlas hom oorweldig, mag hy egter wel aansoek doen om oormatig belas verklaar te word (a 86(1)). 'n Hof mag 'n verbruiker oorbelas ("overindebted") verklaar en sy skulde herskik (a 86(7)(c)(ii)). Dit kan gebeur deur die termyn van die kontrak te verleng of om hom kleiner paaiemente oor 'n langer tyd te laat betaal. Die bepalings betreffende oormatige skuld (met die uitsondering van dié aangaande roekelose krediet) is ooreenkomstig die toepassingsbepaling van artikel 5(1)(d) wel op gebeurlikheidskredietooreen- komste van toepassing.

Met bogenoemde as agtergrond kan daar na die saak onder bespreking teruggekeer word.

5 Die Hof se Uitspraak

Ten eerste beslis die hof dat wetgewing die bron vir die hef van belastings ("rates") deur 'n munisipaliteit is. Die verpligting van 'n belastingbetaler in hierdie verband berus nie op 'n ooreenkoms nie en gevolglik is die Nasionale Kredietwet nie daarop van toepassing nie (par 32). Die verpligting om munisipale dienste te lewer, en die ooreenstemmende verpligting om daarvoor te betaal, het ook 'n statutêre grondslag maar in die finale instansie is dit gebaseer op 'n ooreenkoms tussen die munisipaliteit en die individuele verbruikers van dienste (par 34). Volgens die hof kan so 'n ooreenkoms nie 'n gebeurlikheidskredietooreenkoms wees nie omdat betalings geskied op sterkte van *periodieke rekenings* en nie soseer omdat rente gehef word wanneer betaling nie plaasvind op 'n bepaalde datum nie (par[34]).

Die hof gaan vervolgens in op artikel 4(6)(b) van die Wet ten einde te beslis wat die aard van die kredietooreenkoms is wat die munisipaliteit *in casu* wil afdwing. Dié artikel bepaal die volgende:

> (6) Despite any other provision of this Act –
>
> (b) if an agreement provides that a supplier of a utility or other continuous service –
>
> (i) will defer payment by the consumer until the supplier has provided a periodic statement of account for that utility or other continuous service; and
>
> (ii) will not impose any charge contemplated in section 103 in respect of any amount so deferred, unless the consumer fails to pay the full amount due within at least 30 days after the date on which the periodic statement is delivered to the consumer,
>
> that agreement is not a credit facility within the meaning of section 8(3), but any overdue amount in terms of that agreement, as contemplated in subparagraph (ii), is incidental credit to which this Act applies to the extent set out in section 5.

Artikel 4(6)(b) geld wanneer 'n "utility" of ander "continuous service" gelewer word. Albei dié begrippe word in artikel 1 van die Wet omskryf. Vir huidige doeleindes is dit voldoende om dit te stel dat die begrippe tipiese munisipale kommoditeite en dienste soos die verskaffing van elektrisiteit, water, gas, vullisverwydering en riolering insluit. Artikel 103, waarna artikel 4(6)(b) verwys, handel oor die hef van rente, en spesifiek rente op laat betalings.

Die hof verwys na sekere skrywers se interpretasie van artikel 4(6)(b) en verkies die een wat Van Zyl in Scholtz par 4 3 daaraan geheg het. Sy sê aldaar dat die artikel betrekking het op "an agreement in terms of which the supplier of a utility or other continuous service agrees to defer payment by the consumer until the supplier has provided a periodic statement of account, and not to impose any interest unless the consumer fails to pay the full amount due within the agreed period," mits die verbruiker minstens 30 dae na lewering van die rekening gegun word om dit te betaal (par39). Die hof is van mening dat die vereistes van artikel 4(6)(b) kumulatief is alvorens die verskaffer van 'n nutsdiens "vrygestel" is. Die verpligting tot betaling moet uitgestel wees totdat 'n periodieke rekening gelewer is *en* geen rente moet gehef word voordat minstens 30 dae verloop het nie. Die hof beslis dat "[I]f these conditions are present, then the agreement is neither a credit facility nor an incidental credit agreement, but interest charges in terms of ss (ii) will be incidental credit" (per regter Plasket met wie waarnemende regter Van der Byl saamgestem het - par 40). Ek kan nie hiermee akkoord gaan nie. Dit is nie net die rente wat gehef word wat 'n gebeurlikheidskredietooreenkoms daarstel nie, die hele uitstaande skuld konstateer 'n gebeurlikheidskredietooreenkoms. Die woorde "any overdue amount in terms of that agreement, as contemplated in subparagraph (ii), is incidental credit" verwys duidelik na die hele uitstaande bedrag ondanks die kruisverwysing in subparagraaf (ii) na artikel 130 wat vir beperkings op die hef en berekening van rente voorsiening maak. Indien die

wetgewer wou gehad het dat slegs die rente insidentele krediet daarstel, sou die woord "interest" in plaas van "any overdue amount" gebruik gewees het. Dit is ook nie korrek om te praat van 'n "exemption" wat artikel 4(6)(b) daarstel soos wat die hof doen nie (par [40]). Al wat die artikel doen is om te bepaal dat die ooreenkoms nie 'n kredietfasiliteit is nie mits aan die artikel se vereistes voldoen word. Dit is nog altyd andersins 'n kredietooreenkoms en meer in besonder 'n gebeurlikheidskredietooreenkoms.

Die hof gaan vervolgens in op die feite wat uit die munisipaliteit se stukke blyk. Dit is nie moontlik om op die stukke te beslis dat die aangewese dag vir betaling minstens 30 dae na lewering van die rekening is soos wat artikel 4(6)(b)(ii) vereis nie. Die munisipaliteit het ook nie in sy besonderhede van vordering beweer dat sy eis val binne die "vrystelling" van artikel 4(6)(b) nie. Die landdros was gevolglik reg om te beslis dat die Nasionale Kredietwet van toepassing is en dat die munisipaliteit aan die vereistes van artikels 129 en 130 moes voldoen het. Hy het egter onreëlmatig opgetree deur die saak van die rol te skrap. Hy moes uitstel verleen het sodat die munisipaliteit die nodige kennisgewings kon uitgestuur het (a 130(4) maak daarvoor voorsiening. Sien ook Coetzee *The Impact of the National Credit Act on Civil Procedural Aspects relating to Debt Enforcement* (LLM verhandeling 2009 UP) 115).

Summiere vonnis word gevolglik toegestaan wat die eis vir erfbelasting betref. Insoverre dit die eis vir dienste gelewer betref, word summiere vonnis geweier en word die tersaaklike respondent toestemming verleen om verdediging aan te teken.

6 Kommentaar op die Beslissing

Daar is in paragraaf 4 hierbo oorsigtelik, dog redelik breedvoerig, aangetoon dat die gebeurlikheidskredietooreenkoms 'n besondere plek in die Nasionale Kredietwet beklee. Vir kredietgewers wat nie gepla wil wees met die wet se lastige en soms ingrypende bepalings nie, is die eerste prys dat die wet glad nie op hulle kontrakte van toepassing is nie. Dit is byvoorbeeld die geval wanneer die verbruiker 'n regspersoon is met 'n jaarlikse omset van meer as R1 miljoen (a 4(1)(a)). Die aantal vrystellings kragtens die Wet is andersins egter min. Die wet is byvoorbeeld op verbruikers wat natuurlike persone is van toepassing ongeag die omvang van die krediet wat hulle opneem of hulle aardse skatte andersins. Daar is nie 'n plafonbedrag in die wet vir natuurlike persone nie. Gevolglik is die tweede prys vir kredietgewers om hulle kredietooreenkomste binne die kader van gebeurlikheidskredietooreenkomste te kry.

Dit blyk nie uit die saak watter argumente, indien enige, die munisipaliteit aangevoer het dat die Nasionale Kredietwet hulle nie tref nie of net gedeeltelik tref. Ten eerste is die wet van toepassing op staatsorgane as kredietgewers (a 4(3)(b)(i)) soos wat die hof self uitwys

(par 22 op 587H). Ten tweede het die munisipaliteit probleme in die landdroshof opgetel omdat die landdros tereg gemeen het die munisipaliteit moes die nodige kennisgewing aan die verbruiker uitgestuur het kragtens artikel 129 om die verbruiker op sy versuim te wys en om sekere voorstelle te maak soos deur artikel 129 vereis, en voorts die tyd moes afwag wat artikel 130 voorskryf, alvorens die skuld afgedwing kon word. Nou moet daarop gewys word dat hierdie twee artikels geld ongeag watter tipe kredietooreenkoms voorhande is. Met ander woorde, selfs al was die munisipaliteit se ooreenkoms ooreenkomstig die "vrystelling" in artikel 4(6)(b) 'n gebeurlikheids-kredietooreenkoms gewees, sou die vereistes van artikels 129 en 130 steeds gegeld het bloot omdat hierdie artikels wel op gebeurlikheids-kredietooreenkomste van toepassing is (a 5(1)(g)). Kortom, ongeag die bewoording en struktuur van munisipaliteite se ooreenkomste, hulle moet steeds kennisgewings aan verbruikers stuur soos wat artikel 129 vereis alvorens hulle kan oorgaan tot litigasie vir die afdwing van 'n rentedraende skuld. Die nakoming van artikel 129 is *gebiedend* vir alle kredietgewers. Die hof het in *Absa Bank Ltd v Prochaska t/a Bianca Cara Interiors* 2009 2 SA 512 (D & K) beslis dat die kennisgewing 'n "prerequisite" is om 'n regsproses te begin (par 35). In *Standard Bank of SA Ltd v Van Vuuren* 2009 5 SA 557 (T) het die hof die kennisgewing 'n "mandatory requirement" genoem (562C).

Daar is egter talle ander redes waarom dit vir munisipaliteite van groot belang is of hulle kontrakte gebeurlikheidskredietooreenkomste is, of nie, soos wat onder andere uit paragraaf 4 hierbo geblyk het. Indien die kontrakte nie gebeurlikheidskredietooreenkomste is nie, maar wel 'n ander tipe kredietooreenkoms, moet die munisipaliteit registreer as 'n kredietgewer en onder andere sorg dat sy kontrakte voldoen aan die omvangryke formele inhoudelike vereistes wat die wet se regulasies voorskryf. Van al die ander belangrike dele van die wet wat 'n plaaslike owerheid dan tref kan daar egter met een uiters lastige geval volstaan word, te wete die verpligting tot vasstelling van kredietwaardigheid van verbruikers deur kredietgewers ten einde die verskaffing van roekelose krediet te verhoed. In paragraaf 4(h) hierbo is daarop gewys dat kredietgewers by kredietooreenkomste, anders as gebeurlikheidskrediet-ooreenkomste, 'n evaluering van 'n verbruiker se kredietwaardigheid moet doen. Dit het nie net betrekking op sy betaalvermoëns nie, maar sluit ook 'n ondersoek in na sy insig en begrip van die verpligtinge wat hy op hom neem. Die kredietgewer moet naamlik redelike stappe neem

> to assess -
>
> (a) the proposed consumer's -
>
> (i) general understanding and appreciation of the risks and costs of the proposed credit, and of the rights and obligations of a consumer under a credit agreement;
>
> (ii) debt re-payment history as a consumer under credit agreements;
>
> (iii) existing financial means, prospects and obligations…*(a 81(2)(a))*

Versuim om so 'n ondersoek te doen stel op sigself roekelose krediet daar (a 80(1)(a)) ongeag of die verbruiker die krediet kan bekostig of nie. Dit is ook roekeloos om krediet toe te staan indien dit vir die kredietgewer na die nodige evaluering blyk dat die verbruiker nie die vereiste begrip toon vir die risiko's, koste of verpligtinge wat hy op hom neem nie en desondanks voortgaan om 'n kredietooreenkoms te sluit (a 80(1)(b)(i)). Dit sal ook roekelose krediet daarstel indien die ondersoek gedoen is maar die toestaan van die daaropvolgende krediet op sigself daartoe lei dat die verbruiker skuldmatig oorbelas word ((a 80(1)(b)(ii)). In paragraaf 4(h) hierbo is gewys op die drastiese gevolge (opskorting of tersydestelling van die kontrak, of herskedulering van die verbruiker se skulde) wat kan intree indien roekelose krediet verskaf word.

Uit die bespreking hierbo het dit duidelik geblyk dat munisipaliteite landwyd na hulle dienste-ooreenkomste sal moet kyk in die mate wat hulle dit nog nie gedoen het nie. In die besonder sal hulle moet seker maak dat dit dusdanig bewoord is dat die krediet wat verskaf word nie 'n kredietfasiliteit daarstel nie, maar wel 'n gebeurlikheidskrediet-ooreenkoms behels. Daar is miljoene mense in Suid-Afrika wat kan getuig van swak dienslewering deur sommige munisipaliteite, probleme met munisipale rekenings wat ten ene male nie reggestel word nie, dubbele aanslae wat ontvang word wanneer 'n woonerf onderverdeel is (erfbelasting word gehef op die oorspronklike eiendom wat regtens nie meer bestaan nie, sowel as op al die nuwe verdeelde, afsonderlike titel-eenhede) en traak-my-nie-agtige amptenare. Welgeluksalig is diegene wat mooi getuigskrifte kan uitreik vir die plaaslike owerheid in sy of haar streek of vir toegewyde amptenare. Dit sou vir sukkelende munisipaliteite administratief en andersins 'n onbegonne taak wees om boonop kredietevaluerings vir doeleindes van die Nasionale Kredietwet ten opsigte van miljoene aansoekers om dienste te doen. Indien dit in die toekoms in 'n hofsaak blyk dat 'n spesifieke munisipaliteit se kontrakte nie binne die "vrystelling" van artikel 4(6)(b) val nie, en die verbruiker voer aan dat roekelose krediet aan hom toegestaan is, gaan die vullis die waaier tref. Indien 'n hof byvoorbeeld sou beslis dat 'n ooreenkoms tersyde gestel moet word of selfs net opgeskort moet word, en die uitspraak raak potensieel 'n groot gros van die munisipale kontrakte, sou dit finansiële chaos veroorsaak. In hierdie verband moet egter daarop gewys word dat 'n hof oënskynlik nie *verplig* is om 'n kontrak ter syde te stel, of op te skort, of skulde te herskeduleer indien roekelose krediet wel voorhande is nie. Die hof het, so wil dit voorkom, 'n diskresie. Dit blyk uit die feit dat die woord "may" telkens in hierdie verband in artikel 83 gebruik word. Ongelukkig is die saak nie so eenvoudig nie. Artikel 130(4)(a) bepaal naamlik dat 'n hof wat bevind dat 'n kredietooreenkoms roekeloos is verplig is ("the court must") om een van die bevele in artikel 81 uit te reik, te wete tersydestelling of opskorting van die kontrak, of herskedulering van die verbruiker se skulde. Coetzee (2009 114) stel dit saaklik dat artikel 130(4)(a) die hof met geen diskresie laat nie. Hoe die howe hierdie duidelik botsende bepalings vorentoe gaan versoen en gaan toepas sal net die tyd leer.

Ten slotte moet dit onthou word dat die wet tot 'n baie groot mate terugwerkende krag het en van toepassing is op kredietooreenkomste wat gesluit is voordat die wet in werking getree het. Daar is egter enkele uitsonderings en die bepalings met betrekking tot roekelose krediet is een van hulle. Die huidige wet geld wel ten opsigte van "ou" kontrakte wat betref oormatige skuldbelading, maar nie wat betref die reëls rondom roekelose krediet nie (item 4(2) Bylae 3 tot die wet). Uiteraard tref die wet wel die duisende kontrakte, ook wat roekelose krediet betref, wat sedert die inwerkingtreding van die wet (op 1 Junie 2007) gesluit is. Dit is bepaald slegte nuus vir munisipaliteite wie se kontraksdokumente nie haarfyn bewoord is nie. Dit is die *kontrak* wat akkuraat bewoord moet wees betreffende verbruikers se betalingsverpligtinge. Dit is nie voldoende dat daar maar net een of ander beleidstuk bestaan, of stadsraadsbesluit in hierdie verband geneem is nie. Artikel 4(6)(b) stel dit duidelik dat die "vrystelling" net geld "if an agreement provides" dat periodieke rekeninge vir nutsdienste gelewer sal word, *en* dat geen rente gehef sal word nie tensy die verbruiker versuim om die verskuldigde bedrag te betaal, *en* dat 30 dae tyd vir betaling gegee word.

Stadsrade se regsadviseurs behoort met groot toewyding en met intense konsentrasie 'n studie te maak van die saak onder bespreking. Dit sal hulle dalk ook loon om hulle ooreenkomste met verbruikers te fynkam en kennis te neem van die opmerkings wat in hierdie aantekening gemaak is.

