

# INTRODUCTION TO THE LAW OF SOUTH AFRICA

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EDITED BY

C.G. VAN DER MERWE AND  
JACQUES E. DU PLESSIS

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# **Introduction to the Law of South Africa**

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# **General Introduction**

It is the intention that the following work is to be a part of the series of introductory books to the laws of various countries. The whole project is intended to prepare books which follow basically the same plan for each country. The books in the series are not designed to be definitive texts of the law of any country. Rather, they will attempt to provide academics, lawyers, businessmen, administrators, government officials, students and others with the basic knowledge of legal concepts of the country in broader terms, with special emphasis on practical issues, so that the interested persons will be able to understand the system and pursue research on special legal problems by knowing the proper questions to ask and the proper place to find the answer.

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# Preface

The South African legal system is characterised by some remarkable features. Because it draws strongly on both uncodified Roman-Dutch civil law and the English common law, it can be regarded as a member of an intriguing group of ‘mixed’ legal systems, whose experiences in blending and developing these components contain lessons that are of interest to a broader legal community. South African law further has become especially renowned for the way in which it has been drastically reformed from being an integral component of a system of oppression, towards being a key instrument with which to achieve a more just and equitable society. Of particular significance in this regard are the exciting developments in the application of a Constitution with a Bill of Rights that generally is regarded as one of the most progressive in the world and which has had a profound impact on many areas of the law.

In this volume it has been sought to provide authoritative and accessible introductory expositions of key aspects of South African law. We do, of course, appreciate that opinion may very well differ as to the selection of divisions of law it contains, as well as the depth in which some divisions are dealt with. However, limitations of space, but especially the need for uniformity with other titles in an international series, have been notable constraining factors that resulted in the exclusion or only partial treatment of certain areas of law. Nonetheless, we hope that ultimately we have succeeded in conveying to the reader the essence of the system, and especially something of the excitement shared by so many who have an interest in its continuous development to meet the demands of these challenging times.

In compiling this volume many debts were incurred. We would like to thank the contributors for their willingness to participate and the enthusiasm with which they went about their task. We hardly could have expected more. We are also most grateful to the Max Planck Institute for Foreign Private and Private International Law in Hamburg for the use of its research facilities, and especially to its Director, Reinhard Zimmermann – not only for honouring us with a foreword, but also for generally promoting awareness of the significance of the law of South Africa outside its borders. Finally, grateful acknowledgement is also due to our technical editor, Ilse van der Merwe, for her invaluable assistance

in improving the readability of the text and preparing the manuscript for publication.

C.G. van der Merwe  
Aberdeen

December 2003

Jacques du Plessis  
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# Foreword

South African law has much to offer to anyone who is interested in comparative legal studies. It has inherited a system of private law that is based on the Dutch variant of the *ius commune* prevailing, for many centuries, in continental Europe. Unlike the continental legal systems, but like the English common law, Roman-Dutch law in South Africa has never been codified. As a result we find Courts and legal writers having to grapple, even today, with the historical sources of the *ius commune*. Particular emphasis, of course, is placed on 17th and 18th century Dutch authorities like Grotius, Groenewegen, Voet and Vinnius; but other works from the entire library of learned literature from Bartolus to Windscheid, and even the sources of Roman law itself, are regularly cited in areas like contract, property and succession. From the early 19th century, however, English law started to exercise a significant influence on the law prevailing in the Cape Colony (and subsequently also in Natal and the two Boer Republics beyond the Orange River), and a complex process was set in motion that ultimately transformed Roman-Dutch law in South Africa into a mixed legal system with its own identity: neither purely Roman-Dutch nor purely English but an anglicised, specifically South African *usus modernus* of Roman-Dutch law. Of course, there are some areas where the balance has been tilted very much in one direction. The law of evidence, procedural law, and large parts of commercial law are mainly English in substance and character. The law of property (or ‘things’, as it is usually called in South Africa) and succession, on the other hand, have very largely retained their civilian flavour. A comparative reading of the respective chapters in the present book will make this obvious to the reader.

But even in these fields we do not usually find the one strand of legal tradition continuing to exist in clinical purity. The law of civil procedure, as discussed in chapter 12, provides a good example. For, on the one hand, a particularly characteristic aspect of the English procedural model, the distinction between Courts of law and Courts of equity and the concomitant distinction between two distinct bodies, or levels, of law, was never received in South Africa. On the other hand, the super-imposition of a judicial and procedural framework of common law origin upon the Roman-Dutch law had a decisive influence on South African judicial style which, in turn, could not fail to colour the way in which substantive rules of law were perceived and applied, even where they were of Roman-Dutch origin. However, it is in the law of obligations where a particularly complex

process of blending between civil law and common law has occurred over the past two centuries. Here, too, there has sometimes been a competition of approaches resulting, ultimately, in the rejection of one of them. More often, however, we find an interesting process of interaction: an interaction prefigured, not rarely, in the development of the respective English doctrine. Trust law may also be mentioned in this context, for Courts and legal writers in South Africa have managed to ‘civilianise’ the notion of a trust and thus to create a useful and flexible device which, as Marius de Waal has noted, is not a ‘so-called’ trust, but a proper trust without being an English trust.

How did the individual institutions and doctrines of modern South African private law develop? Which components of Roman-Dutch law have stood the test of time? What was the level of interaction between civil law and common law? Is the process complete or is it still continuing? How is the result to be evaluated? Questions such as these have started to interest scholars of comparative law. This is true, particularly, for Europe, where lawyers today are faced with the challenge of elaborating the foundations of a European private law and of advancing towards coherent and rational solutions of problems on which civil law and common law legal systems take a different view. In fact, in recent years we have experienced a surge of interest in the historical experiences of ‘mixed legal systems’ and among them, most prominently, the two uncodified ones of South Africa and Scotland. This has paved the way for increased international co-operation and for exploring new avenues of comparative legal research. Thus, strong intellectual links have been established between lawyers from Scotland and South Africa which have led to a project attempting to place mixed jurisdictions in a comparative perspective.

Roman-Dutch and English law are the two layers constituting South African law which feature most prominently in the present work. This is not only true for the various branches of private law and procedural law. It also applies to an area such as criminal law where we have common law crimes based on Roman-Dutch and English sources: a very unfamiliar picture for lawyers who have grown up in legal systems dominated by the iron rule of *nulla poena sine lege*. Criminal law also provides an example of considerable influence of German legal doctrine. This influence has started to exert itself in the second half of the 20th century and has shaped a number of general doctrines of criminal liability. The influence of German law was not, however, confined to this area of the law; it has also been felt in contract law though here it was based less on modern doctrinal literature than on pandectist writing.

The common law prevailing in South Africa, as we know it today, was originally imposed by the colonial rulers and its development occurred within a

context of discrimination and oppression. In keeping with the English colonial approach elsewhere in Africa, African customary law, though recognised, was limited in its sphere of application and held at arm's length. It led a separate existence. This is still very largely true today for it was decided, even after the advent of democracy, to retain a common law that continues to be characterised by its eurocentric basis. At the same time, however, the 'law or custom as applied by the Black tribes in South Africa' has been given pride of place in the Constitution and has become an authoritative source of South African law. It has been placed on an equal footing with the common law which, essentially, means that black South Africans are free to choose by which of the two systems their relationships are to be governed. Whether, and to what extent, the South African common law may perhaps even incorporate elements of the customary law, and in this sense 'africanise' itself, remains one of the great challenges of the new South African legal order. Thus, in the opinion of the first Chief Justice to have been appointed under the new constitutional dispensation, South African law will be 'infinitely richer if both systems invigorate and strengthen each other'. African law may thus eventually emerge as yet another layer of South Africa's mixed legal system. That story, however, cannot be told in the present book; it will have to wait for a later edition.

The foundation for the new legal order in South Africa is the Constitution of 1996. Having been drafted and adopted by a Constitutional Assembly, it completed South Africa's negotiated revolution. It is based on the separation of powers, democracy and the rule of law and it contains a Bill of Rights that rests on the values of human dignity, equality and freedom. The Bill of Rights does not only protect the individual against the State but also applies 'horizontally', that is, in relationships between private individuals. Moreover, section 39(2) of the Constitution obliges the Courts to promote the spirit, purport and objects of the Bill of Rights when applying and developing the common law. It is apparent from the chapters of this book that Courts and legal writers have eagerly taken up the challenge of infusing the legal system with the constitutional values, no matter whether we are dealing with old-established areas of the common law like delict or contract, with a subject largely shaped by legislation like family law, or with branches of the law that have only come into their own in more recent times, like labour law or administrative law. The Constitution will continue to have a profound impact upon the development of South African law and upon the way it is applied. This, then, is the most recent layer of an already multi-layered system and it is one that further enhances the attractiveness of that legal system as an object of comparative studies.

All in all, therefore, it is much to be welcomed that a book on South African law appears in this well-established series of introductions to foreign legal systems. It provides legal scholars worldwide with a reliable overview as well as with a convenient starting point for more detailed comparative investigation. May the work serve as a catalyst for an increased interest, internationally, in South African law.

Reinhard Zimmermann  
Hamburg  
October 2003

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# List of Abbreviations

(A)	Appellate Division of the Supreme Court of South Africa (1947–1994)
ACJ	Acting Chief Justice
AD	Appellate Division (pre-1947 Reports)
app.	appendix
AJ	Acting Judge
AJA	Acting Judge of Appeal
AJ	<i>Acta Juridica</i>
All SA	The All South African Law Reports
art.	article
arts	articles
ASSAL	<i>Annual Survey of South African Law</i>
(BA)	Bophuthatswana Appeal Court
BCLR	Butterworths Constitutional Law Reports
BGB	<i>Bürgerliches Gesetzbuch</i>
Bpk	<i>Beperk</i> (Limited)
BCEA	Basic Conditions of Employment Act
(BSC)	Bophuthatswana Supreme Court
(C)	Cape Provincial Division
C	<i>Codex in Corpus Iuris Civilis</i>
CC	Close Corporation
(CC)	Constitutional Court
cf.	compare
chap.	chapter
CILSA	<i>Comparative and International Law Journal of Southern Africa</i>
CJ	Chief Justice
(Ck)	Ciskei Supreme Court
Co	Company
CPD	Cape Provincial Division Reports (pre-1947 Reports)
D	<i>Digesta in Corpus Iuris Civilis</i>
(D)	Durban and Coast Local Division
DJ	<i>De Jure</i>
ed.	edition, editor
eds	editors

(E)	Eastern Cape Provincial Division
HL	House of Lords
ILJ	<i>Industrial Law Journal</i>
ICLQ	<i>International and Comparative Law Quarterly</i>
Inc	Incorporated
I	<i>Institutiones in Corpus Iuris Civilis</i>
J	Judge
JA	Judge of Appeal
JP	Judge President
LAC	Labour Appeal Court
LCC	Land Claims Court
LRA	Labour Relations Act
Ltd	Limited
n.	(foot)note
nn	(foot)notes
(N)	Natal Provincial Division
(NC)	Northern Cape Provincial Division
NLR	Natal Law Reports (pre-1947 Reports)
(O)	Orange Free State Provincial Division
OPD	Orange Free State Provincial Division (pre-1947 Reports)
p.	page
pp	pages
para.	paragraph
paras	paragraphs
PH	Prentice Hall Reports
Plc	public limited company
Pty.	proprietary
Pvt	private (company)
(R)	Rhodesia High Court
(RA)	Rhodesia High Court Appellate Division
reg.	regulation
regs	regulations
s.	section
ss	sections
SA	South Africa
SA	South African Law Reports
SACJ	<i>South African Journal of Criminal Justice</i>
SACR	South African Criminal Law Reports
SAJHR	<i>South African Journal on Human Rights</i>

SALJ	<i>South African Law Journal</i>
(SCA)	Supreme Court of Appeal of South Africa (post-1994)
(SEC)	South Eastern Cape Local Division
Stell LR	<i>Stellenbosch Law Review</i>
(SWA)	South West Africa Provincial Division
(T)	Transvaal Provincial Division
THRHR	<i>Tydskrif vir Hedendaagse Romeins-Hollandse Reg</i>
(Tk)	Transkei
(TkSC)	Transkei Supreme Court
TPD	Transvaal Provincial Division (pre-1947 Reports)
TS	Transvaal Supreme Court (pre-1910 Reports)
TSAR	<i>Tydskrif vir die Suid-Afrikaanse Reg</i>
Tvl	Transvaal
v.	<i>versus</i>
VOC	<i>Vereenigde Oost-Indische Compagnie</i> (Dutch East India Company)
vol.	volume
vols	volumes
(W)	Witwatersrand Local Division
WLD	Witwatersrand Local Division (pre-1947 Reports)



# *Chapter 1*

## **Introduction: History, System and Sources**

*François du Bois\**

### **I. LEGAL CULTURE**

South African law emerged already before the founding of the country that bears this name. When, in 1910, the Union of South Africa was created out of four British colonies, a distinct legal system had already been developing in that part of Africa for nearly 250 years. The law that had been taking shape there after the Dutch East India Company established itself at the Cape of Good Hope in 1652 was deeply affected by local demographic, political and economic factors, especially the replacement of Dutch by British rule, the expansion of the European settlement, the subjugation of the indigenous population, and the development of a commercial and industrial economy in the wake of the discovery of gold and diamonds in the late 19th century. It came to reflect a series of dualities that characterised South African society until very recently. Foremost among these, the overlapping white-black, ruler-ruled dichotomies were mirrored in the ascendancy of European legal principles over indigenous law, little of the latter being (grudgingly) officially recognised as valid law. The duality of colonial society itself – Dutch and English – was manifested in the local application of significant bodies of principles drawn directly from the sources of both metropolitan legal systems. The subsequent history of South African law took the form, first, of their elaboration and reinforcement over a period of some 80 years during which colonial rule matured into the system of racial hierarchy known as apartheid and an urbanised industrial society came into being, and then, remarkably, of their fading away into the background, as apartheid was replaced

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by a constitutional order premised on democracy, the rule of law and the pursuit of equality.<sup>1</sup>

The legal system still bears the clear imprint of the texture of South African society. The principles and institutions of contemporary South African law are strikingly diverse in origin, containing not only laws with African and European roots, but also (within the latter category) elements of both the civil law and the common law traditions. Significant parts of it are, moreover, hybrid: it is the paradigm ‘mixed’ legal system in which this varied heritage has produced friction, but also distinctly local accommodations.<sup>2</sup>

Due to the profound reorientation, since the mid-1990’s, of its guiding principles and values by the post-apartheid constitutional order, it is also, despite its long pre-history, in some respects a very young legal system in which important matters are (once again) unsettled, or in the early stages of development. Legally, as much as socially and politically, South Africa took a new direction when its first democratic Constitution came into force in 1994 and some ten years later is still finding its way. Partly for this reason, but mainly because of the country’s long history of division and oppression, the legal system is, even now, deeply marked by social, economic and cultural cleavages that run along racial lines, especially in respect of its effectiveness, accessibility and legitimacy.<sup>3</sup> It is a microcosm of South Africa’s history, of the continuing impact thereof, and of varied hopes for a better future.

Culturally, this legal system stands in the shadow of colonisation, anglicisation and globalisation. Although South Africa’s population is mainly indigenous, its framework of legal principles and basic institutions are predominantly of Anglo-European origin, increasingly influenced by North America as well as other members of the Commonwealth, while English is today the dominant language in legal education and scholarship, the Courts and legal practice, and the sources of law.<sup>4</sup>

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<sup>1</sup> For general accounts, see H.R. Hahlo & E. Kahn, *The Union of South Africa: The Development of its Laws and Constitution* (1960); R. Zimmermann & D.P. Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996); M. Chanock, *The Making of South African Legal Culture 1902-1936: Fear, Favour and Prejudice* (2001).

<sup>2</sup> See V.V. Palmer (ed.), *Mixed Jurisdictions Worldwide: The Third Legal Family* (2001).

<sup>3</sup> See in general W. Schärf & D. Nina (eds), *The Other Law: Non-State Ordering in South Africa* (2000); H. Kotzé, ‘Mass and Elite Attitudes Towards the Criminal Justice System in South Africa: How Congruent?’ 2003 SACJ 38.

<sup>4</sup> For problems and concerns in this regard, see J.M. Hlophe, ‘Official Languages and the Courts’ 2000 SALJ 690.

It still has features that are closely connected with the civil law tradition carried with them by the Dutch, notably relatively recent and overt connections with Roman law, the use in legal reasoning of broad principles and concepts, extensive direct reliance by the Courts on doctrinal writings, and, post-1994, the existence of a specialised Constitutional Court. And at the margins of the legal system, geographically, jurisdictionally and in lawyers' consciousness and daily practice, local languages and pockets of indigenous law and institutions are accommodated in a pattern, similar to that found in other ex-colonies, that follows the overlapping contours of urbanisation, education, socio-economic class and culture.<sup>5</sup>

Crucially, however, it is lawyers from England or any other member of the 'common law family' of legal systems, who would feel most at home with the operation of South African law. It is an uncodified system that is being shaped by precedents openly produced in, for the most part, Courts of general rather than specialist jurisdiction, and by legislation mostly drafted in the style of detailed and comprehensive rules intended to minimise judicial gap-filling. Its laws are implemented through an essentially oral and adversarial procedure by a judiciary drawn, at senior levels, from the ranks of experienced practitioners. In combination, this makes for a complex legal culture that, while mixed, today lies closer to the common law tradition than any other.

The place of law in general South African culture presents an equally diverse picture. On the one hand, law occupies pride of place in the post-apartheid reconstruction of society. The new constitutional law not only introduced the ethos of a democratic *Rechtsstaat*, but also enacted an extensive array of socio-economic rights that are designed to change South African society fundamentally.<sup>6</sup>

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<sup>5</sup> See C. Himonga, 'A Legal System in Transition: Cultural Diversity and National Identity in Post Apartheid South Africa' 1998 *Recht in Afrika* 1.

<sup>6</sup> On the transformational ambition and potential of post-apartheid constitutional law, see especially K. Klare, 'Legal Culture and Transformative Constitutionalism' 1998 SAJHR 146; H. Corder, 'Prisoner, Partisan and Patriarch: Transforming the Law in South Africa 1985-2000' 2001 SALJ 772; H. Klug, *Constituting Democracy: Law, Globalism and South Africa's Political Reconstruction* (2000); P. Andrews & S. Ellman (eds), *The Post-Apartheid Constitutions: Perspectives on South Africa's Basic Law* (2001). For endorsement hereof by those holding high judicial office, see A. Chaskalson, 'The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order' 2000 SAJHR 193; D. Mosenke, 'The Fourth Bram Fischer Lecture: Transformative Adjudication' 2002 SAJHR 309.

These can be and indeed already have been used to secure, through litigation, the interests of traditionally marginalised groups and to ensure their place on the political agenda.<sup>7</sup> In doing this, lawyers are continuing along a path of social activism that was opened up during the apartheid era by a small group of talented and very courageous legal practitioners who used the Courts to resist and frustrate oppressive laws.<sup>8</sup> This has raised the public profile of the Courts, and seems to have a positive effect on public opinion about the legal system, with the Constitutional Court reportedly being the most widely respected public body.<sup>9</sup> Equally important is that these rights provide a framework of principle for a growing body of legislation that is meant to eliminate the socio-economic legacy of a long history of racial segregation and exploitation in all areas of life, as well as other forms of injustice. The post-apartheid history of South Africans' efforts to construct a better society could indeed largely be told through an account of legislation and litigation.

On the other hand, it is clear that there is a significant gap between the law's claim to authority, and its effectiveness and social acceptance. Very high levels of crime, coupled with low levels of detection and conviction and, paradoxically, a high imprisonment rate, reveal a society in which lawlessness is common, and the law in practice does little to guide behaviour or punish transgressors.<sup>10</sup> Effective access to the legal system is, moreover, far beyond the financial means of most, who at any rate frequently lack the educational sophistication needed to identify their need for legal assistance.<sup>11</sup> Such a context is fertile ground for

<sup>7</sup> See e.g. *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC); *Government of the Republic of South Africa v. Grootboom* 2001 (1) SA 46 (CC); *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza* 2001 (4) SA 1184 (SCA); *Minister of Health v. Treatment Action Campaign* (2) 2002 (5) SA 721 (CC); *Highveldridge Residents Concerned Party v. Highveldridge Transitional Local Council* 2002 (6) SA 66 (T).

<sup>8</sup> See R. Abel, *Politics by Other Means: Law in the Struggle Against Apartheid, 1980-1994* (1995); S. Ellman, *In a Time of Trouble* (1992).

<sup>9</sup> J.L. Gibson & G.A. Caldeira, 'Defenders of Democracy? Legitimacy, Popular Acceptance and the South African Constitutional Court' 2003 *Journal of Politics* 1.

<sup>10</sup> See D.M. Davis, G.J. Marcus & J. Klaaren, 'The Administration of Justice' 1999 ASSAL 773, 787 et seq.

<sup>11</sup> In *Mohlomi v. Minister of Defence* 1997 (1) SA 124 (CC) at para. [14], Didcott J took judicial notice of 'the state of affairs prevailing in South Africa, a land where poverty and illiteracy abound and differences of culture and language are pronounced, where such

alternative, non-state, forms of ‘informal justice’ which all too easily mutate into self-help and vigilantism that challenges the State’s substantive and procedural rules. This, too, is evident in South Africa, especially in the ‘informal settlements’ that house the rapidly urbanising population. History plays a large part in this, inasmuch as alienation from the official legal system is hardly surprising in a society where the law for more than 300 years was not merely associated with, but a principal means of, establishing and maintaining an exploitative and oppressive system of segregation and minority rule, the socio-economic legacy of which still determines most inhabitants’ daily lives. But these causes also have a contemporary dimension. The egalitarian promise held out by the post-apartheid constitutional order has required far-reaching and difficult reorientations in policing, Court procedures and the administration of the State. These reorientations have disrupted their already precarious performance, and have given rise to a measure of disillusionment with the capacity of the law to meet social needs and expectations.<sup>12</sup>

Thus, South African legal culture is today marked as much by the country’s history as by attempts to facilitate society’s escape therefrom. The culture of the legal system itself and the place of the legal system in civic culture generally, both bear the clear signs of a history of colonisation and segregation through law. They are also, however, plainly being shaped by the central role that the legal system is playing in the construction of an integrated, egalitarian and democratic society.

Consciousness of this two-sided character of law, of its being simultaneously the product of history and a bridge to the future, is perhaps the most noteworthy aspect of contemporary legal culture in South Africa. Although law always and everywhere exhibits both facets, this is so palpable in post-apartheid South Africa that it is openly acknowledged and confronted in legal reasoning and legal thought. Three principal strands make up this trend.

There are, first, a significant number of cases that recognise the power of Judges to revise the law and channel it into new directions. Spanning all areas of

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conditions isolate the people whom they handicap from the mainstream of the law, where most persons . . . are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial and geographic reasons’.

<sup>12</sup> See especially W. Schärf & D. Nina n. 3 above. See also C. Plasket, ‘Administrative Justice and Social Assistance’ 2003 SALJ 494 who describes judicial responses to shocking failures of State officials to meet their legal obligations.

law, these cases evince not only consciousness on the part of legal advisers of the possibility of changing the law – and social practices – through litigation, but frequently also contain candid acknowledgements by Judges of their power to do so.<sup>13</sup> Here it is no longer doubted that adjudication engages Judges' convictions and values: attention is focused instead on when and how they should decide on these grounds. Awareness of judicial discretion is also evident in a greater willingness, even on the part of influential political and governmental representatives, to criticise judicial decisions because of their perceived political or ideological bias. This has perturbed senior Judges sufficiently to lead them to call publicly for the exercise of restraint in this regard.<sup>14</sup>

Discretionary judicial power has, of course, always existed, but today there clearly is a greater willingness to use it to modernise the law than there had been for a long time, as well as greater openness about its existence and the manner of its use. Many cases and *dicta* demonstrate a desire on the part of the judiciary to adapt the law to contemporary needs and the prevailing ethos of freedom, equality and the rule of law. This contrasts markedly with legal, certainly judicial, culture in the apartheid era, which in private law set very great store by historical authenticity and in public law was markedly cautious and respectful towards an undemocratic legislature and Executive.<sup>15</sup> This change is undoubtedly due to a combination of anti-apartheid lawyers' critique of judicial complacency in the

<sup>13</sup> Marais JA stated in *Cape Town Municipality v. Bakkerud* 2000 (3) SA 1049 (SCA) at para. [15] that '[t]here are many areas of the law in which courts have to make policy choices', and Froneman J observed in *Ngxuza v. Permanent Secretary, Department of Welfare, Eastern Cape* 2001 (2) SA 609 (E) at 619 that '[t]he reality is that the outcome of this case is not dictated by precedent or deductive legal reasoning alone: my interpretation of s 38 of the Constitution is inevitably also influenced by my own views of the context in which it is to be interpreted and applied'. A. Chaskalson and D. Mosenke n. 6 above contain extra-curial judicial affirmations hereof. In its very first decision to be reported, the Constitutional Court in *S v. Makwanyane* 1995 (3) SA 391 (CC), clearly acknowledged its role in educating and changing public opinion regarding the death penalty. See further M. du Plessis, 'Between Apology and Utopia – The Constitutional Court and Public Opinion' 2002 SAJHR 1, who emphasises the 'edifying' programme of the Constitutional Court.

<sup>14</sup> See 'Press Statement by the Judges of the Witwatersrand High Court' 1999 SALJ 886; D.M. Davis, G.J. Marcus & J. Klaaren, 'The Administration of Justice' 2000 ASSAL 877, 884.

<sup>15</sup> H. Corder, *Judges at Work* (1984) and C. Forsyth, *In Danger for their Talents* (1985) provide historical studies of judicial reasoning in various fields, illustrating the general

face of injustice,<sup>16</sup> and the open-ended character of the provisions of the post-apartheid constitutional Bill of Rights.

Secondly, there are cases reflecting a tension between these two sides of the law. Leaving aside occasional and isolated criticism from the Bench of new legal directions, this is especially apparent in the conflicting predilections of senior Judges for anchoring innovative decisions either in their long-standing common-law powers to overrule precedents, or in their post-apartheid constitutional duty to develop the common law in accordance with the values of the new constitutional order. While these two approaches can lead to equally progressive results, it is noteworthy that some Judges and Courts have made a point of emphasising that they either do or do not see themselves as following the dictates of the Constitution rather than the common law.<sup>17</sup> Since the Constitution symbolises a new beginning, and the common law continuity with the past, this contrast between judicial

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point made in the text. See also E. Cameron, 'Legal Chauvinism, Executive-Mindedness and Justice – LC Steyn's Impact on South African Law' 1982 SALJ 38; D.P. Visser (ed.), *Essays in the History of Law* (1989); A.J. van der Walt 'Tradition on Trial: A Critical Analysis of the Civil-Law Tradition in South African Property Law' 1995 SAJHR 169; D. van der Merwe, 'Roman-Dutch Law: From Virtual Reality to Constitutional Resource' 1998 AJ 117.

<sup>16</sup> The outstanding example of this is J. Dugard, *Human Rights and the South African Legal Order* (1978), but see also the works cited in the previous footnote as well as A.S. Matthews, *Freedom, State Security and the Law* (1986); H. Corder (ed.), *Essays in Law and Social Practice* (1988); D. Dyzenhaus, *Hard Cases in Wicked Legal Systems* (1991).

<sup>17</sup> Striking examples are provided by *The Pharmaceutical Manufacturers Association of SA: In re Ex parte Application of the President of the Republic of South Africa* 2000 (2) SA 674 (CC) and *Carmichele v. Minister of Safety and Security* 2001 (4) SA 938 (CC) in which the Constitutional Court insisted that an issue first dealt with by the Supreme Court of Appeal in terms of the common law in fact raised a constitutional question. Equally clear are the decisions in *National Media Ltd v. Bogoshi* 1998 (4) SA 1196 (SCA) (overruling defamation precedents on free speech grounds, expressly on the basis of the Court's common law powers rather than its Constitutional duties); *Minister of Safety and Security v. Van Duivenboden* 2002 (6) SA 431 (SCA) (majority judgment treats issue as constitutional, whilst Marais JA insists that it can be dealt with purely in terms of the common law); and *Brisley v. Drotsky* 2002 (4) SA 1 (SCA) (Cameron JA insists that a question dealt with by the majority in terms of the common law alone, in fact concerns the impact of the Constitution on contract law). See on this generally, A.J. van der Walt, 'Dancing with Codes – Protecting, Developing and Deconstructing Property Rights in a Constitutional State' 2001 SALJ 258; H. Corder n. 6 above.

approaches reveals different degrees of commitment to these two sides of the law, even among those who agree about the substantive ends to be aimed for.

The third strand is simply a broader manifestation of this. It consists of disagreements and debates about the extent to which Judges should use their power to remake the law. Something of this can be seen in judgments of the Constitutional Court in which some Judges consistently place greater emphasis on the scope created by the Constitution for the exercise of judicial discretion and others on the limits the Constitution imposes thereon. It is also present in other Courts, however, and in contexts that have a rather tenuous connection with the Constitution, such as commercial contracts.<sup>18</sup> These disagreements and debates are echoed in scholarly literature where it becomes particularly clear that they reflect both concern about the first strand identified above, namely open acknowledgement of judicial power, and recognition of the necessity of such openness to keep the powers of Judges within appropriate bounds.<sup>19</sup>

Post-apartheid legal culture, then, appears to be ambivalent about law, recognising its pitfalls as well as its promise. This is hardly surprising, given the role of law in apartheid society, where it served as both an instrument of oppression and a means of resistance. It is nevertheless a striking feature of contemporary South African law that this ambivalence lies close to the surface of legal thought, bringing some uncertainty in its wake, and occasionally breaks through, sometimes overturning settled principles, sometimes sinking back without leaving a trace. And all the while, lawyers' attempts to construct a new legal order interact in complex ways with the divergent attitudes of a still deeply divided population to the efforts of State institutions to reshape society.<sup>20</sup>

<sup>18</sup> See especially *Brisley v. Drotsky* n. 17 above and *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA).

<sup>19</sup> See e.g. I. Currie, 'Judicious Avoidance' 1999 SAJHR 138; M. du Plessis n. 13 above; A.J. van der Walt, 'Living with New Neighbours: Landownership, Land Reform and the Property Clause' 2002 SALJ 816; D. Davis, *Democracy and Deliberation* (2000).

<sup>20</sup> Cf. the cases cited in n. 7 above with *Ex parte Gauteng Provincial Legislature: In re Dispute Concerning the Constitutionality of Certain Provisions of the Gauteng School Education Bill of 1995* 1996 (3) SA 165 (CC); *Transvaal Agricultural Union v. Minister of Land Affairs* 1997 (2) SA 621 (CC) and *Pretoria City Council v. Walker* 1998 (2) SA 363 (CC), all of which involved attempts to use constitutional rights to frustrate governmental efforts at social reform. See also the intemperately expressed judicial animosity to land reform legislation in *Joubert v. Van Rensburg* 2001 (1) SA 753 (W) and the repudiation of this criticism in *Mkangeli v. Joubert* 2002 (4) SA 36 (SCA).

## II. HISTORY

### A. Transplanted Law<sup>21</sup>

Although law existed long before in the area that came to be present-day South Africa, the commencement of the Dutch settlement at the Cape of Good Hope in 1652 represents the start of the history of what became South African law. This is because its distinctive character can be ascribed to the colonial transplantation of European law and the interaction of the latter with local conditions and indigenous laws.