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Hawekwa Youth Camp v Byrne
2010 6 SA 83 (HHA)
Jacobs v Chairman, Governing Body, Rhodes High School
2011 1 SA 160 (WKK)

Deliktuele aanspreeklikheid in skoolverband

1 Feite

In die *Hawekwa*-saak het 'n seun (M) van bykans nege jaar oud 'n skoolgroep onder beheer van sy onderwysers na 'n jeugkamp vergesel waar hulle in huthuise gehuisves is. Gedurende die vroeë ure van die eerste oggend is M bewusteloos op die sementvloer van sy huthuis aangetref en dit het voorgekom of hy stuiptrekkings het. Hy is hospitaal toe geneem waar dit geblyk het dat hy 'n skedelfraktuur met

onderliggende breinbeserings opgedoen het wat tot 'n mate van permanente breinskade gelei het. Die eiser (respondent), M se vader, slaag in die hof *a quo* teen die verweerders (appellante) vir die skade wat die verweerders se werknemers (die onderwysers in beheer van M se groep) na bewering op onregmatige en nalatige wyse aan M en die eiser veroorsaak het.

Die *Jacobs*-saak se feite was soos volg: 'n Hoërskoolleerder (K) het die eiseres, 'n onderwyseres, in die klaskamer en in die teenwoordigheid van ander leerders met 'n hamer toegetakel. Sy het ernstige fisiese en psigiese beserings opgedoen waarvoor sy hospitaal- en ander mediese behandeling moes ondergaan. Die eiseres stel 'n eis om skadevergoeding teen onder meer die hoof van die skool (L) in op grond van eersgenoemde se onregmatige en nalatige versuim om die aanranding te voorkom en teen die LUR vir Onderwys wat ingevolge artikel 60(1) en (3) van die Suid-Afrikaanse Skolewet 84 van 1996 middellik vir L se beweerde delik aanspreeklik kan wees. Die eiseres slaag met haar eis (wat op grond van haar bydraende nalatigheid verminder is) en die verweerders word gesamentlik en afsonderlik vir haar skade aanspreeklik gestel.

In die bespreking wat volg, word net aandag aan die delikselemente onregmatigheid, nalatigheid en kousaliteit gegee. Ander aspekte wat ook in die beslissings ter sprake gekom het, soos bydraende nalatigheid en die *quantum* van skadevergoeding, word daargelaat.

2 Onregmatigheid

Alhoewel appèlregter Brand (89G-90A) in die *Hawekwa*-saak beslis dat op grond van die waarskynlikhede M in sy slaap bo van die slaapbank afgeval het omdat daar geen doeltreffende reëling was om dit te voorkom nie, was hierdie feit nie beslissend om onregmatigheid of nalatigheid aan die kant van M se onderwysers te bevind nie. Met betrekking tot hierdie delikselemente is appèlregter Brand (90A-E) sterk afkeurend van die gebruik van die begrip "duty of care" in die verweerder se pleitstukke. Hy verklaar soos volg (waarmee ons volmondig saamstem):

> As I see it, the quoted contentions are indicative of confusion between the delictual elements of wrongfulness and negligence. This confusion in turn, so it seems, originated from a further confusion between the concept of 'a legal duty', which is associated in our law with the element of wrongfulness, and the concept of 'a duty of care' in English law, which is usually associated in that legal system with the element of negligence … Warnings against this confusion and the fact that it may lead the unwary astray had been sounded by this court on more than one occasion … Nonetheless, it again occurred in this case.

Met betrekking tot onregmatige lates, herhaal appèlregter Brand (90I-91B) die beginsels wat in sekere onlangse beslissings van die Hoogste Hof van Appèl geformuleer is, naamlik dat nalatige gedrag in die vorm van 'n late nie *prima facie* onregmatig is nie maar dat onregmatigheid afhanklik is van die bestaan van 'n regsplig. Die regsplig word deur

regterlike beoordeling vasgestel met verwysing na publieke en regspolitieke maatstawwe wat strook met grondwetlike norme. Hieruit volg, volgens appèlregter Brand, dat 'n nalatige versuim wat skade veroorsaak net as onregmatig en derhalwe gedingsvatbaar beskou sal word as publieke of regspolitieke oorwegings vereis dat sodanige late, indien dit nalatig was, regsaanspreeklikheid vir die gevolglike skade vestig.

Alhoewel 'n hof volgens appèlregter Brand (91E-F) doelmatigheidshalwe eers onregmatigheid kan ondersoek (in welke geval dit gerieflik kan wees om nalatigheid vir hierdie doel te veronderstel), en dit omgekeerd weer gerieflik kan wees om onregmatigheid te veronderstel en die vraag na nalatigheid eerste af te handel, verkies hy om eersgenoemde benadering *in casu* te volg hoofsaaklik omdat hy glo dat die antwoord daarop vanselfsprekend is. Volgens hom (91G) is die enigste vraag by onregmatigheid of die verweerders "as a matter of public and legal policy [should] be held liable for the loss resulting from such harm". Hy beslis dat onregmatigheid wel aanwesig is en vind steun vir hierdie gevolgtrekking in die volgende *dictum* van regter Desai in *Minister of Education v Wynkwart* 2004 3 SA 577 (K) 580A-C:

> It was not in dispute that R [die respondent se minderjarige seun] was injured at school while under the control and care of the appellants' employees and it was fairly and properly conceded that teachers owe young children in their care a legal duty to act positively to prevent physical harm being sustained by them through misadventure. It was submitted that in this instance, as in many other delict cases, the real issue is 'negligence and causation and not wrongfulness'.

Met verwysing na *Van Eeden v Minister of Safety and Security (Women's Legal Centre Trust as amicus curiae)* 2003 1 SA 389 (HHA) 395-397 bevestig regter Moosa in die *Jacobs*-saak (165E-G) dat die onregmatigheid van 'n nalatige late afhanklik is van die bestaan van 'n regsplig om skade vir die eiser te voorkom. Of sodanige plig bestaan, vereis 'n waardeoordeel aan die hand van al die omstandighede, alle relevante faktore, die regsoortuigings van die gemeenskap en positiewe beleidsoorwegings. Sodoende kan die hof bepaal of daar redelikerwys van die verweerder verwag kon word om positiewe stappe te doen om die skade te voorkom. Hy vervolg (165H-I):

> Reasonableness in the context of wrongfulness is different from the reasonableness of the conduct itself. The former concerns the reasonableness of imposing liability, whereas the latter concerns the question of negligence. In the context of wrongfulness it would be better to qualify the legal duty 'as the legal duty not to be negligent' or put differently, whether 'the negligent conduct is actionable'.

Vervolgens verwys regter Moosa na die direkte vrye vertaling op Engels in *Minister of Law and Order v Kadir* 1995 1 SA 303 (A) 320 van die *locus classicus* van die formulering van die onregmatigheidstoets by 'n late deur hoofregter Rumpff in *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597 (hieronder aangehaal).

Na oorweging van verskeie beleidsoorwegings en faktore kom regter Moosa tot die slotsom dat daar wel 'n regsplig op die verweerders en hul werknemers gerus het om die eiseres se skade te voorkom. Hierdie faktore is die volgende (166D-169D): die grondwetlike imperatiewe wat hier toepassing vind, onder andere die plig van die staat om die regte in die handves van regte (oa die eiseres se fundamentele regte op lewe, waardigheid en sekerheid van die persoon) te beskerm; die verantwoordbaarheid van die staat vir sy funksionarisse se optrede; sekere statutêre bepalings en beleidsdokumente wat 'n plig op die verweerders plaas om die veiligheid en sekuriteit van leerders en onderwysers te verseker; die spesiale verhouding wat tussen die verweerders en die opvoeders aan die een kant, en die verweerders en die leerders aan die ander kant, bestaan het; en die feit dat L in beheer was van 'n potensieel gevaarlike persoon.

3 Nalatigheid

Wat nalatigheid betref, bevestig appelrègter Brand (91B-E) die toets soos in *Kruger v Coetzee* 1966 2 SA 428 (A) 430 geformuleer, naamlik dié van redelike voorsien- en voorkombaarheid van skade. Hy bevind (93E-G) dat 'n redelike onderwyser na 'n inspeksie van die beddens sou voorsien het dat daar nie voldoende beskerming was om te verhinder dat kinders in hulle slaap van die beddens afval nie. Daar was dus 'n daadwerklike risiko dat M van sy bed kon afval. Hierna ondersoek hy die voorkombaarheidsbeen en bevind dat die redelike onderwyser in die lig van die voorsienbare skade stappe sou gedoen het om die nadeel te voorkom, soos om die kinders van die boonste beddens op hul matrasse op die vloer te laat slaap. Gevolglik was die onderwysers nalatig.

In 'n minderheidsuitspraak bevind waarnemende appèlregter Griesel dat na sy mening die onderwysers nie nalatig opgetree het nie, Volgens hom (94D-G) is die huidige appèl 'n klassieke voorbeeld van “wisdom after the fact”. Hy is van mening (95H-96C) dat die toets vir die nalatigheid van 'n onderwyser dié van die redelike sorgsame ouer in verhouding tot sy eie kinders is (die *in loco parentis*-beginsel). Toegepas op die feite kom die regter (97E) tot die gevolgtrekking dat die tipe skade wat ingetree het, selfs al was dit redelikerwys voorsienbaar, nie sodanig was dat 'n redelike ouer stappe sou gedoen het om dit te voorkom nie.

Regter Moosa (169E-G) pas ook die nalatigheidstoets soos geformuleer in *Kruger v Coetzee* toe ten aansien sowel H, die eiseres se departementshoof, as L. Wat H betref, bevind die hof (174D-H) dat sy bewus was daarvan dat K ernstige sosiale probleme gehad het en daarna gestreef het om 'n bendelid soos sy pa te word. H moes gevolglik redelikerwys voorsien het dat K 'n bedreiging vir onderwysers, in besonder die eiseres, en leerders ingehou het en redelike stappe gedoen het deur hom onmiddellik vir berading te verwys. H se optrede het dus te kort geskiet aan die optrede van 'n redelike persoon in haar posisie en sy het bygevolg nalatig opgetree.

Met betrekking tot L se optrede kom regter Moosa (177C-D, 178G-J) ook tot die gevolgtrekking dat aangesien L bewus was van K se doodsdreigemente teenoor die eiseres, dit redelikerwys voorsienbaar was dat, deur K sonder toesig op 'n stoel buite sy kantoor te laat sit en hom sodoende buite sy sig en kontrole te plaas, K na sy klas sou kon wegglip om sy doodsdreigemente uit te voer. L moes dus redelike stappe gedoen het om te voorkom dat dit gebeur, soos deur K te versoek om in sy teenwoordigheid in sy kantoor te wag, of om iemand anders te kry om toesig oor hom te hou. Hy moes ook die eiseres gewaarsku het dat haar lewe in gevaar was en stappe gedoen het om haar veiligheid te verseker terwyl hy die polisie en K se ma ontbied het.

4 Kousaliteit

Kousaliteit het net in die *Jacobs*-saak ter sprake gekom. Regter Moosa (175A-F, 176E-G) bevestig dat kousaliteit sowel feitelike as juridiese kousaliteit betrek. Wat eersgenoemde betref, word die *conditio sine qua non*-toets toegepas. Met verwysing na Neethling, Potgieter en Visser (*Law of Delict* (2006) 130) aanvaar die hof (175E-F) die volgende formulering van die toets vir feitelike kousaliteit by 'n late:

> It entails a retrospective analysis of what would probably have happened if the alleged wrongdoer had acted positively in light of the available evidence and the probabilities originating from human behaviour and related circumstances.

Toegepas op die feite, beslis die hof (176D 179E) dat sowel H as dienaar van die verweerders as L feitelik die eiseres se skade veroorsaak het.

Met betrekking tot juridiese kousaliteit, naamlik of daar 'n voldoende noue verband tussen die late en die skade was, omgekeerd of die skade nie "too remote" was nie, verklaar die hof (176E-G) dat 'n soepele maatstaf toegepas moet word wat 'n waardeoordeel behels, gebaseer op beleidsoorwegings, redelikheid, billikheid en regverdigheid. In die lig hiervan beslis regter Moosa (176I-177A 179E) dat sowel H as L se optrede (lates) juridies nie te ver van die eiseres se skade verwyder was om hulle toegereken te word nie.

5 Kommentaar

Wat onregmatigheid vir 'n late betref, stem ons heelhartig saam met regter Moosa se uiteensetting in die *Jacobs*-saak (165E-G) vir sover hy steun op die suiwer benadering van die Hoogste Hof van Appèl in die *Van Eeden*-saak (395-96) wat soos volg lui (sien Neethling en Potgieter *Neethling-Potgieter-Visser Deliktereg* (2010) 58):

> Our common law employs the element of wrongfulness (in addition to the requirements of fault, causation and harm) to determine liability for delictual damages caused by an omission. The appropriate test for determining wrongfulness has been settled in a long line of decisions of this Court. An omission is wrongful if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The test is one of reasonableness. A defendant is under a legal duty to act positively to prevent harm to the

> plaintiff if it is reasonable to expect of the defendant to have taken positive measures to prevent the harm. The Court determines whether it is reasonable to have expected of the defendant to have done so by making a value judgment based, *inter alia*, upon its perception of the legal convictions of the community and on considerations of policy. The question whether a legal duty exists in a particular case is thus a conclusion of law depending on a consideration of all the circumstances of the case and on the interplay of the many factors which have to be considered.

Hierdie benadering vind steeds neerslag in onlangse beslissings van die hooggeregshof (sien bv *Swinburne v Newbee Investments (Pty) Ltd* 2010 5 SA 296 (KZD) 303; *Holm v Sonland Ontwikkeling (Mpumalanga) (Edms) Bpk* 2010 6 SA 342 (GNP) 347) en selfs van die Hoogste Hof van Appèl (sien *Harrington v Transnet Ltd t/a Metrorail* 2010 2 SA 479 (HHA) 485; sien ook *Minister of Safety and Security v Hamilton* 2004 2 SA 216 (HHA) 229; *Minister of Safety and Security v Rudman* 2005 2 SA 16 (HHA) 36). Ongelukkig bederf regter Moosa sy suiwer benadering wanneer hy daaraan toevoeg (165H-I, aangehaal hierbo) dat redelikheid in die konteks van onregmatigheid verskil van die redelikheid van die gedrag self. Volgens hom het eersgenoemde te make met die redelikheid om die verweerder aanspreeklik te stel, terwyl laasgenoemde onregmatigheid betrek. Hy vervolg dat dit in die konteks van onregmatigheid beter sou wees om die regsplig te kwalifiseer as "die regsplig om nie nalatig op te tree nie", oftewel "of nalatige gedrag gedingsvatbaar" is.

Soos voorheen uitgewys (Neethling en Potgieter *Deliktereg* 58 vn 120, 59-60), is hierdie stellings vatbaar vir kritiek. Ons volstaan grootliks met wat daar gesê is, maar wil ons tog in meer besonderhede uitspreek oor die sogenaamde "nuwe variasie" van die toets vir onregmatigheid as synde die "reasonableness of imposing liability" (sien vir 'n kritiese bespreking van hierdie toets Neethling en Potgieter *Deliktereg* 83-88). Alhoewel appèlregter Brand in die *Hawekwa*-saak (90I-91B) aanvanklik ook die suiwer regspligbenadering by die bepaling van die onregmatigheid van 'n late volg, kom dit voor of hy hierdie benadering ignoreer in sy gevolgtrekkende formulering van die toets waar hy verklaar (91A-B) dat 'n nalatige late slegs as onregmatig en dus ageerbaar beskou sal word indien publieke of regspolitieke oorwegings vereis dat sodanige late, indien nalatig, regsaanspreeklikheid vir die gevolglike skade meebring.

Nou is dit interessant dat sowel appèlregter Brand as regter Moosa, ten spyte van hul verwysing na die sogenaamde nuwe variasie van die toets vir onregmatigheid, nie hierdie toets prakties toepas nie maar wel die beproefde regspligbenadering. Appèlregter Brand (91H-92A) verklaar naamlik dat hy tevrede is dat onregmatigheid aanwesig is en laat daarop volg dat hy hom volkome vereenselwig met die *dictum* in die *Wynkwart*-saak (580) (aangehaal hierbo), te wete dat daar 'n regsplig op onderwysers rus om jong kinders onder hulle sorg teen fisiese benadeling te beskerm (en nie dat dit redelik sou wees om die verweerder aanspreeklik te stel nie). Insgelyks fokus regter Moosa (165H-

169D) uitsluitlik op die vraag of daar 'n regsplig op die verweerders gerus het om die aanranding op die eiseres te verhinder en weer eens nie op die vraag of dit redelik sou wees om die verweerders aanspreeklik te stel nie. (By sy toepassing van die regsplig neem hy 'n verskeidenheid norme (ook grondwetlike norme), regspolitieke oorwegings en ander faktore in ag. Sy benadering is dus nie "an intuitive reaction to a collection of arbitrary factors" nie maar duidelik "a balancing against one another of identifiable norms" (sien *Minister of Safety and Security v Van Duivenboden* 2002 6 SA 431 (HHA) 444; Neethling en Potgieter "Liability for an omission: control over a dangerous object" 2011 *THRHR*).

Die vraag ontstaan waarom beide regters dit nodig ag om hoegenaamd die "nuwe variasie" by te bring terwyl hulle in werklikheid onregmatigheid deur middel van die tradisionele regspligbenadering bepaal. Vir doeleindes hiervan kan dit nuttig wees om appèlregter Brand se formulering van die onregmatigheidstoets te vergelyk met die formulering daarvan in die *locus classicus* oor aanspreeklikheid weens 'n late, naamlik *Minister van Polisie v Ewels* 1975 3 SA 590 (A) 597, waarna regter Moosa in die *Jacobs*-saak (166B-D) met goedkeuring verwys. Hoofregter Rumpff stel dit aldaar soos volg:

> Dit skyn of dié stadium van ontwikkeling bereik is waarin 'n late as onregmatige gedrag beskou word ook wanneer die omstandighede van die geval van so 'n aard is dat die late nie alleen morele verontwaardiging ontlok nie maar ook dat die regsoortuiging van die gemeenskap verlang dat die late as onregmatig beskou behoort te word en dat die gelede skade vergoed behoort te word deur die persoon wat nagelaat het om daadwerklik op te tree. Om te bepaal of daar onregmatigheid is, gaan dit, in 'n gegewe geval van late, dus nie oor die gebruiklike 'nalatigheid' van die *bonus paterfamilias* nie, maar oor die vraag of, na aanleiding van al die feite, daar 'n regsplig was om redelik op te tree.

Hierteenoor lui appèlregter Brand (90I-91B) se formulering só:

> [N]egligent conduct in the form of an omission is not regarded as prima facie wrongful. Its wrongfulness depends on the existence of a legal duty. The imposition of this legal duty is a matter for judicial determination, involving criteria of public and legal policy consistent with constitutional norms. In the result, a negligent omission causing loss will only be regarded as wrongful and therefore actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting [damage].

Noukeurig beskou, is dit eerstens duidelik, soos reeds uitgewys (Neethling en Potgieter *Deliktereg* 84), dat die nuwe variasie van die onregmatigheidstoets nie moontlik sou gewees het as die appèlhof nie sy aanvaarding van die nuwe variasie op die misleidende weergawe van die *dictum* in die *Ewels*-saakdeur Fagan "Rethinking wrongfulness in the law of delict" 2005 *SALJ* 107-109 gebaseer het nie. Indien die Hoogste Hof van Appèl – ook appèlregter Brand in die *dictum* hierbo - onregmatigheid van 'n late sou gebaseer het op die regsoortuigings van die gemeenskap soos in die *Ewels*-saak geformuleer, sou dit nie moontlik gewees het om te verklaar dat onregmatigheid in sodanige gevalle aanwesig sou wees "if

public or legal policy considerations require that such omission, if negligent, should attract legal liability for the resulting damages" nie. Tweedens is dit moeilik om die regspligbenadering tot onregmatigheid in die eerste gedeelte van appèlregter Brand se verklaring te versoen met sy gevolgtrekking waarin hy die regsplig oënskynlik ignoreer ten einde onregmatigheid met verwysing na die nuwe variasie te omskryf, des te meer omdat hy in werklikheid nie die nuwe variasie nie – maar wel die regspligbenadering – toepas ten einde onregmatigheid *in casu* te bepaal. Hierdie teenstrydigheid skep verwarring en is 'n geleibuis vir regsonsekerheid. Dit sou aanvaarbaarder gewees het as appèlregter Brand, in ooreenstemming met die *Ewels*- en *Van Eeden*-sake, die onregmatigheid van 'n late net met verwysing na die regspligbenadering geformuleer het, in ooreenstemming sy praktiese toepassing daarvan in die *Hawekwa*-saak. Die verkieslike benadering blyk ook uit *Local Transitional Council of Delmas v Boshoff* 2005 5 SA 514 (HHA) 522 waar appèlregter Brand dit self eenvoudig stel dat "a negligent omission will be regarded as wrongful and therefore actionable only when the legal convictions of the community will impose a legal duty".

Met betrekking tot nalatigheid van onderwysers beweer waarnemende appèlregter Griesel in die *Hawekwa*-saak (95H-96C), soos gestel, dat die toets vir die nalatigheid van 'n onderwyser dié van die redelike sorgsame ouer in verhouding tot sy eie kinders is. Hy stel dit soos volg:

> In considering whether any steps ought to have been taken by the appellant's employees, the standard of care required of them and other persons *in loco parentis* is that of 'a reasonably careful parent in relation to his own children'. Although it has been suggested during argument before us (albeit somewhat tentatively) that the standard of care required of a teacher or someone else *in loco parentis* should actually be higher than the standard required of a reasonably careful parent in respect of his or her own child, we have not been referred to any authority in support of such a proposition, nor am I aware of any such authority. In my view, the test enunciated in the authorities referred to above correctly states the position in our law.

Hierdie siening kan bevraagteken word. Wat ook al die positiefregtelike standpunt in ons reg, *in loco parentis* skep verwarring by die vasstelling van nalatigheid van opvoeders aangesien dit bydra tot die foutiewe siening dat die nalatigheid van opvoeders, omdat hulle "in die plek van die ouer" teenoor die kind staan, gemeet moet word aan die optrede van 'n redelike ouer. Die korrekte nalatigheidstoets van opvoeders, in ooreenstemming met die vasstelling van die nalatigheid van deskundiges (sien Neethling en Potgieter *Deliktereg* 148-50), behoort eerder dié van die redelike opvoeder te wees (sien in hierdie verband ook appèlregter Brand se uitspraak (oa 92F-I, 93D-I, 94B) waar hy klaarblyklik die "reasonable teacher"-toets toepas). Vanuit 'n suiwer opvoedkundige oogpunt beskou sou dit sowel onrealisties as onvanpas wees om van opvoeders te verwag om leerders soos redelike ouers te onderrig. Professionele onderwys, met al sy ingewikkeldhede, is noodsaaklik juis omdat die meeste ouers beperkte insig het in hoe om hulle kinders te

onderrig en op te voed in die verskeidenheid van dikwels hoogs gespesialiseerde en tegniese skoolvakke wat nodig is om doeltreffend in die moderne gemeenskap te kan funksioneer. Hierbenewens word tereg aangevoer dat sekere regte en verpligtinge van ouers in verband met hulle kinders, soos die verskaffing van basiese voedsel en mediese versorging, huisvesting en kleding, nie aan opvoeders oorgedra kan word ingevolge die *in loco parentis*-leerstuk nie. Insgelyks kan byvoorbeeld die ouers se reg om redelike lyfstraf aan 'n kind toe te dien nie aan opvoeders oorgedra word nie omdat lyfstraf ingevolge artikel 10 van die Suid-Afrikaanse Skolewet 84 van 1996 verbied word. Potgieter "Delictual negligence of educators in schools: the confusing influence of the in loco parentis doctrine" 2004 3 *Perspectives in Education* 156 (sien ook Potgieter "Onsekerheid oor die toets vir deliktuele nalatigheid in skoolverband" 2005 *De Jure* 420 ev; "*Williams v LUK Gauteng, Departement van Onderwys*" 2008 *De Jure* 193 ev) kom tot die volgende slotsom:

> From a negligence point of view, the use of the *in loco parentis* concept has led to the application of a negligence standard to educators in schools that should be restricted to parents. As far as negligence is concerned, the standard of care exercised by parents over their children is not appropriate in the school context. The parental standard of care needed in a secluded and restricted home environment is ill-suited to deal with the supervisory functions necessary to ensure reasonable safety for often hundreds of children of various ages in extensive school building complexes, on vast school premises and sport fields, and in dealing with a huge variety of school and sports activities, equipment, vehicles, transport, etcetera. Ideally, therefore, *in loco parentis* should be restricted to its literal Latin meaning, namely 'to be in the place of a parent' ... denoting, in the school context, nothing more than that, for a specific period of time during the school day, a child is being placed by the parent under the physical control of the school authorities.

Laastens is dit in verband met kousaliteit verblydend dat regter Moosa in die *Jacobs*-saak onomwonde die soepel benadering tot juridiese kousaliteit voorstaan. In hierdie verband verwys hy na *Smit v Abrahams* 1994 4 SA 1 (A) 18 waar appèlregter Botha dit soos volg stel:

> Daar is net een 'beginsel': om te bepaal of die eiser se skade te ver verwyderd is van die verweerder se handeling om laasgenoemde dit toe te reken, moet oorwegings van beleid, redelikheid, billikheid en regverdigheid toegepas word op die besondere feite van hierdie saak.

Volgens appèlregter Botha in die *Smit*-saak (18) moet enige poging om aan die buigsame aard van die soepel benadering afbreuk te doen, weerstaan word. Anders as wat appèlregter Brand in *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 2 SA 150 (HHA) 164–165 (sien ook *mCubed International (Pty) Ltd v Singer* 2009 4 SA 471 (HHA) 482) te kenne gee, word juridiese kousaliteit – soos duidelik uit die aangehaalde *dictum* uit die *Smit*-saak blyk– as uitgangspunt deur die soepel maatstaf vasgestel, en kan die tradisionele kousaliteitsmaatstawwe (soos redelike voorsienbaarheid en "direct consequences") hoogstens 'n subsidiêre rol speel. Hiervolgens oorheers

die soepel maatstaf dus die tradisionele maatstawwe. Volgens appèlregter Brand (in die *Fourway Haulage*-saak 165) is die soepel maatstaf nie 'n selfstandige kriterium wat selfs in die afwesigheid van die tradisionele kriteria aangewend kan word nie, maar verg dit slegs dat die tradisionele kriteria nie dogmaties nie, maar soepel toegepas moet word. Sodoende word die subsidiêre rol van die tradisionele kriteria versaak, die oorheersende rol van die soepel benadering negeer en afbreuk aan die buigsaamheid daarvan gedoen. Hopelik sal die Hoogste Hof van Appèl – soos die hof in die *Jacobs*-saak – die oorheersende en buigsame karakter van die soepel maatstaf weer bevestig (sien ook Neethling en Potgieter *Deliktereg* 203 vn 106).

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Kruger NO v Goss and Another 2010 2 SA 507 (HHA)

Die outomatiese beëindiging van onderhoudsbevele ingevolge artikel 7(2) van die die Wet op Egskeiding 70 van 1979

1 Inleiding

Die outomatiese beëindiging van onderhoudsbevele gegee ingevolge artikel 7(1) of (2) van die Wet op Egskeiding 70 van 1979 is nie 'n nuwe onderwerp nie. (Sien aan die een kant die vraagstuk na die outomatiese beëindiging van onderhoudsbevele ingevolge artikel 7(1) met betrekking tot veral die hertroue van die onderhoudsgeregtigde of die dood van die onderhoudspligtige. (Sien ten opsigte van die hertroue van die onderhoudsgeregtigde oa *Smit v Pienaar* Ongerapporteerde saak 13829/94 (K); *Geldenhuys v Meyers and the Sheriff of the Supreme Court of South Africa, South Eastern Cape Local Division* Ongerapporteerde saak 556/96 (SOK); *Van Der Vyver v Du Toit* 2004 4 SA 420 (T); *Odgers v De Gersigny* 2007 2 SA 305 (HHA); *Welgemoed v Mennel* 2007 4 SA 446 (SOK). Ten opsigte van die dood van die onderhoudspligtige sien *Colly v Colly's Estate* 1946 WLD 83; *Owens v Stoffberg NO and Another* 1946 CPD 226; *Hughes v The Master and Another* 1960 4 SA 936 (K); *Milne v Estate Milne* 1967 3 SA 362 (K); *Copelowitz v Copelowitz and Others NO* 1969 4 SA 64 (K) wat beslis is alvorens a 7(1) van die Wet op Egskeiding 70 van 1979 inwerkinggetree het. Aan die ander kant sien *Hodges v Coubrough NO* 1991 3 SA 58 (D) met betrekking tot die outomatiese beëindiging van 'n onderhoudsbevel ingevolge a 7(2) by die dood van die onderhoudspligtige. Sien ook Hahlo "Premium on divorce" 1969 SALJ

385 ev; Hahlo *The South African Law of Husband and Wife* (1985) 370 ev; Van Schalkwyk "Dood en hertroue as beëindigingswyses van onderhoudsbevele tussen eggenotes ingevolge die Wet op Egskeiding 70 van 1979" 2002 *De Jure* 144 ev; Van Schalkwyk "*Odgers v De Gersigny* 2007 2 SA 305 (HHA)" 2008 *De Jure* 215 ev; Van Schalkwyk "Dood en hertroue as beëindigingswyses van onderhoudsbevele tussen voormalige eggenotes ingevolge die Wet op Egskeiding 70 van 1979" in Boezaart en De Kock (reds) *Vita perit, labor non moritur Liber memorialis: PJ Visser* (2008) 233 ev as sekondêre bronne wat hierdie onderwerp onder bespreking neem.) Die onderwerp kom weer vir beslissing in die saak van *Kruger NO v Goss and Another* (*supra*). Dit is die doel van hierdie aantekening om beëindiging van 'n onderhoudsbevel uitgevaardig ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 by die dood van die onderhoudspligtige ingevolge die beslissing van hierdie saak weer krities te ondersoek.

2 Die Feite van die Saak

Die feite van hierdie saak is nie kompleks nie. Nadat die respondente en haar man drie jaar getroud was, is die huwelik by wyse van egskeiding ontbind. Respondente was die verweerderes in hierdie geding en het as teeneis rehabilitatiewe onderhoud geëis. Die eis vir rehabilitatiewe onderhoud ingevolge artikel 7(2) is vir onder andere (en vir hierdie bespreking belangrik) R6 000 per maand vir 57 maande toegestaan. Respondente se gewese man het hierdie onderhoudsbevel vir 33 maande nougeset nagekom, toe hy aan natuurlike oorsake oorlede is. Sy seun (uit 'n vorige huwelik), die appellant, is as eksekuteur van sy boedel aangestel. Respondente het 'n eis vir R144 000 (24 maande x R6 000) teen die boedel ingedien. Nadat appellant regsadvies hieroor ingewin het, het hy die eis verwerp. Respondente het toe 'n aansoek na die Noord-Gauteng Hooggeregshof in Pretoria gebring vir 'n verklarende bevel dat die boedel aan haar R144 000 verskuldig is. Hierdie aansoek is toegestaan. Dit is teen hierdie bevel dat die huidige appèl gebring word.

3 Die Hof se Beslissing en Redes: Bespreking

Die appèl is suksesvol en die bevel van die hof *a quo* is opgehef. Die rede (*ratio decidendi*) vir hierdie beslissing is te vinde in die siening van die hof, by monde van appèlregter Navsa, dat artikel 7(2) nie in isolasie uitgelê kan word nie, maar dat dit in die lig van die gemenereg uitgelê moet word (509E-F) in navolging van die beslissing van regter Didcott in *Hodges v Coubrough NO* (*supra* veral 62H-63A) en dat artikel 7(2) nie uitgelê kan word om die gemenereg te wysig nie (510A-B). Artikel 7(2) bepaal dat 'n hof, 'n onderhoudsbevel mag maak in die afwesigheid van 'n onderhoudsooreenkoms tussen die partye na oorweging van die faktore in die subartikel aangegee. Die subartikel bepaal ook dat die onderhoudsbevel outomaties tot 'n einde kom by hertroue of dood van die onderhoudsgeregtigde. Die subartikel vermeld niks oor die dood of hertroue van die onderhoudspligtige nie. In kommentaar op hierdie bepaling vermeld die hof dan dat die artikel nie in isolasie uitgelê mag word nie, maar dat die gemenereg by die uitleg daarvan betrek moet

word. Die gemeenregtelike reël van onderhoudsvoorsiening tussen eggenotes bepaal dat die reg op en die verpligting tot onderhoudsvoorsiening, 'n gevolg van die huweliksverhouding is (509F) en dat hierdie verpligting en reg by ontbinding van die huwelik deur dood (509F) of egskeiding tot 'n einde kom. (Sien ook *Hodges v Coubrough NO supra* veral 62H-63A.) Die Hoogste Hof van Appèl in *Kruger* (*supra*) bevestig met hierdie uitspraak, die beslissing in *Hodges v Coubrough NO* (*supra*) dat artikel 7(2) nie in isolasie uitgelê mag word nie en dat gevolglik ingevolge die gemeenregtelike reël, die onderhoudsbevel by dood van die onderhoudspligtige outomaties verval.