From the outset, the officials of the Dutch East India Company (*VOC*) settlement at the Cape appear primarily to have applied Roman-Dutch law, which was the law of one of the united provinces of the Netherlands, namely Holland. While the precise reason for this is unclear, it does seem to have accorded with the practice followed at the more important centre of Batavia, to which the Cape was subject, and is probably best thought of as a matter of official custom. Although the *VOC*'s limited initial objective of establishing a facility for the provisioning of ships halfway on their journeys between Europe and Asia meant that they refrained for some time from asserting any authority over the indigenous population and thus only applied this imported law to members of their small settlement on the basis of personal rather than territorial assertion of jurisdiction, growing contact and conflict between Company servants and the indigenous inhabitants inevitably led to the exercise of authority over the latter. Initially, this was justified on the basis that Dutch law represented a sort of *ratio scripta*, a concretisation of the universal natural law that bound all, including the indigenous population, but, with the passage of time, the application of Dutch law to all inhabitants of the territory controlled by the *VOC* seems to have been treated as self-evident. In this way, Dutch law gradually acquired a territorial rather than a personal field of application in tandem with the growth in depth and extent of the *VOC*'s establishment at the Cape. Roman-Dutch law had as a matter of fact been transplanted to the Cape, albeit in a manner impossible to reconcile with the views on the acquisition of sovereignty espoused by Grotius, one of its greatest exponents.<sup>22</sup>

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<sup>21</sup> See generally the literature cited in nn. 1 and 2 above, as well as F. du Bois & D.P. Visser, 'Der Einfluss des europäischen Rechts in Südafrika' 2001 *Jahrbuch für Europäische Geschichte* 47. Unless otherwise stated the information in this section is drawn from these sources.

<sup>22</sup> See Grotius, *De Iure Belli ac Pacis* 2.22.9 and *De Mare Liberum* (R. v. D. Magoffin transl, 1916) 11, 13, 19.

The growth of the settlement itself and that of its law was slow, intermittent and haphazard. Nevertheless, over a period of some 150 years, until the first British occupation of the Cape in 1795, the small provisioning facility was transformed into a colonial settlement in which the administration granted and administered title to land to an increasing settler population, and operated a modest but reasonably well-established network of Courts within an ever-expanding territory. Although some of the indigenous population lived lives that were to some (and varying) extent autonomous of the colonial administration, brutal wars of conquest and disease had reduced their number and turned many into quasi-serfs who lived and laboured alongside imported slaves on settler farms. Gradually, more and more of the Cape came under increasingly intense control of the *VOC* and subject to its laws. But in many ways this was a weak system of law and administration. Officials had great difficulty in controlling the settlers through law and legal institutions, particularly at the boundaries of the settlement where open defiance of the law flared up from time to time. Moreover, the legal institutions at the centre were rudimentary, inefficient and too closely intertwined with the local *VOC* administration and the interests of the wealthy to inspire much confidence even among the colonial settlers. Important steps were taken to reform and professionalise the legal system after the Cape was returned to the Netherlands in 1803. Judicial and administrative/executive institutions were separated more clearly, procedures were modernised and the legal profession was subjected to regulation. However, this period of reformist Dutch rule at the Cape turned out to be short-lived, for in 1806 Britain again occupied the Cape, which was permanently transferred to them by the Dutch in 1815. This second period of British rule soon led to more fundamental legal reforms, which eventually swept away the Cape's Dutch legal institutions, and some – but by no means all – of its Dutch laws.

British rule at the Cape did not *ipso facto* replace Roman-Dutch law.<sup>23</sup> Not only was it stipulated in the Articles of Capitulation that the rights and privileges of the Cape's inhabitants were to be preserved, but the law of colonisation as applied in British Courts also provided that the law of conquered and ceded

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<sup>23</sup> The interaction between Roman-Dutch and English law receives particular attention in the chapters on South Africa in the work edited by Palmer n. 2 above, namely P. Farlam & R. Zimmermann, *South Africa – Report 1*, 83-144 and C.G. van der Merwe, J.E. du Plessis & M.J. de Waal, *South Africa – Report 2*, 145-200. Equally important is E. Fagan, 'Roman-Dutch Law in its South African Historical Context' in R. Zimmermann & D.P. Visser n. 1 above.

territories remained in force until altered by the Sovereign. Colonial records do show initial enthusiasm for full-scale anglicisation of Cape law, but this soon settled into a more moderate programme of piece-meal reform that envisaged an anglicised system as a possible outcome of gradual adjustments. Far-reaching changes were nevertheless set in train by policies that transformed the institutional and socio-economic setting of the law. The Courts of the Dutch period were replaced, first, in 1828, by a Supreme Court staffed (initially exclusively) by imported British Judges and, secondly, by a new system of lower Courts presided over by colonial officials known as magistrates. Due partly to legislation that obliged these new Courts to apply English principles of procedure and evidence, and partly also to the educational and professional backgrounds of the new judicial corps (and soon also of legal practitioners), characteristic features of the common law tradition were introduced into South Africa. These include trials marked by oral, party-managed adversarial procedures, the delivery and publication of full and personalised judgments by individual Judges, and, of course, the doctrine of precedent. Changed practices of drafting pleadings as well as legal documents such as wills and contracts also affected the substance of the law, moulding Roman-Dutch principles along English lines.

Added to this were profound changes in the economy and society of the colonial settlement. Commercial and political activity, both of which had, during the last period of Dutch rule, just started to emerge from the stranglehold of the VOC's authoritarian and monopolistic practices, were boosted significantly by the classical liberal policies and ideology of the new colonial power and the immigration of British settlers. British rule also drew the Cape further into a rapidly expanding and intensifying network of international trade. This created a need, recognised by colonial officials, local merchants and the legal profession alike, for thorough revision of the Cape's commercial laws, particularly to ensure their alignment with the laws of England as well as of other British colonies. Moreover, legal development in the Netherlands had by then ceased to function as a source for the modernisation of Cape law, since the adoption there of a variation of the French *Code Civil* in 1809 effected a radical break with the laws that had been transplanted to the Cape. The upshot hereof was large-scale importation of English commercial law, mainly by way of local legislation, but also by means of deliberate judicial reform of the law. Socio-economic change additionally created a need for legal principles that could be applied when political conflicts, especially between settlers and the local rulers of the colony, spilled over into the Courts and made it necessary to determine the legal limits of governmental authority. Here, too, the relatively greater sophistication of the common law, and its specific link with the new ruling power, combined to

produce a reception of common-law principles, and Roman-Dutch law practically disappeared from the field of public law.

This process broadened and deepened in the wake of the gradual extension of the boundaries of colonial settlement and strengthening of the State during the period of British rule, especially after the discovery in the interior of the country of diamonds (1867) and gold (1886). The legal traditions brought to South Africa by its two successive colonial overlords became increasingly intertwined, the common-law tradition dominating the institutional and procedural dimensions of the system, as well as commercial and public law. Strikingly, this also happened to some extent in the settlements established by those Dutch who, in the 1830's, had left the Cape Colony partly in protest at British legal reforms, and had sought to maintain their laws and practices outside its boundaries. As these matured into more or less stable polities, particularly after the mineral discoveries of the late 19th century, their legal systems became increasingly aligned and connected to that of the Cape from which they imported laws as well as personnel. Predictably, most remaining differences among the South African territories were wiped out after their annexation by Britain at the start of the 20th century so that the process of integrating the legal systems of the colonies, which were subsumed into the Union of South Africa in 1910, was fairly uncomplicated.

This is not to say that the process lacked controversy. After 1910, the growing sophistication of South African lawyers and Judges, as well as of local legal education and scholarship, combined in complex ways with an emerging local white nationalism to lead to a turning away from the rather quick and easy recourse to English law that had characterised much of 19th century legal practice. The newly created Appellate Division of the Supreme Court played a vital role in this return to prominence of Roman-Dutch law. However, determined and programmatic opposition to English legal influence emerged especially at the Universities that taught in Afrikaans, the local offspring of the Dutch language. This gathered considerable momentum towards the middle of the 20th century when heated debates took place between 'purists' and 'antiquarians' who favoured the cutting back of English legal influence on the one side and 'pragmatists' and 'pollutionists' on the other side.<sup>24</sup> These legal arguments resonated with broader political debates flowing from the rise of Afrikaner nationalism. When the political triumph of the latter in 1948 brought increasing numbers of people trained at Afrikaans Universities to the Bench, this 're-civilianisation'

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<sup>24</sup> See especially C. Forsyth n. 15 above, 182-234.

of South African law moved from the realm of theory to that of practice, and a profound re-orientation of South African law away from English law gradually took hold and triumphed, certainly no later than the 1980's.<sup>25</sup> It is nevertheless indisputable that by then a distinctly South African common law had emerged through the blending of Roman-Dutch and English law by the Courts and legislators.<sup>26</sup>

## B. Transformed Law<sup>27</sup>

Equally important are the effects that the strengthening and expansion of the State during British rule had on the relationship between settlers and indigenous people, and thus between transplanted and local law and institutions. Whereas the period of Dutch rule exhibited a haphazard combination of quasi-assimilation and extermination of the indigenous population, both of which destroyed their legal and political structures, matters took a different turn under British rule. Within the boundaries established by the Dutch, things continued much as before, although it must be said that the British brought the rule of law to bear on the relationship between colonial settlers and their indigenous servants/serfs, restraining the behaviour of the former but also subjecting the latter to the State's discipline. Gradually, this led to the creation of a racial sub-class within colonial society, which was the product of further assimilation of indigenous people, the slaves who were freed in 1832, and, of course, many of the offspring of interactions between these groups and settlers.

Beyond these boundaries, British policy initially favoured assimilation, subjecting newly conquered groups to the authority of colonial magistrates and laws and seeking to replace indigenous practices such as communal land tenure,

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<sup>25</sup> For details, see D.P. Visser & D. Hutchison, 'Legislation from the Elysian Fields: The Roman-Dutch Authorities Settle an Old Dispute' 1988 SALJ 619; R. Zimmermann, 'Roman Law in a Mixed Legal System: The South African Experience' in R. Evans-Jones (ed.), *The Civil Law Tradition in Scotland* (1995) 41.

<sup>26</sup> T.W. Price, 'The Future of Roman-Dutch Law in South Africa' 1947 SALJ 494, 498.

<sup>27</sup> M. Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (1996) provides the best general account of the transformation of indigenous and transplanted law in the colonial context, while M. Chanock (n. 1 above) fills in the detail in respect of South Africa specifically. The information and perspective used in this section are drawn from these sources, as well as from F. du Bois & D.P. Visser n. 21 above and E. Fagan n. 23 above.

with European customs such as individual title to land. However, this evoked protest and resistance and became less and less attractive as an ever more strained colonial administration increasingly came into contact with ever larger, stronger, and better organised indigenous communities. Eventually, when a way had to be found to rule the large and powerful Zulu population in the east of the country, legal assimilation was replaced by what came to be known as ‘indirect rule’. This was a policy whereby indigenous institutions and laws were kept in place (and adapted) as a buffer between the colonial State and the colonised population, members of which were co-opted into the colonial administration as junior partners by being allowed to exercise some indigenous legal powers under the supervision of colonial officials and institutions. A rather elaborate parallel legal system developed in this way with its own Code, unwritten ('native customary') laws and tiered system of Courts, all of which was closely connected to the development and maintenance of a racially segregated and hierarchical State, economy and society. In the late 19th century this approach was exported southwards and inland where indirect rule was used in varying degrees and in rather rudimentary form. In 1927 the Native Administration Act applied a modernised version thereof uniformly to the country as a whole.<sup>28</sup> The structures set up by this Act eventually became one of the pillars of apartheid, alongside laws that allocated land, employment and education on a racial basis and enforced social segregation.

Although transplanted European law had become the common law of South Africa, this replacement of assimilationist policies with the system of indirect rule permitted the survival of some indigenous law. This was, however, in truncated and attenuated form: truncated because indigenous law was applied only in respect of some issues, mainly those revolving around family relationships and land; attenuated because its incorporation into the colonial system of law and administration rendered it subject to the influence of the values and priorities of the State, thus diluting its indigenous character. Transformed as it was by the colonial encounter, customary law constituted one segment of a racially segregated legal system that eventually matured into apartheid. Both its substantive content and its institutional form were tainted by the roles they played in helping to shape the social structure that developed in South Africa out of this encounter between Europeans and Africans.

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<sup>28</sup> For details, see T.W. Bennett, *The Application of Customary Law in Southern Africa, the Conflict of Personal Laws* (1985).

To some extent, the same is true of the European legal traditions that were transplanted into South Africa. These, too, were truncated, not only because the presence of both Roman-Dutch and English law meant that neither applied in full, but also because colonial settlement established and elaborated a hierarchical order between colonists and indigenous people (and further categories of racial ‘others’) just as the metropolitan centres of these traditions were moving ever further away from their own hierarchical pasts. The encounter at the Cape between colonial settlers and indigenous people modified Roman-Dutch law through the local development *inter alia* of legal rules that restricted and coerced the provision of labour and limited freedom of movement on a racial basis. In this way, transplanted Roman-Dutch law, loosened from its Dutch social and ethical moorings, became truncated Roman-Dutch law. Hemmed in by its colonial context, the law reflected primarily the concerns and interests of only that section of society whose historical and cultural roots lay in Europe, but it affected all. As such encounters were replicated throughout South Africa, this modified law was carried further inland, and into the future.<sup>29</sup>

Indeed, as the history that had commenced with the Dutch settlement at the Cape continued, this transformation of the transplanted legal system continued apace, coercion of the indigenous population eventually hardening, through legislative intervention, into the elaborate system of racial segregation known as apartheid.<sup>30</sup> In time, this led to the dilution of the liberal impulses bequeathed to Roman-Dutch law in the works of its leading architects, Hugo de Groot (Grotius) and Johannes Voet. In 1989, Arthur Chaskalson, who subsequently became the first President of the Constitutional Court, summed up the practical result thereof in the following terms:

‘Law provided the foundations on which a racially discriminatory society was built . . . In all this there was, of course, a conflict between the common law which denies all forms of discrimination and recognises and seeks to protect fundamental rights and freedoms, and the bureaucratic state which increasingly claimed the right to decide for people how they should lead their lives and how privilege should be distributed. This attempt to create

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<sup>29</sup> See also A. Sachs, *Law and Justice in South Africa* (1973).

<sup>30</sup> Details about apartheid laws can be found in the works of J. Dugard and A.S. Mathews cited in n. 16 above, as well as in A.J. Rycroft (ed.), *Race and the Law in South Africa* (1987). See also M. Lobban, *White Man’s Justice: South African Political Trials in the Black Consciousness Era* (1996).

an apartheid superstructure upon an infrastructure of Roman Dutch common law called for an almost schizophrenic approach by courts to problem solving. They were at one and the same time being asked to articulate and give effect to equitable common law principles, and to uphold and enforce discriminatory laws: at one time to be an instrument of justice and at another to be an instrument of oppression.<sup>31</sup>

English law suffered much the same fate. The ethos of economic freedom that underlay its commercial laws which were imported into South Africa served to enhance the efficiency of an exploitative colonial economy and the prosperity of settlers, thus deepening the racial divide. Transplanted into the setting of a repressive system of racial segregation and exclusion, these laws offered little to the indigenous population, serving instead to facilitate an economy founded on their dispossession. A telling example of the impact of transplantation is provided by the Master and Servants Acts: removed from the moderating effects of the English legal and political context, the South African version of these Acts played a central role in the creation of a racial underclass of workers whose contractual labour obligations were enforced through criminal sanctions and long outlasted their English models. Transplanted public law, too, while comparatively liberal and progressive, primarily served the interests of settler society. Although English public law did on occasion protect freedom in South Africa, its overall impact was to help rather than hinder the development of a legally enforced racial hierarchy, especially because of the particularly repressive effects of the doctrine of legislative sovereignty in a country with a racially restricted franchise.<sup>32</sup> Here, too, excision of the law from the context of its origin served to boost its retrogressive aspects.

### C. Towards Legal Integration

The history recounted so far came to an end in 1994, when South Africa held its first democratic elections in terms of a Constitution that provided for universal

<sup>31</sup> A. Chaskalson, ‘Law in a Changing Society’ 1989 SAJHR 293, 294. See also E. Mureinik, ‘Dworkin and Apartheid’ in H. Corder (ed.) n. 16 above, 207-208.

<sup>32</sup> This is strongly emphasised in the Truth and Reconciliation Commission’s evaluation of the apartheid legal system and its lawyers – see Truth and Reconciliation Commission of South Africa, *Report* (Truth and Reconciliation Commission, 1998), vol. 4, chap. 4. On this process, see D. Dyzenhaus, *Judging the Judges, Judging Ourselves – Truth, Reconciliation and the Apartheid Legal Order* (1998).

suffrage, outlawed racial (and other) discrimination and protected individual rights.<sup>33</sup> The Constitution of the Republic of South Africa, Act 200 of 1993 was the outcome of a multi-party negotiation process, but was itself enacted by the last apartheid Parliament. It was accordingly meant to be temporary only, providing a framework for democratic elections as well as the drafting of a ‘final’ Constitution by representatives so elected. The ‘interim Constitution’, as it became known, was, therefore, replaced by the ‘final Constitution’, the Constitution of the Republic of South Africa, Act 108 of 1996. However, despite its short life, the interim Constitution had a profound and lasting effect on South African law, because it contained two features that are central to the break with the period of legal history marked by colonial and apartheid values: an egalitarian Bill of Rights enjoying special legal status, and a Constitutional Court to enforce such rights and rule of law values generally. These became cardinal features of the final Constitution as well.

Some of the most contentious and significant legal developments after 1994 have revolved around the relationship between the common law and the values enshrined in the new constitutional order. In view of the history recounted above, this should not come as a surprise – South Africa’s European legal heritage has been associated with authoritarianism, racial oppression and economic exploitation and is today seen by many as detracting from the legitimacy of common-law rules.<sup>34</sup> Constitutional rights have served a vital role in the re-orientation of the law by providing lawyers with opportunities for challenging settled principles and doctrines and furnishing Judges with the conceptual tools to bring about such changes. The accuracy of the following prediction, made in 1992 towards the end of the apartheid era, is now becoming increasingly evident:

‘South Africa will, sooner rather than later, get a different political dispensation . . . [and then] the current . . . attitude to European common law sources will simply be anachronistic. Because the South African “people” will then constitutionally be defined differently, Roman Dutch law (and English law) will no longer be the icon of the Eurocentric *Volksgeist*

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<sup>33</sup> For the history and context of the creation of the post-apartheid constitutional order, see L. du Plessis & H. Corder, *Understanding South Africa’s Transitional Bill of Rights* (1994), as well as H. Klug, P. Andrews & S. Ellman n. 6 above.

<sup>34</sup> See e.g. D.P. Visser & D. Hutchison n. 25 above; D. van der Merwe n. 15 above, and A.J. van der Walt n. 17 above.

of white rulers. [This] . . . break will manifest itself in a change in attitude . . . [in terms of which] the judge will use the common law so as to broaden and enrich his or her thoughts with the legal wisdom of centuries of . . . Romanistic legal practice without feeling himself or herself bound by posited rules.<sup>35</sup>

Unlike Roman-Dutch law, customary law was a subordinated legal system, which provided much of the law regulating the intimate lives of the oppressed and, however deformed, represented a link with Africa's pre-colonial past.<sup>36</sup> In keeping with this, the erosion of apartheid in the 1980's was accompanied by developments towards the elevation of customary law to a position of equality with Roman-Dutch law. In the post-1994 legal order, customary law has been given pride of place in the Constitution itself<sup>37</sup> and much legislative work is being done to ensure that it coheres with contemporary human rights norms. The commitment that these post-apartheid reforms display to treating the indigenous legal tradition as the equal of the European tradition of the common law, sharply distinguishes this new phase of adaptation from its colonial predecessor. It is nevertheless important to note that this is not a return to the law that applied before the colonial encounter, and in fact amounts to moving ever further away from the principles and institutions that held sway in pre-colonial days in a direction shaped by the socio-economic, political, and ideological changes that were set in train by European colonisation.<sup>38</sup> Here, too, there is no turning back. The spirit of the times is captured in these words of the first Chief Justice to have been appointed after 1994:

‘South Africa will be poorer without the sound discipline, effectiveness and historical experience of Roman-Dutch law . . . [and] without the

<sup>35</sup> D. van der Merwe, ‘Van “Internalistiese” na “Eksternalistiese” Gemeneregvinding’ 1992 TSAR 730, 733, 736, 737 [own translation].

<sup>36</sup> See C.R.M. Dlamini, ‘The Role of Customary Law in Meeting Social Needs’ 1991 AJ 71.

<sup>37</sup> S. 211(3) of the Constitution stipulates that ‘the courts must apply customary law when that law is applicable, subject to the Constitution and any legislation that specifically deals with customary law’.

<sup>38</sup> See T.W. Bennett, *Human Rights and African Customary Law* (2nd ed., 1998) and C. Himonga & C. Bosch, ‘The Application of African Customary Law under the Constitution of South Africa: Problems Solved or just Beginning?’ 2000 SALJ 306.

spiritualising, humanistic and bonding values of Customary law. [It] . . . will be infinitely richer if both systems invigorate and strengthen each other.<sup>39</sup>

### III. LEGAL SYSTEM

#### A. Courts and Judiciary<sup>40</sup>

Section 166 of the Constitution provides for the following Courts:

- the Constitutional Court;
- the Supreme Court of Appeal;
- the High Courts, including any High Court of Appeal that may be established by an Act of Parliament to hear appeals from High Courts;
- the Magistrates' Courts, and
- any other Court established or recognised in terms of an Act of Parliament, including any Court of a status similar to either the High Courts or the Magistrates' Courts.

Three basic types of division characterise these Courts and the judicial officers who serve in them.

- First, there is a hierarchical division separating the superior Courts – the Constitutional Court, the Supreme Court of Appeal and the High Courts (and any Court of similar status) – which are presided over by Judges, from the inferior Courts in which magistrates preside. The latter of these two categories contains the vast majority of Courts and judicial officers, while jurisdiction over the most serious and complex matters is reserved for the former. Moreover, Judges and magistrates are appointed and regulated on the basis of distinct legal provisions and by different bodies and thus do not form a single judicial corps. Within each category there is also

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<sup>39</sup> I. Mahomed, ‘The Future of Roman-Dutch Law in Southern Africa, particularly in Lesotho’ 1985 *Lesotho Law Journal* 357, 363. See also A. Sachs, *Protecting Human Rights in a New South Africa* (1990), 91-103.

<sup>40</sup> See K. van Dijkhorst, ‘Courts’ in W.A. Joubert (ed.), LAWSA, vol. 5(2), paras 104-165 (1st reissue, 1994). A Superior Courts Bill, presently before Parliament, would, if enacted, affect the issues discussed below, mainly by reasserting the ascendancy of generalist Courts through integration of the Labour Courts into the ordinary Court hierarchy, and by remodelling the High Court divisions along the lines envisaged in the Constitution.

a hierarchical division, with the Courts higher up in each category being presided over by the more senior and accomplished Judges and magistrates. Moreover, while the enumerated superior Courts have, in terms of section 173 of the Constitution, the ‘inherent power’ to regulate their own process, make any order necessary to remedy a wrong or to protect a right, and to develop the common law, the jurisdiction and powers of all other Courts are dependent on specific grant by statute.

- Secondly, there is a geographical division. The jurisdiction of the two most senior superior Courts, the Constitutional Court and the Supreme Court of Appeal, cover the whole country, but the 13 High Courts have co-ordinate geographically circumscribed jurisdiction. Magistrates’ Courts likewise enjoy jurisdiction over specific demarcated areas known as magisterial districts.
- A limited degree of functional division between the Courts provides the third characteristic. Although the Court structure exhibits, at all levels, the typical common-law trait of being dominated by Courts of general jurisdiction that adjudicate criminal as well as civil matters, including, in the case of the superior Courts, questions of administrative and constitutional law, specialised Courts do exist. The most important of these is the Constitutional Court, which, like its counterparts in civil law systems, has jurisdiction only over constitutional matters and exercises final authority over such matters although it does not have a monopoly over them. Other important specialised Courts include the Land Claims Court,<sup>41</sup> a hierarchy of Labour Courts,<sup>42</sup> a Competition Tribunal and Appeal Court,<sup>43</sup> a Special Court for Income Tax Appeals,<sup>44</sup> the Court of the Commissioner of

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<sup>41</sup> This Court hears disputes arising from those laws that underpin the post-apartheid land reform programme. These are the Restitution of Land Rights Act 22 of 1994, the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

<sup>42</sup> Created by the Labour Relations Act 66 of 1995, and including a Labour Appeal Court with a status equal to that of the Supreme Court of Appeal.

<sup>43</sup> The Competition Act 89 of 1998 provides that this Court and tribunal share exclusive jurisdiction over the interpretation and application of the main substantive provisions of the Act. The Court consists of three Judges of the High Court, appointed to this Court by the President on the advice of the Judicial Service Commission. One of them is designated the Judge President of this Court.

<sup>44</sup> Constituted in terms of the Income Tax Act 58 of 1962 to hear appeals against income tax assessments. It is presided over by a High Court Judge, and further includes an experienced accountant and a representative of the commercial community.

Patents,<sup>45</sup> the Copyright Tribunal,<sup>46</sup> a Water Tribunal,<sup>47</sup> Divorce Courts,<sup>48</sup> Equality Courts,<sup>49</sup> Children's Courts<sup>50</sup> and Courts of Traditional Leaders.<sup>51</sup>

The staffing of the specialised Courts presents a complex pattern: although they all have some special appointment procedure, some (for example the Income Tax Appeals Courts, the Court of the Commissioner of Patents and the Copyright Tribunal and Competition Appeal Court) have no separate corps of judicial officers, but are presided over by Judges whose working time is mostly spent in the general Courts, or are simply Magistrates' or High Courts bearing a different designation (for example Equality Courts and Children's Courts). Others do have a fully autonomous staff (for example Divorce Courts) or are presided over by judicial officers who at least for the time being do not sit in other Courts (for example the Labour Appeal Court) but may well move or return to them; yet others (notably the Constitutional Court, and the Income Tax Appeals Court) have a membership that is drawn partly from the ranks of the ordinary judiciary and partly from outside. In some cases, again, the members preside over Courts only part-time (for example the Courts of Traditional Leaders, and the Water Tribunal).

The number and importance of these specialised Courts have been increasing since 1994 and this has led to some tension over jurisdictional boundaries and rivalry over the classification of legal questions, especially as the new Courts have been created with the aim of injecting a new ethos into specific areas of law.<sup>52</sup>

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<sup>45</sup> Established by the Patents Act 57 of 1978.

<sup>46</sup> Established by the Copyright Act 98 of 1978.

<sup>47</sup> See the National Water Act 36 of 1998.

<sup>48</sup> See III.A.6. below.

<sup>49</sup> In terms of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, all Magistrates' and High Courts are designated as Equality Courts.

<sup>50</sup> In terms of the Children's Act 33 of 1960.

<sup>51</sup> See III.A.6. below.

<sup>52</sup> Jurisdictional friction and uncertainty has erupted especially between the Constitutional Court and Supreme Court of Appeal, the latter and the Labour Appeal Court, and the Land Claims Court and the general Courts. See especially *Fredericks v. MEC for Education and Training, Eastern Cape* 2002 (2) SA 693 (CC) (High Court or Labour Courts?); *NEHAWU v. UCT* 2003 (2) BCLR 154 (CC) (SCA or LAC?); *Duiker v. Mostert* 2003 (1) BCLR 295 (LCC) (LCC or Labour Court?), and the cases cited in n. 17 above regarding the relationship between the CC and the SCA.

Despite their proliferation, it is nevertheless clear that the overall Court structure remains that of a common law jurisdiction, especially in view of the mobility of judicial officers between these Courts and the Courts of general jurisdiction.

### *1. Judicial officers*

There are two main categories of judicial officers, namely Judges and magistrates. Judges preside in the superior Courts, while magistrates adjudicate cases in the inferior Courts. Judges are relatively few in number (about 200) and are as a rule appointed from the ranks of experienced private practitioners, while there is a fairly large number of magistrates (approximately 1 500) who, for the most part, are drawn from the ranks of the public prosecutors employed by the State, and need not have qualified for private legal practice. Accordingly, Judges enjoy much higher legal and social status than magistrates and their appointment and tenure is regulated separately.<sup>53</sup>

In the post-1994 constitutional dispensation, Judges are appointed with the involvement of the Judicial Service Commission.<sup>54</sup> This body invites applications for vacancies as they arise in particular Courts, advertises such applications for public comment, and conducts public interviews of the candidates for judicial office before making its recommendation(s) to the President, in whom the power of appointment vests. The Commission is chaired by the Chief Justice and has a broad membership designed to ensure that it represents all pertinent interest groups while remaining independent from each of them.<sup>55</sup>

The Commission's involvement in the appointment of Judges has played a vital role in the post-1994 transformation of the judiciary. The contrast between the transparency of this appointment procedure and its limitation of Presidential power, and the informal, secretive pre-1994 process that was entirely in the hands of the Executive, has not only helped to open the field to a broader range of candidates, but has also served to safeguard the legitimacy of the judiciary in the face of the appointment of relatively junior practitioners to the Bench in the

<sup>53</sup> For critical reactions to proposals for moving towards a more civilian judicial structure, see W.G. Thring, 'Comment on the White Paper on the Judicial System: Chapter on the Judiciary Produced by the Policy Unit, Department of Justice' 1999 SALJ 858 and E. Cameron, 'A "Single Judiciary"? Some Comments' 2000 SALJ 141.

<sup>54</sup> See s. 174 of the Constitution for details.

<sup>55</sup> See s. 178 of the Constitution.

interest of racial and gender diversity,<sup>56</sup> and indeed to rescue it from the tarnished reputation that it acquired among most South Africans during the apartheid era. A notable additional feature of this transformation is that the informal monopoly of advocates over judicial appointment has been broken – a number of post-1994 appointments have come from the ranks of the attorneys.<sup>57</sup>

The Commission also plays a central role in safeguarding the independence of Judges in respect of their possible removal from office. Section 177 of the Constitution provides that a Judge may be removed from office only if the Commission finds that the Judge suffers from an incapacity, is grossly incompetent or is guilty of gross misconduct and the National Assembly calls for that Judge to be removed by a resolution adopted with a supporting vote of at least two thirds of its members. Suspension from office pending this procedure may also only take place on the advice of the Commission.<sup>58</sup>

Apart from this, Judges' term of office is unlimited, except in the case of tenure on the Constitutional Court, which is subject to special regulation in the Constitution. The Judges' Remuneration and Conditions of Employment Act 47 of 2001 regulates all Judges' discharge from active service in similar fashion. It provides for their retirement at the age of 70, with continuation of full salary payment for Judges who served for a minimum of 15 years, which may be postponed to 75 so as to enable a Judge to complete the minimum period of service. In return for these generous retirement terms, Judges can be called on to fill temporary vacancies and to provide other forms of appropriate public service, such as chairing of commissions of enquiry. The Constitution further provides in section 176 that Judges' salaries, allowances and benefits may not be reduced.

Magistrates were until fairly recently treated as members of the ordinary civil service, subject to the same administrative and disciplinary powers of the Minister and Director General of the Department of Justice as any other employee

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<sup>56</sup> See D.M. Davis *et al.* n. 10 above, 783. Change in the composition of the judiciary has been noteworthy: while on 27 April 1994 there were 160 white men, 2 white women, 3 black men and no black women among the Judges, there were 13 white women, 61 black men and 12 black women along with the 128 white men on the Bench by June 2003.

<sup>57</sup> On the functioning of the Commission, see K. Malleson, 'Assessing the Performance of the Judicial Service Commission' 1999 SALJ 36.