Die Hoogste Hof van Appèl verwys in sy uitspraak nie na die sake van *Odgers v De Gersigny* (*supra*) of *Welgemoed v Mennell* (*supra*) nie. Alhoewel beide van hierdie sake handel met die beëindiging van 'n onderhoudsbevel ingevolge artikel 7(1) wat op ooreenkoms berus, is die uitsprake van hierdie sake vir die huidige bespreking myns insiens nie sonder waarde nie. Ek kyk eerste na *Welgemoed v Mennell* (*supra*). Die partye kom ooreen dat applikant aan respondente onderhoud sal betaal tot aan die einde van haar lewe. (Klousule 2.5 van die onderhoudsooreenkoms soos weergegee op 447C.) 'n Paar jaar later hertrou respondente, maar hierdie huwelik word twee maande later in die egskeidingshof ontbind. Applikant doen nou aansoek om 'n verklarende bevel dat die onderhoudsbevel outomaties by hertroue van die respondente verval het en haal *Van der Vyver v Du Toit* (*supra*) as gesag aan. Volgens laasgenoemde saak kom die bevel outomaties tot 'n einde op grond van 'n stilswyende bepaling, tensy die pligtige uitdruklik van hierdie reg afstand gedoen het (par 19). Volgens die siening van regter Selikowitz in die *Welgemoed*-saak is die stilswyende bepaling waarvan hier melding is nie van die gemenereg afkomstig nie (450F) en hiermee word saamgestem. As rede voer hy aan dat die reg om onderhoud te eis gemeenregtelik reeds by egskeiding opgehef is (450F-G). Die onderhoudsreg en –verpligting ter sprake word kontraktueel geskep en ingevolge artikel 7(1) van die Wet op Egskeiding 70 van 1979 in die hofbevel opgeneem. (450G. Die Hoogste Hof van Appèl in *Odgers v De Gersigny supra* par 8 is van dieselfde mening.) Artikel 7(1) bevat nie 'n stilswyende bepaling dat by hertroue van die geregtigde, die onderhoudsbevel outomaties opgehef word nie. Dit gebeur alleen indien hertroue as beëindigingswyse in die ooreenkoms (hetsy uitdruklik hetsy stilswyend) vervat is. Geen stilswyende bepaling van regsweë kan ingelees word nie, omdat die gemeenregtelike onderhoudsplig en –aanspraak by egskeiding beëindig is en gevolglik moet beëindiging van die bevel ingevolge die uitdruklike of stilswyende bepalings van die ooreenkoms bepaal word. Indien hierdie uitspraak met dié in *Kruger* vergelyk word, ontken die hof in *Welgemoed* die bestaan van hertroue as 'n stilswyende gemeenregtelike bepaling wat die onderhoudsbevel outomaties beëindig. Hiermee word volmondig saamgestem aangesien onderhoudsvoorsiening tussen eggenotes gemeenregtelik by ontbinding van die huwelik (bv deur egskeiding) beëindig is. In *Kruger* erken die Hoogste Hof van Appèl egter steeds die stilswyende gemeenregtelike bepaling dat die onderhoudsbevel outomaties by dood van die pligtige

verval. Die Hoogste Hof van Appèl neem glad nie dié standpunt in ag nie dat die gemeenregtelike reël nie toepassing *kan* vind nie, aangesien die huwelik reeds by egskeiding ontbind is. Dit open die deur vir debat oor wat die uitspraak sou wees indien hierdie argument wel oorweeg is. My standpunt is dat die beslissing van regter Selikowitz in *Welgemoed* logies aanneemlik is. Die gemeenregtelike reël wat meebring dat onderhoud tussen eggenotes by beëindiging van die huwelik tot 'n einde kom, vind nie meer toepassing nie aangesien die onderhoud nou deur wetgewing en 'n onderhoudsooreenkoms beheers word. Die uitspraak van appèlregter Navsa in die *Kruger*-saak pas die gemeenregtelike reël nadat die huwelik reeds deur egskeiding ontbind is weereens toe en dit blyk nie logies te wees nie. Die reël is tog sekerlik nou reeds uitgedien. (Sien ook Van Schalkwyk in Boezaart en De Kock (reds) (2008) 254.) Indien hierdie standpunt en kritiek teen die beslissing in die *Kruger*-saak nie oortuigend is nie, bevestig *Odgers v De Gersigny* (*supra*) myns insiens ook die standpunt dat die *Kruger*-saak verkeerd beslis is, alhoewel die *ratio* hiervoor van die *Welgemoed*-beslissing verskil.

In *Odgers v De Gersigny* (*supra*) word 'n onderhoudsooreenkoms by egskeiding bereik waarby onderhoud aan die geregtigde vir 'n sekere tydperk voorsien word. Twee maande na egskeiding hertrou respondente en appellant hou op om onderhoud te betaal soos ooreengekom. Die hof beslis nie oor die regsvraag of 'n onderhoudsbevel outomaties by hertroue van die geregtigde verval nie en is dié beslissing gevolglik op hierdie punt slegs *obiter*. Die Hoogste Hof van Appèl ontken dat die onderhoudsbevel by hertroue van die geregtigde beëindig, indien die onderhoudsooreenkoms uitdruklik vermeld dat die onderhoudsbevel vir 'n sekere tydperk betaal moet word en die geregtigde voor verstryk van daardie tydperk hertrou. Die hof beskryf dit só ([10]):

> ... It remains to consider whether there is scope for the implied term imposed by common law contended for by the appellant's counsel – effectively that the obligation to pay maintenance shall, in all cases, terminate on remarriage or death. In this case, the express provisions of the maintenance clause, which are specific regarding the duration of the obligation, are in conflict with the contradictory implied term contended for. A term imposed by law may not be implied in total disregard of the parties' intention and will not be implied if it is in conflict with the express provisions of the contract. The contradictory clauses cannot co-exist.

Ingevolge hierdie siening beëindig die onderhoudsvoorsiening nie by dood van die pligtige nie, omdat die ooreenkoms wat bepaal dat die onderhoud vir sekere periode voorsien moet word, die toepassing van die stilswyende gemeenregtelike reël dan uitskakel of kanselleer. Indien hierdie *obiter* siening op die *Kruger*-beslissing toegepas word, verval die bevel ook nie outomaties by dood van die pligtige nie. Hierdie beslissing is ook nie in die *Kruger*-saak oorweeg nie.

Op grond van bogenoemde kritiek wil dit voorkom of die *ratio decidendi* in die *Kruger*-saak verkeerd is en die beslissing gevolglik nie korrek kan wees nie.

Benewens bogenoemde siening van regter Didcott in die *Hodges v Coubrough NO* (*supra*) wat die *ratio decidendi* van die beslissing in *Kruger* is, voer regter Didcott ten minste nog vier redes aan waarom 'n onderhoudsbevel ingevolge artikel 7(2) by dood van die pligtige tot 'n einde kom. Daar word kortliks ook na hulle verwys.

(i) Eerstens, is die hof van mening dat indien dit die bedoeling van die wetgewer was om onderhoud na dood van die pligtige te laat voortduur, die wetgewer uitdruklik daarvoor voorsiening sou gemaak het. "It would hardly have left such to be conveyed by the sidewind of generally worded provisions which, while accommodating the idea linguistically, dealt with it obliquely and elliptically." (64E-F.) Die wetgewer vermeld alleen in artikel 7(2) die omstandighede wat tot beëindiging van die bevel aanleiding gee met spesifieke verwysing na die posisie van die geregtigde; die dood van die pligtige word vanselfsprekend aanvaar die onderhoudsbevel te beëindig (64G). Hoekom die wetgewer alleen na die posisie van die geregtigde verwys, verklaar die hof deur te sê dat die hertroue van die geregtigde sekerlik die hoofbeweegrede was en dat die wetgewer toe maar om die prentjie ten opsigte van die geregtigde ten volle te skets ook die dood van die geregtigde ingesluit het (65H-I). Toe artikel 7(2) op die wetboek verskyn het, was die Wet op Onderhoud van Langslewende Gades 27 van 1990 nog nie in werking nie en het 'n weduwee nog geen eis vir onderhoud teen die oorlede gade se boedel gehad nie (64B-C). In die lig hiervan is dit vir die hof nouliks denkbaar dat 'n onderhoudsbevel ingevolge artikel 7(2) na dood van die onderhoudspligtige kan voortduur deur "... giving them rights against the estates of people no longer married to them at the time of death which widowed spouses did not enjoy against the estates of those to whom they were then still married." (64D-E van die *Hodges*-saak.) Hierdie standpunt word met goedkeuring deur die beslissing onder bespreking aangehaal (par [12]). Die oortuigingskrag van hierdie standpunt is nie oortuigend nie. Die geskeide gade was in elk geval ingevolge artikel 7(2) in 'n gunstiger posisie as die weduwee sover dit die gemeenregtelike onderhoudsverpligting betref. Ingevolge artikel 7(2) word, soos reeds gesê, die gemeenregtelike reël opgehef, maar die gemeenregtelike reël het steeds voortbestaan by dood totdat dit eers met inwerkingtreding van die Wet op Onderhoud van Langslewende Gades 27 van 1990 afgeskaf is.

(ii) Tweedens, verwerp die hof die uitsprake in die reeks beslissings van *Colly v Colly's Estate* (1946 WLD 83), *Owens v Stoffberg NO and Another* (1946 CPD 226) en *Hughes NO v The Master and Another* (1960 4 SA 936 (K)) as gesag vir die standpunt dat die onderhoudsbevel ingevolge artikel 7(2) by dood van die pligtige voortduur. (65I-66C. Al drie hierdie sake het die boedel van die oorlede onderhoudspligtige aanspreeklik gehou ingevolge 'n onderhoudsooreenkoms wat by egskeiding, 'n bevel van die hof gemaak is.) Regter Didcott in *Hodges* (*supra*) motiveer dit met verwysing na die verskil in uitleg van 'n statutêre bepaling (soos `n onderhoudsbevel ingevolge a 7(2)) en 'n onderhoudsbevel wat op ooreenkoms gefundeer is (soos 'n onderhoudsbevel ingevolge a 7(1)). In

die geval van 'n onderhoudsbevel wat op ooreenkoms berus (a 7(1)) moet die ooreenkoms uitgelê word om 'n antwoord te verskaf op die vraag of die bevel na dood van die pligtige voortduur (66D-E). In die geval van wetgewing, moet die bedoeling van die wetgewer vasgestel word (66F). In laasgenoemde geval, naamlik wanneer die bedoeling van die wetgewer vasgestel moet word, moet hy die uitleg van die wetgewing ook die gemenereg in ag neem, wat nie deel uitmaak van die uitleg van 'n onderhoudsbevel ingevolge ooreenkoms nie (66F) en mag die wetgewing dus nie in isolasie van die gemenereg uitgelê word nie. Appèlregter Navsa in *Kruger NO v Goss and Another* (*supra*) verwys nie na hierdie onderskeid nie. Hierdie verskil in uitleg van 'n onderhoudsbevel ingevolge artikel 7(1) aan die een kant en 'n onderhoudsbevel ingevolge artikel 7(2) aan die ander kant word deur 'n verdere oorweging bevestig. Regter Didcott stel dit só (66G-67A):

> Then there is a further consideration, a rule governing contractual obligations which has no counterpart in the area of those generated statutorily. The rule lays down that the estate of each party to a contract is liable when he dies to perform every obligation incurred by him in terms of it which he, if alive, would have had to fulfill. For he is deemed to have undertaken such on behalf of his estate as well as himself. The rule is subject to a couple of exceptions. It does not apply to any contract that provides otherwise, expressly or impliedly. Nor does it operate when the performance required was the sort appropriate to the deceased alone ... The obligation is then extinguished by his death. That does not go, however, for the payment of maintenance. ... It is therefore unhelpful, I believe, to compare the wording of the legislation with that of the agreements examined in the three judgments cited.

(iii) Derdens, verwys die regsverteenwoordiger van applikante in die *Hodges*-saak (*supra*) ook na *Copelowitz v Copelowitz and Others NO* (1969 4 SA 64 (K)) waar regter Van Zijl van mening is dat 'n onderhoudsbevel ingevolge artikel 10(1)(a) van die Wet op Huweliksaangeleenthede 37 van 1953 (die voorloper van artikel 7(2) onder bespreking) na die dood van die pligtige voortduur. Regter Didcott verwerp hierdie beslissing op twee gronde. Aan die een kant vermeld hy dat *Copelowitz* die enigste beslissing is waar bevind is dat die onderhoudsbevel, net soos in gevalle waar die onderhoudsbevel op ooreenkoms berus, nie by dood van die pligtige verval nie. Aan die ander kant verwerp hy ook die beslissing op grond van die voormelde verskil in uitleg van 'n bevel wat op ooreenkoms berus en een wat nie op ooreenkoms berus nie. (Hierbo (ii).)

(iv) Vierdens, vermeld regter Didcott dat indien hy in die bogenoemde beskouing verkeerd is, bestaan daar om die minste te sê groot twyfel oor die bevoegdheid van die hof om ingevolge artikel 7(2) 'n onderhoudsbevel te maak wat na dood van die pligtige voortbestaan. Hy stel dit in die volgende woorde (69E-G):

> Perhaps, however, I am wrong in taking that definite view. If so, I feel the problems are such that I can with safety go the length of regarding the existence of the power as highly doubtful at least. Experience shows, what is more, that the doubts are hardly mine alone. Since the Matrimonial Affairs Act was passed in 1953, after all, awards of maintenance running into hundreds

> of thousands must have been made throughout the land in the absence of agreement. Countless people on the paying side must have died by now. Yet I know of no single case of that kind in which the contention has previously been advanced that any of their estates happened to be liable. The lack of such for almost 40 years tells against a widespread belief in the transmissibility of the obligation. It suggests rather an assumption to the contrary which appears to have been pretty universal.

(b) Die hof in *Kruger* verwerp ook die standpunt van die hof *a quo* waar beslis is "... that s 7(2) was inapplicable, in that rehabilitative maintenance is 'an animal of its own', and if ordered in the terms referred to in para [3], the estate of the 'maintaining spouse' is liable to pay the outstanding maintenance." (510E.) Ongelukkig het ek nie die beslissing van die hof *a quo* in my besit nie en kon ek dit nie self lees nie. Indien regter Hartzenberg wat die beslissing in die hof *a quo* gelewer het, hiermee bedoel het dat rehabilitatiewe onderhoud nie ingevolge artikel 7(2) beveel mag word nie, sou ek daarvan wou verskil en saamstem met die beslissing van appèlregter Navsa dat rehabilitatiewe onderhoud ook 'n spesie van onderhoud is en dat artikel 7(2) ook vir rehabilitatiewe onderhoud voorsiening maak (510D-E). Die advokaat vir die respondente het egter voor die hofsaak toegegee dat indien rehabilitatiewe onderhoud as 'n spesie van onderhoud gesien word, moet die appèl slaag. (Vgl 510D van die verslag.) Waarom hierdie standpunt ingeneem is, is nie vir my duidelik nie. Gevolglik beslis die hof moet die appèl vir hierdie rede alleen slaag (510E). Ek stem saam dat rehabilitatiewe onderhoud 'n spesie van onderhoud is en dat artikel 7(2) daarvoor voorsiening maak. Dit is egter een ding om hiermee saam te stem, maar 'n totaal ander ding om hiermee ook te sê dat die rehabilitatiewe onderhoudsbevel dan ook noodwendigerwys as gevolg van die gemeenregtelike beginsels wat onderhoud tussen gades ten grondslag lê by die dood van die onderhoudspligtige beëindig word.

(c) Die hof wys dan ook op verdere oorwegings wat die uitleg soos reeds genoem bevestig en wat teen die uitspraak van die hof *a quo* stry (510E). Indien die eis van die respondente gehandhaaf word, sou dit tot verskeie ongewenste gevolge aanleiding gee (510F). Ek noem hulle kortliks en nommer hulle self:

(i) Die aanspraak op onderhoud uit die boedel van die oorledene deur sy kinders mag verminder of uitgewis word (510F).

(ii) Die regte van bevoordeeldes mag betrek word of in gedrang kom (510F).

(iii) Teoreties mag die eis vir onderhoud onder bespreking meeding met die eis vir onderhoud van 'n langslewende gade en die kinders van die oorledene en die eis van bevoordeeldes van die oorledene (510G-H). Punt (iii) is myns insiens 'n herformulering van punte (i) en (ii) waartoe die eis om onderhoud van 'n langslewende gade bygevoeg word. Dit word uitdruklik bepaal dat die eis/vordering vir onderhoud van die langslewende gade ingevolge die Wet op Onderhoud van Langslewende Gades 27 van 1990 dieselfde rangorde teenoor ander vorderings teen die boedel beklee as wat 'n vordering vir onderhoud van 'n afhanklike kind

van die afgestorwe gade teen die boedel beklee en indien die vordering van die langslewende gade en dié van 'n afhanklike kind met mekaar meeding, word die vorderings indien nodig, eweredig verminder. (Sien a 2(3)(a) van die Wet.) Hierdie bepaling is natuurlik nie van toepassing op die onderhoudsvordering van die geskeide gade van die afgestorwe gade nie. Desnieteenstaande hierdie feit mag die eis van die geskeide gade, indien dit erken word, volgens die siening van appèlregter Navsa in die saak onder bespreking, meeding met die eise hierbo vermeld. Die wyse van meedinging word nie vermeld nie. Daar is gesag voor hande wat in wese die meedinging ingevolge die bepaling van die Wet op Onderhoud van Langslewende Gades 27 van 1990 reeds voor inwerkingtreding van die vermelde wet inlui en ondersteun. (Sien bv *Chizengeni v Chizengeni* 1989 1 SA 454 (ZHH) veral 456. Sien ook Joubert 1980 *De Jure* 80 93-94; Hahlo 366.) Daar is egter ook gesag wat nie hierdie meedinging voorstaan nie, maar aan die geskeide gade 'n sterker reg as aan die langslewende/huidige gade erken omdat die reg eerste gevestig is en die langslewende/huidige gade sekerlik ook daarvan moes geweet het alvorens die huwelik gesluit is. (Sien oa *Hancock v Hancock* 1957 2 SA 500 (K) 503B, 506H-507A; *Loubser v Loubser* 1958 4 SA 680 (K) 684; *Dawe v Dawe* 1993 1 SA 141 (Z) 143D-E, 144A; *Reid v Reid* 1992 1 SA 443 (OK) 448E-H; *Davis v Davis* 1993 1 SA 293 (SOK) 296E-G, maar waar die hof op 296F ook byvoeg dat hierdie bevoorregte posisie van die geskeide gade nie absoluut is nie.) Gevolglik is die sogenaamde ongewenste gevolge waarvan appèlregter Navsa praat, nie nuut en onbekend nie en verdien dit hoegenaamd nie om as rede te dien vir die outomatiese beëindiging van die vordering by dood van die pligtige nie.

(iv) Laastens word daar op die onderhoudsbeginsel gewys dat onderhoud altyd relatief tot die vermoë en behoefte van die onderskeie gades is en dat as hierdie aspekte verander behoort dit as 'n veranderde omstandigheid te kwalifiseer wat aanleiding tot die wysiging van die bevel kan dien. (510H-I. Vgl ook bv die bewoording van artikel 8(1) van die Wet op Egskeiding 70 van 1979 wat voorsiening maak vir onder andere die wysiging van 'n onderhoudsbevel verleen ig die Wet op Egskeiding, indien daar "voldoende rede" daarvoor bestaan.) Hierop sê appèlregter Navsa (511A-B): "To subject a deceased estate to assessments of this kind is not only undesirable, but appears to me to offend against first principles."

Dit is sekerlik so dat hierdie berekenings moeilik vasstelbaar en berekenbaar is (sien bv ook *Ex parte Jacobs* 1982 2 SA 276 (O) 279 waar waarnemende-regter Smit ten opsigte van die onderhoudseise van afhanklike kinders teen die boedel van 'n oorlede ouer vermeld dat dit nie moontlik is om vir alle gebeurlikhede in die onderhoudsbevel voorsiening te maak nie), maar om dit as "ongewens" te beskou, mag sekerlik nie as rede dien waarom die bevel nie mag/kan voortbestaan nie. *In casu* is dit 'n vasgestelde bedrag vir 'n vaste tydperk wat sekerlik nie onder dieselfde probleme as waarna verwys word, gebuk gaan nie.

4 Slot

Ek volstaan met die onderstaande opmerkings en/of kommentaar:

(a) Rehabilitatiewe onderhoud het ingevolge hierdie beslissing slegs 'n beperkte toepassing wat net tydens die lewe van die onderhoudspligtige betekenis en toepassing het. Die oomblik as die onderhoudspligtige sterf, kom die rehabilitatiewe onderhoudsbevel outomaties tot 'n einde, desnieteenstaande die Hoogste Hof van Appèl erken dat artikel 7(2) vir rehabilitatiewe onderhoud voorsiening maak (hierbo par 3(b)). Hierdie effek van die beslissing is myns insiens grondwetlik aan te veg. Indien die rehabilitatiewe onderhoudsbevel ingevolge artikel 7(1) gemaak is, is daar weinig twyfel dat in die lig van beide *Odgers* as *Welgemoed* die onderhoudsbevel nie by dood van die onderhoudspligtige outomaties sou verval het nie. Hierdie verskil in uitleg en effek met die beslissing onder bespreking lyk op die oog af na 'n oortreding van artikel 9(1) van die Grondwet van die Republiek van Suid-Afrika, 1996, wat ook nie ingevolge artikel 36 van die Grondwet regverdigbaar is nie. In die lig van hierdie opmerking en kommentaar, is ek van oordeel dat hierdie beslissing, net soos *Hodges v Coubrough NO* (*supra*), met respek gesê, verkeerd beslis is. (Vgl ook Van Schalkwyk in Boezaart & De Kock (reds) (2008) 254.)

(b) Indien die Hoogste Hof van Appèl kennis van die beslissing in *Welgemoed* (*supra*) geneem en toegepas het (sien die bespreking hierbo 3(a)), vind geen stilswyende (gemeenregtelike) ontbindingsbepaling toepassing nie en moet daar outomaties aan die bepalings van die rehabilitatiewe onderhoudsbevel (hetsy ingevolge a 7(1) hetsy ingevolge a 7(2) van die Wet op Egskeiding 70 van 1979) uitvoering gegee word. Die effek hiervan is dat geen onderhoudsbevel uitgevaardig ingevolge artikel 7(2) by die dood van die onderhoudspligtige outomaties tot 'n einde kom nie, tensy die bevel anders bepaal.

(c) Indien die Hoogste Hof van Appèl kennis van die beslissing in *Odgers* (*supra*) geneem en toegepas het (sien hierbo 3(a)), is die effek minder uitgebreid as dié van die *Welgemoed*-saak en sal rehabilitatiewe onderhoudsbevele (gekoppel aan 'n ontbindende voorwaarde of termyn) nie by dood van die onderhoudspligtige verval nie, indien die onderhoudspligtige voor vervulling van die ontbinde voorwaarde of termyn sterf. Die rede hiervoor is te vinde in die feit dat die stilswyende (gemeenregtelike) ontbindingsbepaling nie toepassing vind indien die bepalings van die onderhoudsbevel strydig daarmee is nie.

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The Citizen v McBride
2010 (4) SA 148 (SCA)

As a matter of fact: But whose fact?

1 Introduction

In the case involving *The Citizen* newspaper and Robert McBride, the SCA dismissed an appeal by *The Citizen* and others in their attempt to overturn the decision of the court *a quo.* The Witwatersrand Local Division of the High Court had ruled that articles and editorials published in *The Citizen* newspaper between 10 September 2003 and 20 October 2003 were defamatory of McBride.

The issue in this case was whether the fact that the plaintiff had been granted amnesty by the Truth and Reconciliation Commission (TRC) (in terms of section 20 of Promotion of National Unity and Reconciliation Act 34 of 1995 (the TRC Act)) rendered false any reference to him as a murderer. The majority judges of the SCA, per Streicher JA (Mthiyane and Ponnan JJA, each dissenting for different reasons), ruled that any such reference to the plaintiff who had been granted amnesty was false. As a result thereof the court rejected the defendants' defences for truth publication and for fair comment on the basis that the underlying fact upon which the opinion was based was not true. The majority was particularly at pains to regard the publication as a comment. Mthiyane JA largely disagreed with the view that the statements were portrayed as the truth as opposed to comments, and he granted the defence of fair comment. Ponnan JA, on the other hand, disagreed with both the majority conclusion and Mthiyane JA's conclusion, largely on the basis of the objectives of the TRC Act which sought to foster reconciliation and nation building.

This case note presents a critical evaluation of the conclusion reached by the majority on the main points and their bases for dismissing both defences. It partly takes issue with Mthiyane JA's acceptance of the fair comment defence. It is submitted that in respect of both defences the appeal should have failed, but for different reasons, instead of those advanced by the court. The truth defence should have failed on the basis that referring to the plaintiff who had been granted amnesty as a murderer was not in the public interest or public benefit (especially in view of the objectives of the TRC Act and the fact that the plaintiff was being prevented from taking office due to crimes for which he was indemnified). This certainly was not in the spirit of reconciliation. Of course this must be balanced against the need for the public to know the kind of person who was tipped for an onerous public office requiring integrity. The fair comment defence should have failed not on the basis that the facts on which the comment was based were rendered untrue by virtue of amnesty or that it was not a comment, but on the basis that the

comment was not fair since the plaintiff had been granted amnesty in terms of a valid legal process.

2 The Facts

The facts of the case appear from the judgments of both the majority and Mthiyane JA. *The Citizen* had published a series of articles and editorials starting on 10 of September 2003. On this day, under the heading "McBride tipped to head Metro cops" (par 3), the newspaper published revelations that it had learned from its reliable sources that McBride was about to be appointed to replace the chief of police for the Ekurhuleni Metropolitan who had resigned. The revelations were published with a detailed background and history of McBride. These included his criminal conviction for placing a bomb in a bar in Durban, which killed "several people including three women". It also mentioned his subsequent application for what turned out to be a successful amnesty from the TRC. It also mentioned how McBride was later arrested and "charged" with gun running in Mozambique and subsequently released and sent home.

This publication was followed by an editorial of 11 of September 2003 which questioned his candidacy and the African National Congress' attitude towards crime. The editorial went so far as stating that McBride's candidacy could be acceptable only if his backers supported "the dubious philosophy: set a criminal to catch a criminal". The editorial branded McBride as a criminal for "the cold-blooded multiple murders" that resulted from his bombing of the Durban bar. According to the editorial, it was for this reason and for "his dubious flirtations with alleged gun dealers in Mozambique" that McBride should have been disqualified for the job of police chief. The debate of McBride's candidacy was then joined by the then State President Mbeki who lashed out at those who criticised McBride's pending appointment (par 10). In response to this criticism of McBride's critics on 21 October 2003 *The Citizen* published an article by its columnist, one Andrew Kenny, which panned Mbeki for his criticism of *The Citizen*. In this article *The Citizen* referred to McBride as one of the "three most notorious non-government killers of the later apartheid period … who obstructed the road to democracy." In this article, *The Citizen* callously lashed out at McBride for his act of killing innocent victims in his bombing incident. It accused him of "strengthen[ing] the hand of die-hard supporters [of] apartheid" thereby "prolonging the wretched regime" by murdering innocent women.

3 Fact or Opinion?

The appellants, primarily, sought to rely on the defence of publication of truth. However, after analysing the whole effect of the TRC Act and its process, the majority in the Supreme Court of Appeal was of the opinion that this defence could not succeed. It reasoned that since McBride applied for, and was granted, amnesty, reference to him as a murderer was no longer true. The main question therefore is whether the appellants should have relied on the defence of truth publication or on that of fair comment.

The following facts are common cause: that McBride did bomb a Durban bar; that he applied for and was granted amnesty by the TRC; that he was detained in Mozambique for alleged gun running; and that he was subsequently released by the Supreme Court of Mozambique as there was no evidence against him. All of this had become public knowledge. It is also common cause that the allegations about the impending appointment of McBride as the chief of police for Ekurhuleni were true, as he was subsequently appointed in that position. However, *The Citizen* was of the view that he was not a suitable candidate for the position and, through a series of articles and editorials, sought to illustrate why it held this view. Its bases were mainly the multiple murders he had committed and his detention in Mozambique (the challenge to the latter was abandoned by McBride). Therefore, it submitted that Mthiyane JA was correct to conclude that, to a reasonable reader of *The Citizen*, the series of the articles would have been regarded as a comment and not as publication of truth. Hence, the defence of fair comment should have been pursued by the appellants. Whether this should have succeeded or not is another question for consideration. However, before considering the merits of this defence of fair comment, it is imperative to first consider the defence of truth publication, which was considered and rejected by the majority judges.

4 Publication of Truth

It is submitted that when considering the defence of truth, the SCA erred when failing to consider it in conjunction with public benefit. It is trite law that it is not sufficient for the defendant to prove that the publication was the truth. In addition to being substantially true, such publication must also be for public benefit (Burchell *Personality Rights and Freedom of Expression: The Modern Actio Injuriarum* (1998) 274). Widely interpreted, public benefit incorporates public interest (*Ibid*). In turn, according to Thirion J in *Buthelezi v SABC* 1997 12 BCLR 1733 (D), public interest should be understood to incorporate the concept of public concern (Burchell 275). As the author puts it, "some advantage must be conveyed to the public by the communication of the information" (Burchell 274). According to Hefer JA in *National Media Ltd v Bogoshi* 1998 4 SA 1195 (SCA), public interest refers to "the material in which the public has an interest, as distinct from the material which is interesting to the public" (Burchell 275). These two parts of the defence, that is, truth and public benefit, must not be regarded separately, but should be considered in relation to each other (Burchell 273). It is therefore submitted that the Supreme Court of Appeal erred in considering the truth in isolation from public benefit, which will be discussed in more detail later in this note. At this point it is worth considering the conclusion reached by the majority on the question of whether the statements published in *The Citizen* were false. This also requires a brief examination of the effect of the TRC process.

4 1 Truth

To suffice as a defence, only the material allegations of a statement must be true, rather than every minute detail (Burchell 272). This being the case, protection is even given to some erroneous defamatory statements, depending on the circumstances of the publication (Burchell 272-73). The complexity of the issue *in casu* lies in the fact that McBride was granted amnesty by the TRC, in terms of a legal process. Thus, one must examine this element of the defence in relation to the effect of such amnesty granted by the TRC. The effect of the granting of amnesty is spelt out under sections 20(7)(a), (8) and (10) of TRC Act:

> (7)(a) No person who has been granted amnesty in respect of an act, omission or offence shall be criminally or civilly liable in respect of such act, omission or offence and no body or organisation or the State shall be liable, and no person shall be vicariously liable, for any such act, omission or offence.
>
> …
>
> (8) If any person –
>
> (a) has been charged with and is standing trial in respect of an offence constituted by the act or omission in respect of which amnesty is granted in terms of this section; or
>
> (b) has been convicted of, and is awaiting the passing of sentence in respect of, or is in custody for the purpose of serving a sentence imposed in respect of, an offence constituted by the act or omission in respect of which amnesty is so granted, the criminal proceedings shall forthwith upon publication of the proclamation referred to in subsection (6) [which requires gazetting the names and actions of persons granted amnesty] become void or the sentence so imposed shall upon such publication lapse and the person so in custody shall forthwith be released.
>
> …
>
> (10) Where any person has been convicted of any offence constituted by an act or omission associated with a political objective in respect of which amnesty has been granted in terms of this Act, any entry or record of the conviction shall be deemed to be expunged from all official documents or records and the conviction shall for all purposes, including the application of any Act of Parliament or any other law, be deemed not to have taken place: Provided that the Committee may recommend to the authority concerned the taking of such measures as it may deem necessary for the protection of the safety of the public.

The effect of amnesty spelt out in section 20 of the TRC Act was fully canvassed by both Streicher JA for the majority and by Mthiyane JA. It is submitted that section 20(7)(a) and section 20(8) must be understood with section 20(10) of the TRC Act. These sections should also be understood within the broader objectives of the TRC process which were reconciliation and nation building (addressed in more detail later). Properly interpreted, these subsections excuse anyone who has been granted amnesty from both criminal and civil liability. Put differently, no one who has been granted amnesty by the TRC committee will be held accountable for those acts for which amnesty was granted. While the

amnesty granted to the respondent could not, according to Streicher JA (par 33), obliterate those facts or erase them from the historical record, it ensured that the respondent is no longer considered to be a criminal in respect of the deeds committed by him (par 33). It appears that Mthiyane JA is in agreement with the majority that the granting of amnesty does not blot out historical record of what was committed (par 80). He differs from the majority judges on whether reference to a recipient of amnesty as a criminal is rendered false as a result of the amnesty. He is of the view that it does not render it false, whereas Streicher JA thinks it does (pars 80–81, 33). Contrary to the view of the majority, I agree with Mthiyane JA that amnesty does not render any reference to deeds for which one was amnesty granted, false. This will be misrepresenting the purpose of amnesty, namely, nation building and reconciliation, and not eradicating the facts of history.

Mthiyane JA is also of the opinion that such reference is not prohibited as a result of amnesty (par 80). However, Streicher JA seems to suggest that such reference is prohibited when he said "… the respondent is no longer considered to be a criminal in respect of deeds committed by him" (par 33). In view of the objectives of the TRC process and s20(7) of the TRC Act, I agree with Streicher JA's view. A protracted reference to a recipient of amnesty as a criminal in respect of crimes for which he obtained amnesty renders him accountable, criminally or otherwise for such deeds, whereas in law he should not be. This would be contrary to section 20(10) of the TRC Act, which excuses recipients of amnesty from such liability. It also undermines efforts to achieve reconciliation and nation building through the integration of former political prisoners in the society. This view will be mainly relevant when I consider the second part of the truth and public interest defence, namely, public benefit.

The majority were incorrect to conclude that the statements were false as a result of amnesty granted to McBride by the TRC. It is a fact that McBride did place a bomb in a bar which killed and injured people. He was convicted for this deed. The bombing and the subsequent injuries and deaths are historical facts. Thus, notwithstanding amnesty granted to him in terms of a lawful TRC process, the published statements were substantially true.