<sup>58</sup> For judicial reaction to proposals for extending accountability mechanisms, see L. Harms, 'Proposals for a Mechanism for Dealing with Complaints against Judges, and for a Code of Ethics for Judges' 2000 SALJ 377.

thereof. Furthermore, unlike Judges who have never had such duties, magistrates were given administrative responsibilities, particularly in rural areas where they discharged important governmental functions. However, in 1993, the Magistrates' Court Act 90 of 1993 was passed, following recommendations by the Hoexter Commission of Enquiry into the Structure and Functioning of the Courts that magistrates should be made independent of the public service. This Act constituted a decisive shift from past practice in that it created specific mechanisms for the appointment, discipline and removal of magistrates, separate from those applicable to public servants in general. In terms of the Act, the Minister of Justice remained ultimately responsible for the appointment and career management of magistrates, but had to consult with a Magistrates' Commission, created by the Act, in carrying out these functions. This was intended to ensure that appointments, promotions, transfers and disciplinary action were carried out without favour or prejudice. As in the past, magistrates could be required to perform at least some administrative functions if these were assigned by the Minister through regulations made after consultation with the Commission. The composition of the Magistrates' Commission has, since the enactment of the final Constitution, been brought closer to that of the Judicial Service Commission.

The Constitutional Court had occasion in the case of *Van Rooyen v. The State (General Council of the Bar of South Africa Intervening)*<sup>59</sup> to consider whether Magistrates' Courts satisfied the constitutional requirement of judicial independence in spite of the differences that exist between the appointment and removal provisions that apply to magistrates and to Judges respectively, especially in regard to the important role played by the Minister of Justice and his officials in determining *inter alia* magistrates' terms of service and promotion. The Court held that they did, emphasising both the role of the Magistrates' Commission in curbing the Minister's discretion and the ability of the higher Courts not only to protect the lower Courts against interference with their independence, but also to supervise the manner in which they discharge their functions.

## 2. *Constitutional Court*

The Constitutional Court (CC) is the highest Court in respect of all constitutional matters.<sup>60</sup> It functions primarily as a final appellate Court, with constitutional

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<sup>59</sup> 2002 (5) SA 246 (CC).

<sup>60</sup> See s. 167 of the Constitution regarding the Constitutional Court and its powers and s. 172(2) for the other Courts' powers in respect of constitutional matters.

litigation typically commencing in a High Court and usually proceeding via the Supreme Court of Appeal. In exceptional cases, however, direct access is granted and abstract review proceedings may be initiated in this Court by members of the national Parliament and provincial legislatures, or by the President of the Republic or by the Premier of a province. Although the High Courts and Supreme Court of Appeal have extensive constitutional jurisdiction and responsibility, the CC alone has the power to render an Act of Parliament or of a provincial legislature null and void, since every order of invalidity must be confirmed by the CC before it takes effect. This Court was newly created in the interim Constitution partly in order to ensure that politically sensitive matters would not be handled by Judges tainted by their association with apartheid. The permanence of this division of final judicial power remains controversial.<sup>61</sup>

The CC consists of 11 Judges, one of whom is the Chief Justice of South Africa, another being designated the Deputy Chief Justice (although prior to November 2001, the head of this Court was known as its President). In practice, all 11 Judges hear every case, although the Constitution only requires eight Judges to preside in a case. The Constitution stipulates that at least four judges of this Court must be appointed from the ranks of Judges serving in the other Courts. All Judges of the CC are appointed by a special procedure that involves Parliament more directly and gives the President greater say than is the case when other Judges are appointed. When Judges are appointed to this Court, the President is not required to act on the advice of the Judicial Service Commission, but is permitted to choose from among candidates put forward by the Commission, or, when the Chief Justice and his deputy are appointed, merely to consult the Commission. He is also required to consult the leaders of the parties represented in the National Assembly. The President may appoint an acting Judge on a temporary basis. CC Judges may serve for a non-renewable term of 12 years, but must retire from active service at the age of 70.

The Court hears comparatively few cases. Since its establishment it has on average decided fewer than 30 cases per year. While it is usual for the highest Court in a common-law country to hear a very small number of cases, the Court's caseload contrasts strikingly with that of the German Constitutional Court, which has much the same general powers and functions, and, more significantly, with that of the Supreme Court of Appeal whose word is final on all non-constitutional issues.

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<sup>61</sup> See D.M. Davis *et al.* n. 10 above, 774-776.

### 3. Supreme Court of Appeal

The Supreme Court of Appeal (SCA) is the highest Court in respect of all non-constitutional questions.<sup>62</sup> It functions exclusively as an Appellate Court, and is reached via a High Court or a specialised Court of similar status. It has general jurisdiction, hearing appeals against both decisions on questions of fact and decisions on questions of law pertaining to matters of all kinds, whether civil, criminal, administrative or constitutional, except where (as in the case of labour disputes) its jurisdiction is expressly excluded. There is no automatic right of appeal to this Court: in all instances leave to appeal must first be obtained from either the Court *a quo* or the SCA itself. Very often it functions as a second-stage Appellate Court, since appeals against decisions of Magistrates' Courts and of High Court Judges sitting alone are heard in the High Courts.

This Court is a reincarnation of the Appellate Division of the Supreme Court of South Africa, which existed from the creation of the Union of South Africa in 1910 until 1997, when the coming into force of the final Constitution separated the various divisions of the Supreme Court into the SCA and several High Courts. Apart from the superior status of the CC in respect of constitutional issues, the SCA treats itself as a continuation of the Appellate Division (AD). It accords to AD decisions the status of its own precedents, and it is followed in this by the High Courts, which likewise treat AD and SCA decisions as precedents emanating from the same Court.

The SCA is headed by a President and Deputy President since the legislative relocation in November 2001 of the Chief Justice to the CC. They are appointed by the President of the Republic after consulting the Judicial Service Commission. The Court has 17 further permanent members, styled Judges of Appeal, who are appointed on the advice of the Commission and thus by way of the same procedures as are followed in respect of all other judicial appointments outside the CC. Temporary vacancies are filled by the Minister of Justice who appoints acting Judges of Appeal after consulting the President of the SCA. Permanent appointment is, at least since the transformation of the AD into the SCA, invariably preceded by an acting appointment, and appointment of either kind is in practice limited to permanent Judges on High Courts. There is no limit to the length of service on the SCA, although the general age limit of 70 for active service applies to Judges of Appeal as well.

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<sup>62</sup> See s. 168 of the Constitution.

The Judges of Appeal never sit *en banc*. As a rule, five members of the SCA make up the bench that hears a particular appeal. This makes it possible to convene more than one Bench simultaneously. The President of the SCA, whose task it is to divide up the work among the Judges of his Court, determines the constitution of the Bench for each particular appeal. This is done on the basis of individual Judges' experience and interest, although it must be stressed that the SCA does not consist of chambers or divisions – every member is in principle a generalist who may hear an appeal of any type. This method of operation, however, runs the risk that conflicting decisions might be handed down by differently constituted benches. This has in fact happened.<sup>63</sup> Such a state of affairs is plainly unsatisfactory in case of the decisions of a final Court. The volume of work confronting the SCA, however, makes any other mode of operation impossible: it annually disposes of some 240 appeals and about twice that number of applications for leave to appeal. Partly for this reason reforms were proposed some years ago with the aim of reducing the number of appeals reaching the SCA. Nothing has yet come of this, perhaps because attention has been diverted by debates concerning the relationship between the SCA and the CC.

#### 4. *The High Court*

There are at present 13 High Court divisions located in as many cities and towns across South Africa. They operate both as Courts of first instance and as Appellate and reviewing Courts.<sup>64</sup> By virtue of having 'inherent' jurisdiction, they can hear any matter and make any order, subject to the express exclusion of their jurisdiction (as is the case in respect of matters falling within the exclusive jurisdiction of either the Labour Courts or the Land Claims Court) and to the need for Constitutional Court confirmation of orders of statutory invalidity. They are, therefore, in classical common-law style, Courts of general jurisdiction, staffed by generalist Judges each of whom is in principle capable of adjudicating civil, criminal and administrative as well as constitutional disputes. Their jurisdiction is demarcated on a territorial basis.

The divisions of the High Court still follow the pre-1994 jurisdictional areas of the provincial and local divisions of the old Supreme Court, although the country has been divided into nine provinces ever since the interim Constitution came into force. The final Constitution requires the structure of the High Court

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<sup>63</sup> See *Van der Walt v. Metcash Trading Ltd* 2002 (5) BCLR 454 (CC).

<sup>64</sup> See s. 169 of the Constitution.

divisions to be rationalised in order to bring the jurisdictional areas of the Courts into line with the new provinces. In 2003 a Superior Courts Bill was submitted to Parliament, containing detailed proposals in this regard. Until these are fully implemented, there will exist a complex pattern in which some provinces contain more than one High Court division, others none, and the jurisdiction of some Courts crosses provincial boundaries. The Constitution provides that, pending rationalisation, the structure and functioning of the High Court will continue in an unchanged manner. Thus the following provincial and local divisions continue to exist,<sup>65</sup> but now as divisions of the High Court rather than the Supreme Court:

- Cape Provincial Division (C), with its seat in Cape Town;
- Eastern Cape Provincial Division (E), with its seat in Grahamstown;
- Northern Cape Provincial Division (NC), with its seat in Kimberley;
- South-Eastern Cape Local Division (SEC), with its seat in Port Elizabeth;
- Natal Provincial Division (N), with its seat in Pietermaritzburg;
- Durban and Coast Local Division (D), with its seat in Durban;
- Orange Free State Provincial Division (O), with its seat in Bloemfontein;
- Transvaal Provincial Division (T), with its seat in Pretoria;
- Witwatersrand Local Division (W), with its seat in Johannesburg.

In addition, the Supreme Courts of four polities, namely Transkei, Bophuthatswana, Ciskei and Venda, created as part of the apartheid policy and regarded as independent by South Africa until their official re-incorporation in 1994, are now functioning within the borders of South Africa.

Every High Court is headed by a Judge President, assisted by a Deputy Judge President in the larger Courts, whose task it is to assign cases and determine the constitution of the Bench that is to decide a particular case. The number of Judges varies from Court to Court along with the case-load of the Courts, from approximately 65 at the Transvaal Provincial Division which covers the two busiest Courts, Pretoria and Johannesburg, to a mere four at the Ciskei High Court, which hears the smallest number of cases. All High Court Judges are appointed on the advice of the Judicial Service Commission and the positions of Judge President and Deputy Judge President are filled in the same way. Although a Judge is appointed in order to fill a vacancy in a particular division, he or she

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<sup>65</sup> See Schedule 1 to the Supreme Court Act 59 of 1959.

may sit in any division, and may therefore move either temporarily or permanently to another division without having to be re-appointed. Acting Judges are appointed by the Minister of Justice after consultation with the Judge President of the Court on which they are to serve.

High Courts function as Courts of first instance in respect of matters that either fall outside the jurisdiction of Magistrates' Courts altogether (because of the type of matter, or the value, severity or character of the order being sought) or are considered sufficiently complex or important to warrant the involvement of a superior Court. The size and composition of the Bench hearing a particular case is determined by the Judge President of the relevant division, and reflects the perceived complexity and importance of the case. If more than one Judge is assigned to determine the case, it is said to be heard by a 'full Bench'. The size of the Bench is important, because it not only affects the extent to which the Judge(s) will be bound by precedent, but also whether an appeal against the decision may proceed directly to the SCA or will be heard within the High Court itself: a single Judge is left relatively little leeway by the doctrine of precedent, and appeals against his or her decisions are heard by a full Bench of the relevant High Court.

A full Bench must always be constituted to hear appeals against and to review Magistrates' Courts' decisions, as well as to decide appeals against the decisions of single Judges. A full Bench consists of three Judges when a single High Court Judge's decision is being challenged and two Judges when a Magistrates' Court decision is under consideration.

### 5. *Magistrates' Courts*

The overwhelming majority of both civil and criminal cases are decided in Magistrates' Courts, of which there are more than 250 throughout the country.<sup>66</sup> The first Magistrates' Courts were established at the Cape in 1830 as part of the British reorganisation of the colonial administration of justice, from where they subsequently spread across South Africa in the wake of British administration. The 1917 Magistrates' Courts Act established a uniform pattern of Magistrates' Courts for the whole country. The system that exists today incorporates the Commissioners' Courts, which, prior to 1984, constituted a segregated system of lower Courts for Blacks.

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<sup>66</sup> For descriptions of the often lamentable physical conditions and infrastructure in these Courts and comparisons with the High Court, see *S v. Dlamini* 1999 (4) SA 623 (CC) at para. 2 and *S v. Steyn* 2001 (1) SA 1146 (CC) at paras 17 and 18.

Magistrates' Courts' powers are limited to those specifically granted to them by Acts of Parliament,<sup>67</sup> and particularly by the statute in terms of which they have been established, namely the Magistrates' Courts Act 32 of 1944. It follows, therefore, that Magistrates' Courts have only limited jurisdiction and that many matters must of necessity be instituted in the superior Courts rather than in the Magistrates' Courts. It is particularly important to note that Magistrates' Courts may not decide questions of administrative law and have a very limited constitutional jurisdiction as they are not permitted to enquire into or rule on the constitutionality of any legislation or any conduct of the President.

There are two types of Magistrates' Courts:

- District Courts exist in each of the 243 magisterial districts into which South Africa has been divided. The Court is located in the major centre or town of a district, although in large and thinly populated districts, Court sessions are periodically held in other parts of the district as well. The number of magistrates varies from district to district, primarily along with the volume of cases arising in each district. They have criminal as well as civil jurisdiction, both of which are limited as to subject matter and magnitude of permissible orders.
- Regional Courts, which have been in existence since 1956, have criminal jurisdiction only. Each of the Regional Courts has jurisdiction over a territory covering several magisterial districts, and is headed by a Regional Court President. These Courts have a higher status than District Courts, in that they may try any criminal matter other than one involving a charge of treason and may impose more severe (albeit still limited) punishment. They are accordingly composed of magistrates who are senior to and possess higher minimum legal qualifications than those who preside in District Courts.

Both types of Magistrates' Courts function as Courts of first instance only and are subject to the supervisory jurisdiction of the High Courts, exercised according to their geographical location. This supervision is carried out via two avenues: party-initiated appeal and review proceedings, and the automatic mandatory review of certain classes of District Court decisions in criminal matters. In contrast with the position in the High Courts, parties always have the right to appeal against a Magistrates' Court decision and thus do not need to obtain leave to appeal.

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<sup>67</sup> See s. 173 of the Constitution.

## 6. Other important inferior Courts

- Divorce Courts have concurrent jurisdiction with the High Court. They offer a cheaper and speedier alternative to the latter. Originally constituted on a racially segregated basis to determine suits of nullity, divorce and separation among black South Africans, these Courts now have a non-racial jurisdiction. Appeals lie to the High Court and are to be prosecuted as if they were appeals from a magistrate's judgment in a civil matter.
- Family Courts, offering a specialist and integrated service in respect of all family matters. As a pilot project, six Courts of this type have already been established in centres throughout the country. Their reception has been mixed, however, with those who can afford to do so, preferring to take their disputes to the High Court.
- Small Claims Courts were established by the Small Claims Court Act 61 of 1984 after the Hoexter Commission of Inquiry into the Structure and Functioning of the Courts identified the need for a Court that would provide individuals with speedy and affordable justice, particularly in cases involving small amounts of money. Businesses may not appear as plaintiffs, only as defendants. Court proceedings are simplified so as to allow individuals to pursue their claims without recourse to expensive legal assistance. In fact, to keep the costs of proceedings low, no legal representation is allowed. These Courts follow a more inquisitorial mode of procedure, the presiding officer (who is called a Commissioner) playing a much more active role in the proceedings than presiding officers do in other Courts. The decision of a Small Claims Court is final and there is no appeal to a higher Court, although a High Court may review its proceedings on limited grounds.
- Courts of indigenous Traditional Leaders, or 'customary Courts' also exist by virtue of the power of the Minister of Justice under the Black Administration Act 38 of 1927 to authorise a 'chief or headman' to determine some civil claims and to adjudicate some criminal offences according to indigenous (or 'customary') law. These provisions can be traced back to the colonial system of indirect rule over the indigenous population, and formed an important part of the racially segregated system of Courts that also became a centrepiece of apartheid rule. Although most of that system was abolished in 1986, these Courts were retained and indeed survived the demise of apartheid in 1994.<sup>68</sup> This is due to the fact that, despite their

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<sup>68</sup> See s. 211 of the Constitution.

unfortunate history, these Courts do enjoy considerable legitimacy in rural areas where they are often the most significant dispute resolution institutions. An important reason for this is that they utilise informal procedures in which public input is welcomed and which exclude formal legal representation. These Courts seem likely to survive as their continued existence has been endorsed by the South African Law Commission – albeit with the proviso that their jurisdiction be carefully limited (*inter alia* so as to exclude family matters) and be made optional in criminal matters.<sup>69</sup>

## B. Legal Practitioners<sup>70</sup>

South Africa has what is known as a ‘split Bar’ system. This has been the case ever since the Dutch colonial period, although the system was placed on a more rigorous and secure footing by the British re-organisation and anglicisation of the Cape Colony’s legal system in the 19th century, and thereafter in general followed the organisational model of the English division between barristers and solicitors.<sup>71</sup> Hence the legal profession is divided into two distinct branches, namely advocates (some of whom are members of the Bar – see III.B.1. below) and attorneys, and no-one may simultaneously be both an advocate and an attorney. Each branch has its own regulatory structures, training system and requirements for admission and traditional field of operation, even though most attorneys and advocates today have the same academic qualifications. However, recent legislation has diluted the Bar’s historical monopoly over the representation of clients before the superior Courts and the post-1994 appointment of several attorneys as Judges has done the same for its monopolisation of judicial office. Moreover, several years of negotiation between the Minister of Justice and the two branches of the legal profession have produced a Legal Practice Bill which, if enacted by Parliament, will create the single profession of ‘legal practitioner’, consolidating the regulatory structures of the profession while

<sup>69</sup> South African Law Commission, Project 90, *Report on Traditional Courts and the Judicial Function of Traditional Leaders* (2003).

<sup>70</sup> See generally, K. van Dijkhorst & H.F. Mellet, ‘Legal Practitioners’ in W.A. Joubert (ed.), LAWSA, vol. 14, paras 256-452 (1st reissue, 1999), from which much of the following information is derived.

<sup>71</sup> See the judgment of Thirion J in *Society of Advocates of Natal v. De Freitas (Natal Law Society Intervening)* 1997 (4) SA 1134 (N) for an excellent comprehensive description and historical survey.

leaving its members free to establish voluntary associations along the lines of the current split.<sup>72</sup>

The classic statement of the difference between the two branches of the profession is that of Corbett CJ:

‘The advocate is, broadly speaking, the specialist in forensic skills and in giving expert advice on legal matters, whereas the attorney has more general skills . . . The attorney has direct links (often of a permanent or long-standing nature) with the lay client seeking legal assistance or advice and, where necessary or expedient, the attorney briefs an advocate on behalf of his client. The advocate has no direct links or long-standing relationship with the lay client: he only acts for the client on brief in a particular matter and is normally precluded by Bar rules from accepting professional work direct from the client. The attorney is responsible to the advocate for the payment of professional fees due to the latter by the client and for the recovery of these and his own fees and disbursements from the client: the advocate has no direct financial dealings with the client. An attorney is responsible for the keeping of trust funds; an advocate is not.’<sup>73</sup>

These various differences are reflected in the existence of distinct paths of post-University practical training, each being aimed at the acquisition of the special skills required by a particular type of legal work, as well as in divergences between the rules and structures whereby attorneys and advocates are respectively regulated. The High Courts, however, exercise ultimate control over the standards of professional conduct of members of both branches. This enables the Courts to exclude those whom they regard as lacking integrity and/or the proper respect for the law to be expected from someone who is regarded as an officer of the Court and whose duties to the administration of justice may override his or her own interests and those of his or her clients.

### *I. Advocates*

In terms of the Admission of Advocates Act 74 of 1964, the main requirements for admission as an advocate are, first, possession of a LLB degree from a South African University, and, secondly, being ‘fit and proper’ to practice as an advocate. However, the great majority of advocates in private practice also go

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<sup>72</sup> See Davis *et al.* n. 14 above, 886.

<sup>73</sup> *In re Rome* 1991 (3) SA 291 (A) at 306.

through the separate, voluntary process of joining a Bar association (society of advocates) located at the seat of one the High Courts. This requires completion of a short period of practical training, called pupillage, during which the pupil receives no remuneration. This is undergone in the chambers of a junior member of the Bar who undertakes to teach the pupil the practical aspects of Court practice and who must certify at the end of the period that the pupil has done the prescribed training. In recent years, the Bars have also offered courses and seminars on topics such as Court procedure and litigation technique. Pupils are then required to pass the practice-oriented National Bar Examination, set by the National Bar Examination Board on behalf of the various Bars. If successful, the advocate joins one of the Bar associations. His or her practice will concentrate on, but need not be limited to the jurisdictional area of the High Court at whose seat the Bar he or she belongs to, is situated.

Membership of the respective Bars is limited to advocates in individual private practice and brings important advantages with it. Most importantly, attorneys do not brief advocates who do not belong to a Bar, and no member of a Bar may accept a brief or in any way act professionally with any advocate who is not a practising member of any South African Bar, except in a criminal matter where the other advocate is a public prosecutor employed by the State. Membership, however, also imposes duties. Members of the Bar are obliged to occupy chambers (offices) together at a place determined by the society. Although it is permitted for them to share chambers and administrative staff and equipment, advocates, unlike attorneys, are not permitted to form partnerships but must practise on their own. They are also obliged to hold themselves available to do work pertaining to the profession of advocate (the ‘cab rank’ rule). This includes *pro deo* work at the request of the Court.

Most importantly, the various Bar associations, through their elected Bar councils, exercise discipline over their respective members. This is done on the basis of a set of rules of professional conduct formulated by the General Council of the Bar. In broad terms, these rules seek to ensure advocates’ loyalty to their clients while balancing this against their duties to the administration of justice and to their profession. The General Council of the Bar hears and decides appeals from decisions of constituent Bars in disciplinary proceedings.

The High Courts exercise their powers of control and discipline by striking an advocate’s name off the roll if he or she is no longer fit and proper for practice. In doing this, the Courts take cognisance of the Bars’ rules of conduct and will attempt, as far as possible, to uphold those rules. The Courts are, however, not bound by them but remain the ultimate arbiters of the ethical rules of conduct of the profession.

## 2. Attorneys

The Attorneys Act 53 of 1979 governs the admission of attorneys, provides for their regulation via a system of compulsory self-regulation, and prescribes, for the sake of protecting the public, in some detail how attorneys' practices are to be organised and managed.

Admission as an attorney is preceded by a period of modestly remunerated apprenticeship-like practical training. Today, this almost always follows only upon completion of a LLB degree course at a University, although in the recent past many attorneys had graduated with a B Proc degree and somewhat longer ago it was not uncommon for an attorney to have no degree in law. The most common route into the profession involves completing a two-year period as an articled clerk with a firm of attorneys. This was traditionally the only route, but since 1993 alternatives have been available, namely service at a legal aid clinic or a community legal aid centre, or the completion of a legal practice course of five months at one of the University-affiliated Schools for Legal Practice, in which case only one year of articles or community service will be required. Once a candidate attorney has completed the prescribed period of training and passed a professional examination, he or she may apply to the High Court to be admitted to the roll of attorneys. Normally a candidate attorney will also write the separate examinations necessary to qualify as a notary and as a conveyancer.

An attorney must by law belong to one of the provincial law societies recognised in the Attorneys Act. These still follow the general pattern of the pre-1994 provincial boundaries, their reorganisation having been postponed pending the overall transformation of the entire legal profession in the proposed Legal Practice Bill. They have, however, come together under the umbrella of a voluntary association called the Law Society of South Africa, which represents the profession as a whole and is dedicated in particular to the transformation of the profession in accordance with the post-1994 ethos.

The provincial law societies serve not only to represent and advance the interests of the profession, but also enjoy important and considerable statutory powers to control the professional conduct of their members and to discipline them. These powers are regulated in some detail in the Act, and include powers to question attorneys and to inspect their books and records. However, the power to suspend or remove an attorney from practice rests with the High Courts, which may do so where someone is no longer 'fit and proper' to practice. Such proceedings are initiated by the law society of which an attorney is a member. The law societies are therefore the first ports of call for complaints from members of the public and constitute the primary means for investigating and

taking steps against attorneys' misconduct. Their performance of this task has, however, come in for heavy criticism from all sectors of society, including Government and the judiciary, in the light of repeated uncovering in recent years of ongoing theft and fraud by attorneys. Mainly for this reason, the Legal Practice Bill envisages diluting the degree of self-regulation by ensuring that a broader range of persons participates in the profession's policy-making and disciplinary structures.

#### IV. SOURCES OF LAW

The Constitution does not contain a specific list of the sources of South African law, but it does mention and recognise most of them. It mentions itself, of course, as well as legislation, but also 'the common law', including the role of Court decisions (precedents) in its development,<sup>74</sup> and 'customary law'.<sup>75</sup> In addition, the Constitution authorises the use of public international law as well as foreign law.<sup>76</sup> Two further sources, namely custom and the doctrinal writings of legal scholars are, however, not mentioned.

These various sources are usually divided into 'binding' and 'persuasive' sources. A binding source is one to which a Court must give effect if it is applicable, provided, of course, that it is not overridden by a source that has greater authority. Hence the Constitution is a binding source, as are legislation, the common law (but not all precedents), customary law, custom and, in some cases, public international law. Foreign legal principles and the writings of legal scholars are persuasive sources, as are some precedents. These are sources that may persuade a Court to decide a legal question one way rather than the other, but do not compel the Court to do so. Evidently a binding source 'trumps' a persuasive source in the event of a conflict between the two, except, however, where, as in the case of the common law, a Court has the power to modify the binding source and is persuaded that it is appropriate to do so.

In addition, there is a hierarchy of binding sources that determines which rule will prevail in the event of a conflict. At the top of the hierarchy is the Constitution, which proclaims in section 2 that it is 'the supreme law of the Republic; law

<sup>74</sup> Ss 8(3), 39(2) and (3), and 173.

<sup>75</sup> Ss 39(2) and (3), and 211.

<sup>76</sup> S 39(1).

or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled'. Legislation is second in line, since the various bodies in which the Constitution vests legislative authority are free to make and unmake the law as they see fit, subject only to the Constitution itself. The common law and customary law jointly constitute the next tier as they are equal in status if not in range of application, and are both subject to legislative reform. Finally, customs bind the Courts only if they do not conflict with any of the other sources of law.

### A. The Constitution

The Constitution does more than stipulate the sources of law, the mechanisms of their creation and conditions for their validity. It is a distinctive source of substantive rights and duties – between individuals and the State as well as among individuals – in its own right. These are contained in the Bill of Rights, which forms chapter 2 of the Constitution. What these rights and duties are and the various means whereby effect is given to them, are more appropriately dealt with in the chapter on constitutional law. Two points must nevertheless be emphasised here regarding the role played by the Constitution as a source of law.

The first point is that constitutional rights and duties pervade all areas of law and thus do not constitute a discrete, separate field of law. In other words, they are as relevant to family law and the law of contract as they are to administrative law:

‘There are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. There is only one system of law. It is shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.’<sup>77</sup>

The practical implementation of these rights and duties, however, is complex. That is the second point. On the one hand, they are directly enforceable against the State, for example when someone challenges the validity of legislation or an administrative act or failure or refusal to act. But they are also indirectly enforceable against the State, as well as against private individuals and organisations,

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<sup>77</sup> *The Pharmaceutical Manufacturers Association of SA: In re Ex parte Application of the President of the Republic of South Africa* n. 17 above at para. [44].

since legislative rules and common law principles must, respectively, be interpreted or developed in conformity with the content and spirit of the Bill of Rights, or invalidated, if need be.<sup>78</sup>

Moreover, all superior Courts have the power and duty to give effect to the Constitution in these ways, and, specifically, the inherent power to develop the common law, although the Constitutional Court has the final say both over what counts as a constitutional issue and how that issue is to be resolved. The principle that has emerged so far is that the Constitutional Court will exercise a form of constitutional oversight over the common law, setting aside decisions of the Supreme Court of Appeal which do not in its view give adequate effect to the implications of the Constitution for the common law, but, by sending the matter back rather than deciding the dispute itself, will leave it to that Court to determine ultimately exactly how the common law should be changed.<sup>79</sup>

## B. Legislation<sup>80</sup>

The Constitution provides for three ‘spheres of government’ – national, provincial and local – and vests legislative authority in respect of each in a particular body.<sup>81</sup> South Africa therefore has national legislation made by Parliament and assented to by the President,<sup>82</sup> provincial legislation made by the legislatures of its nine provinces and assented to by their respective Premiers,<sup>83</sup> and local legislation made by municipal councils.<sup>84</sup> Being granted in the Constitution, these are said to be ‘original’ legislative powers. They are respectively referred to as Acts of Parliament, provincial Acts (called ‘ordinances’ if enacted prior to 1994), and municipal by-laws. The Constitution contains a fairly detailed division of competence among these bodies, as well as rules governing the resolution of conflicts between them. It also stipulates in varying degrees of detail the procedures that they must follow. Needless to say, the validity of

<sup>78</sup> S. 39(2) of the Constitution.

<sup>79</sup> See the *Carmichele* decision n. 17 above.

<sup>80</sup> L.M. Du Plessis, ‘Statute Law and Interpretation’ in W.A. Joubert (ed.), LAWSA, vol. 25(1), paras 278-365 (1st reissue, 2001).

<sup>81</sup> Ss 40 and 43 of the Constitution.

<sup>82</sup> See chap. 4 of the Constitution.

<sup>83</sup> See chap. 6 of the Constitution.

<sup>84</sup> See chap. 7 of the Constitution.

legislation depends on compliance with these constitutional provisions as well as the Bill of Rights, and also with any pertinent provincial Constitution or legislation governing municipal powers.

In addition to these three sources of ‘original’ or ‘primary’ legislation, there is also ‘subordinate’ or ‘secondary’ legislation in the form of regulations, proclamations and the like that are made in the exercise of legislative powers granted in primary legislation.<sup>85</sup> Thus an Act of Parliament typically authorises the relevant Minister to make regulations for the implementation of the Act. Hence secondary legislation is usually formulated within the national or provincial Executive, although it also frequently takes the form of a municipal by-law. Their enactment is, therefore, an administrative act, and as such subject to the principles of administrative law. Their validity is also, of course, dependent on the limits of the powers granted in authorising legislation. Secondary legislation is therefore subject to a more extensive array of controls than primary legislation.

Legislation must be promulgated before it can enter into force. This takes place by way of its publication in the Government Gazette if it is national legislation, and the relevant provincial Gazette in the case of provincial and municipal legislation. These are official Government publications and they appear frequently. They are numbered consecutively by year. They also contain proposals for legislation, which are referred to as ‘Bills’ or ‘draft Bills’, as the case may be.

Legislation is always referred to by the short title which is invariably given to it in the Act or regulations itself, for example, the ‘Health Act’, the ‘Western Cape Gambling Act’, or the ‘Regulations on the Legal Qualifications for Prosecutors’. Divisions within Acts are (hierarchically) referred to as chapters, sections, subsections, paragraphs and sub-paragraphs. Primary legislation is cited by number and year of enactment, with the addition of a provincial identifier where applicable, while secondary legislation is identified by the number of the Government Notice by which it was published as well as the number and date of the Government Gazette.<sup>86</sup> Each of the two main legal publishers in South Africa

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<sup>85</sup> On this distinction, see L.M. Du Plessis n. 80 above, paras 284-289 and the judgment of Chaskalson P, Goldstone J and O'Regan J in *Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metropolitan Council* 1999 (1) SA 374 (CC) as well as that of Locke J in *Premier, Eastern Cape v. Cekeshe* 1999 (3) SA 56 (Tk) at 77-78.