4 2 Public Interest

The question that should also be asked is whether the public stood to derive some benefit from publishing McBride's background and history. In this regard, the concept of "public benefit" should be given wider interpretation, such as "that which concerns the public" or "that in which public has an interest". In this instance, McBride was tipped for a senior public office which requires extreme integrity. Thus, the public is interested in knowing the nature and character of any person who assumes such an important public office (as *The Citizen* correctly argued). However, in view of the circumstances of the case and the plaintiff, the matter does not end there. McBride had been a political

prisoner and a recipient of amnesty who needed to be integrated in the society, in the name of reconciliation and nation building. Therefore, another important factor that must be considered in ascertaining whether publication was made in the public interest is the objectives of the TRC Act and the TRC process.

This notion of public interest was widely canvassed by Ponnan JA in the present matter, although he did not specifically confine it within the bounds of any defence (paras 92–95). The Judge of Appeal was of the view that continued reference to McBride as a criminal and murderer was impermissible, as it goes against the purposes of reconciliation, nation building and a promise of integration into the public, of those who had been granted amnesty (paras 92–93). It is submitted that the reasoning of Ponnan JA is preferable as it goes to the central issue in the case. It is also in harmony with what was expressed by De Villiers CJ in *Graham v Ker* 1892 9 SC 185. The Chief Justice stated that 'an incentive for reformation will be lost if past transgressions could be raked up with impunity' (Burchell 275). However, Mthiyane JA expressed the view that reference to McBride as a murderer was not an unnecessary 'raking of past ashes', but that it was relevant to the post for which McBride was tipped (par 83). It is submitted that while such reference may have been relevant, it was not in the public interest to publish it in view of the objectives of the TRC process.

Moreover, in relation to McBride's detention in Mozambique, regard should be had to the rule of law that requires that the public needs to respect the constitutional principle of presumption of innocence until one is proven guilty. The success of the defence of truth and public benefit depended upon the aspect of public interest, instead of the truth aspect. Therefore it is submitted that both the majority and minority made an error when they made the truth aspect of the statements a central issue in this case. While important, it does not hold the key in resolving the main issue that faced the court.

5 Fair Comment

The test for distinguishing a factual statement from comment or expression of opinion is correctly set out in the case of *Marais v Richard* 1981 1 SA 1157 (A). It is "how the ordinary reasonable reader would have understood [the statement to be" (quoted in paras 40 and 67). According to Jansen JA in the *Marais* case, the answer depends largely on the content of the allegation, the context in which it is used and the circumstances known to the reader (par 40). The majority *in casu* were reluctant to entertain the defence of fair comment on *The Citizen*'s behalf, primarily as they were of the view that the publications purported to be truth as opposed to opinion (par 42). Nonetheless they gave *The Citizen* the benefit of the doubt and considered this defence (pars 43–44). They held that they would have dismissed the defence for lack of true basis and in the light of the amnesty granted to McBride (43–44).

However, Mthiyane JA was of the opinion that the published article would have been understood by a reasonable reader to be an opinion (par 49).

The requisites for a successful defence for fair comment were laid down as early as 1917 in the case of *Crawford v Albu* 1917 AD 102 114, namely: (i) The allegation in question must amount to a comment or opinion; (ii) it must be fair; (iii) the factual allegation on which the comment is made must be true; and (iv) the comment must be on a matter of public interest. These points were echoed by the court in the *Marais* case (1167F). These were also considered by Mthiyane JA (par [66]).

5 1 Comment or Opinion

Firstly, the imputation must be an expression of a comment or opinion, as opposed to an assertion of facts. In other words, one must be expressing a viewpoint as opposed to stating an assertion of facts, and one must be understood by a reasonable listener, or as in the present case, a reasonable reader of the newspaper, to be expressing an opinion. It is submitted that that Mthiyane JA was correct in his dissenting finding that, under the present circumstances, the articles and editorials amounted to an opinion (par [49]). Viewed as a whole, I submit that a reasonable reader of *The Citizen* would have regarded these statements as an expression of opinion, rather than an assertion of facts; and would have understood them to be an opinion about McBride's unsuitability for the post of chief of police for the reasons they expressed therein.

5 2 True Facts

A second requirement for a fair comment defence is that an opinion should be based on true facts. It is trite that the facts need not be absolutely true or true in all respects, but it is sufficient that the facts be substantially true (Burchell). The court spent a considerable amount of time (in respect of both the defence for truth publication and fair comment) probing whether the appellants' comment was based on true facts, in view of the fact that McBride successfully applied for amnesty. In fact, for the majority, the whole issue of the appellants' defence stood or fell on this one element. The majority held that the granting of amnesty had rendered the bases for *The Citizen's* comment false. As submitted earlier, this conclusion is incorrect, for the reasons already advanced above. This view would be contrary to the cause of the amnesty granted in terms of TRC Act, which was not to render deeds of the past obliterated. As already mentioned, it is common cause that the bombing, for which McBride was convicted and then given amnesty, did occur. Moreover, it is true that he was arrested in Mozambique on allegations of gun running between Mozambique and South Africa, but subsequently discharged by the Supreme Court of Mozambique. Therefore, the comment by the appellants was based on facts that are substantially true.

5 3 The Comment Must be Fair

The third requirement for fair comment defence is that the comment must be fair. It is submitted that while the element of truth is necessary for a successful defence of fair comment, the element of fairness of the statements made by the appellants held the key to the success of their entire defence. This requirement entails that the comment be an honest or bona fide expression of an opinion; it must be relevant; and that it must not be motivated by malice or ulterior motives on the part of the defendant. The latter is a subjective criterion. It is submitted that the articles and editorials in question may have been motivated by ulterior motives or malice. It cannot be ruled out that Appellants' intention was to taint McBride's reputation thereby ensuring that he did not get the post of chief of police. They were aware that he had been granted amnesty for his actions in terms of a lawful process. Yet they relentlessly referred to him as a "criminal", "bomber McBride" or a "murderer". They went as far as casting a shadow of doubt on his credentials as a genuine freedom fighter. Judged by their tone, it is submitted that, at worst, the articles were intended to arouse hatred for McBride. Therefore it is humbly submitted that the opinion expressed by the appellants was not motivated by honesty. Thus, they do not pass the test for fairness.

Moreover, McBride is branded a criminal who is not suitable to head any decent police force. His legitimacy as a true freedom fighter is further questioned when he is equated with a notorious apartheid killer and accused of strengthening the hand of apartheid. Therefore, the comments made by the appellants reflect negatively on McBride's integrity. Hence a stricter test of fairness must be applied (Burchell 278). This requires invoking an additional requirement for fairness, namely, that the comment must also constitute a reasonable inference from the facts. *In casu*, McBride was granted amnesty by the TRC in terms of the TRC Act, which was intended to ensure full integration for political prisoners and to give them a new lease on life. The Act intended that persons granted amnesty should not be held accountable for crimes perpetuated in the name of the struggle (paras 73-74). However, the appellants on more than one occasion referred to McBride as a criminal or a murderer. Therefore it is submitted that in the circumstances, reference to McBride as a murderer or criminal, after he had been granted amnesty, is not a reasonable inference from the facts. Instead, it amounts to holding him accountable for actions for which he had been granted amnesty. Alternatively, it is submitted that if the effect of amnesty does not fall under the requirement for fairness of the comment, it must at least play an integral role under the fourth requirement for fair comment defence, namely, whether the appellants' comment was in the public interest.

Furthermore, reference to McBride's arrest in Mozambique is also questionable as far as the motivation for making such a reference is concerned. It imputes dishonorable motives to McBride, by implying that he contrives with criminals from the underworld or that he is corrupt. It

is common cause that McBride was arrested in Mozambique, but he was subsequently acquitted by the Supreme Court of Mozambique because there was no evidence or substance to the allegations. It is submitted that this fact, as well as the constitutional principle of presumption of innocence until proven otherwise, render the appellants' comment unreasonable. Nevertheless, it is submitted that in view of the nature of the position for which McBride was aspiring, he was wise to abandon this part of the claim.

5 4 Matter of Public Interest

Finally, a successful defence of fair comment requires that the defendant should have commented on a matter of public interest. In other words, the matter commented on must concern the public (Burchell 274-75). Matters of public interests include, *inter alia*, matters about the administration of justice, the conduct of public figures, political and state institutions, books, films, and works of art (Burchell 283). The appellants were commenting on a matter of public interest, as Mthiyane JA correctly held (par 83). Their comment related to a public figure who aspired to a senior public position. Thus this element is satisfied in respect of *The Citizen*'s case. However, the comment *per se* was not in the public interest, as it was against the spirit of reconciliation and nation building engendered by the TRC Act.

Hence, it is submitted that, perhaps, this requirement should be given an extended meaning which also looks at whether the comment made is *in the public interest*, rather than simply requiring that one be commenting *on a matter of public interest*. In other words, it must be shown that the public stands to derive some benefit from comments in the same way as is the case in the defence of truth and public benefit.

6 Conclusion

In the final analysis, it is submitted that the majority judges erred by making their central focal point the truthfulness or falsity of referring to McBride as a criminal after his successful application for amnesty. Secondly, by finding that such reference was false, in view of his amnesty. This does not reflect a proper interpretation of section 20 of the TRC Act which indemnifies any one granted amnesty from criminal and civil liability. Hence, it was an error to conclude that the defence of fair comment had no basis as a result of the effect of obtaining amnesty from the TRC. The correct view is that the comment *does* have substance as the act of killing (for which amnesty was granted) was committed. However, the perpetrator is *no longer accountable* as a result of obtaining amnesty, as Mthiyane JA correctly held. It was also incorrect of the majority to conclude that the published articles and editorials were statements of truth, rather than opinion. They do indeed amount to comments. As Mthiyane JA correctly held, a right-thinking reader would have understood them as expressions of opinion (paras 49–50). Therefore Mthiyane was correct in accepting them as opinion, for the purposes of the defence for fair comment. It is also submitted that the

majority erred in dismissing the defence for fair comment on the bases of lack of true facts, after concluding that granting of amnesty rendered the statements false. This was as a result of missing the real issue, which was either fairness of the publications or perhaps, whether the articles and editorials were made in the public interest. Moreover, it is submitted that Mthiyane JA, on the other hand, was correct in his finding that the effect of the amnesty was not to render true events of the past false. However, it is submitted that he nevertheless erred in deciding the defence of fair comment mainly on that basis. Instead, the main focus should have been whether it was fair to refer to a person who had been lawfully granted amnesty as a murderer and a criminal. Alternatively, his focus should have been whether a continued reference to McBride as a murderer and criminal was in the public interest, as was Ponnan JA's argument, although he did not categorise it either under the fair comment defence or truth publication. It is submitted that Ponnan JA was correct in this approach. Lastly, while Mthiyane JA combines fair comment and freedom of expression, it submitted that the tone of the articles borders on hate speech which will not enjoy the protection of the Constitution (section 16(1)). Therefore, in the final analysis, the published comment on the suitability for McBride for the post of the chief of police for Ekurhuleni is neither fair nor in the public interest.

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Postscript

The Constitutional Court has since made its ruling on an appeal filed by *The Citizen* newspaper against the Supreme Court of Appeal's (SCA) judgment in this matter (Case CCT 23/10[2011] ZACC 11). In the judgment delivered on 8 April 2011, the Constitutional Court decided by majority of 5 to 3 (led by Cameron J) that the publications made by *The Citizen* that referred to McBride as a murderer, among other things, despite successfully applying for amnesty from the TRC, was protected by the defence of fair comment. The court found that finding for McBride in the matter would amount to muzzling the freedom of expression, and would inhibit the healing process for the victims of gross human rights violations. This overall finding is generally supported by Ngcobo CJ (with Khampepe J concurring). However, the Constitutional Court unanimously found for McBride in so far as *The Citizen* falsely asserted that McBride was not contrite for his action in bombing a bar, despite available evidence that he was remorseful. On the other hand, my view that a continued reference to McBride as a murderer and a criminal, despite obtaining amnesty, was vindicated by Mogoeng J. Mogoeng J (in a separate minority judgment) held that such a comment was not justified under the defence of fair comment as it goes contrary to the public interest as manifested in the main objective of the TRC, namely reconciliation and reconstruction – which is national unity and nation building. He, in fact, emphatically found that *The Citizen* went beyond the exercise of its right to freedom of expression, but was actuated by malice and hatred for McBride. Hence, he concluded, it was not protected by the defence of fair comment. I fully agree with Mogoeng J's sound and well-reasoned judgment. However, this judgment of the Constitutional Court will be the subject of a forthcoming note. - *MCB*

MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga 2008 6 SA 264 (Ck) *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 4 SA 122 (SCA)

Ostensible authority, reliance and the implied authority of an attorney to compromise a suit

1 Introduction

Estoppel by representation is a flexible doctrine capable of application in a variety of circumstances, including the question of contractual liability. The courts have recognised that this doctrine may be employed to hold a party bound to the impression created of assenting to a contract, despite an absence of true agreement between the parties (*Van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417 422-424; *Peri-Urban Areas Health Board v Breet* 1958 3 SA 783 (T) 790; cf *Benjamin v Gurewitz* 1973 1 SA 418 (A) 425; *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 1002ff). Although over the years some writers have strongly advocated the use of estoppel to maintain the fiction of a contract in such instances (see De Wet and Van Wyk *Die Suid-Afrikaanse Kontraktereg en Handelsreg 1* (1992) 22-23; cf De Vos "Mistake in Contract" 1976 *Acta Juridica* 177 180-81), the fact is that the need for estoppel has been greatly diminished by the rise of the doctrine of quasi-mutual assent, a version of reliance-based liability giving rise to an actual contract rather than the mere fiction of one (Rabie and Sonnekus *The Law of Estoppel in South Africa* (2000) 196; Van der Merwe *et al Contract: General Principles* (2007) 36-37 41).

Nonetheless, while estoppel in all probability will not directly be used to uphold a fictitious contract where consensus is in question, it has been instrumental in determining contractual liability in another sense, and that is where a principal has been held bound to a contract on the basis of ostensible authority. In the latter situation a principal incurs contractual obligations, despite a lack of actual authority on the part of his representative, on the basis that the principal created the impression that the representative actually had the requisite authority to conclude the juristic act in question on behalf of the principal (Van der Merwe *et al* 256-57; Rabie and Sonnekus 156). In such instances estoppel, in the guise of ostensible authority, is pivotal in affirming contractual liability. The recent matter of *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2008 6 SA 264 (Ck); *MEC for Economic Affairs, Environment and Tourism, Eastern Cape v Kruizenga* 2010 4 SA 122 (SCA) provides an apt illustration of the working of

estoppel in this manner and also deals with the pressing question whether an attorney has the implied authority to compromise a suit, a matter which it seems has yet to be settled in our law. This note examines both aspects, as well as whether the reliance theory could be applied in circumstances traditionally suited to invocation of estoppel by agency.

2 Facts

In an action for damages in delict, the applicant's (*MEC for Economic Affairs, Environment and Tourism, Eastern Cape*) legal representatives, at the pre-trial conference (in terms of rule 37 of the Uniform Rules of Court) and later at the trial, conceded liability on the merits of the case and undertook to pay amounts claimed under certain heads of damage. An order of court that the applicant was to pay the admitted damages was made by consent and the hearing postponed. The applicant (appellant on appeal), with a view to reopening his case on the merits, launched the present application for rescission of the aforementioned judgment and an order withdrawing the admissions that his legal representatives had made as recorded in the pre-trial minutes.

The application was brought on the ground that, consistent with departmental practice, the state attorney, who had represented the applicant, had lacked specific authority to concede the merits of the action or to agree to payment of the amounts claimed. The attorney concerned testified that he had been instructed, in general, to conduct the litigation, but conceded that he had not received any express instruction to settle the merits and had simply made a mistake in doing so. The respondents resisted the application firstly on the grounds that the concessions made by the applicant's legal representatives, and the agreement that the matter should proceed only on the remaining issues, constituted a compromise of issues that were no longer in dispute; and secondly that the applicant was estopped from denying his legal representatives' actual authority.

3 Decisions

In the court of first instance, Van Zyl J, in a comprehensive judgment concluded that by virtue of his appointment to conduct the applicant's defence, a representation had been made to the outside world that the state attorney (and counsel) had the usual authority that applies to that office (including it seems the authority to compromise or settle a case). In the absence of informing the respondents that a limitation had been placed on the authority of his legal representatives, the applicant must reasonably have expected that persons who dealt with them would believe that they had the authority to compromise the claims. Accordingly, the applicant was estopped from denying the authority of his legal representatives to enter into the settlement agreement and the application was dismissed with costs (par 69). In this regard Van Zyl J duly took stock of *Glofinco v Absa Bank Ltd (t/a United Bank)* 2002 6 SA 470 (SCA) 480D-E wherein Nienaber JA observed that the appointment

of a person to a certain position of authority is a factor that is not to be underestimated.

On appeal, Cachalia JA, in delivering the unanimous decision of the Supreme Court of Appeal, accepted that by agreeing to the settlement, the State attorney not only exceeded his actual authority, but did so against the express instructions of his principal. However, it mattered not whether an attorney acting for a principal exceeded his actual authority, or acted against the principal's express instructions. The consequence for the other party, who is unaware of any limitation of authority and has no reasonable basis to question the attorney's authority, is the same. That party is entitled to assume, as did the respondents, that an attorney attending a pre-trial conference clothed with an "aura of authority" has the necessary authority to agree on compromises and settlements on behalf of his principal. In the respondents' eyes the state attorney quite clearly had apparent authority to agree to a settlement (par 20). Consequently, concluded Cachalia JA, the applicant was estopped from denying the authority of the State attorney and the appeal was dismissed.

That these decisions appeal to one's sense of justice and are entirely appropriate is quite apparent, but several aspects invite closer scrutiny, more specifically whether an attorney has the implied authority to compromise a suit and whether there is any room for applying the reliance theory directly in the circumstances.

4 Commentary

4 1 The Implied Authority of Legal Representatives to Compromise a Suit

It appears as if the question whether an attorney of record (or counsel) has the implied authority to compromise a case has not authoritatively been settled. In the present matter Cachalia JA expressed himself as follows in this regard:

> It is settled law that a client's instruction to an attorney to sue or to defend a claim does not generally include the authority to settle or compromise a claim or defence without the client's approval.

That seems straightforward enough, but compare on the other hand the following dictum of Plewman JA in *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 2 SA 59 (SCA) 65C-E:

> What is more, in this country (as in England) the conduct of a party's case at the trial of an action is in the entire control of the party's counsel. Counsel has authority to compromise the action or any matter in it unless he has received instructions to the contrary. In England his apparent authority to compromise cannot be limited by instructions unknown to the other party. …. At the stages prior to the assumption of control by counsel the attorney of record stands in the same position.

The contradiction between these two dicta is fairly obvious and both emanate from the level of the Supreme Court of Appeal, suggesting a measure of ambiguity at the very least (see further Midgley "The nature

and extent of a lawyer's authority" 1994 *SALJ* 415 419ff). Cachalia JA was prepared to admit that there was some uncertainty in the way the principle he enunciated had been applied by the courts (127B-C). However, our law has been heavily influenced by English law on this point (*Kruizenga court a quo* 296B; *Klopper v Van Rensburg* 1920 EDL 239 242; *Hlobo v Multilateral Motor Vehicle Accidents Fund supra* 65C; Midgley 1994 *SALJ* 420ff) and there it has been plainly said that the general authority to conduct a case provides the attorney with authority to compromise (*Chown v Parrot* (1863) 14 CB (NS) 74 83). Similar powers extend to counsel in English law (eg *Swinfen v Lord Chelmsford* (1860) 5 H & N 890 921).

Midgley (1994 *SALJ* 420) concludes that our courts, under the influence of English law, have distinguished between settlements on the one hand made prior to trial proceedings and those made during the course of litigation on the other, "and have accepted that the power to settle a claim is one of the usual powers afforded a legal representative when acting as an advocate in an action" (referred to by Cachalia JA par 8). Moreover, he observes (422), attorneys who conduct trials should have similar powers. Midgley cautions, however, that in the English matter of *Matthews v Munster* (1888) 20 QBD 141 (CA) 143-144 145 the court held that the authority to compromise does have certain limitations (420-423): first, the compromise must be incidental to conducting the case; second, counsel must act reasonably within the limits of his authority; third, the compromise must not be unjust; fourth, the legal representative must not have acted under a mistake of fact; and fifth, the client must not have been in court. Above all it seems that counsel has the power to do what he considers to be in the best interest of his client.

Although there is authority to the effect that it is within the general power of a legal representative to compromise his client's case (eg *Mfaswe v Miller* (1901) 18 SC 172; *Alexander v Klitzke* 1918 EDL 87; *Klopper v Van Rensburg supra*), in other instances the courts have taken a far more restrictive view of the matter (eg *Goosen v Van Zyl* 1980 1 SA 706 (O); *Bikitsha v Eastern Cape Development Board* 1988 3 SA 522 (E); *Hawkes v Hawkes* 2007 2 SA 100 (SE) (which indicates that the case law is fairly ambiguous); see further Midgley 1994 *SALJ* 419ff). In contrast to the position in English law, Roman-Dutch law was seemingly adverse to permitting agents, including attorneys, to compromise suits without a special mandate (eg Voet 3 3 18; Grotius 3 4 3; and see further *Kruizenga court a quo* par 58; Midgley 1994 *SALJ* 415). Midgley (1994 *SALJ* 428), however, suggests that cases where legal representatives have settled without notifying the client are not necessarily in conflict with Roman-Dutch law, but are instances where these agents have what Voet 2 15 3 refers to as "free administration" (translation by Gane *The Selective Voet* (1957)). He also refers to Van der Keessel (*Praelectiones ad Gr* 3 4 3) who notes that a procurator is within his power to compromise a case where it is in the interests of the principal (423) (see further Silke *The Law of Agency in South Africa* (1981) 158).

The common law's reluctance to permit attorneys to compromise suits is of course not without merit. The settling of a case is hardly a trivial matter and in the normal course of events one would expect any reasonable attorney to confer with his client prior to reaching a settlement (Midgley 1994 *SALJ* 428). But in the court *a quo* Van Zyl J observed that our law has been largely influenced by English law in this regard and that the requirement of a special mandate to compromise a suit is to be found in the historical development of the office of attorney in the Roman and Roman-Dutch law rather than as a general principle (par 58). Consequently, he concluded, the rationale for a special mandate is no longer relevant and that presently an attorney and counsel are substantially in the same position as their counterparts in English law (par 59). These observations are not to be taken lightly, coming from whence they did, but regrettably in the Supreme Court of Appeal Cachalia JA did not deal with this aspect of the judgment by Van Zyl J.

Whatever the history, it nonetheless appears as if the position at present is anything but clear, a situation that is graphically demonstrated by different versions of the law stated in the present matter. In the court *a quo* Van Zyl J followed dictum by Plewman JA in *Hlobo v Multilateral Motor Vehicle Accidents Fund* (*supra* 65C-E) as being a correct reflection of the legal position (par 57), while after reviewing the authorities Cachalia JA concluded as follows (par 11):

> To summarise, it would appear that our courts have dealt with questions relating to the actual authority of an attorney to transact on a client's behalf in the following manner: attorneys generally do not have implied authority to settle or compromise a claim without the consent of the client. However, the instruction to an attorney to sue or defend a claim may include the implied authority to do so, provided the attorney acts in good faith. And the courts have said that they will set aside a settlement or compromise that does not have the client's authority where, objectively viewed, it appears that the agreement is unjust and not in the client's best interests. The office of the State attorney, by virtue of its statutory authority as a representative of the government, has a broader discretion to bind the government to an agreement than that ordinarily possessed by private practitioners, though it is not clear just how broad the ambit of this authority is.

Unfortunately, this statement does not take the matter much further. It may, for instance, be rather difficult to determine whether the instruction to an attorney to conduct a suit may include the implied authority to settle and, furthermore, if attorneys generally do not have such implied authority then why would the issue of setting aside an unsanctioned settlement which is unjust and not in the client's best interests arise at all? This dictum could perhaps even be construed as meaning that for all practical purposes attorneys *do* have the implied authority to compromise a claim. All of which again suggests that the situation at present is far from satisfactory.

There are probably several good reasons why attorneys should have implied authority to compromise a claim: for one thing, they are no ordinary agents, but trained professionals and officers of the courts. One

should be able to rely on the fact that an attorney (or counsel) who offers or accepts a compromise of a legal suit has the authority to do so. In other words, the very status of an advocate or attorney justifies an inference of such authority (see Midgley 1994 *SALJ* 421-22; cf *R v Matonsi* 1958 2 SA 450 (A) 456A-H; *Benjamin v Gurewitz* 1973 1 SA 418 (A) 428E-F). For another, the implied authority to settle a matter is necessary to facilitate the proper administration of justice (Midgley 1994 *SALJ* 421 428; cf *Kruizenga court a quo* 302D-E). In this regard it is opportune to note that it is the attorney of record who is the mouthpiece for a litigant. If exchanges between litigants usually flow through their legal representatives, it makes little sense to saddle a party with the duty of verifying a concession or compromise made by an opposing legal representative during the course of legal proceedings. That would render a process which is already somewhat cumbersome even more difficult to manage. And, as noted by Van Zyl J in the court *a quo* (296D), an agent's implied authority and his ostensible authority normally coincide. So, in the absence of a communication or circumstances indicating the contrary, it appears reasonable to take an attorney who conducts himself as having the authority to compromise a suit at his word. What is further apparent is that the state Attorney has a broader discretion to agree to a settlement of a suit than private practitioners, although as indicated by Cachalia JA the exact ambit of this authority is not clear (see further *Dlamini v Minister of Law and Order* 1986 4 SA 342 (D); *Moult v Minister of Agriculture and Forestry, Transkei* 1992 1 SA 688 (Tk) 692; SCA par 10; *Kruizenga court a quo* par 62; Midgley 1994 *SALJ* 424-426).

Interestingly, despite Cachalia JA's statement of principle regarding an attorney's authority, or lack thereof, to compromise a suit, he had little trouble in finding that in the circumstances the relevant attorney was clothed with an "aura of authority" to do what attorneys usually do at rule 37 conferences, including agreeing to compromises (132D). That seems very similar to accepting that attorneys normally have the implied authority to settle matters at pre-trail conferences, *a fortiori* because the very purpose of such proceedings is to limit or settle points of contention between litigating parties. Nonetheless, it is suggested that when again confronted with the question of the implied authority of an attorney to compromise a case, the Supreme Court of Appeal should authoritatively deal with the matter and dispel the apparent ambiguity present in case law.

It appears that the courts are prepared to interfere with compromise agreements concluded without a client's consent in certain circumstances (see *Kruizenga SCA* 127A-B; Midgley 1994 *SALJ* 420ff; cf *Matthews v Munster supra*). However, the real question is whether the grounds for striking down a compromise that has not specifically been authorised will be limited to the existing grounds for setting aside a contract (or declaring it void), or extend further. So, for instance, it may be perfectly feasible to declare void a compromise on the basis of (justifiable) mistake (compare eg *De Vos v Calitz and De Villiers* 1916

TPD 465; *Chevallier v Protea Versekeringsmaatskappy Bpk* 1972 2 PH A47 (T); *Bam v Rafedam Boerdery BK* 2004 1 SA 484 (O); and see further Midgely 1994 *SALJ* 420-423; Pretorius "Reasonable reliance and the duty to enquire" 2005 *THRHR* 122 124ff), but will the courts generally be prepared to extend this grace to the vaguer ground of agreements that are "unjust and not in the client's best interests" emphasised by Cachalia JA (129D-E)? After all the Supreme Court of Appeal has frequently declared that the courts will not strike down contracts merely because they are unfair (eg *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) 9B-C; *Brisley v Drotsky* 2002 4 SA 1 (SCA) par 24; *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA) par 32), and one might wonder why compromise agreements should be treated any differently. So guidelines regarding any extraordinary circumstances in which an unsanctioned settlement agreement may be set aside are also required.

4 2 Limitation of an Agent's Authority

It is of course open to a principal to expressly curtail the implied authority of his agent but, as Van Zyl J duly noted in the court *a quo* (par 60), if a litigant limits the implied authority of his attorney to compromise a case (if it is accepted that generally such an authority exists and even more so in the case of the state attorney), unless the limitation of authority is communicated to the opposing litigant or legal representative, or is implicit from the principal's conduct or the surrounding circumstances, he may be estopped from relying on the lack of authority (as to the nature of the relationship between attorney and client see Midgley *Lawyers' Professional Liability* (1992) 5-10). A litigant (or any principal for that matter) cannot by way of private instructions to his legal representative (or any representative for that matter) curtail the latter's authority as far as third parties are concerned (see *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 2 SA 59 (SCA) 65D; *Glofinco v Absa Bank Ltd (t/a United Bank)* 2002 6 SA 470 (SCA) 482B; Sonnekus "Akojee v Sibanyoni and another" 1977 *TSAR* 176 179; De Wet and Van Wyk 114).

De Wet and Du Plessis *LAWSA* (ed Joubert) 1 (1993) par 119 seem to maintain that where the tacit authority of a representative has been limited by private instructions which have not been communicated to the other party, the principal's liability is based on actual tacit authorisation and not estoppel as such. The distinction between tacit authorisation and ostensible authority is rather fine, but more importantly it is suggested that where authority, whether express or implied, is curtailed by private instructions there is in fact no authority to bind the principal to the prohibited juristic consequence, and so it seems artificial to speak of "actual tacit authorisation." The principal is in fact held bound on the basis that it reasonably appears to third parties as if the representative has the requisite authority, which conceptually amounts to no less than estoppel or the maintaining of an impression of authority attributable to the principal (see generally Du Bois (gen ed) *Wille's Principles of South African Law* (2007) 990-991; Visser and Potgieter *Estoppel: Cases and*

Materials (1994) 290ff; Van der Merwe *et al* 256-257; Kahn, Lewis and Visser *Contract and Mercantile Law: A Source Book 1* (1988) 855).

Nevertheless, it is trite that ostensible authority (estoppel by agency) requires a representation by the principal in words or conduct (and not merely the assurance of the agent) that the agent has the required authority to bind the principal to the juristic act in question (see eg *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 1 SA 396 (SCA) 412C-E; *Glofinco v Absa Bank Ltd (t/a United Bank) supra* par 13; *South African Broadcasting Corporation v Coop* 2006 2 SA 217 (SCA) pars 63-64; and the authorities cited by Du Bois *et al* 991 fn62; Rabie and Sonnekus 156ff). But it seems that a principal can represent by conduct merely by appointing a person to a position that usually clothes the incumbent with certain powers (Kerr *The Law of Agency* (2006) 96). And where, as in the present matter, an attorney is appointed to defend a claim, those powers would include attending pre-trial conferences where parties habitually make concessions and often agree to settlements (*Kruizenga SCA* pars 16-20). In other words, if an attorney attending a pre-trial conference conducts himself as if having the authority to settle the case, his counterpart would in most instances be reasonable in relying on such conduct, and the former's principal would be bound by a compromise, irrespective of any express limitation on the attorney's authority to conclude a settlement (*Kruizenga SCA* par 20). All of which tends to reinforce the notion that an attorney of record generally should have the implied authority to compromise a case. At the very least the distinction between actual implied authority and ostensible authority virtually evaporates in such instances and one simply cannot fault a party who relies on a settlement agreed to by an attorney at a pre-trial conference (*Kruizenga SCA* par 19). It should be remembered that although the principal is bound by the compromise agreement, he has recourse against the attorney who has breached his mandate (see Midgley *Professional Liability* 75-76; Midgley 1994 *SALJ* 428).

4 3 Ostensible Authority and Reliance

When an agreement is struck by an agent outside his authority the principal usually raises the representative's lack of authority as a defence to being bound to the agreement. Although fairly common it appears that the nature of this defence is not entirely clear. The accepted grounds for holding a party contractually liable in South African law provide an apt point of departure, because notionally a principal can only incur contractual responsibility if one of these grounds is present. The bases for contractual liability have been dealt with elsewhere and do not bear repeating in any detail (see Pretorius "The basis of contractual liability in South African law" 2004 *THRHR* 179, 383, 549; Hutchison and Pretorius (eds) *The Law of Contract in South Africa* (2009) 13-20 91-107), but may be summarised as comprising the will theory qualified by the doctrine of estoppel (eg *Van Ryn Wine & Spirit Co v Chandos Bar* 1928 TPD 417 422-424; *Peri-Urban Areas Health Board v Breet* 1958 3 SA 783 (T) 790) or its relative the reliance theory (eg *Hartley v Pyramid Freight (Pty) Ltd t/a Sun*

Couriers 2007 2 SA 599 (SCA) par 6; *Pillay v Shaik* 2009 4 SA 74 (SCA) par 55), and a modified form of declaration theory as corrected by the *iustus error* approach (eg *George v Fairmead (Pty) Ltd* 1958 2 SA 465 (A) 470-473; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 2 SA 473 (A) 479).