<sup>86</sup> Eg. Code of Good Practice: Key Aspects on the Employment of People with Disabilities GNR 1345 GG 25789 of 19 August 2002.

publishes a regularly updated collection of statutes, in paper<sup>87</sup> and electronic<sup>88</sup> formats, and there is also a commercial on-line information service providing the full text of all Gazettes, Bills and national as well as provincial legislation.<sup>89</sup>

### C. Common Law and Precedent

Since South Africa has an uncodified legal system, the basic framework of principles of most areas of law and the detailed rules of many are to be found in the form of common law. The practical importance of the common law in the everyday life of the legal system must not be exaggerated, of course. Some of the most important fields of law are governed by what are, in effect, mini-codifications: company law is to be found in the Companies Act 61 of 1973 and associated legislation; the law relating to insolvency in the Insolvency Act 24 of 1936; administrative law in the Promotion of Administrative Justice Act 3 of 2000, and so on. Moreover, no field of law today consists only of common law rules, since legislation has altered and supplemented the common law in all areas. However, it is a cardinal feature of South African law that the fundamental rules and principles of large parts of the law, especially the law of obligations and property law, are not contained in legislation. By virtue of the breadth of their subject-matter and its centrality to all legal relations, these areas of law form the backdrop to those that are largely legislative in structure, so that even the latter cannot be fully stated or understood without recourse to common law principles and concepts. In this way, the common law permeates the whole legal system.

The common law, then, is non-enacted law, specifically that part of South Africa's non-enacted law that has its historical roots in Western Europe. It consists of an amalgam of rules drawn primarily from Roman-Dutch and, to a lesser extent, English law, which have been combined and adapted by the Courts so as to meet what they perceived as the country's own evolving needs. South Africa's common law therefore has three main strands: Roman-Dutch law, English common law and South African precedents.

<sup>87</sup> These are *The Statutes of South Africa Classified and Annotated from 1910* published by Butterworths (Durban) and consisting of 26 loose-leaf volumes updated twice per year, and *Juta's Statutes* (Cape Town) of which a new set of seven volumes is published annually.

<sup>88</sup> Jutastat Publications, updated every three months, and Butterworths Electronic Publications, updated monthly.

<sup>89</sup> Sabinet Online, accessible at [www.sabinet.co.za](http://www.sabinet.co.za).

In practical terms, the last of these is the most important. Over the years a sufficiently large body of South African judicial decisions has been built up to make this the most-used source of non-statutory general principles and detailed rules today. Judicial decisions have also interpreted, abolished, extended and truncated common law rules to such an extent that it is certainly not possible to obtain an accurate picture of any area thereof through an examination of Roman-Dutch or English legal materials alone. Moreover, there is a growing trend in the Courts since 1994 to conduct fundamental re-examinations of legal principles concerning questions such as the role of good faith in contract and the liability of public bodies in delict (tort) through the lenses of the Constitution and on the basis of policy considerations rather than simply by way of an investigation of the historical common law sources.<sup>90</sup> Thus a new common law methodology is emerging which, especially in the case of the Supreme Court of Appeal, differs markedly from the ready and very detailed direct recourse that, in comparable cases, was had to Roman-Dutch legal materials throughout the 20th century and especially in the 1980's.<sup>91</sup> To this must be added the direct impact of the Constitution, which, due to its enactment and alteration of the previously frequently unwritten basic public law rules and rights, has displaced a large section of the common law. There is, then, across the large area traditionally covered by the common law, an increasing emphasis on treating legal principles as the product of the judicial interpretation and elaboration of the basic framework of rights and duties contained in the Constitution. This is likely to accelerate and enhance the ever-growing importance of precedent in this context.

Roman-Dutch law nevertheless constitutes the original core of South Africa's common law, and in that way provides a foundation to the law that is still of contemporary practical relevance.<sup>92</sup> Roman-Dutch legal materials are still cited before and examined by the Courts and used by them to determine rights and duties. Although such instances of direct recourse thereto are, for the reasons just explained, increasingly rare, Roman-Dutch concepts, terms and principles are

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<sup>90</sup> See in this regard especially the decisions of Cameron JA in *Brisley v. Drotsky* and Nugent JA in *Minister of Safety and Security v. Van Duivenboden* n. 17 above.

<sup>91</sup> See the literature cited in n. 25 above.

<sup>92</sup> For a remarkable demonstration of this, see *Mineworkers Investment Co (Pty) Ltd v. Modibane* 2002 (6) SA 512 (W) in which the *amende honorable* (apology) of Roman-Dutch law, long thought to have been extinct in South Africa as a remedy for defamation, was revived with the aid of the Constitution.

pervasive and feature daily in legal practice. Thus, South African lawyers speak of a ‘law of things’ and use distinctions such as those between personal and real rights, between ownership and possession, between moveables and immovables, and between personal and praedial servitudes that would be familiar to a Dutch jurist from the 18th century. They still use rules of intestate succession derived from Charles V’s Political Ordinance of 1590, institute the *condictio causa data causa non secuta* and seek remedies such as *restitutio in integrum*, the *actiones redhibitoria* and *quanti minoris* and the *mandament van spolie*. In that sense, South Africa’s common law is, despite all the changes that the Courts, legislation and now the Constitution have wrought, still accurately described as a local adaptation of Roman-Dutch law.

English law played a vital role in that process of adaptation. Especially during the 19th and early part of the 20th centuries, the Courts supplemented and adjusted Roman-Dutch law by importing English principles and doctrines, for example the trust,<sup>93</sup> and the doctrines of estoppel, innocent misrepresentation and the undisclosed principal.<sup>94</sup> Despite a ‘purist’ backlash against this around the middle of the previous century, many of these have remained part of South African law. However, they have been thoroughly domesticated so as to have developed their own layer of local precedents, and frequently differ significantly from their English antecedents. Moreover, opposition to reliance on English law did produce results, in that it led to increasing research into Roman-Dutch and other civilian legal systems and a corresponding reduction in recourse to English law. In addition, the decisive break of the post-1994 constitutional order from the past, especially through the replacement of the classical Westminster notion of parliamentary sovereignty by the principle of constitutionally limited Government, has significantly diminished the importance of English principles in public law. Thus, while there are aspects of South African common law that are plainly English in origin, these have by now been absorbed into areas of law that derive their essential characteristics from other traditions. Although more influential than all the other legal systems that have been, and still are, drawn upon by South African Courts in their development of the common law, English law no longer enjoys the *de facto* special status it once had.

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<sup>93</sup> See E. Cameron, ‘Constructive Trusts in South African Law: The Legacy Refused’ 1999 *Edinburgh Law Review* 341.

<sup>94</sup> See generally regarding the reception of English legal principles, R. Zimmermann & D.P. Visser (eds) n. 1 above and the South African Reports in Palmer n. 2 above.

### I. Precedent<sup>95</sup>

The doctrine of precedent, or *stare decisis*, is probably the most significant connection between South African law and the English common law, and its most important divergence from Roman-Dutch law. It became part of South African legal practice upon the establishment in 1832 of the Cape Supreme Court, initially staffed exclusively by British Judges, and was provided with a firm base once the publication of law reports commenced in 1857. It seems never to have been as rigid as the original English doctrine, however. Perhaps this is due in part to its operation here against the background of Roman-Dutch principles that provided, simultaneously, external criteria for measuring the correctness of judicial decisions, and the legal certainty that in England was supplied by strict adherence to previous decisions.

A central feature of this doctrine is that it generates, in contrast with the less formalised comparable practice of Courts in civilian jurisdictions, a fundamental distinction between two ways in which a previous judicial decision may feature in later cases as a reason for deciding one way rather than the other: it may be ‘binding’ or it may be ‘persuasive’. This distinction has two facets. First, as the labels suggest, a binding precedent must be followed, whereas a persuasive precedent may, but need not, be followed. The second flows from this, and it is that whereas a binding precedent is, in itself, sufficient reason for deciding in a particular way, a persuasive precedent is not: since its mere existence does not create an obligation to follow it, there must be some further reason for doing so.

The basic distinction between binding and persuasive precedents pivots on the notion of the *ratio decidendi* of a judgment, that is, the finding of law yielding the general legal rule that the Court applies to the facts, as found, when it determines the outcome of the case. It is a fundamental principle of this doctrine that the *ratio decidendi* is binding, as opposed to the actual decision regarding the concrete rights of the particular parties before the Court, or findings of fact. That is, a judgment is a binding precedent in respect of the proposition of law, the existence of which was treated by the Court as necessary for arriving at its decision as to who should win, given the facts as found. Thus, propositions of law that are *not* treated as necessary in this way are not binding. They are known as *obiter dicta* and are merely persuasive. Although it is often clear whether a Court’s statement of a legal principle forms part of the *ratio decidendi* or is an

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<sup>95</sup> E. Kahn, ‘The Rules of Precedent Applied in South African Courts’ 1967 SALJ 43, 175, 308 and K. van Dijkhorst n. 40, par 157.

*obiter dictum* (a judgment might expressly state, for example, that, although the Court considers that the law is this or that, or should be, it is unnecessary to decide the matter), it can also be difficult and controversial to determine this.<sup>96</sup> The same is true of the question whether a precedent is in point, or distinguishable. These questions are consequently the subject matter of much legal analysis, debate and litigation. Their significance should not be exaggerated, however. A persuasive precedent can be very persuasive indeed, and for all practical purposes have much the same impact as a binding precedent.<sup>97</sup>

The binding force of a precedent and the degree to which it binds, is, however, variable. It depends on the relative positions in the Court hierarchy of the Court that produced the precedent and the Court that is subsequently faced with that precedent. Where the former occupied a higher position, the precedent is said to be ‘absolutely’ or ‘fully’ binding, meaning that the subsequent Court lacks the power to refuse to follow or to overrule the precedent. Naturally, the opposite is the case in the inverse situation, so that the decision of a Court in a lower position is at most persuasive authority to a Court in a higher position. Since hierarchical divisions also exist within single institutions, specifically between a full Bench Court and a single Judge Court within one High Court, this vertical operation of the doctrine is also found within Courts. Horizontally, again, a precedent is said to be ‘*prima facie*’ or ‘presumptively’ binding. That is, a precedent established by an earlier decision of the same Court must be followed, unless it is later considered to have been ‘clearly wrong’. When that is the case, the earlier decision may be overruled. In addition, the superior Courts’ constitutionally recognised power to develop the common law enables them to overrule horizontal precedents when they no longer accord with the current general social ethos, or prevailing *boni mores*, but this seems to be done only by the Supreme Court of Appeal.

<sup>96</sup> See, e.g., the disagreement regarding the question whether earlier judicial pronouncements that a husband cannot rape his wife were mere *obiter dicta*, between Heath J (*S v. Ncanywa* 1992 (2) SA 182 (Ck) at 211) and Galgut JA, Diemont JA and Rabie JA concurring (*S v. Ncanywa* 1993 (2) SA 567 (Ck) at 575).

<sup>97</sup> A case in point is the famous decision of *Administrateur, Natal v. Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A) in which the Appellate Division stated in an *obiter dictum* that the time was ripe for granting compensation for losses suffered as the result of a negligent misrepresentation made outside the contractual context. This was not only immediately applied in cases where such claims were brought, but was also fairly soon after relied on as authority for granting compensation in the distinguishable situation where the misrepresentation had induced a contract.

Two further points must be added to this general description. The first is that earlier decisions of a Court in a different hierarchy are persuasive only. Thus decisions of the High Court may persuade but do not bind the Land Claims Court and vice versa. The same is true of the force of their precedents among the different divisions of the High Court: they are merely persuasive and do not bind. The Cape High Court for example is not bound – not even *prima facie* – by a decision of the Natal High Court. The second point is that only Courts of which the decisions are published can establish precedents, for the obvious reason that the operation of the doctrine depends on the public accessibility of the Courts' decisions. For this reason, the lower Courts' decisions do not constitute precedents at all, not even *inter se*.

*Stare decisis* has come under some pressure in the wake of the fundamental legal change brought about by the post-apartheid constitutional dispensation. The introduction of the Bill of Rights, in particular, has not only had the obvious consequence of casting doubt on the continuing authority of many pre-1994 precedents,<sup>98</sup> but has also led some lawyers and Judges to believe that the doctrine itself has been affected, diluting the general binding force of precedents when it comes to constitutional questions. This belief has been strongly resisted, and the Constitutional Court has rightly insisted that post-1994 precedents are in principle as binding in constitutional matters as otherwise.<sup>99</sup>

In concrete terms, the position is as follows:

- The Constitutional Court is the highest Court in respect of its purely constitutional jurisdiction, and is therefore bound only by its own decisions. It may, however, overrule them if convinced that a decision is clearly wrong. It has not yet had occasion to do so.
- The Supreme Court of Appeal is bound presumptively by its own decisions.<sup>100</sup> As the successor to the Appellate Division that existed until 1996, it treats decisions of that Court as its own. It is also absolutely bound by decisions of the Constitutional Court.

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<sup>98</sup> On this, see *Afrox Healthcare Bpk v. Strydom* n. 18 above at 38-40.

<sup>99</sup> *Ex parte Minister of Safety and Security: In re S v. Walters* 2002 (4) SA 613 (CC) at paras [57]-[61].

<sup>100</sup> *National Media Ltd v. Bogoshi* n. 17 above provides a good recent example of the overruling of ‘horizontal’ precedents for having been ‘clearly wrong’, while *Amod v. Multilateral Motor Vehicle Accidents Fund* 1999 (4) SA 1319 (SCA) illustrates the overruling of decisions that no longer accord with the prevailing social ethos.

- The High Court is always absolutely bound by decisions of the Constitutional Court and the Supreme Court of Appeal. One geographical division of the High Court is not bound by decisions of another and may refuse to follow them, although such decisions do carry great persuasive weight. Within a particular division, full Bench decisions are absolutely binding on single Judges, while a full Bench and a single Judge are each presumptively bound by earlier decisions of Courts of equal status, and not at all by those of lower status. High Court Judges are in general less inclined to channel the law in new directions than their colleagues in the Supreme Court of Appeal, no doubt because of the inconsistencies and uncertainty that may result if a Court of limited geographical jurisdiction were to strike out on its own. However, it is important to bear in mind that the post-1994 constitutional order has deprived some previously binding precedents of their authority, and that this has meant that High Courts have to consider the status and continued force of such precedents.<sup>101</sup> This has undoubtedly given the High Courts an important role in post-1994 legal renewal.
- The Magistrates' Courts and other inferior Courts are absolutely bound by decisions of the Constitutional Court, the Supreme Court of Appeal and the High Courts. Where there is a conflict between decisions of different High Court divisions, a magistrate must follow the decision of the High Court that has geographical jurisdiction over his or her Court. Inferior Courts' decisions do not themselves constitute precedents at all.

There are several sets of commercially published law reports containing the decisions of the superior Courts, each with its own citation style.<sup>102</sup> The main ones are:

- the South African Law Reports – SA (post-1947);<sup>103</sup>
- the South African Criminal Law Reports – SACR (post-1990);<sup>104</sup>

<sup>101</sup> For good examples, see the decision of Madlanga J in *Premier, Eastern Cape v. Cekeshe* n. 85 above at 103-104, and *Mineworkers Investment Co (Pty) Ltd v. Modibane* n. 92 above.

<sup>102</sup> For the history of law reporting in South Africa, see R. Zimmermann & D.P. Visser, 'Introduction' in R. Zimmermann & D.P. Visser (eds) n.1 above, 15-19; and for current editorial practice, consult *Criteria for the Reportability of Judgments* 2002 (1) SA 905.

<sup>103</sup> Published by Juta and available electronically as part of Jutastat. Citation style: *Boesak v. Minister of Home Affairs* 1987 (3) SA 665 (C).

<sup>104</sup> Published by Juta and available electronically as part of Jutastat. Citation style: *S v. Martin* 1996 (2) SACR 378 (W).

- the Butterworths Constitutional Law Reports – BCLR (post-1994);<sup>105</sup> and
- the All South African Law Reports – All SA (post-1996).<sup>106</sup>

## 2. Roman-Dutch law<sup>107</sup>

To the extent that Roman-Dutch law is still examined and applied by the Courts, they use the following sources:<sup>108</sup>

- Roman-Dutch writers constitute the principal source. In order of the apparent frequency of their citation in the Courts, the most important of these ‘old authorities’ (as they are usually called) are: Johannes Voet (mostly his *Commentarius ad Pandectas*), Simon Van Leeuwen (especially his *Het Roomsche Hollandsch Recht*), Van der Keessel (both *Theses Selectae Iuris Hollandici et Zeelandici* and *Praelectione Iuris Hodiegni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*), Hugo De Groot or Grotius (particularly his *Inleidinge tot de Hollandsche Rechtsgeleerdheid* but also *De Iure Belli ac Pacis*), Ulricus Huber (*Heedendaegse Rechtsgeleertheyt* and *Praelectiones Iuris Civilis*), and Van der Linden (*Rechtsgeleerd, Practicaal en Koopmans Handboek*).<sup>109</sup>
- Dutch legislation from the relevant period is also used, but only if it is regarded as reflecting generally applicable legal rules rather than specifically local, special or fiscal regulations. As the Cape was never subject to Holland specifically, these do not, however, carry authority in their own right, but only in so far as they were received into the general body of the

<sup>105</sup> Published by Butterworths and available electronically as part of Butterworths Electronic Publications. Citation style: *Harris v. Minister of Education* 2001 (8) BCLR 796 (T).

<sup>106</sup> Published by Butterworths and available electronically as part of Butterworths Electronic Publications. Citation style: *Ex parte Stoter* [1996] 4 All SA 329 (E).

<sup>107</sup> See generally H.R. Hahlo & E. Kahn, *The South African Legal System and its Background* (1968) 329-567.

<sup>108</sup> Note, however, that the term ‘Roman-Dutch’ is frequently used very broadly so as to include writers from beyond Holland, and indeed all the phases of the development of the European *ius commune*. See on this especially E. Fagan n. 23 above, 41-45.

<sup>109</sup> For detailed treatments of Roman-Dutch law, see R. Feenstra & R. Zimmermann (eds), *Das römisch-holländische Recht: Fortschritte des Zivilrechts im 17. und 18. Jahrhundert* (1992) and R. Zimmermann, ‘Roman-Dutch Jurisprudence and its Contribution to European Private Law’ 1992 *Tulane Law Review* 1685.

law by the old authorities. Hence only some of the *Placaeten* that are to be found in the *Groot Placaet Boek* have been applied in South Africa. It must also be remembered that since these do not have the status of legislation in South Africa, they may be held to have been abrogated by disuse or otherwise have been superseded by the operation of the doctrine of precedent.

- The decisions of Dutch Courts are also consulted. They are not, of course, treated as precedents, but are used, along with the other sources here mentioned, to build up the total picture of Dutch law on a particular point. The most important collections are those of Cornelius van Bijnkershoek *Observationes Tumultuariae* and Pauw *Observationes Tumultuariae Novae*. Coren *Observationes Rerum in Supremo Senatu Hollandiae Zeelandiae Frisiae Judicatarum* contains decisions of the *Hooge Raad* while Neostadius (Pelgrim van Loo) *Curiae Hollandiae, Zeelandiae et West-Frisiae Decisiones*, Loenius *Decisien en Observatien* and Pieter Bort *Tractaat Handelende van Arresten*, cover decisions of the *Hof van Holland* and Sande *Decisiones Frisicae* those of the *Hof van Friesland*.
- Several collections of legal opinions are also consulted. Foremost among these are the *Hollandsche Consultatien* (6 vols, 1645-1666), *Nieuwe Hollandsche Consultatien* (1741), *Nederlandsch Advysboek* (2 vols, 1780-1781) and *Vervolg op de Hollandsche Consultatien* (2 vols, 1780-1782). Grotius' legal opinions, collected in the first of these, carry particular weight, and have also been published separately.
- Roman law is applied to the extent that it was received in Holland, where it was a subsidiary source of law. Hence the *Corpus Iuris Civilis* may still today be examined and applied directly.<sup>110</sup>

#### **D. Customary Law<sup>111</sup>**

Section 211 of the Constitution expressly obliges the Courts to apply 'customary law' when it is applicable. In this sense, that is, in the sense of an authoritative source of South African law, this term refers to law with specifically indigenous

<sup>110</sup> See Zimmermann n. 25 above on the place of Roman law in contemporary South Africa.

<sup>111</sup> See especially T.W. Bennett nn. 28 and 38 above, as well as C. Himonga & C. Bosch n. 38 above.

cultural roots and does not cover the personal laws of religious groups, such as Muslims and Jews, which in general usage are also often referred to as customary. The latter do not constitute authoritative sources of law in South Africa, although the Courts may and often do recognise them. This source of law is accordingly also referred to as ‘indigenous law’, which is officially defined as ‘law or custom as applied by the Black tribes in the Republic’.<sup>112</sup>

There are fundamental differences of character between customary law and the common law:

- Customary law applies over a much narrower range of legal issues. Its relevance is essentially confined to family matters and associated property and inheritance issues.
- Customary law has a different general ethos, laying more stress on solidarity than on individuality, and focusing on reconciliation rather than on the strict vindication of rights.
- Customary law is more receptive to actual social practice, despite the fact that the Courts may rely on books and previous decisions to determine its content. Although there is certainly a general gap between the official customary law applied in (most of) the Courts and the ‘living’ customary law as practised in social life, customary law uniquely enables this gap to be narrowed – evidence may be adduced in Court as to its content. Moreover, customary law is in rural areas predominantly applied in Courts staffed by traditional leaders, whose knowledge thereof is more intimate and direct than that acquired through formal legal education.
- There is no single body of customary law: different indigenous cultures and different localities all have their own laws that differ to varying degrees.

The applicability of customary law to a dispute is determined by a set of principles developed by the Courts.<sup>113</sup> These are founded on the notion that customary and common law are, in principle, equal. They proceed from the starting point that everyone is free to choose which of the two systems is to govern his or her relationships to others. In accordance with this, the Courts first look for an express or implied choice of system in the pleadings. When that fails, they examine the nature of the parties’ transaction or interaction, for example the

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<sup>112</sup> Law of Evidence Amendment Act 45 of 1988, s 1(4).

<sup>113</sup> See on this especially T.W. Bennett n. 28 above.

manner in which a marriage was contracted, or, if necessary, examine more broadly which system is more closely associated with their manner of living and their cultural practices. If it turns out that more than one system of customary law is potentially applicable, the Courts select one on the basis of territoriality.

Customary law is, like the common law, subject to the Constitution and to development in accordance with its spirit and underlying principles.<sup>114</sup> Some rules of customary law have, therefore, been declared invalid, although the superior Courts have been hesitant to do so, largely, it seems, in order to avoid superimposing the common law ethos. Legislation has, however, brought about significant changes, notably in the important area of marital relations with a view to securing the constitutional rights of women and children. More legislation is envisaged, *inter alia* in respect of traditional Courts and the principles determining the application of customary law. It seems likely that this will be the principal mode of the reform of customary law.

### **E. Custom<sup>115</sup>**

Quite separately from customary law, a custom or social or commercial practice can be held by a Court to be legally binding. Hence custom can serve as a source of new law. This is a rare occurrence, but there are a few modern examples.

For a custom to give rise to a legal rule, it must be generally complied with (in the locality or community in question) in the belief that it is binding, although it need not be particularly old; be definite and certain; be fair and reasonable, and not be inconsistent with the law, including the common law. Custom is therefore at most a source of supplementary rules.

### **F. Foreign and International Law**

Extensive reliance on foreign law as a persuasive source has long been a particularly notable feature of the practice of South Africa's superior Courts.<sup>116</sup> Thus

<sup>114</sup> On the matters discussed in this paragraph, see especially T.W. Bennett as well as C. Himonga & C. Bosch n. 38 above, and M. Pieterse, 'It's a "Black Thing": Upholding Culture and Customary Law in a Society Founded on Non-Racialism' 2001 SAJHR 364.

<sup>115</sup> W.J. Hosten, 'Custom and Usage' in W.A. Joubert (ed.), *LAWSA*, vol. 5(2), paras 373-384 (1st reissue by E. Schoeman, 1994).

<sup>116</sup> See the remarks to this effect already in V. Sampson, 'Sources of Cape Law' 1887 *Cape Law Journal* 109, 109-110.

scholars investigating avenues for law reform are not the only ones who engage in comparative research. Legal practitioners and Judges do so as well almost routinely in the superior Courts. This is in large measure due to a combination of the legal system's colonial origins, which accustomed South African lawyers to look elsewhere; its small size, which generated too few cases to build up an adequate body of case law; and, associated with the latter, its initial lack of local doctrinal scholarship and sophisticated legal education. To this must be added, however, both that Roman-Dutch law, in being part of the pre-nationalist *ius commune*, had always incorporated a wide range of influences, and that a common law system is intrinsically more permeable than a codified one. Foreign legal education, especially in England, the Netherlands, Germany, and latterly the United States, Canada and Scotland, has played a particularly important role, partly by familiarising prospective practitioners and Judges with the content and style of these systems, and partly by providing a range of concepts and ideas that have been drawn upon by academic writers in stating and evaluating South African law.

Equally noteworthy is the wide range of foreign legal systems that feature in legal reasoning. The great influence exerted by English law is well-known and understandable in view of South Africa's colonial history, as is the (less frequent) citation of *ius commune* sources from across Western Europe. Apart from these, however, South African Courts regularly consider material relating to other common law systems (especially Canada and the United States, less often India, Australia, New Zealand and the smaller jurisdictions), and to contemporary civil law systems (particularly Germany and Holland). The influence of particular systems varies as between the different areas of law. Thus common law systems tend to be more important in commercial law than elsewhere, and civil law influence is strongest in the classical areas of private law.

The new constitutional dispensation has reinforced and intensified this aspect of legal reasoning and has made public international law a more prominent part thereof. This is so for two main reasons. First, it expressly authorises recourse to foreign legal systems and commands reliance on public international law in the interpretation of the Bill of Rights.<sup>117</sup> Secondly, its text, especially in the Bill of Rights, bears the imprint of several foreign legal systems as well as international human rights instruments, all of which were exhaustively researched in the process of its drafting.<sup>118</sup> It is very much a local distillation of international wisdom

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<sup>117</sup> S. 39(1).

<sup>118</sup> See the literature cited in n. 33 above.

and experience. Hence those jurisdictions that exerted a significant influence on the text of the Bill of Rights, especially Canada, Germany and the UN Human Rights instruments, or those that have a well-developed and accessible human rights jurisprudence, such as the European Human Rights system, the USA and India, feature in virtually every decision of the Constitutional Court and pertinent scholarly writings, while other legal systems are referred to when they are considered relevant and comparable. Making due allowance for their higher caseload and more modest research facilities, the same is true of the other Courts' treatment of fundamental rights cases. The Constitutional Court has nevertheless emphasised that it is essential to take proper account of the differences that might exist between the legal and socio-economic context in which South African and foreign Courts respectively operate.<sup>119</sup>

## G. Legal Scholarship<sup>120</sup>

Contemporary scholarly writing on law is cited and discussed as a matter of course in judgments of the superior Courts, especially the Supreme Court of Appeal and the Constitutional Court. Whenever possible and relevant, the Courts examine academic guidance offered in respect of novel or controversial issues, or take note of and discuss academic criticism of their decisions or of the law generally. In this respect South African legal practice seems to be closer to that of civil law than of common law systems, although the contrast between these two traditions varies among jurisdictions and is no longer what it was, and the open, discursive, style in which South African judgments are written, makes this feature of civilian legal reasoning perhaps more visible here than elsewhere.

The prominence of South African legal scholarship in judicial reasoning is not altogether surprising in a system that has since its establishment found many of its fundamental rules and basic concepts in books written by 'old authorities'. However, it is also due in part to a combination of its relative youthfulness and the small volume of local cases. This means that there have always been many gaps and deficiencies in judge-made law. These could not always easily be filled by direct recourse to Roman-Dutch, or even English sources, as the former had come to the end of its development at the start of the 19th century and the latter

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<sup>119</sup> See e.g. *Sanderson v. Attorney-General, Eastern Cape* 1998 (2) SA 38 (CC) at para. [26].

<sup>120</sup> See on this, R. Zimmermann & D.P. Visser n. 1 above, 19-30, where the authors provide a detailed account of the development of South African legal literature.

often sat uneasily with doctrines already employed in South Africa. The upshot was that the growth of the legal system generated a practical need for legal material that would mediate between its historical foundations and its contemporary challenges by restating the rules and principles of South African law in a manner that reflected contemporary thought and concerns. Hence legal practice needed legal theory for reasons that, broadly, still remain in place today.

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# *Chapter 2*

## **Constitutional Law**

***Johan de Waal\****

### **I. INTRODUCTION: PRE-DEMOCRATIC HISTORICAL BACKGROUND**

While South Africa's political history is rich and interesting, the same is not true of the practice of constitutional law before the adoption of the interim Constitution on 27 April 1994. If the establishment by the Dutch East India Company (*VOC*) of an outpost at the Cape in 1652 is used as starting point, it is safe to say that there were only a few significant developments. The first came towards the end of the 19th century when the Courts in the Boer Republics assumed the power to test legislation based on the principle of constitutional supremacy; the second relates to the application of the doctrine of parliamentary supremacy in a unified but racially divided South Africa; while the third specifically concerns the role of the judiciary in the time leading up to the transition to democracy in 1994.

#### **A. Boer Constitutionalism**

When the British captured the Cape in 1806, Roman-Dutch law remained the common law of the Cape,<sup>1</sup> but, as far as public law and constitutional law in particular is concerned, the Dutch did not leave much of a legacy. The reason for this is that from 1652 until shortly before the British took over, the Cape was for all intents and purposes governed by the *VOC*, with hardly any interference from the Dutch Government.<sup>2</sup>

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<sup>1</sup> In accordance with the rule of English constitutional law laid down in *Campbell v. Hall* (1774) 1 Comp. 204 at 209, 98 ER 1045 at 1047 that 'the laws of the conquered country continue in force, until they are altered by the conqueror'.

<sup>2</sup> See H.R. Hahlo & E. Kahn, *The South African Legal System and its Background* (1968) 533-543, 567-575.

After British colonisation, English systems of Government and constitutional principles were soon adopted at the Cape and later in Natal. Throughout the 18th century, the constitutional form of British colonial rule in the Cape and in Natal closely tracked developments in other British colonies such as Canada and Australia. A different brand of constitutionalism was adopted in the Boer Republics. These Republics were established by groups of Dutch-speaking settlers, later called Afrikaners, who left the British colonies on ‘a Great Trek’ north in search of freedom from British rule. They eventually found two Republics: the South African Republic (also known as ‘the ZAR’ or ‘the Transvaal’), and the Orange Free State. The drafters of the Boer Constitutions departed from the Westminster system in significant respects. They drew inspiration from the United States, France and the Netherlands and provided for a form of separation of powers with directly elected Presidents and, in the case of the Free State, a justiciable Bill of Rights. During the final years of the Boer Republics, the judiciary showed signs of rejecting the doctrine of parliamentary supremacy in favour of constitutional supremacy. In 1897, for example, Kotze CJ declared most of the South African Republic’s legislation invalid because the *Volksraad* (the National Council) did not observe the Constitution’s manner and form provisions when adopting these laws.<sup>3</sup> The President of the ZAR, Paul Kruger, was not impressed with this judgment and threatened all Judges who did not renounce this ‘testing power’, which he equated with the devil challenging the will of God, with dismissal.

Interesting as they are, the constitutional systems opted for the Boers were in operation only for a few decades and they had no lasting influence. It will certainly be wrong to suggest that the notion of constitutional supremacy took root in the Republics. As is clear from Kruger’s reaction to Kotze CJ’s judgment, the idea of judicial review of legislation remained a highly contested one amongst the Boers themselves.

## B. Formation of a Unified South Africa and the Apartheid State

After the Boers were defeated in the South African War (1899-1902), British colonial power was consolidated throughout the territory of the present day South Africa. A period of direct rule by Britain followed the surrender of the

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<sup>3</sup> *Brown v. Leyds NO* (1897) 4 OR 17 at 39, also reported in 1897 *Cape Law Journal* 94. The procedure for making legislation in the ZAR was so cumbersome and the majorities required so high that the manner and form provisions of the Constitution were consistently ignored.

Boer Republics during which the negotiations aimed at unifying the territories were conducted. The need to secure unity of the war was the overriding concern at the 1909 National Convention. The final product, often called the ‘Union Constitution’,<sup>4</sup> was based on the Westminster model, of which the central feature of course is the doctrine of parliamentary sovereignty. A unitary State with limited powers for the four provinces (Transvaal, Orange Free State, Cape and Natal), was established and instead of the judiciary, the upper house of Parliament – the Senate – was meant to protect the interests of the smaller provinces and the interests of the ‘coloured people’. However, if ever there was a constitutional mismatch, it must have been the Westminster system of parliamentary sovereignty as applied in the South African circumstances. The reason was simply that, other than the few living in the Cape, black people were denied the franchise.<sup>5</sup> And, as I shall discuss below, by the fifties, the relatively small number of Africans, Indians and Coloureds who qualified to vote in the Cape, were removed from the common voters’ roll.<sup>6</sup>

The undemocratic sovereign Parliament soon passed the Natives Land Act in 1913. This Act allocated a mere 13% of the Republic’s land for black ownership.<sup>7</sup> Apartheid laws were then introduced, resulting in a further deterioration in

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<sup>4</sup> The South Africa Act 1909 (9 Edw VII, c 9) will be referred to as the ‘Union Constitution’.

<sup>5</sup> White women were granted the vote in terms of the Women’s Enfranchisement Act 18 of 1930.

<sup>6</sup> See *re Africans*: The Representation of Natives Act 12 of 1936 (removing Africans from the common voters’ roll in the Cape, giving them indirect representation in Parliament – challenge to the law failed in *Ndlwana v. Hofmeyer* 1937 AD 229); *re Indians*: The Asiatic Land Tenure and Indian Representation Act 28 of 1946 (removing the only two Indians that could vote in Natal from the common voters’ roll in that province); *re Coloureds*: The Separate Representation of Voters Act 46 of 1951 (the removal of coloured voters from the common voters’ roll resulted in the constitutional crisis in the 1950’s discussed below).

<sup>7</sup> It must be said that, despite its notoriety, the Land Act merely entrenched the unfair distribution of land that existed at the time. As in countries such as the United States, Canada, Australia and New Zealand, Africans lost most of their land through conquest, or unfair and corrupt deals. In fact, by 1913, Africans owned far less than 13% of the land in South Africa. The effect of the Land Act was to prevent them, and Coloureds and Indians, from buying land and fortunately in many instances, also from selling land. See C. Bundy *The Rise and Fall of the African Peasantry* (2nd ed., 1988).

education and other public services for particularly Africans.<sup>8</sup> Pass laws<sup>9</sup> and Group Areas legislation<sup>10</sup> were introduced, which kept ‘unwanted’ Blacks out of the cities and divided the cities and towns on racial lines. In the end, all Africans were destined to lose their South African citizenship in exchange for citizenship of an ‘independent’ Bantustan State<sup>11</sup> and an attempt was made to accommodate

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<sup>8</sup> South Africans were classified as, broadly speaking, either Black, Coloured, Indian or White in terms of the Population Registration Act 30 of 1950, which was only repealed by Act 114 of 1991. The legal consequences (and the personal hardship) that followed this classification are too many to list here. Some of the apartheid laws were explicitly racist, such as the Prohibition of Mixed Marriages Act 55 of 1949 (prohibiting interracial marriages) and the Immorality Act 23 of 1957 (prohibiting sexual intercourse between Whites and Blacks). These two laws were only repealed in 1985 by the Immorality and Prohibition of Mixed Marriages Amendment Act 72 of 1985. Others, such as the education laws, explicitly segregated: see the Black Education Act 47 of 1953, the Indians Education Act 60 of 1965, the Coloured Persons Education Act 47 of 1963 and the Extension of University Education Act 45 of 1959. Some were more subtle: the provinces for example were entitled to make law in the area of public health and they empowered medical superintendents to prevent Blacks from accessing white hospitals: see e.g., s. 20(2)(A) of Ordinance 8 of 1971 of the Orange Free State. Or, local Government was empowered to segregate burial grounds: see s. 146(1) of the Orange Free State Ordinance 8 of 1962.

<sup>9</sup> See ss 10-15 of the Black (Urban Areas) Consolidation Act 25 of 1945; the Blacks (Abolition of Passes and Co-Ordination of Documents) Act 67 of 1952 and the Prevention of Illegal Squatting Act 52 of 1951. Blacks were regarded as ‘temporary workers’ in the cities. The Act was amended in 1978 (Act 97 of 1978) in terms of which Africans could obtain 99-year lease on property in the cities and black local Government was set up under the Black Local Authorities Act 102 of 1982. Ownership of land in the cities became possible for the first time in 1984 when the Black Communities Development Act 4 of 1984 was passed. Influx control was abolished in 1986 with the adoption of the Abolition of Influx Control Act 68 of 1986.

<sup>10</sup> The first of several statutes that divided the cities and towns on racial lines was the Group Areas Act 41 of 1950.

<sup>11</sup> The process of self-government was set in motion with the Black Authorities Act 68 of 1951, which entrusted some of the functions of Government in the rural areas to traditional leaders. The Promotion of Bantu Self-Government Act 46 of 1959 made it clear that full independence for eight ethnic groups was envisaged. Denationalisation was completed under the Black States Constitution Act 21 of 1971 and the National States Citizenship Act 26 of 1970. First to gain independence was the Transkei with the passing of the Status of the Transkei Act 100 of 1976. Bophuthatswana followed in 1977, Venda in 1979 and the Ciskei in 1981. The reversal started with the Restoration of South African

coloured and Indian South Africans in a farcical tricameral Parliament.<sup>12</sup> Needless to say, the unfair system had to be propped up by increasingly oppressive security laws.

### C. The Role of the Judiciary

There are two points about the role of the judiciary during the time leading up to transition to a democracy in 1994 that need to be mentioned. The first concerns the so-called ‘constitutional crisis’ in the 1950’s. When the National Party came to power in 1948, it believed that the 1931 Statute of Westminster had freed the South African Parliament from the procedural shackles imposed on it by the Union Constitution, and it soon tried to remove the coloured voters from the common voters’ role without the requisite two-thirds majority of both houses of Parliament sitting together.<sup>13</sup> In *Harris v. Minister of the Interior*,<sup>14</sup> the Appellate Division invalidated this law on the basis that Parliament had to observe the manner and form requirements in order to produce an Act of Parliament. According to the Court, the procedural restrictions served as ‘rules of recognition’ which help the Courts to identify an Act of Parliament. In other words, for purposes of amending or repealing the entrenched sections, legislation would only be an ‘Act of Parliament’ if it had been passed with a two-thirds majority by Parliament sitting unicamerally.

In response to the *Harris* decision, a High Court of Parliament was set up by Parliament<sup>15</sup> to review Court decisions that invalidated Acts of Parliament.<sup>16</sup> The

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Citizenship Act 73 of 1986 and the Bantustans were reincorporated into South Africa when the interim Constitution and the Restoration and Extension of South African Citizenship Act 196 of 1993 were passed.

<sup>12</sup> See the Constitution of the Republic of South Africa, Act 110 of 1983. Government affairs were divided between ‘own’ and ‘general’. Each House of Parliament (Assembly for Whites, Delegates for Indians and Representatives for Coloureds) was entitled to independently make laws on own affairs and they jointly legislated on general affairs. But numerically the White House dominated the other two, and a variety of mechanisms (including the white dominated President’s Council) ensured that dissent from the Coloured and Indian Houses could be overridden.

<sup>13</sup> Separate Representation of Voters Act 46 of 1951.

<sup>14</sup> 1952 (2) SA 428 (A).

<sup>15</sup> See the High Court of Parliament Act 35 of 1952.

<sup>16</sup> See in this regard L. Boulle, B. Harris & C. Hoexter *Constitutional and Administrative Law: Basic Principles* (1989) 132-143.

High Court of Parliament consisted of every member of the Assembly and the Senate and it took decisions by majority vote. The High Court of Parliament Act was of course aimed at overturning the *Harris* decision, the only Act of Parliament that was ever invalidated by the Appellate Division. The High Court of Parliament was therefore established with the sole purpose to overturn this decision of the Appellate Division, something it purported to do soon after its establishment. The High Court of Parliament Act was then, in turn, invalidated by the Appellate Division in the case of *Minister of the Interior v. Harris*.<sup>17</sup> In the course of his judgment, Centlivres CJ remarked that the so-called ‘High Court of Parliament’ is not ‘a Court of Law but simply Parliament functioning under another name’.<sup>18</sup> As the ‘Court’ was just another ‘legislature’ it could not by simple majority do what the Constitution required it to do by special majority.

The *Harris* decisions were the furthest a South African Court would ever go in reviewing an Act of Parliament. They were ground breaking decisions, arguably making new law for many Commonwealth countries. The second decision is especially noteworthy because it was not merely decided on a narrow, procedural ground but the Judges of the Court invoked fundamental principles of constitutional law, such as the doctrine of separation of powers and the requirement of judicial impartiality to substantiate its decision.

Even though the doctrine of parliamentary sovereignty was a significant constraint on the judiciary’s power to protect human rights during apartheid, it remains heavily disputed whether or not Judges fully utilised their opportunities to safeguard the liberties of the individual through a restrictive interpretation of apartheid laws. The record of the South African judiciary, in this regard, has been described by many, but the scorecards differ significantly.<sup>19</sup> It is necessary to discuss briefly this aspect of the role of the judiciary during apartheid as it impacted on the system of judicial review adopted by the drafters of the present Constitution.

<sup>17</sup> 1952 (4) SA 769 (A).

<sup>18</sup> *Ibid* at 784D.

<sup>19</sup> See e.g. A.S. Mathews *Law, Order and Liberty in South Africa* (1972); A. Sachs *Justice in South Africa* (1973); J. Dugard *Human Rights and the South African Legal Order* (1978); H. Corder *Judges at Work: the Role and Attitudes of the South African Appellate Judiciary, 1910-1950* (1984); C. Forsyth *In Danger for their Talents: a Study of the Appellate Division of the Supreme Court of South Africa from 1950-1980* (1985); A. van Blerk *Judge and be Judged* (1988); S. Ellmann *In a Time of Trouble* (1992); R. Abel *Politics by Other Means* (1995).

Initially, people like Professor Tony Mathews focused their criticism on the injustice caused by apartheid legislation.<sup>20</sup> But from the middle of the 1970's, he and Professor John Dugard started to scrutinise the performance of the judiciary and pointed out that Judges were not always prepared to exploit the opportunities available to them to prevent invasions of liberty and the denial of equality which resulted from the regime's policies.<sup>21</sup>

In the 1980's, the debate was a different one. By now the accusation was that anyone who participated in the legal system, whether he or she supported apartheid, was neutral or opposed it, was according it the legitimacy that helped to sustain it.<sup>22</sup> For this reason Professor Raymond Wacks called on Judges to resign in the early 1980's. This led to the well-known debate between him and Professor John Dugard, who argued that Judges should not resign but should avail themselves of the opportunities they had to oppose apartheid.<sup>23</sup> Paradoxically, in the 1980's, the ability of the Courts, in the sense of their competence to mediate in disputes between the apartheid Government and its opponents, was greater than ever. The Westminster doctrine of the sovereignty of Parliament became almost irrelevant, at least as far as the conflict between the liberation movements and the security forces was concerned. The latter were provided with sweeping powers in terms of emergency regulations, which like other forms of subordinate legislation, were subject to greater control by the judiciary in terms of the principles of administrative law. Judges therefore had more opportunity than before to prevent the abuse of power. Most commentators remain critical of the performance of the Courts during the states of emergency.<sup>24</sup>

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<sup>20</sup> See n. 19 above.

<sup>21</sup> See J. Dugard *Human Rights and the South African Legal Order* (1978); A.S. Mathews *The Darker Reaches of Government* (1978); A.S. Mathews *Freedom, State Security and the Rule of Law* (1986). For an early example of courageous criticism – for which the author was charged and convicted for contempt of Court – of the Courts' approach to capital punishment, see B. Van Niekerk 'Hang by the Neck until you are Dead' 1969 SALJ 457, 1970 SALJ 60.

<sup>22</sup> See e.g. E. Cameron 'Submission on the Role of the Judiciary under Apartheid' 1998 SALJ 436.

<sup>23</sup> See R. Wacks 'Judges and Injustice' 1984 SALJ 267; J. Dugard 'Should Judges Resign? A Reply to Professor Wacks' 1984 SALJ 286; R. Wacks 'Judging Judges: A Brief Rejoinder to Professor Dugard' 1984 SALJ 295.

<sup>24</sup> See E. Cameron 'Nude Monarchy: The Case of South Africa's Judges' 1987 SAJHR 338; E. Mureinik 'Pursuing Principle: The Appellate Division and Review under the

This raises the question of whether the judiciary would have resisted the apartheid system even if they had greater powers, if they could test apartheid laws against a justiciable Bill of Rights. Judges were appointed from the ranks of senior practising advocates, an overwhelmingly white and largely conservative body.<sup>25</sup> Since they never made sufficient use of the limited opportunities they had to resist, Judges became associated with the goals of the regime. The deficit in legitimacy suffered as a result of the failure to protect basic human rights became an important consideration when the structure and role of the judiciary was placed on the negotiating table in the early 1990's. In short, it resulted in the adoption of a centralised system of judicial review, headed by a Constitutional Court and not a diffuse system of judicial review, as is normally found in common law systems.

## II. THE NEGOTIATIONS AND THE ADOPTION OF THE 1996 CONSTITUTION

### A. Negotiations

Although the transition in South Africa is often described as a miracle, the reality is that the South African Constitution was the result of a lengthy and difficult process of negotiation.<sup>26</sup> In the 1980's, the Government realised that its dual

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State of Emergency' 1989 SAJHR 60; S. Ellmann n. 19 above. On a more positive note, see A. van Blerk *Judge and be Judged* (1988).

<sup>25</sup> In addition, S. Ellmann n. 19 above and J. Dugard 'The Judiciary and National Security' 1982 SALJ 655 have attempted to demonstrate that there was a practice of selecting executive-minded Judges to hear political cases. The Judge President of a Division of the Supreme Court was responsible for allocating cases and the Chief Justice determined which Judges heard appeals against such decisions. Ellmann, for example, (at p. 6) argues that certain Judges were always selected to decide on state of emergency cases. He calls them the 'emergency team'. According to Ellmann, the decisions of the Court changed when a more progressive Judge was appointed Chief Justice. In contrast, the Constitutional Court always sits *en banc*, which ensures that the views of all its members are taken into account when decisions are made. See *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC) at para. 55. In the High Court, the Judge President remains responsible for allocating cases, a practice that remains susceptible to criticism.

<sup>26</sup> For a good account of the negotiations, see H. Ebrahim *The Soul of a Nation: Constitution-Making in South Africa* (1998); S. Friedman & D. Atkinson *The Small Miracle: South Africa's Negotiated Settlement* (1994).

strategy of reform and repression was not convincing anyone while the liberation movements realised that the combination of their armed struggle and economic sanctions was not going to result in quick change in South Africa. Faced with these realities, informal contacts started in 1985 between the National Party Government and the imprisoned Mr Nelson Mandela. These secret meetings continued until 1990, when President F.W. de Klerk released Mr Mandela and unbanned the African Nationalist Congress (ANC) and the Pan Africanist Congress (PAC), opening the way for official negotiations. All-party negotiations formally began by convening the Conference for a Democratic South Africa (CODESA) on 20 December 1991 and ended, two agonising years later, with the adoption of the interim Constitution by the tricameral Parliament on 22 December 1993.<sup>27</sup>

## B. The Interim Constitution

The interim Constitution was formally adopted by the pre-democratic tricameral Parliament in order to ensure the continuity of the South African State. After the 1994 elections, the new Parliament and Government of National Unity were established and began to function in accordance with the interim Constitution, which came into force on 27 April 1994.

The interim Constitution was a transitional Constitution. One of its principal purposes was to set out the procedures for the negotiation and drafting of a ‘final’ Constitution. Once the final Constitution was adopted, the interim Constitution fell away. But in spite of its transitional status, the interim Constitution was binding, supreme and fully justiciable. Surprisingly, political consensus was easily achieved on the principle that a new South African Constitution would provide for constitutional supremacy and a Bill of Rights to be enforced by an independent judiciary.<sup>28</sup> Of course, such a constitutional system affords enormous power to the Courts, and for the reasons mentioned earlier, there was considerable disagreement as to whether the existing judiciary could be entrusted with such power. The negotiators were concerned about the political legitimacy of the existing judiciary. There was a perception that these Courts had associated

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<sup>27</sup> See A. Sparks *Tomorrow is Another Country: The Inside Story of South Africa's Negotiated Revolution* (1994).

<sup>28</sup> This was one of the ‘areas of commonality’ reported on by CODESA, Working Group 2, on 27 April 1992.

themselves with the apartheid ideology and that they were unrepresentative.<sup>29</sup> There was even a fear, widespread amongst members of the liberation movements, that some of the ‘old Judges’ would use the powers to undermine the newly created democratic order. It was felt that the Court, which was to exercise the function of guardian of the new Constitution, should be one that could be regarded as symbolic of the new order.<sup>30</sup> While members of the judiciary urged the creation of a specialised constitutional chamber of the Appellate Division, the agreement reached during the negotiations was for the creation of a separate Court with exclusively constitutional jurisdiction, that would act as the Court of final instance over all matters relating to enforcement of the Constitution. A Constitutional Court was therefore established, modelled on the German Federal Constitutional Court.

### C. Certification and the 1996 Constitution

The 1996 Constitution completes South Africa’s negotiated revolution. Whereas the interim Constitution was not the product of a democratically elected body, the 1996 Constitution was drafted and adopted by a Constitutional Assembly.<sup>31</sup>

<sup>29</sup> Despite determined attempts to change its composition, the judiciary remains unrepresentative. In *S v. Collier* 1995 (8) BCLR 975 (C) Hlope J rejected the argument that an accused has a right to be tried by a Court which is representative of the society from which he or she comes. A much cruder argument, that the judiciary lacked legitimacy because of ‘their links with the apartheid past’ was rejected as unsubstantiated, vague, generalised, scurrilous and contemptuous in *Law Society of the Transvaal v. Tloubatla* 1999 (11) BCLR 1275 (T) at 1278G.

<sup>30</sup> The debate on the creation of a Constitutional Court is surveyed by N.R.L. Haysom ‘Constitutional Court for South Africa’ CALS Occasional Paper 14 (November 1991).

<sup>31</sup> The Constitutional Assembly was effectively the Parliament that had been elected in the 1994 elections. The Constitutional Assembly consisted of the National Assembly and the Senate, sitting jointly. The Constitutional Assembly made concerted attempts to involve the public in the constitution-writing exercise and to avoid the charge that had been levelled at the interim Constitution, namely that it was an ‘elite pact’. These attempts included a vast publicity exercise, public meetings held around the country and a series of workshops designed to engage the public in debate on controversial issues. The success of the effort can be measured against the fact that even before the publication of the first draft of the final Constitution for public comment, the Constitutional Assembly had received over 2 million submissions from private individuals and organisations. But in spite of the overwhelming public interest in the process of drafting the Constitution, it is

The Constitutional Assembly was given two years to produce a Constitution that conformed to the 34 Constitutional Principles that had been agreed on during the 1991-1993 political negotiations.<sup>32</sup> In order to ensure that the final Constitution conformed to the Principles, the Constitutional Court was required to certify the draft final constitutional text.<sup>33</sup> After the Court initially refused to do so, due to non-compliance with certain constitutional principles, the text was amended accordingly and the Court finally approved the text.<sup>34</sup> At the historically significant Sharpeville, President Nelson Mandela signed the Constitution into law on 4 February 1997, bringing to a close a long and bitter struggle to establish constitutional democracy in South Africa.

The Constitutional Principles were a framework for the creation of a democratic State with a supreme Constitution in which the fundamental rights and freedoms of all citizens are protected.<sup>35</sup> What is the status of the Principles now that the certification process is completed? According to the Constitutional Court, once the draft final Constitution had been certified,

‘that [was] the end of the matter and compliance or non-compliance thereof with the . . . [Constitutional Principles] can never be raised again in any court of law, including [the Constitutional Court]’.<sup>36</sup>

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unclear to what extent the public submissions influenced the final outcome which, on politically controversial issues at least, was often the result of deal-making between the principal political parties. See further I. Currie & J. De Waal, *The New Constitutional and Administrative Law*, vol. 1 (2002) chap. 2.

<sup>32</sup> The Principles were contained in Schedule 4 and their operation was governed by chap. 5 of the interim Constitution, which dealt with the writing and adoption of the final Constitution.

<sup>33</sup> S. 72(1)IC.

<sup>34</sup> See *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996 (First Certification Judgment)* 1996 (4) SA 744 (CC), 1996 (10) BCLR 1253 (CC) and *Ex parte Chairperson of the Constitutional Assembly: In re Certification of the Amended Text of the Constitution of the Republic of South Africa, 1996 (Second Certification Judgment)* 1997 (2) SA 97 (CC), 1997 (1) BCLR 1 (CC).

<sup>35</sup> *First Certification Judgment* n. 34 above at para. 34.

<sup>36</sup> *First Certification Judgment* n. 34 above at para. 18.

This means that it is not possible to object to amendments of the 1996 Constitution on the grounds that the amended text no longer complies with the Constitutional Principles.<sup>37</sup> The Principles do retain a limited use as guidelines for interpreting the Constitution. In the certification proceedings, where more than one meaning could be ascribed to a provision of the constitutional text, the Constitutional Court adopted the interpretation that was consistent with the Constitutional Principles. The Court stated that in future,

‘a court should approach the meaning of the relevant provision of the . . . [Constitution] on the basis that the meaning assigned to it by the Constitutional Court in the certification process is its correct interpretation and should not be departed from save in the most compelling circumstances’.<sup>38</sup>

### III. FUNDAMENTAL CHANGES IN CONSTITUTIONAL DISPENSATION

The commencement of the interim Constitution on 27 April 1994 and the 1996 Constitution (the final Constitution) on 4 February 1997, brought about three fundamental changes:

- For the first time in South Africa’s history, the franchise and associated political and civil rights were accorded to all citizens without racial qualification. The interim Constitution brought to an end the racially-qualified constitutional order that had accompanied 300 years of colonialism, segregation and apartheid. It replaced it with a universal franchise and an electoral system based on proportional representation. It also ended the racial ‘Balkanisation’ that was the hallmark of grand apartheid. The farcical statelets that had been given separate constitutional status under apartheid were reincorporated into the national territory.
- The doctrine of parliamentary sovereignty was replaced by the doctrine of constitutional supremacy. A Bill of Rights was put in place to safeguard

<sup>37</sup> Suppose that Parliament, following the procedures for amending the Constitution set out in s. 74, were to repeal the Bill of Rights. One could not argue that the amended Constitution no longer complied with CP II (which required the final Constitution to have a justiciable Bill of Rights).

<sup>38</sup> *First Certification Judgment* n. 34 above at para. 43.

human rights, ending centuries of State-sanctioned abuse. The Courts were given the power to declare invalid any law or conduct inconsistent with the Bill of Rights and the Constitution.

- The strong central Government of the past was replaced by a system of Government in which legislative and executive power was divided among national, provincial and local spheres of Government.

These changes and the jurisprudence of the Courts over the last ten years will be discussed in greater detail at V. and VI. below. Before doing so, it is useful to set out the structure of the South African Government, if only for purposes of explaining the terminology used below.

## IV. THE NEW STRUCTURE OF GOVERNMENT

### A. National Legislative Authority

The legislative authority of the Republic, in the national sphere of Government, is vested in Parliament. Parliament is a bicameral legislature. It consists of two Houses – the National Assembly (Assembly) and the National Council of Provinces (NCOP). The main function of the NCOP is to represent the interests of the provinces in the national legislative process. The national legislative authority is distributed between the Houses.<sup>39</sup> Although the NCOP participates in all national lawmaking, it has stronger powers (but no veto) in areas where the provinces have concurrent lawmaking powers.

#### 1. *The National Assembly*

The Assembly is elected in terms of a party list system of proportional representation for a term of five years.<sup>40</sup> This means that the electorate is not afforded a choice between candidates, only between parties. Until recently, an ‘anti-defection clause’ also ensured that members of the Assembly lose their seats if they are expelled, resign or otherwise attempt to ‘defect’ from the parties that nominated them for election to the Assembly. However, due to recent political developments, a series of legislative amendments were effected to provide for a

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<sup>39</sup> S. 42(1) read with s. 43(a).

<sup>40</sup> S. 49(1).

limited system of floor crossing. During a 15-day period, in the second and fourth year after each election, party allegiances may now be changed without the legislators concerned losing their seats, provided that at least 10% of the members of a party defect in the relevant period.<sup>41</sup>

## 2. *The National Council of Provinces*

The NCOP consists of 90 delegates – ten from each province. These delegates are appointed by the provincial legislature in terms of a formula that aims to ensure that all parties form part of the delegation and that the strength of a political party in the provincial legislature is reflected proportionally in the delegation to the Council.<sup>42</sup> However, unless the Constitution provides otherwise, each province only has one vote in the NCOP.<sup>43</sup> Provision is made for two categories of NCOP delegates: permanent delegates and special delegates.

The rationale behind the provisions relating to the voting and composition of the provincial delegation, and especially those dealing with special delegates, is to link the delegation closer to the province.<sup>44</sup> In theory, the special delegates, who are appointed from time to time and for limited periods, perhaps to scrutinise particular national bills in their areas of expertise and to report to the provincial legislature on the implications of national legislation for the province, are more likely to show allegiance to the province than to national party political interests. But in practice there is little evidence, thus far, of provincial interests trumping party allegiance in the NCOP.

## B. The National Executive Authority

The Constitution provides that executive authority at national level is vested in the President.<sup>45</sup> The President is head of State and the head of the Cabinet.<sup>46</sup> The

<sup>41</sup> See, in general, *United Democratic Movement v. President of the Republic of South Africa (No 2)* 2003 (1) SA 495 (CC) where a challenge to the amendments were rejected by the Constitutional Court.

<sup>42</sup> See s. 61. The formula is provided in Schedule 3 Part B.

<sup>43</sup> S. 65(1)(a).

<sup>44</sup> See also *Second Certification Judgment* n. 34 above at para. 61.

<sup>45</sup> S. 85(1).

<sup>46</sup> S. 91(1).

President exercises the head of State powers alone and the executive authority together with the other members of the Cabinet.<sup>47</sup>

In South Africa the powers and functions of head of State and head of the Executive are therefore vested in one person, namely the President. The trend was started by the drafters of the 1983 tricameral Constitution and was unfortunately perpetuated by the drafters of the two post-apartheid Constitutions. As a result, an important check in the form of a figurehead President, a person capable of operating above party political considerations and uniting the nation, was sacrificed. Although the South African President's powers and functions are clearly divisible, and they should be exercised differently depending on whether they are the functions of head of State or head of the Executive,<sup>48</sup> the distinction contributes little to a balanced Government or to checks and balances.

The 'head of State' powers are the prerogative powers traditionally exercised by the British Monarch, such as the assenting to and the signing of Bills, the appointment of commissions of enquiry, the appointment of ambassadors and the pardoning of offenders.<sup>49</sup> The 'head of Executive' powers are those traditionally exercised by the Prime Minister in Commonwealth countries, such as the development of policy, the implementation of legislation and the co-ordination of the functions of State departments. In an important judgment, the Constitutional Court held that the exercise of the 'prerogative' or 'head of State' powers may be reviewed by the Courts for consistency with the Constitution.<sup>50</sup>

Although the head of the Executive is called the President, the South African Government functions much more like a parliamentary system of Government than a presidential system of Government. The reason for this is that the President is indirectly elected by the members of the Lower House and is dependent on the support of the Lower House. The members of the Cabinet, including the President, are accountable collectively and individually to Parliament for the exercise of their powers and the performance of their functions.<sup>51</sup>

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<sup>47</sup> S. 85(2).

<sup>48</sup> See I. Currie & J. de Waal n. 31 above, 237.

<sup>49</sup> See s. 84 of the Constitution, which contains a *numerus clausus* of such 'prerogative powers'. In *President of the Republic of South Africa v. Hugo* 1997 (4) SA 1 (CC), the Constitutional Court held (at para. 8) that there are no powers derived from the royal prerogative which are conferred upon the President other than those enumerated in the Constitution.

<sup>50</sup> *President of the Republic of South Africa v. Hugo* n. 49 above.

<sup>51</sup> S. 92.

The rest of the checks and balances are also typical of a parliamentary system of Government. The National Assembly may pass, by a vote supported by a majority of its members, a motion of no confidence in the President. If a motion of no confidence is passed, the President and the other members of the Cabinet, as well as the deputy Ministers must resign.<sup>52</sup> A motion of no confidence may also be passed in the Cabinet, excluding the President. The President must then reconstitute the Cabinet.<sup>53</sup> The National Assembly may also, by a resolution supported by two-thirds of its members, remove or ‘impeach’ the President from office on the grounds listed in section 89. The grounds are a serious violation of the Constitution or the law, serious misconduct, or an inability to perform the functions of office.

The efficacy of the motion of no confidence and the impeachment provision is diluted by section 50 of the Constitution. In terms of this provision, the acting President must dissolve the National Assembly if there is a vacancy in the office of the President and the Assembly fails to elect a new President within 30 days after the vacancy has occurred. In other words, if a motion of no confidence or the section 89 procedure is used to remove the President, the National Assembly will have to find a suitable replacement within 30 days, otherwise elections will follow. The motion of no confidence in the President must therefore be ‘constructive’ in the sense that the majority of the Assembly must not only agree to remove the President, but also agree on a replacement. If the majority of the Assembly cannot agree on a new President, the prospects of an election will, in all likelihood, deter the legislators from passing a motion of no confidence in the incumbent President.

### C. The Judiciary

After the Union was formed in 1910, the judicial authority of the South African State was divided between the superior Courts consisting of various divisions of the Supreme Court with full and original review jurisdiction staffed by Judges with security of tenure, and an inferior Court system administered by civil servants, called the Magistrates’ Courts. An Appellate Division was created, with jurisdiction to hear appeals from the provincial and local divisions of the Supreme Court.

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<sup>52</sup> S. 102(2).

<sup>53</sup> S. 102(1).

The interim Constitution preserved the pre-1994 hierarchy of Courts, simply creating an additional Constitutional Court as the Court of final instance over constitutional matters. The Constitutional Court was situated at the same level of the judicial hierarchy as the Appellate Division. The drafters wanted to preserve the equal status of the two highest Courts by dividing legal matters between constitutional and other (ordinary) legal matters and by preventing the Appellate Division from interfering with the work of the Constitutional Court and vice versa. The idea was to have the two highest Courts operate alongside one another, both supreme in their area of the law. The Appellate Division had no constitutional jurisdiction and the Constitutional Court no jurisdiction over non-constitutional issues. The strict separation meant that neither Court was empowered to hear appeals from the other.

In addition, the drafters of the interim Constitution wanted to secure ultimate control for the newly established (and staffed) Constitutional Court on the question of whether statutes are consistent with the Constitution. In the interim Constitution, the Constitutional Court was therefore accorded exclusive jurisdiction to consider the constitutional validity of Acts of Parliament.