Now since actual agreement is usually regarded as the primary basis for contractual liability (see eg *Saambou-Nasionale Bouvereniging v Friedman* 1979 3 SA 978 (A) 993E-F; *Mondorp Eiendomsagentskap (Edms) Bpk v Kemp en De Beer* 1979 (4) SA 74 (A) 78G-H; De Wet and Van Wyk 9; Van der Merwe *et al* 38-39; Hutchison and Pretorius 20), it tends to follow that the defence of lack of authority of an agent amounts to no more than an assertion by the principal that he has simply not assented to the contract in question and therefore cannot be liable. That seems simple enough, if not self-evident, because clearly the principal does not wish to be contractually bound on the basis that the agreement brokered by his agent does not accord with his intention. In other words there is dissensus between the principal and third party, and possible liability falls to be decided on objective grounds, including the doctrine of estoppel (compare eg *Van Ryn Wine & Spirit Co v Chandos Bar supra* 422ff; cf *Benjamin v Gurewitz* 1973 1 SA 418 (A) 425). In terms of the law of agency, however, a principal's liability is determined with reference to consensus reached between the agent and third party since it is the agent who acts and not the principal (see Joubert *Die Suid-Afrikaanse Verteenwoordigingsreg* (1979) 44; De Wet and Du Plessis *LAWSA* par 109). In the court *a quo* Van Zyl J explained as follows (292 note 105):

> As it is the representatives and not the principal who concludes the juristic act, the question whether the parties were in agreement has to be determined with reference to the intention of the representative. The principal's intention is not relevant to the question whether consensus necessary to produce a contract existed or did not exist. Knowledge required [acquired] by the representative is imputed to the principal and a contract concluded by the representative on terms not intended by the principal does not affect the issue of consensus.

One may nevertheless question whether the intention of the principal is necessarily irrelevant to the determination of consensus, because surely the juristic act in question should generally accord with the mutual intention of the contractual parties (cf *Van Ryn Wine & Spirit Co v Chandos Bar supra* 422; *Goldberg v Carstens* 1997 2 SA 854 (C) 859). After all the contractual obligations arise between the principal and the third party (albeit through the endeavours of the agent), something of which all the parties should be aware (cf Du Bois *et al* 989; Van der Merwe *et al* 254 260-261). If, for instance, the third party knew that the agent exceeded his authority in binding the principal one could hardly say that consensus existed (cf De Wet and Du Plessis *LAWSA* par 119). A further indication that the intention of the principal is relevant is the fact that he can exert his will on an unauthorised juristic act by affirming its validity by way of ratification. Ratification is a unilateral juristic act

amounting to a declaration of intention to be bound by an otherwise unauthorised (and hence non-binding) legal act (see generally Kerr *Agency* 80-94; De Wet and Du Plessis *LAWSA* 123-29; Van der Merwe *et al* 257; De Wet and Van Wyk 114-15). The relationship between principal, agent and third party seems to entail more than mere linear acts between principal and agent on the one side and agent and third party on the other (cf De Wet and Du Plessis *LAWSA* par 119). Ultimately, the principal is bound because there is a basis for liability as between the agent and third party, and because the principal actually authorised or ostensibly authorised the conclusion of the juristic act. But the question is whether this two-pronged approach can be merged into one in typical instances of estoppel by agency.

Where an agent exceeds his authority in binding his principal to an agreement there certainly appears to be a measure of dissensus: on the one hand the third party surely labours under some form of misapprehension as to the intention of the principal to enter into the legal relations in question, while on the other hand the principal lacks the intention to enter into the contract (cf Christie *The Law of Contract in South Africa* (2006) 29-32; Kerr *The Principles of the Law of Contract* (2002) 41-45; Van der Merwe *et al* 23-24; Hutchison and Pretorius 85). Consequently, one may very well query where an agent exceeds his authority, and hence misrepresents (by act or omission) his authority to bind his principal, whether true consensus between the representative and the third party exists. Rather it seems as if an element of consensus is absent; namely whether the principal has the requisite intention to enter into the specific legal relations with the third party. It is important to note that although one is dealing with consensus between the agent and third party, their mutual intention relates to the incurring of obligations as between the principal and third party (cf Du Bois *et al* 989; Van der Merwe *et al* 254; De Wet and Du Plessis *LAWSA* par 101) and the common intention must at least by implication incorporate the principal's intention (to incur contractual obligations). It is this latter intention that is misrepresented to the third party. Whichever way one looks at the situation there seems to be dissensus occasioned by the conduct of the representative. Although of course the agent himself may incur personal liability for unauthorised acts (see De Wet and Du Plessis *LAWSA* par 138ff), the question for present purposes is under what circumstances the principal should be held accountable.

It is clear that a principal must bear the brunt of the misrepresentation of his agent who causes an operative mistake on the part of a third party; this results in the undoing of the agreement on the basis of a *iustus error* (eg *Allen v Sixteen Stirling Investments (Pty) Ltd* 1974 4 SA 164 (D); *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A); *Maresky v Morkel* 1994 1 SA 249 (C); *Goldberg v Carstens supra*; cf *Kok v Osborne* 1993 4 SA 788 (SE)). In such circumstances the misrepresentation of the agent activates successful invocation of reliance in its indirect or negative form; that is that no contract exists because of material and reasonable error on the part of the third party. Conversely,

one could argue that where an agent misrepresents (in as many words or by other conduct) to a third party that he has the necessary authority to conclude an agreement of specific content on behalf of his principal, whereas in fact he has exceeded his actual authority, it could trigger an application of reliance in its direct or positive form; that is that despite dissensus a contract exists based on the reasonable reliance in consensus of the third party (cf *Van Ryn Wine & Spirit Co v Chandos Bar supra*). However, a prerequisite for rendering the principal accountable in either instance is that the agent must at least have acted within the general scope of his authority, although he has exceeded the private instructions of the principal unbeknown to the third party (cf Du Bois *et al* 998; Van der Merwe *et al* 259; Van der Walt and Midgley *Principles of Delict* (2005) 38; Neethling, Potgieter and Visser *Law of Delict* (2010) 371). Generally the courts have been loath to come to the aid of a principal who clothes his agent with apparent authority and then falls back on private instructions in an attempt to escape the consequences of the agent's conduct (compare eg *United Cape Fisheries (Pty) Ltd v Silverman* 1951 2 SA 612 (T) 616C; *Akojee v Sibanyoni* 1976 3 SA 440 (W) 442H).

Notionally the issues of an intention to incur legal relations on the part of the principal and the authority to enter into such relations by the agent on behalf of the principal tend to overlap. If the representative's misrepresentation is attributed to the principal then the latter may be held liable on the basis of an objective theory of contract, such as the reliance theory, and provided further that the principal was complicit in some or other manner in creating the impression that the agent had the authority to bind him to the particular transaction. Indeed the law reports contain clear cases of the analogous situation where an employee has exceeded his authority in representing that his employer has assented to an agreement, and the employer has incurred contractual liability despite the absence of an actual intention to enter into the particular transaction (eg *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board supra*; *Hlobo v Multilateral Motor Vehicle Accidents Fund* 2001 2 SA 59 (SCA); cf *Cecil Nurse (Pty) Ltd v Nkola* 2008 2 SA 441 (SCA)). In such instances the courts have stressed that as long as the employee was the appropriate person within the organisation to usually deal with the matter at hand, the lack of actual authority for the transaction could not be used to escape liability (eg *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board supra* 480C-D; *Hlobo v Multilateral Motor Vehicle Accidents Fund supra* 66I-J). Now it may be said that in these cases it is in fact the employer acting through its functionary, while in the case of an independent agent it is the agent acting albeit on the behalf of the principal, but the principle nevertheless seems to be very similar.

The courts have filled the interstitial space between an agent exceeding his authority and possible dissensus with the construct of ostensible authority, which boils down to a specific application of estoppel by representation (Pretorius "The basis of tacit contracts" 2010

Obiter 518 532-533; Van der Merwe *et al* 256-257; De Wet and Du Plessis *LAWSA* 129). In such instances for liability to lie there must be a basis for contractual liability (at the very least by implication) and the requirements for ostensible authority must have been met (compare eg *Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd* 1979 3 SA 267 (W) 281E, 282E-F; *NBS Bank Ltd v Cape Produce Co (Pty) Ltd* 2002 1 SA 396 (SCA) 408E, 412C-E; *South African Eagle Insurance Co Ltd v NBS Bank Ltd* 2002 1 SA 560 (SCA) 573E-H; cf *Hlobo v Multilateral Motor Vehicle Accidents Fund supra* 65G-I, 66D-I). On the other hand if the principal is directly accountable for the agent's misrepresentation, the process may be short-circuited by merely applying the reliance theory against the principal. And in both scenarios the issues central to establishing liability tend to converge, the underlying theme being the protection of reasonable reliance on the part of the third party (cf Hutchison and Pretorius 92-93; Pretorius 2004 *THRHR* 190-91; Van der Merwe *et al* 41). Furthermore, in either instance the law would require some form of misrepresentation on the part of the principal as to the agent's authority to hold him accountable for the acts of the agent. Generally, such a misrepresentation (by conduct) would constitute appointing a representative to a position with certain inherent or implied powers (see *Glofinco v Absa Bank Ltd (t/a United Bank)* 2002 6 SA 470 (SCA) par 1; Kerr *Agency* 96; cf *Southern Life Association Ltd v Beyleveld* 1989 1 SA 496 (A) 503B-D) or instructing an agent belonging to a particular class which has customary powers (*Inter-Continental Finance and Leasing Corporation (Pty) Ltd v Stands 56 and 57 Industria Ltd* 1979 3 SA 740 (W) 748D), and then limiting those powers by way of private instruction or later denying them. Notionally then liability stems from two misrepresentations: a misrepresentation on the part of the principal in clothing his representative with apparent authority to conclude the juristic act in question (contrary to the agent's actual authority) and a misrepresentation by the agent that he has authority to bind the principal to the juristic act, whereas in fact he has exceeded his actual authority. Cumulatively these misrepresentations engender reasonable reliance in consensus on the part of the third party, justifying the ascription of contractual liability to the principal (contrast also Kerr *Agency* 94ff).

In the present matter Cachalia JA framed the test for holding the principal bound by way of estoppel as follows (132B-C):

> The proper approach is to consider whether the conduct of the party who is trying to resile from the agreement has led the other party to reasonably believe that he was binding himself.

Now this approach is on all fours with the authoritative statement of the reliance theory in *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A) 239I-J (see also eg *Constantia Insurance Co Ltd v Compusource (Pty) Ltd* 2005 4 SA 345 (SCA) par 17; *Cecil Nurse (Pty) Ltd v Nkola supra* par 15), and the practical result in the circumstances was no different than applying the reliance theory directly to the facts (cf Kerr *Agency* 94-95). In sum: where an agent exceeds his actual authority in

concluding a contract on behalf of his principal, depending on the circumstances, one could either determine whether a basis for the contract is present and then look to estoppel to counter a plea by the principal that the agent lacked the actual authority to bind him, or accept that there is dissensus between the agent and third party and apply the reliance theory directly. Circumstances permitting, the end result should for all practical purposes be the same. Hardly surprising then that whenever lack of authority is raised by a party as a defence to being contractually bound elements of estoppel (ostensible authority) and/or the reliance theory (indirectly or directly) tend to feature and are sometimes interwoven (compare eg *Van Ryn Wine & Spirit Co v Chandos Bar supra* 422-23; *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board supra* 478ff; *Hlobo v Multilateral Motor Vehicle Accidents Fund supra* 64ff; cf Kerr *Agency* 94ff).

In general terms it seems that a principal will be liable for the misrepresentation of his agent where the latter has the (usually implied) authority to make representations in relation to the transaction concerned (Van der Merwe *et al* 259; Neethling *et al* 371-72; cf Van der Walt and Midgley 38). The basis for such liability is not clear (see Wicke "Vicarious liability for agents and the distinction between employees, agents and independent contractors" 1998 *THRHR* 609 612ff; Van der Merwe *et al* 260 note 103), but the possibility of risk creation seems to be gaining favour (see Neethling, Potgieter and Visser 371). Likewise the most plausible explanation for attributing an agent's misrepresentation (as to his authority) to his principal within the context of the reliance theory is probably risk. The risk theory has been suggested as a possible corrective to the will theory in certain instances of dissensus (see eg Meijers "De grondslag der aansprakelijkheid bij contractueele verplichtingen" *Verzamelde Privaatrechtelijke Opstellen 3* (1955) 81 84-85; Hofmann "The basis of the effect of mistake on contractual obligations" 1935 *SALJ* 432 436), but this principle is poorly developed and simply cannot stand independently as contractual basis (see *Stewart v Zagreb Properties (Pvt) Ltd* 1971 2 SA 346 (RA) 350-51; Lubbe and Murray *Farlam and Hathaway Contract: Cases, Materials and Commentary* (1988) 163 note 1; Pretorius 2004 *THRHR* 389 note 44). However, risk can potentially function as a possible determinant of liability within the context of an objective theory of contract, such as for instance the reliance theory (Pretorius "The basis of contractual liability (2): Theories of contract (will and declaration)" 2005 *THRHR* 441 453; Floyd and Pretorius "A reconciliation of the different approaches to contractual liability in the absence of consensus" 1992 *THRHR* 668 672-73).

In other words the representative's misrepresentation as to his authority binds the principal simply because the latter should bear the potential risk occasioned by appointing the agent to a position which usually carries certain powers or appointing an agent of a class which customarily has certain powers, even if those powers have been curtailed by private instruction. It seems that the courts have been prepared to

embrace the notion of risk in agency situations (see Neethling *et al* 371). For instance, in *Randbank Bpk v Santam Versekeringsmaatskappy Bpk* 1965 4 SA 363 (A) 372 Steyn CJ noted:

> Dit is redelik dat die prinsipaal wat sy verteenwoordiger kies en hom voorhou as 'n betroubare person, en nie die ander party wat geen seggenskap by die keuse het nie, die risiko van sy moontlike oneerlike voorstellings of verswygings sal dra.

Ultimately, the principal may be liable, despite a lack of intention to engage in the specific contractual relations in question, because the third party was led to reasonably believe that a consensual juristic act had been validly concluded. Although the specific circumstances of each case will no doubt play an important role in determining whether the principal and agent have been instrumental in inducing reasonable reliance on the part of the third party, within the context of legal practice, the compromising of a suit at a pre-trial conference by an attorney of record will be hard to refute by the principal irrespective of the reliance-based mechanism invoked by the third party (cf *Kruizenga SCA* par 19).

5 Conclusion

Whether or not an attorney (or counsel) has the implied authority to compromise a suit on behalf of his client still seems to be an unresolved issue in our law, and there are seemingly contradictory statements of principle in this regard at the elevated level of the Supreme Court of Appeal. In the present matter the court *a quo* was quite prepared to acknowledge such authority, but the Supreme Court of Appeal came to the opposite conclusion. Roman-Dutch law generally was adverse to the notion of implied authority on the part of an attorney to settle a matter without the client's consent, but English law developed along different lines and broadly supports this proposition. Although there probably are good reasons for holding either way, it is suggested that the evidence that our law has borrowed rather heavily in this regard from English law, and generally is in accordance with the position in that legal system, is convincing. Consequently, the approach of the court *a quo* is preferable to that adopted in the Supreme Court of Appeal. What is still required though is an authoritative statement of principle by the Supreme Court of Appeal to dispel the present uncertainty. Above all it appears as if the general implied authority to compromise a suit is vital for the effective administration of justice: it simply is too much to saddle a litigant with the burden of having to determine whether each concession or settlement proposed by the opposing attorney bears the express approval of the latter's principal.

Although estoppel these days is rarely seen as a mechanism for holding a party bound to an apparent agreement, it continues to be instrumental in the apportionment of contractual liability by way of ostensible authority where seemingly an agreement has been concluded by an agent who has exceeded his authority. In such circumstances the principal invariably relies on the representative's lack of actual authority to escape liability under the agreement, to which the other contractual

party usually raises a plea of estoppel by agency. The question is whether the principal represented to the other contractant that the agent had the required authority to bind the principal to the juristic act in question. Although estoppel has done sterling service in this regard and its application here attests to its continued vitality within the context of contract formation, it is suggested that the process may be short-circuited simply by applying the reliance theory in appropriate circumstances. Such an application is essentially founded on a dual premise: firstly, the issue of lack of authority in actuality amounts to a contention that the principal lacked the required intention to enter into the juristic act in question, which boils down to an absence of actual agreement as contractual basis as between the agent and third party and potentially activates an objective theory of contract, such as reliance. Secondly, a misrepresentation on the part of the principal in appointing his representative to a position which usually carries certain powers or appointing an agent of a class which customarily has certain powers, and then privately limiting the implied authority of his representative, and a further misrepresentation on the part of the agent in exceeding his actual authority (attributed to the principal on the basis of risk creation) cumulatively induce reasonable reliance in consensus on the part of the third party.

Although the *estoppel by agency* and *direct reliance* approaches eventually achieve the same result, the latter may be preferable in that it combines the elements of contractual liability and ostensible authority in one approach, whereas estoppel by agency requires a separte basis for liability on the one hand and the requirements for ostensible authority to be met on the other. Both approaches, however, are largely contingent upon elements typical of reliance-based liability in the form of inducement and reasonable reliance. In the present matter the Supreme Court of Appeal framed the test for ostensible authority in a manner suggestive of direct reliance, perhaps portending that the reliance theory may yet readily be applied in circumstances traditionally suited to estoppel by agency.

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