These political considerations necessitated a series of complex jurisdictional provisions and referral provisions to integrate the Constitutional Court into the existing legal system. They also led to a perception that constitutional law was the exclusive domain of the Constitutional Court. However, far from wanting to decide all constitutional issues itself, the Constitutional Court was determined to involve other Courts in constitutional adjudication. Sadly those other Courts, particularly the Appellate Division, declined the invitation and preferred to decide cases without reference to the Constitution or to unnecessarily refer issues to the Constitutional Court. By ‘de-constitutionalising’ an issue, the Appeal Court ensured that the Constitutional Court’s jurisdiction was excluded and that it had the final say in respect of legal matters. These wasteful jurisdictional exercises frustrated the development of South African constitutional jurisprudence. In its first years, the Constitutional Court was also overly protective of its own jurisdiction, adding to the jurisdictional quagmire that the interim Constitution created.<sup>54</sup>

Most of the problems have been successfully addressed in the 1996 Constitution. There is also a much better working relationship between the members of

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<sup>54</sup> In *Luitingh v. Minister of Defence* 1996 (2) SA 909 (CC) at para. 12, the Constitutional Court made a statement that perhaps best summarised its approach to jurisdiction under the interim Constitution. It said that ‘the strict control by us of our adjudication is essential to the work that we have to perform’.

the Appellate Division, now called the Supreme Court of Appeal (SCA) and the Constitutional Court. In the 1996 Constitution, the SCA was provided with the same constitutional jurisdiction as the various divisions of the Supreme Court, which are now called High Courts. It is now also possible to appeal from the SCA to the Constitutional Court in respect of constitutional issues. Orders invalidating a provision of an Act of Parliament, a provincial statute or conduct of the President still have no force and effect until ‘confirmed’ by the Constitutional Court. However, whereas under the interim Constitution the issue of whether a statute is constitutional was often referred *holus bolus* to the Constitutional Court, the High Courts and the SCA are now obliged to rule on the validity of statutes. It is only when a High Court or the SCA strike down a statutory provision that the Constitutional Court is called upon to ‘automatically review’ the order of invalidity. The point is that the review powers have been spread more evenly between the superior Courts in the 1996 Constitution and South African constitutional jurisprudence benefited as a result.

The Constitutional Court continues to have exclusive jurisdiction in respect of a number of issues. These include:

- constitutional disputes between organs of State at national or provincial levels of Government;
- disputes over the constitutionality of provincial or parliamentary Bills on referral from the President, and the validity of statutes on referral from members of Parliament or the provincial legislatures, and
- the determination whether Parliament or the President has failed to comply with a constitutional duty and the certification of provincial Constitutions.

But these disputes seldom arise in practice. In particular, the procedure for the ‘abstract review’ of statutes, which allows one-third of the members of Parliament (or one-fifth of the provincial legislatures) to refer statutes they believe to be unconstitutional to the Constitutional Court, has only been invoked on a few occasions.

The position of the lower Courts remains problematical. At the moment, the Magistrates’ Courts have very little room to apply the Constitution. As creatures of statute, the authority to do so must be conferred on them by legislation. This has not happened.<sup>55</sup> As a result, many constitutional issues must now be taken up

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<sup>55</sup> The Magistrates’ Courts are afforded important powers in terms of legislation such as the Promotion of Administrative Justice Act 3 of 2000 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, but the relevant provisions have not been put into force.

on appeal to the High Court or in separate applications to the High Court. The independence of magistrates also remains in the spotlight. Since the Magistrates' Act 90 of 1993, magistrates have been removed from the ambit of the civil service. Instead, the appointment, promotion, determination of conditions of service and disciplinary control of magistrates were entrusted to a Magistrates' Commission. The Constitutional Court held that the new system, on the whole, passed constitutional scrutiny.<sup>56</sup>

## D. The Provinces

The legislative authority of the nine provinces vests in provincial legislatures, while the executive authority vests in an indirectly elected Premier and the members of an executive council (MEC's).

Section 104 bestows on provinces the competence to enact legislation to the exclusion of Parliament in certain areas (exclusive competence)<sup>57</sup> and the competence to legislate together with Parliament in other areas (concurrent competence).<sup>58</sup> The national legislature may however 'intervene' in the areas of 'exclusive' provincial competence,<sup>59</sup> and broad overrides favour national legislation in a situation of conflict with provincial laws in the areas of concurrent legislative competence.<sup>60</sup>

A provincial legislature may also adopt a Constitution for the province with the support of at least two-thirds of the members of the provincial legislature,<sup>61</sup> but a provincial Constitution must be consistent with the national Constitution.<sup>62</sup> It may,

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<sup>56</sup> *Van Rooyen v. The State (General Council of the Bar of SA Intervening)* 2002 (5) SA 246 (CC).

<sup>57</sup> Listed in Schedule 5 to the Constitution.

<sup>58</sup> Listed in Schedule 4 to the Constitution.

<sup>59</sup> S. 44(2).

<sup>60</sup> S. 146.

<sup>61</sup> S. 142.

<sup>62</sup> S. 143(1)(a). Note that a province is competent to put provisions in a provincial Constitution that are inconsistent with national laws. When there is conflict between a provincial Constitution and national legislation, the conflict is resolved under s. 147. But the province is not competent to put provisions in its Constitution that are inconsistent with the national Constitution. See *Certification of the Constitution of the Western Cape, 1997* 1997 (4) SA 795 (CC) at para. 76.

however, provide for provincial legislative or executive structures and procedures that differ from those provided for in the Constitution.<sup>63</sup> An extremely narrow interpretation of provincial constitution-making power by the Constitutional Court has made it very difficult for the provinces to be creative with this power.<sup>64</sup> Only one province, the Western Cape, has adopted its own Constitution.

The provinces have much stronger executive powers. The reason for this is that the provinces do not only implement their own laws. To the extent that the province has the administrative capacity to assume effective responsibility,<sup>65</sup> it also implements national legislation within the functional areas of concurrent lawmaking, and other legislation assigned to the province, unless the Act of Parliament or the Constitution provides otherwise.<sup>66</sup>

The provinces may not establish their own Courts.<sup>67</sup>

## **E. Local Government and Traditional Authorities**

The apartheid legacy was always going to be much tougher to undo at local level. From the outset of the negotiation process it was realised that it was going to take many years to achieve legal integration and decades to achieve social and political integration at local level.

Under apartheid, unelected traditional leaders exercised considerable powers in some rural areas<sup>68</sup> while ineffective regional service councils and joint service boards constituted rural local Government in others. In the urban areas, the Group Areas Act<sup>69</sup> was used to force the population groups apart so that they could be governed by different local authorities.

<sup>63</sup> S. 143(1)(a).

<sup>64</sup> In *Ex parte Speaker of the KwaZulu-Natal Provincial Legislature: In re Certification of the Constitution of the Province of KwaZulu-Natal 1996* 1996 (4) SA 1098 (CC).

<sup>65</sup> S. 125(3).

<sup>66</sup> S. 125.

<sup>67</sup> See *Ex Parte Speaker of the KwaZulu-Natal Provincial Legislature: In Re Certification of the Constitution of the Province of KwaZulu-Natal 1996* n. 64 above. The province of KwaZulu-Natal wanted to establish its own provincial Constitutional Court. These provisions were found to be inconsistent with the national Constitution since the province does not have the legislative power to regulate its own status or to establish Courts.

<sup>68</sup> They did so under the Black Administration Act 38 of 1927.

<sup>69</sup> Originally Act 41 of 1950.

Local Government was not on the agenda for most of the Multi-Party Negotiation Process at Kempton Park. Instead, local Government issues were separately negotiated through the Local Government Negotiating Forum.<sup>70</sup> The complex deals reached during these negotiations became law when the Local Government in Transition Act (LGTA) was passed. Although the LGTA is simply an ordinary statute of Parliament, it fulfils the same role for local Government as the interim Constitution did for national and provincial Government.<sup>71</sup>

Most provisions of the LGTA have now been repealed. But the framework for local Government remains difficult to understand. The constitutional framework is patchy, to say the least. More than any other part of the Constitution, the provisions dealing with local Government are in need of clarification and implementation by national and provincial legislation. The most important laws in this regard are undoubtedly the Municipal Demarcation Act 27 of 1998, the Municipal Structures Act 117 of 1998 and the Municipal Systems Act 32 of 200, which became fully operational after the 2000 local Government elections.

These statutes basically provide that the local sphere of Government consists of different types of municipalities, which are established for the whole of the Republic. The legislative and executive authority of the municipality vests in an elected municipal council. Local Government may only make law on a limited number of areas<sup>72</sup> and its laws are invalid to the extent that they are inconsistent with national or provincial laws.<sup>73</sup>

As with the provincial sphere of Government, the executive authority of local Government is stronger than its legislative authority. Local Government is primarily responsible for the delivery of services, such as water, electricity and sanitation to members of its community. In this regard it is important to note that so-called ‘wall-to-wall’ local Government was established in terms of the 1996 Constitution. The idea is to ensure that services are provided to previously neglected rural areas by local Government. In many parts this means that elected local Government rather than unelected traditional leaders now govern the affairs of local communities.

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<sup>70</sup> See G. Pimstone ‘Local Government’ in M. Chaskalson, J. Kentridge, J. Klaaren, G. Marcus, D. Spitz & S. Woolman (eds), *Constitutional Law of South Africa* (loose-leaf, 1996-), (Rev. 5) 5A.2 (b); *Executive Council of the Western Cape v. Minister of Provincial Affairs and Constitutional Development* 2000 (1) SA 661 (CC) at para. 44.

<sup>71</sup> Act 209 of 1993.

<sup>72</sup> See Schedule 4B and 5B to the Constitution.

<sup>73</sup> S. 156(3).

The traditional authorities have been relegated to an advisory role. Section 81 of the Municipal Structures Act provides that traditional leaders identified by provincial Governments may participate (but not vote) in local and district councils, but they may not constitute more than 10% of the membership of these councils.<sup>74</sup> Provision is also made for a Council of Traditional Leaders on national level, with the power to advise on matters such as customary law.

## V. BASIC FEATURES OF THE NEW CONSTITUTIONAL ORDER

### A. Constitutional Supremacy and Constitutional Amendment

Sections 2 and 172 of the South African Constitution entrench the principle of constitutional supremacy. In terms of these provisions, the rules and principles of the Constitution are binding on all branches of the State and have priority over any other rules made by the Government, the legislatures or the Courts. Any conduct or law that is not in accordance with the Constitution, either for procedural or substantive reasons, will therefore not have the force of law.<sup>75</sup>

The provisions of the Constitution are also justiciable. Section 172 provides that, provided that it has jurisdiction to do so, a Court ‘must declare that any law or conduct that is inconsistent with the Constitution, is invalid to the extent of its inconsistency’. Court orders must be obeyed by the other branches of the State. According to section 165(5), an ‘order or decision issued by a court binds all persons to whom and organs of state to which it applies’.

Section 74 deals with amendments. The manner and form requirements for amending the Constitution are complex, since some of the provisions are more securely entrenched than others. Essentially, while most of the Constitution may be amended by a two-thirds majority of the National Assembly, an amendment of the Bill of Rights and amendments which affect the powers of the provinces, must also be passed by six provinces in the National Council of

<sup>74</sup> Under the interim Constitution traditional leaders were entitled to be members of local Government in their areas. See s. 182 of the interim Constitution and *African National Congress v. Minister of Local Government and Housing, Kwazulu-Natal* 1998 (4) BCLR 399 (CC).

<sup>75</sup> *Executive Council of the Western Cape Legislature v. President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para. 62.

Provinces.<sup>76</sup> Section 1 of the Constitution is ‘super-entrenched’ and may be amended only if a 75% majority of the Assembly is secured, with a supporting vote of six provinces in the NCOP. Section 1 includes the basic features of the Constitution, such as supremacy, the rule of law, equality, human dignity and democracy. The question is whether other provisions of the Constitution that give effect or correspond to the founding provisions will also require such support. For example, does an amendment of the prohibition against discrimination on the basis of race and gender, contained in section 9 of the Constitution, require the support of two-thirds or 75% of the Assembly?

One would have thought that amendments to section 1 require Parliament to observe the procedures and majorities for amending section 1 and that amendments of the other provisions of the Constitution merely require Parliament to observe the less onerous procedure for amending that provision of the Constitution. But in its only judgment on the matter, the Constitutional Court appears to have accepted that the additional protection accorded to the founding values in section 1 ‘spills over’ onto other provisions. In *United Democratic Movement v. President of the Republic of South Africa (No 2)*,<sup>77</sup> the Court accepted without much debate that a constitutional amendment which, in some circumstances, allow representatives to ‘cross the floor’ to other political parties, may be tested for consistency with the basic values such as the rule of law and democracy. Although the challenge to the amendment, on this ground, was ultimately unsuccessful, the consequences of the approach are rather significant.

The reality is of course, as the Court remarked, that once a provision is part of the Constitution, it cannot be challenged on the grounds of inconsistency with other provisions of the Constitution. The Constitution, as amended, must be read as a whole and its provisions must be interpreted in harmony with one another.<sup>78</sup> The significance of the *United Democratic Movement* decision is that it would appear as if the Court is prepared to ‘screen out’ certain amendments for inconsistency with the founding values in section 1 *before they become law*.

Another question, which inevitably arises in a country such as South Africa, where one political party (the ANC) has already achieved more than the support

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<sup>76</sup> The differences do not mean that some constitutional provisions have a higher status than others, but simply that a more onerous manner and form is prescribed for some amendments than for others.

<sup>77</sup> 2003 (1) SA 495 (CC).

<sup>78</sup> *Ibid.* at para. 12.

of two-thirds of the representatives in both Houses of Parliament, is whether some of the features of the South African Constitution are so basic and fundamental that they cannot be amended at all. This question was considered *obiter* in the context of the interim Constitution by the Constitutional Court in *Premier of KwaZulu-Natal v. President of the Republic of South Africa*.<sup>79</sup> According to Mahomed DP:

‘It may perhaps be that a purported amendment to the Constitution, following the formal procedures prescribed by the Constitution, but radically and fundamentally restructuring and re-organising the fundamental premises of the Constitution, might not qualify as an ‘amendment’ at all.’

The Court went on to refer to Indian jurisprudence where it was held that the supremacy of the Constitution, the rule of law, the principle of equality, the independence of the judiciary and judicial review are all basic features of the Indian Constitution that cannot be ‘amended’. In other words, there is a difference between ‘amending’ the Constitution and ‘abolishing’ the basic premises of the Constitution. The latter cannot be achieved in terms of the procedure provided for the former.

It is not clear whether the argument made in the *Premier of KwaZulu-Natal* case remains valid in the light of the fact that the 1996 Constitution permits the founding provisions in section 1 to be amended, albeit only with a 75% majority of the Assembly and the support of six provinces. It is difficult to reconcile the fact that section 1 may be amended with the idea that basic features of the Constitution are immune from amendment. It is hard to imagine ‘features’ more ‘basic’ than those found in the founding provisions to which the reasoning in the *Premier of KwaZulu-Natal* case and the Indian and German authorities can now apply. It is also hard to avoid the – somewhat cynical – conclusion that the super-entrenchment of section 1 was intended to negate the *obiter dictum* of Mahomed DP in the *Premier of KwaZulu-Natal* case.

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<sup>79</sup> 1996 (1) SA 769 (CC) at para. 47. See also *Executive Council of the Western Cape Legislature v. The President of the Republic of South Africa* 1995 (4) SA 877 (CC) at para. 205 where Sachs J expresses doubt whether Parliament may, by constitutional amendment, abolish itself or give itself eternal life or declare a perpetual holiday. In my view, nothing prevents Parliament from so amending the Constitution.

## B. The Rule of Law

In South Africa there appears to be some confusion about the exact name and nature of the basic feature equivalent to the English principle of the ‘rule of law’, the German *RechtsStaat* and the United States notion of ‘due process of law’. The preamble to the interim Constitution talked about the need for the creation of a ‘constitutional state’ (Afrikaans *regstaat*).<sup>80</sup> With this term the drafters of the interim Constitution appeared to have imported the German *Rechtsstaat* concept into our law.<sup>81</sup> However, the 1996 Constitution makes no mention of ‘a constitutional state’, but section 1 refers to the ‘supremacy of the constitution’ and ‘the rule of law’ (Afrikaans *oppergesag van die reg*) as founding provisions. With this move, one would have thought, the drafters rejected the German concept in favour of the English ‘rule of law’.

However, and despite the absence of the term ‘constitutional state’ in the 1996 Constitution, Ackermann J and Chaskalson J (with the support of the Court) continue to refer to it. Sometimes they use the term as a synonym for the South African version of ‘constitutionalism’ (the idea that State power should be governed and constrained by the Constitution). On other occasions it seems as if the term is used to describe a unique South African version of the German *Rechtsstaat* or the British rule of law. It may even be used as another term for ‘constitutional supremacy’. But, whatever its name may be (it will be referred to as the rule of law here), the Constitutional Court has made decisive direct use of the principle in a number of cases, developing from it a general requirement that all law and State conduct must be rationally related to a legitimate Government purpose.

The first of these cases, *Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metropolitan Council*,<sup>82</sup> was decided under the interim Constitution. The lawfulness of a substantial increase in property rates levied by the Council was challenged. The Court held that the exercise of legislative powers by an elected local Government was not ‘administrative action’ for purposes of the interim Constitution. This did not of course mean that local Government

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<sup>80</sup> Ackermann J held that arbitrariness is dissonant with this concept in *S v. Makwanyane* 1995 (3) SA 391 (CC) at para. 156 and *Prinsloo v. Van der Linde* 1997 (3) SA 1012 (CC) at para. 25.

<sup>81</sup> See J. de Waal ‘A Comparative Analysis of the Provisions of German Origin in the Interim Bill of Rights’ 1995 SAJHR 1, 3-9.

<sup>82</sup> 1999 (1) SA 374 (CC).

legislation was beyond constitutional control. Local Government had to act within the powers lawfully conferred on it. This was a fundamental principle of the rule of law, which was in turn a fundamental principle of constitutional law:

‘It seems central to the conception of our constitutional order that the legislature and executive in every sphere are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. At least in this sense, then, the principle of legality is implied within the terms of the interim Constitution. Whether the principle of the rule of law has greater content than the principle of legality is not necessary for us to decide here. We need merely hold that fundamental to the interim Constitution is a principle of legality.’<sup>83</sup>

What then does the principle of legality require? According to the *Fedsure* case, it is a value-neutral procedural requirement along the lines of the common-law *ultra vires* doctrine. Legislation or conduct must be lawfully authorised by the Constitution and the law. In this case, the Council had to act within the four corners of its constitutional mandate and the specific laws governing local Government.

*New National Party of South Africa v. Government of the Republic of South Africa*<sup>84</sup> took the rule of law to a new level. The case involved a challenge to provisions of the Electoral Act 73 of 1998 which provided that voters could only register on the voters’ roll and subsequently vote if they produced a bar-coded identity document issued after 1986, or a temporary identity certificate. The essence of the challenge was that the practical effect of these requirements would be a violation of the right to vote of millions of people who did not have the proper documentation.

A majority of the Constitutional Court dismissed the challenge. According to the Court, Parliament is empowered by the Constitution to require potential voters to identify themselves. This is in order to comply with the Constitution’s insistence on a national common voters’ roll and free and fair elections. Two constitutional constraints are placed on Parliament in the exercise of its power. The first is that there must be a rational relationship between the scheme that it adopts and the achievement of a legitimate governmental purpose. Parliament

<sup>83</sup> *Ibid.* at para. 58.

<sup>84</sup> 1999 (3) SA 191 (CC).

cannot act capriciously or arbitrarily. To do so would be inconsistent with the rule of law that is a core value of the Constitution. The absence of a rational connection will result in the measure being unconstitutional. An objector who challenges the electoral scheme on these grounds has the onus of establishing the absence of a legitimate Government purpose, or the absence of a rational relationship between the measure and that purpose. The second constraint is that the electoral scheme must not infringe any of the fundamental rights enshrined in the Bill of Rights.<sup>85</sup>

A notable aspect of this approach is that the Court derives from the rule of law a general requirement that Parliament and other constitutional actors must exercise their powers rationally. Rationality means non-arbitrariness, tested by seeking a rational connection between an action and the achievement of a legitimate purpose. This test is to be performed before testing for a violation of the Bill of Rights.

The Court has used the rule against arbitrary decision making in a number of cases to test the constitutional validity of both law and conduct. For example, in *President of the Republic of South Africa v. South African Rugby Football Union*,<sup>86</sup> it applied the test in order to reject a challenge to the exercise of the power of the President in terms of section 84(2)(f) of the Constitution to appoint a commission of enquiry. In its seminal decision in the *Pharmaceutical Manufacturers* case,<sup>87</sup> the Court had to consider the basis on which the exercise by the President of a power granted by an Act of Parliament to bring the Act into operation was constitutionally reviewable. The power, it was held, though derived from legislation and close to the administrative process was not administrative action. Instead, the power that was given to the President lay between the law-making process and the process of the administration of the legislation. The exercise of the power required a political judgment as to when the legislation should be brought into force, a decision that is necessarily antecedent to the implementation of the legislation which comes into force only when the power is exercised. Although not an administrative action and therefore not subject to the administrative justice right in the Bill of Rights, the President's conduct was, however, an exercise of public power which had to be carried out lawfully and

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<sup>85</sup> *Ibid.* at paras 19-20, 24.

<sup>86</sup> 2000 (1) SA 1 (CC).

<sup>87</sup> *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

consistently with the provisions of the Constitution.<sup>88</sup> The Court went on to hold that the President's decision to bring an Act into operation mistakenly (on the basis of erroneous advice that secondary legislation necessary for the proper operation of the Act had been prepared) was not objectively rational and was therefore invalid.<sup>89</sup>

### C. Democracy

The Constitution contains numerous references to the principle of democracy.<sup>90</sup> Indeed, section 1 provides that the Republic of South Africa is a sovereign, *democratic* State founded on, amongst others, the values of 'universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness'.

The central pillar of the representative democracy is to be found in the right to vote, entrenched in section 19 of the Constitution. As stated above, a list system of proportional representation is used at the national and provincial level of Government. The lists are compiled by the parties themselves and no rules other than the party's own Constitution, govern this process. An Independent Commission manages the elections.<sup>91</sup>

In *August v. Electoral Commission*,<sup>92</sup> the Constitutional Court held that the failure of the Electoral Commission to make appropriate arrangements to enable prisoners to register and vote was unconstitutional. The Court, however, added that its judgment in the *August* case should not be read as suggesting that Parliament is prevented from disenfranchising certain categories of persons, such as prisoners.<sup>93</sup> In the *August* case, the fatal objection was that the Commission, and not Parliament, decided to disenfranchise the prisoners by failing to allow them to register and vote. If Parliament decides to limit the right of prisoners to vote,

<sup>88</sup> *Ibid.* at para. 79.

<sup>89</sup> *Ibid.* at para. 89.

<sup>90</sup> See the preamble, and ss 1, 7, 36, 39, 57, 59, 61, 70, 72, 116, 118, 152, 160, 195, 234, 236 and the whole of chap. 9.

<sup>91</sup> See s. 190 of the Constitution and the Electoral Commission Act 51 of 1996.

<sup>92</sup> 1999 (3) SA 1 (CC) at para. 3.

<sup>93</sup> *Ibid.* at para. 31.

as it has done with mentally handicapped persons, the question will be whether it is a justifiable limitation of the right to vote.

#### D. Accountability, Responsiveness and Openness

References to the principle of democracy in the Constitution are often followed by references to the ideas of openness, responsiveness and accountability.<sup>94</sup>

The most important constitutional provision that gives effect to the idea of openness is the section 32 right to access to information. As far as the Executive is concerned, the provision is in turn largely implemented through the Promotion of Access to Information Act 2 of 2000. One of the aims of the Act is to promote transparency, accountability and effective governance of all public and private bodies by empowering people to effectively scrutinise and participate in decision-making by public bodies that affect their rights.

Apart from the right to information, section 59 of the Constitution provides that the National Assembly must facilitate public involvement, conduct its business in an open manner and may not exclude the public, including the media, from a sitting of a committee unless it is reasonable and justifiable to do so in an open and democratic society. Similar provisions apply to the National Council of Provinces,<sup>95</sup> provincial legislatures<sup>96</sup> and municipal councils.<sup>97</sup>

The most important right in respect of accountability is the section 33 right to just administrative action, especially the right to written reasons and to administrative action which is justifiable in relation to the reasons given. This right has been fleshed out in the Promotion of Administrative Justice Act 3 of 2000. The Act has gone some way towards codifying South African administrative law.

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<sup>94</sup> See e.g. s. 1(d) where ‘a multi-party system of democratic government, to ensure accountability, responsiveness and openness’ is entrenched as one of the founding values. See also the preamble (‘a democratic and open society’) and s. 195(1) (‘Public administration must be governed by the democratic values and principles enshrined in the Constitution, including . . . [p]eople’s needs must be responded to, and the public must be encouraged to participate in policy-making. Public administration must be accountable. Transparency must be fostered by providing the public with timely, accessible and accurate information’).

<sup>95</sup> See ss 70(1) and 72.

<sup>96</sup> See ss 116(1) and 118.

<sup>97</sup> See s. 160(7).

A number of State institutions supporting the constitutional democracy is also meant to ensure and advance accountability. Together with Parliament they are supposed to act as watchdogs over Government by investigating misconduct and monitoring the implementation of policy. Since they are independent, they are indeed in a much better position to investigate sensitive political matters than the members of Parliament, who are subject to the discipline of the political parties they belong to. The institutions, such as the Public Protector, the Human Rights Commission, the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities, the Commission for Gender Equality, the Auditor-General and the Electoral Commission, are in turn made accountable to the National Assembly.<sup>98</sup>

### **E. Separation of Powers**

The South African Constitution recognises a separation of functions. Section 43 vests the legislative authority of the Republic in the national sphere in Parliament and in the provincial sphere in the provincial legislatures. Sections 85 and 125 in turn vest the executive authority of the Republic in the President, and the executive authority of the provinces in the Premiers, while section 165 vests the judicial authority in the Courts.

While the functions are separated, they are not always performed by different persons or institutions. As in all parliamentary systems of Government, the most glaring overlap is that most members of Cabinet are also members of the legislature. While the legislative and executive functions are still performed by different institutions (but to an extent by the same persons) at national and provincial level, both the executive and the legislative authority is vested in the municipal council at local level.<sup>99</sup>

The lack of separation of personnel has already influenced the Courts' approach to the separation of functions between the legislative and executive branches of Government. The Constitutional Court has stated that in Commonwealth countries the Courts have insisted on an independent judiciary but have not upheld a strict separation between the Executive and the legislative branches of Government.<sup>100</sup> For example, as far as the delegation of legislative authority to

<sup>98</sup> See s. 181(5).

<sup>99</sup> S. 151(2).

<sup>100</sup> See *Executive Council of the Western Cape Legislature v. The President of the Republic of South Africa* n. 75 above at paras 55, 60.

the Executive is concerned, the only limitation that have emerged, thus far, is that Parliament may not delegate plenary powers to the Executive to make, amend or repeal Acts of Parliament.<sup>101</sup>

In contrast, a much stricter approach is followed to the separation of judicial and Executive functions. For example, in *South African Association of Personal Injury Lawyers v. Heath*,<sup>102</sup> the Constitutional Court held that a Judge may not head a special investigations unit into public and private corruption and maladministration. The investigations were of an intrusive nature, involving litigation on behalf of the State and required the Judge to be appointed for an indefinite period of time. Such functions, according to the Court, were partisan in the sense that they do not permit the Judge to distance himself from the actions of the investigators and it was declared to be incompatible with the judicial office and invalid.

## F. Co-operative Government

The provisions of the 1996 Constitution aim to entrench a system of co-operative federalism in South Africa. Instead of allocating sets of exclusive powers to local, provincial and national Government, the drafters opted to confer mostly concurrent powers on these branches of Government. The idea is that the spheres of Government are to ‘co-operate’ and not ‘to compete’. For this reason, the spheres are described as ‘distinctive, interdependent and interrelated’.<sup>103</sup> While national, provincial and local Government are separately elected, they share many competences.

As far as the legislative authority is concerned, both the provinces and the national Government may make law in the most important areas,<sup>104</sup> but broad overrides favour parliamentary legislation when they conflict with provincial laws. These overrides will enable the national Government to set up the frameworks within which the provinces and local Government are to operate. The Constitution indeed specifically sanctions national framework laws in the areas

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<sup>101</sup> See *Executive Council of the Western Cape Legislature v. The President of the Republic of South Africa* n. 75 above.

<sup>102</sup> 2001 (1) SA 883 (CC).

<sup>103</sup> S. 40.

<sup>104</sup> These include education (except at tertiary level), the environment, health, housing, industrial promotion, public transport, trade, urban and rural development and welfare services.

of Government finance, and foresees frameworks in the many other areas.<sup>105</sup> As is typical in this form of federalism, the provinces' loss of lawmaking power is compensated for by giving them a say in the adoption of national legislation through their representatives in the second House of Parliament, the NCOP.

The allocation of executive responsibility in the South African Constitution is also typical of the system of co-operative Government we described above. While the national Government is not precluded from executing laws in the areas of concurrent competence, this will be, in terms of the Constitution, the exception rather than the rule. Generally speaking, the provinces and local Government are responsible for executing national and provincial laws.

The system of co-operative Government opted for by the drafters of the 1996 Constitution has influenced the interpretation of the constitutional provisions conferring power on the various spheres of Government. As the system is largely intended to promote a certain type of federalism, the structure and scheme of the Constitution will largely influence the provisions dealing with the vertical devolution of power. Co-operative Government in South Africa means that the exclusive lawmaking competences of the provinces will be narrowly interpreted, as has already been done by the Constitutional Court in the *Liquor Bill* case.<sup>106</sup> The overrides in favour of Parliament will be broadly construed to ensure central Government's dominance in the field of lawmaking. On the other hand, as far as the Executive authority is concerned, the powers of the provinces and local Government will be extensively interpreted to ensure that they dominate in this area.

## VI. THE BILL OF RIGHTS

The Bill of Rights is contained in chapter 2 of the 1996 Constitution. It contains 33 sections of which 27 list the protected rights themselves. The remaining six sections are 'operational provisions'. These provisions govern the manner in

<sup>105</sup> See the *First Certification Case* n. 34 above at para. 293.

<sup>106</sup> See *Ex parte President of the Republic of South Africa: In re Constitutionality of the Liquor Bill* 2000 (1) SA 732 (CC) where the Court held that the Schedule 5 areas of exclusive provincial legislative competence pertain to matters that can be regulated intra (as opposed to inter) provincially. In other words it only covers matters that can be effectively regulated in one province alone.

which the Bill of Rights operates and the manner in which it can be enforced by the Courts. They are:

- section 7 (State's duty to respect, protect, promote and fulfil rights in the Bill of Rights);
- section 8 (application of the Bill of Rights);
- section 36 (limitation of rights);
- section 37 (suspension of rights in states of emergency);
- section 38 (standing to enforce rights), and
- section 39 (interpretation of the Bill of Rights).

Besides the six operational provisions, enforcement of the Bill of Rights is also controlled by chapter 8 of the Constitution, which contains important rules relating to the jurisdiction of Courts in constitutional matters and the remedies that Courts may grant when a provision of the Bill of Rights has been violated.

## A. The Operational Provisions

### 1. Standing

In *Ferreira v. Levin NO*,<sup>107</sup> the Constitutional Court adopted a broad approach to standing in fundamental rights litigation. The crucial ruling in the *Ferreira* case was to adopt the so-called ‘objective theory of constitutional invalidity’. In terms of this theory, laws that are inconsistent with the Constitution in principle ceased to have legal effect on the date of the Constitution’s commencement.<sup>108</sup> Based on this theory, it was held that an applicant does not have to show that the rights of any particular person was infringed in order to have standing to obtain a declaration of invalidity. An applicant must merely show that a provision of the Bill of Rights was infringed or is threatened and that he or she has a sufficient interest in a remedy. For example, a male doctor charged with performing an illegal abortion may argue that the rights of pregnant women to freedom and security of the person, privacy and equality are infringed. The subjective position of the applicant need not feature at all in fundamental rights litigation.

In order to be afforded standing, an applicant must demonstrate, besides alleging that a provision in the Bill of Rights was infringed or is threatened, a

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<sup>107</sup> 1996 (1) BCLR 1 (CC), 1996 (1) SA 984 (CC).

<sup>108</sup> *Ferreira v. Levin NO* n. 107 above at para. 26.

‘sufficient interest’ in the remedy he or she seeks. That interest does not have to be an interest of his or her own. An applicant may litigate on behalf of a class of persons. In *Permanent Secretary, Department of Welfare, Eastern Cape v. Ngxuza*,<sup>109</sup> the Supreme Court of Appeal held that the quintessential requisites for a class action are that:

- the class is so numerous that joinder of all its members was impractical;
- the questions of law and fact were common to the class;
- the claims of the litigants representing the class were typical of the claims of the remainder of the class, and
- the litigants would fairly and adequately protect the interests of the class.

An applicant may also litigate ‘in the public interest’. In *Ferreira v. Levin NO*,<sup>110</sup> O’Regan J stated:

‘Factors relevant to determining whether a person is genuinely acting in the public interest will include considerations such as: whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court. These factors will need to be considered in the light of the facts and circumstances of each case.’

Apart from having standing, the applicant must show that the constitutional issue is ripe for decision. It is said that the doctrine of ripeness serves the useful purpose of highlighting that the business of a Court is generally retrospective: it deals with situations or problems that have already ripened or crystallised and not with prospective or hypothetical ones. The issue may also not be moot. Whereas ripeness precludes a Court from deciding an issue too early, mootness prevents the Court from deciding an issue when it is too late. For example, issues that can no longer affect the interests of the parties are moot and should not be decided.

<sup>109</sup> 2001 (4) SA 1184 (SCA) at para. 16.

<sup>110</sup> N. 107 above at para. 234.

## 2. Application and remedies

Traditionally, a Bill of Rights regulates the relationship between the individual and the State. The 1996 Bill of Rights goes further than is traditional. It recognises that private abuse of human rights may be as pernicious as violations perpetrated by the State. For this reason, the Bill of Rights is not confined to protecting individuals against the State. In certain circumstances the Bill of Rights protects individuals against abuses of their rights by other individuals and private institutions.

According to section 8(2), a provision of the Bill of Rights also applies to the conduct of a private person or a juristic person to the extent that the provision is applicable, taking into account the nature of the right and the nature of any duty imposed by the right. For example, the nature of the right to human dignity does not necessarily demand differentiation between State and private conduct. The right is to protect an individual against assault on his or her dignity from any source, whether private or public. The nature of the right to just administrative action, on the other hand, makes it inapplicable to private persons.

Apart from the nature of the right, the nature of any duty imposed by the right must be taken into account. This consideration is of particular importance when it comes to the imposition of duties that entail the spending of money. Since the conduct of private persons has to be funded from their own pockets, the same duties may not be imposed on them as can be imposed on an organ of State which relies on public funds. For example, unlike a State hospital, a private hospital cannot be saddled with the duty to provide every child with basic health care services.

However, even though the 1996 Bill of Rights is clearly aimed at protecting both against State and private violations of fundamental rights (that is, it applies directly in both ‘horizontal’ and ‘vertical’ relationships), there has been little enthusiasm for the direct application of the Bill of Rights to private conduct and the common law, at least in so far as the latter governs disputes between private parties.

One reason for the absence of cases applying the Bill of Rights ‘horizontally’ is the principle of avoidance. This clearly favours ‘indirect application’ of the Bill of Rights over direct application. In terms of section 39(2), the Bill of Rights may be applied ‘indirectly to the law’ in the sense that the legislation may be interpreted, or, in the case of common and customary law, developed, with reference to the spirit, purport and objects of the Bill of Rights, so as to avoid inconsistency between the law and the Bill of Rights. When the Bill of Rights is indirectly relied upon with reference to section 39(2), the dispute continues to be

governed by ordinary law in all respects, except that an argument for the construction of the ordinary law in a particular way is made with reference to the provisions of the Bill of Rights.

In common-law disputes between private parties, a direct application of the Bill of Rights will seldom offer significant advantages for a litigant over an indirect application. In most cases, a litigant will motivate for a change in the common law and it matters little whether a Court is persuaded to do so with reference to an argument based on direct or indirect application. For this reason, the debate whether the Bill of Rights is only vertically or also ‘horizontally’ applicable, has faded in South Africa.<sup>111</sup> If one compares the indirect horizontal application of the Bill of Rights by the Constitutional Court in *Carmichele v. Minister of Safety and Security*,<sup>112</sup> with the direct horizontal application in *Khumalo v. Holomisa*,<sup>113</sup> it is hard to spot the difference.

In the former case, the Constitutional Court held that, in assuming, as the High Court and the SCA did, that the pre-constitutional test for determining the wrongfulness of omissions in delictual actions should be applied, the demands of section 39(2) had been overlooked.<sup>114</sup> The plaintiff, Carmichele, was seriously assaulted by an accused on bail. The earlier Courts dismissed the claim without considering the impact of the Bill of Rights on the common law. The Constitutional Court therefore referred the matter back to the trial Court for it to continue the trial, where Carmichele ultimately was successful and was awarded a substantial award of damages.

In the *Khumalo* case, the question was whether the common law of defamation was inconsistent with the Bill of Rights in that it cast an onus on a defendant, once the plaintiff proved that a defamatory statement was made, to prove that the statement was true and in the public interest. After finding that the right to freedom of expression does apply ‘horizontally’, the Court proceeded much as it did in the *Carmichele* case, ultimately reaching the conclusion that the common law was not inconsistent with the Bill of Rights.

The only cases where direct application to the common law seems to make sense is when common-law offences or rules are challenged with the purpose of ‘invalidating’ them. An indirect application, that is the development of the

<sup>111</sup> See, in this regard, *Du Plessis v. De Klerk* 1996 (3) SA 850 (CC).

<sup>112</sup> 2001 (4) SA 938 (CC).

<sup>113</sup> 2002 (5) SA 401 (CC).

<sup>114</sup> N. 112 above at para. 37.

common law, seems impossible in such cases. The only other advantage of a direct application of the Bill of Rights may be found in the generous approach to standing which the Courts apply in fundamental rights litigation.

Another reason for the reluctance of private parties to invoke the Bill of Rights directly is that constitutional remedies for the private violation of fundamental rights are difficult to envisage or unattractive to litigants. While the Constitutional Court and the Supreme Court of Appeal have aggressively extended State liability for personal injury caused by negligent omissions of police officials, prosecutors and prison authorities by indirectly applying the Bill of Rights in cases such as *Carmichele and others*,<sup>115</sup> it has reacted negatively to claims for ‘constitutional damages’ in the sense of punitive damages claimed for the violation of a constitutional right *per se*.<sup>116</sup>

The indirect application of the Bill of Rights has also had a significant impact on the interpretation of statutes in South Africa. The indirect application of the Bill of Rights to legislation has become known as ‘reading down’. Section 39(2) places a general duty on every Court, tribunal or forum to promote the spirit, purport and objects of the Bill of Rights when interpreting any legislation. The general duty to promote the Bill of Rights becomes particularly important when it is possible to avoid an inconsistency between a legislative provision and the Bill of Rights by interpreting the legislation so that it conforms to the Bill of Rights. This ‘indirect’ form of application has emerged to be the most popular form of reliance on the Bill of Rights and particular constructions of statutes are motivated on a daily basis with reference to the Bill of Rights in the Courts.

While the indirect application of the Bill of Rights to the interpretation of statutes is frequently employed, the direct application of the Bill of Rights presents a litigant with a useful tool to challenge State conduct or legislation. Not only has the Bill of Rights and the rest of the Constitution vastly increased the grounds for such a challenge, but the remedy flowing from a finding of inconsistency between

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<sup>115</sup> See *Minister of Safety & Security v. Van Duivenboden* 2002 (6) SA 431 (SCA) (police held liable for failing to ensure deprivation of firearm despite being in possession of information warranting person being declared unfit to possess firearms); *Van Eeden v. Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA) (police held liable for injury to dangerous criminal who escaped from police custody through unlocked gate).

<sup>116</sup> *Fose v. Minister of Safety and Security* 1997 (3) SA 786 (CC) (plaintiff allegedly tortured while held in custody, Court rejecting claim for amount of ‘punitive’ damages claimed in addition to normal delictual damages for violation of constitutional right).

the Bill of Rights and State conduct or legislation is the invalidation of the conduct or the law. This remedy will usually be an attractive one for a litigant.

The Courts have further developed an extensive jurisprudence with reference to section 172 of the Constitution aimed at dealing with the impact of a declaration of invalidating legislation. The impact may be regulated by severing the unconstitutional provisions in a statute from the rest<sup>117</sup> by reading words into a statute,<sup>118</sup> by controlling the retrospective effects of a declaration of invalidity<sup>119</sup> and by

<sup>117</sup> Kriegler J laid the groundwork for the Constitutional Court's approach to severance in *Coetzee v. Government of the Republic of South Africa* 1995 (4) SA 631 (CC). The test laid down there has two parts: first, it must be possible to sever the bad from the good, and secondly, the remainder must then still give effect to the purpose of the law. The first objective (severing the bad from the good) may be achieved through actual severance or notional severance. Actual severance entails the striking out of words and phrases from a legislative provision. Notional severance entails leaving the language of the provisions intact, but subjecting it to a condition for proper application.

<sup>118</sup> In *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) SA 1 (CC) at para. 70, the Constitutional Court has given the green light to the reading of words into a statute which it considers to be a corollary to the remedy of severance. Severance is used in cases where it is necessary to remove offending parts of a statutory provision. Reading-in is predominantly used when the inconsistency is caused by an omission, and it is necessary to add words to the statutory provision to cure it. As with severance, a reading-in should ensure that the inconsistency between the Constitution and the statute is removed. Interference with the legislation must be kept to a minimum. But as reading-in permits a much more radical reconstruction of a statute, there are further considerations, such as that a Court cannot read-in words if it cannot define with sufficient precision how the statute ought to be extended in order to comply with the Constitution and the remedy of reading-in ought not to be granted where it would result in an unsupportable budgetary intrusion. In *S v. Manamela* 2000 (3) SA 1 (CC), the Court went a step further and held that reading-in may also be used as 'part of the process of narrowing the reach of a provision that is unduly invasive of a right'. The Court then invalidated a reverse onus presumption and read an evidential presumption into its place. After the *Manamela* case, one is indeed left with the impression that despite all the rules about severance, reading down and reading-in, the Courts are in a position to reconstruct a statute much like they want to.

<sup>119</sup> The Constitutional Court has taken several factors into account when determining whether to limit the retrospective effects of an order of invalidity. In general, the Court balances the disruptive effects of an order of retrospective invalidity against the need to give effective relief to the applicant and similarly situated people. As far as disruption is concerned, a Court will be hesitant to disturb the results of cases finalised before its order of invalidity,

temporarily suspending a declaration of invalidity.<sup>120</sup> Any party to litigation may motivate for a remedy other than a straightforward declaration of invalidity to be granted.

In contrast, by extending the direct operation of the Bill of Rights to private relations, the 1996 Bill of Rights has not contributed much to the resolution of private legal disputes. In most cases, the remedies that apply to such disputes, particularly common-law remedies, appear to be sufficiently flexible to be considered appropriate for a horizontal infringement of the Bill of Rights. It is, in any event, difficult to imagine alternative and more appropriate remedies for these types of infringements.

### *3. Limitation and suspension*

The Constitution provides for the limitation of fundamental rights by way of a general limitations clause in section 36. It is general because it applies in the same way to all the rights in the Bill of Rights. In this regard the Constitution differs from, for example, the US Constitution which does not contain a limitations clause at all. Again, the German Bill of Rights does not have a general limitations clause but contains specific limitations clauses attached to most of the fundamental rights.

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and even be more careful before it will open those who acted in good faith under ostensibly valid legislative authority to delictual claims. As far as the need to give effective relief is concerned, the Court has recognised the importance of affording successful litigants the relief they seek, but has also held that the litigants before the Court should not be singled out for relief and that all people who are in the same situation should be afforded relief.

<sup>120</sup> When then will a Court suspend an order of invalidity? Ordinarily, a declaration that legislation or conduct is invalid will have immediate effect. This places a burden on a litigant seeking a suspension of an order of invalidity (usually the State) to persuade the Court to exercise its s. 172(1)(b)(ii) power in the interests of justice and equity. In *Minister of Justice v. Ntuli* 1997 (3) SA 772 (CC), it was held that, as with arguments made to justify infringements of rights under the general limitations clause, it is important that all relevant information is placed before the Court when it is asked to suspend an order of invalidity. The information must relate to the consequences of an order of invalidity (effect on the successful litigant and similarly situated persons and effect on the administration of justice and the State machinery) and the time that will be needed to remedy the defect in the legislation. Although the Court had never explicitly stated so, its approach has been to compare the possible detrimental effects of immediate invalidation against the detrimental effects of continued operation of the unconstitutional law or conduct.

One consequence of the inclusion of a general limitations clause in the Bill of Rights is that the process of considering the limitation of fundamental rights must be distinguished from that of interpretation of the rights. If it is argued that conduct or a provision of the law infringes a right in the Bill of Rights, it will first have to be determined whether that right has in fact been infringed and thereafter whether the infringement is justified.

In terms of section 36, only a ‘law of general application’ can validly limit a right in the Bill of Rights. This is the minimum requirement for the limitation of a right. A limitation must be authorised by a law, and the law must be of general application. The next stage is to determine whether the limitation ‘is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. In this respect, section 36 directs a Court to take into account certain factors such as the importance of the purpose of the limitation, whether there are less infringing alternatives, the nature of the right and the extent of the infringement. Although they do not constitute an exhaustive list, the factors mentioned in section 36 have indeed become the focus of the enquiry. A Court would typically first consider the factors and then afterwards perform a balancing exercise to determine whether the limitation is reasonable and justifiable (or as it is sometimes stated, whether the limitation is proportional). The balancing exercise involves placing the purpose, effects and importance of the infringing legislation on one side of the scales and the nature and extent of the infringement caused by the legislation on the other. The more substantial the inroad into fundamental rights, the more persuasive the grounds of justification have to be. In South Africa the factors are not necessarily considered sequentially and as a series of threshold inquiries. On the contrary, none of the factors are decisive. Ultimately a balancing exercise must be done with reference to the factors to determine whether the limitation is proportional.

Section 37 explains when, and under what conditions, a state of emergency may be declared and fundamental rights suspended. An emergency may only be declared when the life of the nation is threatened and exceptional measures are temporarily necessary to restore peace and order. Certain rights may not be derogated from during an emergency, or may only be derogated from to a certain extent. These are set out in the Table of non-derogable rights that form part of section 37.

## B. Substantive Provisions

It is of course not possible to discuss the case law dealing with the 27 substantive provisions of the Bill of Rights in any detail here. The bulk of that case law deals

with section 35, the rights of arrested, detained and accused persons. The application of these rights has over the last ten years become an integral part of the criminal procedural law, and they are also discussed in that context in this work. After section 35, the right to just administrative action (section 33) has featured more frequently in the case law. Again, this right and the right of access to information (section 32) are mostly discussed in the context of administrative law or the law of evidence. Property rights (section 25) are treated under the law of property, labour relations rights (section 23) under labour law and children's rights (section 28) under family law.

Some of the other fundamental rights, such as the protection against slavery, servitude and forced labour (section 13), the rights to freedom of assembly (section 17), to freedom of association (section 18), to citizenship (section 20), to freedom of movement (section 21), the environmental rights (section 24) and the rights to education (section 29), language and culture (section 30), have hardly featured in the Courts' jurisprudence thus far. It will therefore make little sense to discuss these provisions here.

As regards the interpretation of the remaining fundamental rights, the Constitutional Court adopts a 'purposive' approach. This means that the Court attempts to identify the core values that underpin the fundamental rights in an open and democratic society based on human dignity, equality and freedom and then to prefer the interpretation of a provision that best supports and protects those values.

Section 39(1) further provides that a Court 'shall' consider public international law and 'may' consider foreign law when interpreting the Bill of Rights. Despite the injunction to do so, the Constitutional Court has seldom referred to public international law, with the exception of the jurisprudence of the European Court of Human Rights. On the other hand, the early decisions of the Constitutional Court almost read like works of comparative constitutional law. This has changed over the last few years. Not only does the Court no longer refer to foreign jurisprudence as frequently as it did before, but much shorter judgments aimed at resolving the dispute between the parties and no more, have become the norm.

### *1. Life and dignity*

In its early jurisprudence, the Constitutional Court placed the right to life and the right to human dignity at the centre of the value order founded by the Bill of Rights. In *S v. Makwanyane*,<sup>121</sup> the Constitutional Court had to consider the constitutional validity of the death sentence. In ruling the death sentence to be a

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<sup>121</sup> 1995 (3) SA 391 (CC) at paras 83-85.

form of cruel, inhuman and degrading punishment, the Court described the rights to life and dignity as ‘the most important of all human rights’ and the ‘ultimate limitation of state power’. Unlike many of the other rights, these two rights are textually unqualified, which will make it difficult to justify the introduction of the death sentence in South Africa.<sup>122</sup>

The right to human dignity, in particular, has been given central significance. The Constitutional Court considers human dignity to lie at the heart of the prohibition against unfair discrimination. It has also held that human dignity forms the basis of political rights, such as the right to vote,<sup>123</sup> to privacy,<sup>124</sup> and the protection against cruel, inhuman and degrading punishment.<sup>125</sup> Apart from informing the interpretation of the other fundamental rights, human dignity is of central significance in the limitation enquiry. When balancing rights under section 36, one must ask how the central constitutional value of human dignity is affected.<sup>126</sup>

The right to human dignity has a residual function. Much like the American notion of ‘substantive due process’ it is used by the Constitutional Court where many of the more specific rights that give effect to the value of human dignity, do not apply. In order to fulfil this function, the right to human dignity is

<sup>122</sup> *Ibid.* at para. 25. The issues of abortion and euthanasia have not reached the Constitutional Court. As far as abortion is concerned, the Choice on Termination of Pregnancy Act 92 of 1996 favours individual choice by permitting abortion on request by a woman during the first 12 weeks of her pregnancy, and thereafter for medical or social reasons. In *Christian Lawyers' Association of South Africa v. Minister of Health* 1998 (4) SA 1113 (T), this Act was (unsuccessfully) challenged in the High Court by proponents of strong Government intervention to protect life.

<sup>123</sup> *August v. Electoral Commission* 1999 (3) SA 1 (CC) at para. 17: ‘The vote of each and every citizen is a badge of dignity and of personhood. Quite literally, it says that everybody counts.’

<sup>124</sup> *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd* 2001 (1) SA 545 (CC) at para. 18: ‘The right to privacy protects more intensely the closer the law moves to the intimate personal sphere. This understanding of privacy flows from the value placed on human dignity.’

<sup>125</sup> *S v. Williams* 1995 (3) SA 632 (CC) at para. 35: the ‘common thread running through the phrases [used in s. 12] is the identification and acknowledgement of society’s concept of decency and human dignity’.

<sup>126</sup> *Christian Education South Africa v. Minister of Education* 2000 (4) SA 757 (CC) at para. 15.

generously construed, entailing an acknowledgement of ‘the intrinsic worth of human beings’ and the recognition that ‘human beings are entitled to be treated as worthy of respect and concern’.<sup>127</sup> In *Dawood v. Minister of Home Affairs*,<sup>128</sup> the Constitutional Court held that the right to human dignity must be interpreted to afford protection to the institutions of marriage and family life, which are not protected elsewhere in the Constitution. The Court then invalidated a provision of the Aliens Control Act 96 of 1991 that made it difficult for foreigners to live with their South African spouses during the time it took for their application for immigration permits to be considered by the Government.

## 2. Equality

In the early decision of *Harksen v. Lane NO*,<sup>129</sup> the Constitutional Court tabulated the stages of enquiry into a violation of the equality clause. In essence, any form of differentiation in laws has to be rationally connected to a legitimate Government purpose. As laws inevitably differentiate, an extremely deferential standard of review is employed in these cases.<sup>130</sup>

A much stricter level of scrutiny applies when a law is found to discriminate on a ground listed in section 9(3) such as race, gender or sexual orientation. The latter ground formed the basis for the striking down of laws that criminalised sodomy<sup>131</sup> or denied equal benefits for gay life-partners.<sup>132</sup> In such cases, the Court first determines whether challenged law or conduct amounts to discrimination and then whether the discrimination is unfair.

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<sup>127</sup> Per O'Regan J in *S v. Makwanyane* n. 121 above at para. 44.

<sup>128</sup> 2000 (3) SA 936 (CC).

<sup>129</sup> 1998 (1) SA 300 (CC) at para. 53.

<sup>130</sup> This test was for example employed when the Court upheld laws in *Prinsloo v. Van Linde* 1997 (3) SA 1012 (CC) (different onus of proof in delictual actions depending on whether fire started in controlled area (onus on plaintiff to prove negligence) and non-controlled areas (onus on defendant to prove lack of negligence)) and in *Jooste v. Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) (difference in extent of damages and time within which employees may claim for personal injury under Compensation for Occupational Injuries and Diseases Act 130 of 1993 and under the common law).

<sup>131</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC).

<sup>132</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) SA 1 (CC); *Satchwell v. President of the RSA* 2002 (6) SA 1 (CC).

It is relatively easy to show that a law ‘discriminates’. One reason for this is that the Constitutional Court has held that differentiation on grounds that are analogous to those listed in section 9(3) will constitute discrimination and has not hesitated to add to the listed grounds by finding discrimination on an analogous ‘ground’. For example, differentiation on grounds of citizenship,<sup>133</sup> marital status<sup>134</sup> and HIV positive status<sup>135</sup> has been held to amount to discrimination.

Another reason is that discrimination may be either ‘direct’ or ‘indirect’. Indirect discrimination occurs when the impact of a law is discriminatory. In South Africa it is therefore not necessary to show that the purpose of the law is discriminatory. A showing of discriminatory impact is enough as long as there is a causal connection between the law and the discrimination against the listed group.

What makes discrimination unfair? Differentiation on one of the listed grounds is presumed to be unfair discrimination. The Constitutional Court has indicated that the determining factor is the impact of the discrimination on its victims.<sup>136</sup> Most discrimination cases are resolved at this stage of the enquiry. For example, in *President of the Republic of South Africa v. Hugo*,<sup>137</sup> the Court held that the

<sup>133</sup> In *Larbi-Odam v. MEC for Education (North-West Province)* 1998 (1) SA 745 (CC), the Constitutional Court held that citizenship, though not a listed ground, is suspect because it is based on attributes and characteristics which had the potential to impair the fundamental human dignity of non-citizens hit by the regulation. The Court noted that foreign citizens are a minority in all countries, and have little political muscle and that they are therefore vulnerable to having their interests overlooked and their rights to equal concern and respect violated. Second, citizenship is a personal attribute that is difficult to change. ‘In addition’, the Court noted, ‘the overall imputation seems to be that because persons are not citizens of South Africa they are for that reason alone not worthy of filling a permanent post’.

<sup>134</sup> E.g. in *Harksen v. Lane NO* n. 129 above, the differentiation arose from certain attributes or characteristics possessed by solvent spouses, namely their usual close relationship with the insolvent spouse (personal intimacy) and the fact that they usually live together in a common household. ‘Marital status’ was not a listed ground under the interim Constitution, but the Court nevertheless held that differentiation on the basis of this personal attribute has the potential to demean persons in their inherent humanity and dignity and that differentiation on this unlisted ground is discriminatory.

<sup>135</sup> *Hoffmann v. South African Airways* 2000 (11) BCLR 1211 (CC) at paras 22-41 (Court ordered appointment of HIV-positive job applicant).

<sup>136</sup> *Harksen v. Lane NO* n. 129 above at paras 50-51.

<sup>137</sup> 1997 (4) SA 1 (CC).

effect of a general pardon of mothers convicted of certain categories of less serious offences was not unfair to similarly situated fathers, as the effect was to do no more than to deprive fathers of minor children of an early release to which they had no legal entitlement. In contrast, in *Pretoria City Council v. Walker*,<sup>138</sup> the Court held that a decision of the Council not to enforce its claims for outstanding services against black township residents but only against the mostly white residents of suburbs had an unfair impact as the targeted group was made to feel that they were not deserving of equal concern, respect and consideration.

Section 9(4) makes ‘private discrimination’ unconstitutional. Section 9(4) further requires the enactment of national legislation to prohibit or prevent unfair discrimination. The Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 is aimed at fulfilling this requirement, but has not come into force. In the employment context, discrimination is dealt with under the Employment Equity Act 55 of 1998, which also requires many employers to adopt affirmative action programmes.

### 3. *Socio-economic rights*

Sections 26 and 27 confer a right to adequate housing and to health care, food, water and social security. In South Africa, socio-economic rights are therefore expressly included in the Bill of Rights and there is no indication in the text itself that indicate that they are non-justiciable. The Constitutional Court stated in the *Grootboom* case<sup>139</sup> that socio-economic rights cannot exist on paper only: they must be enforced by the Courts. The question, however, is how to enforce them. Generally speaking, the Court held that socio-economic rights can at least be negatively enforced. They prohibit the State from adopting ‘deliberately retrogressive measures’ such as, for instance, denying them existing access to water, food or housing. A negative violation of the right to housing would be to create homelessness through forced eviction without provision of alternative accommodation.<sup>140</sup>

The positive dimension of socio-economic rights requires the State to adopt reasonable measures (reasonable laws and policies and programmes implemented by the Executive) to fulfil the socio-economic rights. Though a considerable

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<sup>138</sup> 1998 (2) SA 363 (CC).

<sup>139</sup> *Government of the Republic of South Africa v. Grootboom* 2000 (11) BCLR 1169 (CC) at para. 20.

<sup>140</sup> *Ibid.* at para. 88.

margin of discretion is given to the State in this regard, the reasonableness of the measures may be evaluated by a Court.<sup>141</sup> For example, in the *Grootboom* case, the Constitutional Court found the measures of the Government to provide housing to be unreasonable since they made no provision for temporary shelter for homeless people. This omission was unreasonable since it ignored those most in need.<sup>142</sup>

On the other hand, in the *Soobramoney* decision,<sup>143</sup> the Constitutional Court held that the denial of treatment to a person suffering from chronic renal failure and requiring dialysis two to three times a week to remain alive was not inconsistent with the right to health care.

In one of its most celebrated decisions to date, in the *Minister of Health v. Treatment Action Campaign (2)*,<sup>144</sup> the Court held that the Government's decision not to make the drug Nevirapine available to HIV-positive mothers and their newborn children was inconsistent with the Bill of Rights. It then directed the Government to take reasonable measures within available sources to make the drug available free of charge.

#### *4. The right to personal freedom*

Section 12 of the Constitution entrenches a right to personal freedom. In the early decision of *Ferreira v. Levin NO*,<sup>145</sup> an expansive interpretation of this right, which would have encompassed a general and residual right to personal liberty, was rejected by the majority of the Court. The role of 'residual due process right' is now fulfilled by the rule of law and the right to dignity. According to the majority in the *Ferreira* case, the primary purpose of section 12 is to ensure the protection of the physical integrity of the individual. This means that the protection of section 12 is only activated once an individual is deprived of his or her physical liberty.

Although the Court has not defined the duration, degree and intensity of the deprivation,<sup>146</sup> the freedom right will be triggered when someone is detained or his or her physical movements are otherwise constrained. Once a person is deprived of his or her physical freedom, the freedom right generates both

<sup>141</sup> *Ibid.* at para. 41.

<sup>142</sup> *Ibid.* at para. 44.

<sup>143</sup> *Soobramoney v. Minister of Health, KwaZulu-Natal* 1998 (1) SA 765 (CC).

<sup>144</sup> 2002 (5) SA 721 (CC).

<sup>145</sup> 1996 (1) SA 984 (CC).

<sup>146</sup> See *De Lange v. Smuts NO* 1998 (3) SA 785 (CC) at para. 28.

substantive and procedural protection. The substantive component of the right requires the grounds for the curtailment of freedom to be acceptable. Or as section 12(1)(a) provides: freedom may not be deprived ‘arbitrarily’ or ‘without just cause’.<sup>147</sup> This component applies not only to cases of preventative or coercive detention, but also to criminal offences punishable with imprisonment.<sup>148</sup> In all such cases there must be a good reason justifying the deprivation of freedom.

The requirements of the procedural component will depend on the circumstances of the case.<sup>149</sup> Although section 12(1)(b) refers to a right not to be detained without ‘trial’, it does not require a ‘trial’ similar to that guaranteed by section 35 for accused persons. Section 12 nevertheless affords comprehensive protection. In *De Lange v. Smuts NO*,<sup>150</sup> a majority of the members of the Constitutional Court held that section 12 requires, apart from anything else, a hearing conducted by a judicial officer in the Court structure established by the 1996 Constitution. The officers empowered by the Insolvency Act to commit examinees lacked the required objective structural independence to commit recalcitrant examinees. The provision in the Act was therefore invalidated. In *Coetzee v. Government of the Republic of South Africa*,<sup>151</sup> the procedural shortcomings were of a different nature. In this case, section 65 of the Magistrates’ Courts Act 32 of 1944 was invalidated. The Act provided for the detention of a civil debtor who failed to explain why he did not comply with a Court order to pay his debts. However, since an onus was placed on the debtor, and no personal notice had to be served on the debtor, the system of debt collection did not properly distinguish between those debtors who were unable to pay and those who did not want to pay. It was unacceptable that the former ended up in jail with the latter.

Section 12(1)(e) contains protection against cruel, inhuman and degrading punishment and treatment. Apart from the death sentence that was invalidated in *S v. Makwanyane*,<sup>152</sup> the Constitutional Court has also ruled in *S v. Williams*<sup>153</sup>

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<sup>147</sup> *Ibid.* at para. 146.

<sup>148</sup> See *Scagell v. Attorney-General of the Western Cape* 1997 (2) SA 368 (CC) at para. 32.

<sup>149</sup> *Nel v. Le Roux NO* 1996 (3) SA 562 (CC) at para. 14.

<sup>150</sup> See n. 146 above.

<sup>151</sup> See n. 117 above.

<sup>152</sup> See n. 121 above.

<sup>153</sup> 1995 (3) SA 632 (CC).

that judicially imposed juvenile whippings constituted cruel, inhuman and degrading punishment.

### 5. Privacy

The right to privacy in respect of personal matters has led to the invalidation of laws that banned the possession of erotic material<sup>154</sup> and the offence of sodomy.<sup>155</sup> However, ultimately the State may justify intervening even in such truly private spheres to combat social evils such as child pornography.<sup>156</sup>

Searches and seizures that invade privacy must comply with strict requirements:

- It must be conducted in terms of legislation that clearly defines the power to search and seize. A section of the Medicines and Related Substances Control Act 101 of 1965, which was challenged in the *Mistry* case,<sup>157</sup> did not comply with this requirement. Instead, it gave carte blanche to inspectors to enter any place, including private dwellings, where they suspected medicines to be and then to inspect documents, including intimate documents.<sup>158</sup>
- Prior authorisation by an independent authority is normally necessary before a search may be conducted. A warrant must therefore be obtained unless the object of the search would be frustrated by the delay. Warrants are, however, not necessary in so-called ‘regulatory inspections’ where the object is routine control over potentially dangerous activities.<sup>159</sup>
- There must be reasonable grounds for conducting the search.<sup>160</sup> In the context of a criminal investigation, the requirement means that a search

<sup>154</sup> See *Case v. Minister of Safety and Security* 1996 (3) SA 617 (CC) at para. 91: ‘[w]hat erotic material I may choose to keep within the privacy of my home, and only for my personal use there, is nobody’s business but mine’.

<sup>155</sup> *National Coalition for Gay and Lesbian Equality v. Minister of Justice* 1999 (1) SA 6 (CC).

<sup>156</sup> This qualification was added by Langa J, along with support of the rest of the Court, to the judgment of Didcott J in *Case v. Minister of Safety and Security* n. 153 above at para. 99.

<sup>157</sup> *Mistry v. Interim Medical and Dental Council of South Africa* 1998 (4) SA 1127 (CC).

<sup>158</sup> *Ibid.* at para. 29.

<sup>159</sup> *Ibid.*

<sup>160</sup> *Investigating Directorate: Serious Economic Offences v. Hyundai Motor Distributors (Pty) Ltd* n. 124 above at para. 28.

would not be constitutional unless there is a reasonable suspicion that an offence had been committed.

#### 6. Religion

Section 14 guarantees two rights: a right to hold and freely exercise a religious belief and a right to be treated equally with other religions.

As far as the right to freely exercise a religion is concerned, the Constitutional Court has adopted a broad construction of the right and prefers to resolve disputes under the general limitations clause. For example, in *Christian Education South Africa v. Minister of Education*,<sup>161</sup> the Constitutional Court stressed that ‘in the view of the complainants’ the impact of the ban on corporal punishment on their religious and parental practices was far from trivial. In this case, the Constitutional Court then proceeded to hold that the issue of whether a religious group may demand corporal punishment of their children in schools should rather be resolved under the limitation clause. In applying section 36, the Court held that the applicants’ beliefs were outweighed by considerations such as that the symbolic, moral and pedagogical purpose of the ban of corporal punishment would be undermined if an exemption was granted, and that it would be difficult to monitor and control the administration of corporal punishment. The ban on the use of corporal punishment in all schools was therefore upheld. Similarly, in *Prince v. President, Cape Law Society*,<sup>162</sup> the Court held that certain laws which prohibited the possession of cannabis infringed the right of a Rastafarian to exercise his religious freedom, but held that the limitation was justified under section 36, the general limitations clause. In this case, the Law Society had refused to register the applicant, a candidate attorney, because he had two previous convictions for possession of cannabis and had indicated that he intended to continue to use cannabis. In holding that the violation was justified, the Court held that the use of cannabis by Rastafarians cannot be sanctioned without impairing the State’s ability to enforce its legislation in the interest of the public at large and to honour its international obligation to do so.

Apart from the right to exercise a religious belief, section 15 guarantees a right to equal treatment of religions. In South Africa, the drafters decided not to include an ‘establishment clause’. In its place, the principle of equal treatment of religions was laid down in *S v. Lawrence, S v. Negal, S v. Solberg*<sup>163</sup> by the

<sup>161</sup> 2000 (4) SA 757 (CC).

<sup>162</sup> 2002 (2) SA 794 (CC).

<sup>163</sup> 1997 (4) SA 1176 (CC).

Constitutional Court. At the same time, the practical difficulties with implementing the principle are well illustrated by the decision. The case concerned the provisions of the Liquor Act 27 of 1989, which prohibited the sale of liquor on ‘closed days’ (defined as Sundays, Christmas Day and Good Friday). A majority of the Court upheld the law. Some of them did not deal with the denial of equal treatment and simply held that the law did not inhibit the free exercise of any religion.<sup>164</sup> Another held that the law did favour Christians by showing a special solicitude to their opinions but found the violation to be justifiable in that it reduced the damage caused by alcohol abuse on high-risk days.<sup>165</sup> A minority found the endorsement of the Christian religion to be unacceptable and unconstitutional.<sup>166</sup>

### *7. Speech*

Section 16(1) protects free expression generally but also specifically includes protection for the freedom of the press and media, the freedom to receive and impart information and ideas, artistic creativity, academic freedom and scientific research.

Section 16(2) places certain forms of expression outside the scope of the right, namely propaganda for war, incitement of imminent violence and certain forms of hate speech. As far as propaganda for war and the incitement of imminent violence is concerned, the possible effects of the speech on its audience must also be considered. The context is of course all-important. The mere abstract teaching of the moral propriety or even the necessity to resort to violence may not be enough in circumstances where the context does not indicate that any action will result from the speech.

### *8. Professional freedom*

The interim Constitution contained a right to ‘freely engage in economic activity and to pursue a livelihood anywhere in the national territory’.<sup>167</sup> The right was included at the instance of political groupings that felt strongly about the protection of property rights and economic liberty. These groups were less strongly represented in the Constitutional Assembly responsible for the drafting of the

<sup>164</sup> See the judgment of Chaskalson P.

<sup>165</sup> See the judgment of Sachs J.

<sup>166</sup> See the judgment of O'Regan J.

<sup>167</sup> See s. 26 of the interim Constitution.

1996 Constitution. As a result the broad economic activity right was replaced with a narrower right to ‘choose’ a ‘trade, occupation or profession freely’.

Individual occupational freedom is a narrower but also a more precise concept than freedom of commercial activity. Apart from providing for the right to occupational choice, section 22 provides that the practice of a trade, occupation or profession may be regulated by law.

### 9. Access to Courts

Section 34 guarantees three rights for a person involved in a dispute that can be resolved by law:

- it creates a right of access to a Court or another tribunal or forum;
- it requires tribunals or forums other than Courts to be independent and impartial when they are involved in the resolution of legal disputes, and
- it requires the dispute to be decided in a fair and public hearing.

The threshold enquiry is whether a dispute can be resolved by law. If it can, the three components of section 34 (access, independence and impartiality and fairness) are triggered.

The first aspect of section 34 obviously finds application when the State precludes access to Courts, for example, by ouster clauses. Since 1994, the Courts have *inter alia* considered restrictions imposed by the law on the right of vexatious litigants to approach Courts,<sup>168</sup> the constitutional validity of the process of granting amnesty<sup>169</sup> and the constitutionality of statutory notice requirements and expiry periods.<sup>170</sup> What has become clear, is that while section 34 guarantees access to a Court, it is not violated when a cause of action is abolished. The legislature may for example abolish an existing common law delictual action and replace it with a more limited action against a statutory body, without infringing section 34.<sup>171</sup>

<sup>168</sup> *Beinash v. Ernst & Young* 1999 (2) SA 116 (CC) (upholding the restrictions on vexatious litigants).

<sup>169</sup> *AZAPO v. President of the Republic of South Africa* 1996 (4) SA 671 (CC) (upholding The Promotion of National Unity and Reconciliation Act 34 of 1995).

<sup>170</sup> *Mohlomi v. Minister of Defence* 1997 (1) SA 124 (CC) (striking down six month expiry period and one month notice period for actions instituted against the Minister of Defence).

<sup>171</sup> *Jooste v. Score Supermarket Trading (Pty) Ltd* 1999 (2) SA 1 (CC) (common law action against employer replaced with more limited action against statutory fund for injuries at the workplace).

However, this provision is not only concerned with restrictions on the right to access to Courts. It requires the resolution of disputes by law where possible. In this regard, the purpose of section 34 (and, behind it, the rule of law), is to support the prohibition of self-help. In *Chief Lesapo v. North West Agricultural Bank*,<sup>172</sup> the Court stressed the need for ‘institutionalising the resolution of disputes, and preventing remedies being sought through self-help’. The Court invalidated section 38(2) of the Northwest Agricultural Bank Act 14 of 1981 which permitted the Bank, without the need for a Court order, to attach and sell property of a debtor given in security for a loan. Section 34, the Constitutional Court held, guaranteed that ‘any constraint upon a person or property shall be exercised by another only after recourse to a court recognised in terms of the law of the land.’<sup>173</sup> The Act violated this provision in that it allowed the Bank to be the judge in its own cause and to usurp the powers and functions of the Courts.

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<sup>172</sup> 2000 (1) SA 409 (CC).

<sup>173</sup> *Ibid.* at para. 16.

# *Chapter 3*

## **Administrative Law**

***Cora Hoexter\****

### **I. INTRODUCTION**

In the South African context, administrative law may be defined as being concerned with the empowerment, supervision and control of the public administration. The public administration itself is harder to describe. Broadly speaking, it encompasses organs and agencies falling under the executive branch of the State. It thus includes all the Government departments at national and provincial levels, local Government administrations, the security forces, any number of parastatal or fringe organisations and the public service (the employees of the various Government departments). The administration usually excludes organs forming part of the legislative and judicial branches. It also usually excludes the highest policy-making organs of the Executive: the President and the Cabinet at the national level, and their counterparts at the provincial level.

None of this is absolute, however, and in our law it is quite possible for organs not ordinarily falling within the public administration to perform administrative action. Even private bodies may engage in administrative action if they happen to be exercising power of a sufficiently public nature. ‘Administrative action’ is a term of considerable technical significance in South African administrative law, and is defined in greater detail elsewhere in this chapter (see especially VI.B. below).

It should be noted that the discussion in this chapter focuses exclusively on general administrative law as opposed to particular branches of the subject such as licensing, social welfare, taxation and telecommunications. While such branches are subject to their own particular statutory regimes, they are also subject to general administrative law: general rules that are applicable to all or most kinds of administrative action. The main source of general administrative law today is section 33 of the Constitution of the Republic of South Africa, Act 108 of 1996,

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whose contents have been translated into statutory form in the Promotion of Administrative Justice Act 3 of 2000. As will be explained below, however, other parts of the Constitution also play an important role, and the principles of our common law have continuing relevance as well.

## II. ADMINISTRATIVE LAW – PAST AND PRESENT

As a result of our colonial history, South African administrative law shares a number of characteristics with the common-law model. In our system, as in English law, the administration has always been subject to supervision by the ordinary Courts rather than by special administrative Courts. While the powers and duties of public authorities have generally been statutory in their origin, the rules and remedies of administrative law have largely been the product of judicial creation and development in a casuistic fashion over the years. In practice, judicial supervision (in the form of judicial review) has also been the most significant method of controlling administrators and keeping them within the bounds of their powers. Because the most important source of administrative power, legislation, is subject to interpretation by the Courts, the legality of administrative conduct is inextricably bound up with the judicial interpretation of statutory language.

South African administrative law came strongly under the influence of English constitutionalism of the late 19th century, particularly as it was represented in the writings of A.V. Dicey. Even today, under a supreme, democratic Constitution that has had dramatic effects on the common-law foundations of our system, the constitutional themes that inform the judgments of the Courts closely resemble those traditionally upheld in English public law. Our Courts continue to rely heavily on the distinction between public power and private power, the rule of law, the separation of powers (a more moderate brand than that practised in the United States) and the concomitant and all-important distinction between appeal and review. Although the common-law grounds of review have now been translated into legislation in terms of a constitutional mandate, and although the door has been opened to the creation of special administrative Courts, the common-law flavour of South African administrative law remains distinctive.

Unlike most other common-law jurisdictions, however, the political backdrop to South African administrative law for much of the 20th century was one of increasingly systematic racial oppression. In 1948 the administrative system became a vehicle for implementing the National Party Government's official policy of apartheid, while administrative law (again, mainly in the form of judicial

review) became one of the few weapons available for ameliorating that policy's effects. The system of parliamentary sovereignty that prevailed until 1994 meant that the Courts were relatively powerless in those days. However, the balance of power between the legislature, executive and judiciary has altered dramatically with the advent of the democratic era.

While no branch of the legal system has remained untouched by South Africa's transition to democracy, our administrative law has been especially profoundly affected by it. For this reason it is helpful in the discussion that follows to draw a distinction between the democratic era and the pre-democratic era. The pre-democratic era refers to the period before the coming into force of the interim Constitution of the Republic of South Africa, Act 200 of 1993 and subsequently the 1996 Constitution. The democratic era is understood to have begun officially on 27 April 1994, the day on which the interim Constitution came into force.

### III. THE IMPACT OF THE CONSTITUTION

In the pre-democratic era South African administrative law was dominated by judicial review, or the exercise of the Courts' power to pronounce on the lawfulness of administrative action on various common-law grounds. Extra-judicial methods of reconsidering and controlling administrative action were poorly developed or non-existent. But despite its general significance, judicial review was greatly inhibited by the doctrine of parliamentary sovereignty. In accordance with this doctrine, the legislature not only had complete freedom to define the content of lawfulness itself but could limit or even exclude judicial scrutiny of administrative decisions in particular cases. Administrative excesses and oppression were all too common in South Africa under apartheid, and parliamentary sovereignty saw to it that the Courts had little power to ameliorate matters.

Things are entirely different today. The Courts exercise their review jurisdiction not in terms of their common-law powers but by virtue of a justiciable Bill of Rights and national legislation made in terms of it. Section 33 of the Bill of Rights in the Constitution of 1996 protects something seldom found in Constitutions around the world: a fundamental right to just administrative action. It thus effectively 'constitutionalises' administrative law. The Bill of Rights (chapter 2 of the Constitution) also contains several other provisions of relevance to administrative law. Particularly worthy of mention are the right of access to State-held information (section 32(1)), a right to have justiciable disputes settled by a Court or 'other independent forum' (section 34) and wide standing to enforce the

various constitutional rights (section 38), including of course the administrative justice right itself.

The constitutional protection of administrative justice does not end with the Bill of Rights, however. Other important features include chapters 9 and 10 of the Constitution. Chapter 9 creates a number of ‘State institutions supporting constitutional democracy’, some of which are of great relevance to our administrative law. Chapter 10, which is devoted to the public administration and the values and principles governing it, also creates a Public Service Commission – a body responsible for improving the efficiency and effectiveness of the public service. Finally, apart from express provisions such as these, the Courts have also acknowledged a constitutional principle of legality immanent in the Constitution – a sort of safety net that governs the exercise of all public power, whether it qualifies as ‘administrative action’ or not.

In 1994, at the start of the transition to democracy, one of South Africa’s most eminent administrative lawyers described the interim Constitution as a bridge leading away from a culture of authority and towards a culture of justification.<sup>1</sup> This is also an apt description of the aspirations of the new South African administrative law. As is evident from the brief sketch above, the Constitution is replete with provisions designed to safeguard against administrative tyranny and to foster the constitutional values of responsiveness and accountability.

In the early days of the new constitutional dispensation there was a certain amount of confusion regarding the precise effect of the Constitution on administrative law. This confusion was fuelled by the fact that our two highest Courts, namely the Constitutional Court and the Supreme Court of Appeal, are depicted as supreme in their respective ‘constitutional’ and ‘non-constitutional’ spheres. There was thus a belief that administrative law somehow occupied two separate spheres, that of the Constitution and that of the common law; that each sphere had its own highest Court, and that somewhat different rules applied in each. This was a view upheld by the Supreme Court of Appeal in a case decided in 1999. However, the Constitutional Court rejected this view a year later in the seminal case of *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa*.<sup>2</sup> It indicated that there are not two

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<sup>1</sup> E. Mureinik, ‘A Bridge to Where? Introducing the Interim Bill of Rights’ 1994 SAJHR 31.

<sup>2</sup> 2000 (2) SA 674 (CC), see especially paras 44 and 45. Here the Court was reacting particularly to the judgment of the Supreme Court of Appeal in *Commissioner of Customs and Excise v. Container Logistics (Pty) Ltd* 1999 (3) SA 771 (SCA).

systems of law, each having similar requirements and each operating in its own field with its own highest Court. Rather, there is only one system of law, and it is shaped and governed by the supreme Constitution. However, the Constitutional Court also made it clear that the common law has not lost its relevance. The principles of the common law (to the extent that they are compatible with the Constitution) will continue to inform the content of administrative law and to contribute to its future development.

#### IV. THE CONSTITUTIONAL MANDATE AND THE ADMINISTRATIVE JUSTICE ACT

Section 33 of the 1996 Constitution is very broadly cast. Section 33(1) states that '[e]veryone has the right to administrative action that is lawful, reasonable and procedurally fair', while section 33(2) provides that '[e]veryone whose rights have been adversely affected by administrative action has the right to be given written reasons'. Section 33(3) requires national legislation to give effect to the right to just administrative action. This legislation must provide for the review of administrative action 'by a court or, where appropriate, an independent and impartial tribunal'. In addition, it must impose a duty on the State to give effect to the rights in section 33(1) and (2); and it must 'promote an efficient administration'.

##### A. The Status of Section 33 of the Constitution

Section 33 did not come into force immediately. To avoid the potentially chaotic results of enforcing such a sweeping right against an unprepared administration, the operation of the right was suspended in terms of a rather complicated transitional arrangement contained in Schedule 6 to the 1996 Constitution. Item 23 of Schedule 6 provided that the national legislation referred to in section 33(3) had to be enacted within three years of the date on which the 1996 Constitution took effect. By supplying the necessary detail and specificity, it was anticipated that the national legislation would narrow down the breathtaking ambit of the right in section 33. During the period before the enactment of this national legislation, section 33 had to be read as if it were the transitional right contained in item 23(2)(b) of Schedule 6. The wording of this transitional right was almost identical to that of section 24 of the interim Constitution, the predecessor to section 33. In essence, then,

section 24<sup>3</sup> continued to operate until the enactment of the national legislation required by section 33(3). The operation of the very broad right to access to information in section 32 of the 1996 Constitution was similarly suspended pending the enactment of national legislation.

The administrative justice legislation was enacted as the Promotion of Administrative Justice Act 3 of 2000 (Administrative Justice Act) in February of that year, just before the expiry of the deadline, although it came into force only on 30 November 2000. The enactment of the legislation was sufficient to end the suspension of section 33, however, and that right therefore came into operation in February 2000. Section 33 continued to operate as the primary source of administrative law during the period between the enactment of the national legislation and its coming into force, but since 30 November 2000 the Act has become the most immediate source of administrative law. The Administrative Justice Act has not, of course, replaced or destroyed the constitutional right to administrative justice, which is a norm higher up in the legal order. But while the administrative justice right in section 33 continues to exist, it is no longer the first port of call for those seeking judicial review of administrative action. That role has been taken on by the Act.

## B. The Scope of the Administrative Justice Act

In accordance with the instructions given in section 33 of the Constitution, the Administrative Justice Act provides for review of administrative action; it imposes duties on the State to comply with the rights in section 33(1) and (2), and it may be said to promote an efficient administration. Each of these points is worthy of brief elaboration here.

<sup>3</sup> Section 24 of the interim Constitution provided as follows:

'Every person shall have the right to –

- (a) lawful administrative action where any of his or her rights or interests is affected or threatened;
- (b) procedurally fair administrative action where any of his or her rights or legitimate expectations is affected or threatened;
- (c) be furnished with reasons in writing for administrative action which affects any of his or her rights or interests unless the reasons for such action have been made public; and
- (d) administrative action which is justifiable in relation to the reasons given for it where any of his or her rights is affected or threatened.'

The transitional right was the same except that it used the pronoun 'their' instead of 'his or her' in each case.

- Section 6 of the Act fulfils the first part of the constitutional mandate by providing that proceedings for judicial review of administrative action may be instituted by any person ‘in a court or a tribunal’. It also lists a number of grounds of review, including almost all the grounds that were familiar to South Africans at common law. Section 1 defines ‘administrative action’, a crucial term in the context of both the Constitution and the Act, as well as other essential terms such as ‘court’ and ‘tribunal’. Section 7 deals with the procedure for judicial review, including matters such as the duty to exhaust domestic remedies before approaching a Court or tribunal and the need to institute review proceedings without delay – both familiar rules at common law, but here given a new stringency. Finally, section 8 provides for the various remedies available to an applicant for judicial review.
- In relation to the second part of the constitutional mandate, the Act imposes specific duties on any ‘administrator’ (another term defined in section 1) regarding procedural fairness and the giving of reasons. Section 3 imposes a duty to act fairly in relation to administrative action affecting individuals, while section 4 governs fairness in administrative action affecting the public. Section 5 is an innovation in South African law, since it introduces a general duty to provide written reasons on request for administrative action. The other two elements of section 33, lawfulness and reasonableness, do not feature in these duty-imposing provisions. However, since these elements are covered in the long list of grounds of review, one may conclude that there is a duty on the State, albeit not directly expressed, not to engage in unlawful and unreasonable conduct. The duties imposed in sections 3-5 are in any event rather limited, since administrators may depart from them where it is reasonable and justifiable to do so. In addition, section 2 of the Act makes provision for exemptions from the duties imposed in sections 3-5 and for permissions to vary the requirements of those sections. Furthermore, action taken in terms of section 4 is expressly excluded from the definition of ‘administrative action’ in section 1 of the Act. Since the Act (and therefore judicial review) applies only to ‘administrative action’, this effectively means that duties imposed by section 4 cannot be judicially enforced.
- It is possible to read the constitutional mandate to promote an ‘efficient’ administration in a number of ways. If one is trying to achieve speed and cost-effectiveness, one would tend to limit the burden on the administration; if one wants efficiency in the sense of being more accountable and more responsive to the needs of citizens, one would tend to impose greater

burdens on the administration. The Act achieves a rather uneasy balance between these two kinds of efficiency, giving with one hand while taking away with another. Thus the generous provisions of sections 3-5, 6 and 8 seem to support the second kind of efficiency. Section 10 is particularly noteworthy in this regard, since it allows for the investigation and consideration of a number of reforms and improvements to our administrative law. These include the establishment of an advisory council to advise the Minister; the publication of registers of rules and standards; the automatic lapsing of rules and standards in terms of ‘sunset’ provisions; the reform of the current system of internal administrative appeals, and the education of administrators and the public regarding the contents of the Act and the Constitution. It is heartening that a code of good administrative conduct is currently being drawn up in terms of section 10(1)(e).

On the other hand, section 2 of the Act seems determined to support the first kind of efficiency. Section 1 is the most remarkable provision in this respect, however, since it offers an extremely narrow definition of ‘administrative action’ – and as already noted, the Act applies only to ‘administrative action’. This section suggests a desire to limit the application of the Act as far as possible, and may make the Act susceptible to constitutional challenge on the basis that it fails to give effect to the right in section 33 of the Constitution.

## V. JUDICIAL AND NON-JUDICIAL CONTROL OVER ADMINISTRATIVE ACTION

Unlike many civil-law jurisdictions, South Africa does not have a separate system of specialised administrative Courts. Here, as in other jurisdictions that have come strongly under the influence of English law, administrative agencies have always been subject to supervision by the ordinary Courts. Consequently, the thousands of public officials and administrative tribunals found in South Africa are all subject to the power of judicial review. But judicial review is an essentially limited enterprise. While administrative agencies can and do concern themselves with the merits of administrative decisions, the Courts may not. In theory at least, they are confined to judging the legality of the decision – that is, the way in which the decision was reached. In practice, however, review often entails at least *scrutiny* of the merits. This is particularly true of review for reasonableness.

As already noted, judicial review was the most important tool of administrative law during the pre-democratic era. One reason for this was simply the dearth

of other procedures and safeguards. A system of administrative appeals (appeals from one administrative agency to another) certainly existed, but it was poorly developed, and the appellate agencies often lacked independence. There was no right of access to State-held information; on the contrary, Government secrecy was cultivated as a virtue. Public participation in administrative decision-making was not encouraged. There was no ombudsman worthy of the name. Parliamentary oversight of the administration was limited, and was feeble in practice. This meant that judicial review was the only reliable method of achieving reconsideration of administrative action.

Another reason for the prominence of judicial review was the lack of a democratic and supreme Constitution with a justiciable Bill of Rights. To put it differently: in the absence of full-scale constitutional review, administrative-law review had a great deal of work to do. For example, the absence of justiciable fundamental rights in the pre-democratic era meant that one could not challenge discriminatory original legislation at all; and if one wanted to challenge discriminatory delegated legislation, one had to use the principles of administrative law rather than constitutional law to do so.

While judicial review is as vigorous as ever today, the South African administrative system is now replete with non-judicial procedures and safeguards as well. The most important of these are described briefly below. However, it is true to say that judicial review is still the most significant method of controlling administrative action. This is likely to remain so, particularly since the Administrative Justice Act emphasises judicial review and makes it more accessible than it used to be as an unwritten, common-law remedy.

### A. Administrative Appeals

Administrative appeals, also known as domestic or internal appeals, generally enable an appeal tribunal to reconsider the merits of an administrative decision. They take various forms, including appeal to a single departmental official (such as the Minister concerned); appeal to a tribunal specially created to hear appeals (such as licensing appeal boards and town planning appeal boards); and appeal to special Courts. The latter are usually presided over by High Court Judges, sometimes assisted by administrative experts.

South African appellate bodies vary widely in terms of their independence from the administration, their procedures and their powers. An important distinction is drawn between tribunals with narrow and wide appellate jurisdiction. Both types amount to a rehearing on the merits, but in a narrow or ordinary appeal the tribunal is confined to the record of the original decision-maker,

whereas in a wide appeal new evidence and information may be admitted. Wide appeal thus includes the power of review.

Section 10(2)(a) of the Administrative Justice Act enables the Minister of Justice to make regulations establishing an advisory council, *inter alia* to advise the Minister on ‘the appropriateness of establishing independent and impartial tribunals, in addition to the courts, to review administrative action’, and likewise the appropriateness of ‘specialised administrative tribunals, including a tribunal with general jurisdiction over all organs of state or a number of organs of state, to hear and determine appeals against administrative action’ (section 10(2)(a)(iii)). This allows not only for the possible development of non-judicial review, but also for the development of a general administrative tribunal along the lines of the Australian Administrative Appeals Tribunal (AAT).

## B. Legislative Control

Section 55(2) of the Constitution requires the National Assembly to ‘provide for mechanisms’ to ensure, first, that executive organs of State in the national sphere are accountable to the National Assembly; and secondly, to maintain oversight of the exercise of the national Executive authority, ‘including the implementation of legislation’. Since the implementation of legislation is regarded as the archetype of administrative action, section 55(2) amounts to a constitutional duty to supervise the administration in particular as well as the Executive more generally.

Supervisory methods include collective and individual ministerial responsibility to the national legislature, the scrutiny of delegated legislation and the consideration of reports submitted to Parliament. However, legislative control over the administration has traditionally been rather weak in practice, and this does not seem to have changed much in the democratic era. For one thing, Cabinet Ministers are reluctant to accept responsibility for maladministration in their departments, and have apparently been allowed to get away with this attitude. Then, too, legislative scrutiny of delegated legislation is very limited, since in practice Parliament is merely called upon to consider a list of delegated legislation tabled within 14 days of its promulgation.

## C. Public Participation

Section 4 of the Administrative Justice Act, which applies ‘where an administrative action materially and adversely affects the rights of the public’, contains important reforms relating to public participation. These apply most obviously, though not exclusively, to the activity of rule making. Section 4(1) calls on

administrators to choose between holding a public inquiry, following a notice and comment procedure, doing both of these things or adopting any other fair procedure. The choice will naturally depend on the nature of the proposed action. Notice and comment procedures may be most appropriate where rule-making is concerned, whereas public inquiries might be most appropriate for other administrative action which is likely to be controversial or otherwise be of great interest to the public. The terms of section 4(1) are sufficiently broad and flexible to encompass various other sorts of procedure, including negotiated rule making.

As is explained more fully below (in the section on judicial review), the administrator's choice whether to engage in any participatory procedure is not reviewable since it does not amount to 'administrative action'. The 'duty' to consider using any of the procedures is therefore unenforceable. If an administrator chooses to use a particular procedure, however, it will be held to the requirements laid down in the rest of section 4 and in the regulations promulgated under the Act.

#### D. Ombudsmen

An ombudsman is usually conceived of as an independent, high-level public official who has the task of receiving complaints relating to corruption and maladministration, of investigating them and of making recommendations for remedying them. South Africa has two institutions answering to this description. Both are 'state institutions supporting constitutional democracy' established in terms of chapter 9 of the Constitution.

- The first is the Public Protector, an office regulated by the Public Protector Act 23 of 1994. The Public Protector is empowered to investigate (either on receipt of a complaint or on the incumbent's own initiative) allegations of improper conduct in the public administration or in any sphere of Government. The Public Protector is empowered by the Constitution to report on the conduct in question and may also take appropriate remedial action.
- The second institution is the Auditor-General, an official required by section 188 of the Constitution to 'audit and report on the accounts, financial statements and financial management' of a very wide range of governmental departments and institutions at national, provincial and local levels. The functions and conditions of service of the Auditor-General are treated in detail in the Auditor-General Act 12 of 1995.

Section 181 of the Constitution requires both institutions to be independent, and demands of other organs of State that they provide assistance and protection 'to ensure the independence, impartiality, dignity and effectiveness of these

institutions'. Both institutions are accountable to the National Assembly and must report to that body on their activities at least once a year.

### E. Access to Information

South Africans acquired a right of access to information for the first time by virtue of section 23 of the interim Constitution. It was a significant development, particularly since the pre-democratic era was characterised by the Government's reluctance to part with information. The right is now contained in section 32 of the 1996 Constitution, whose operation was (like that of section 33) suspended pending the enactment of national legislation to give effect to the right. Section 32 allows for access to information in private as well as in State hands, but on different terms. While everyone has a right of access to 'any information held by the state', any information that is held by another person is accessible only if it is 'required for the exercise or protection of any rights'. Section 32 also allows the national legislation to provide for 'reasonable measures to alleviate the administrative and financial burden on the state'.

The national legislation required by section 32 was enacted as the Promotion of Access to Information Act 2 of 2000. It governs the procedure for requesting records from public bodies as well as private ones. Certain records are exempt from the Act, such as those of the Cabinet and of Courts when exercising their judicial functions (see Chapter 14. VII.).

## VI. JUDICIAL REVIEW

### A. Several Routes to Judicial Review

In the pre-democratic era South African administrative law knew only two types of judicial review: a general power of review in terms of the common law, and special statutory review, that is, provision in particular statutes for judicial review on specified grounds. In the democratic era the picture is much more complex. As far as the review of *public* power is concerned:

- the main route to judicial review is now review in terms of the Administrative Justice Act;
- direct constitutional review in terms of section 33 of the Constitution would be an option only in exceptional cases: typically when it is argued that a provision in the Act does not faithfully give effect to section 33.

Importantly, review under the Act (as with review under section 33 itself) is available only if the action under review qualifies as ‘administrative action’. If the action does not so qualify, two other ways of reviewing the exercise of *public* power are:

- review in terms of the constitutional principle of legality (where the grounds of review would be more limited and less searching than under the first two options above); and, as in the past,
- special statutory review on whatever grounds of review happen to be provided by the particular statute in question.

As far as *private* power is concerned:

- review on common-law grounds is still available. An example of its application would be where a private club exercises disciplinary power over one of its members in terms of the contract between them.

## B. The Concept of Administrative Action

As indicated above, action must qualify as ‘administrative action’ before it can be reviewed in terms of the Act. The definition of administrative action in section 1(i) of the Act is unfortunate, however, in that it is both unnecessarily complicated and very narrow – features which may make it susceptible to constitutional challenge in future. The provision reads as follows:

“[A]dministrative action” means any decision taken, or any failure to take a decision, by –  
(a) an organ of state, when –  
    (i) exercising a power in terms of the Constitution or a provincial constitution;  
    (ii) exercising a public power or performing a public function in terms of any legislation; or  
(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision,  
which adversely affects the rights of any person and which has a direct, external legal effect . . .”

A list of nine exclusions follows the definition. The first five of these are an attempt to capture the approach of the Constitutional Court in the years before the enactment of the Administrative Justice Act, when in several important

judgments<sup>4</sup> it distinguished administrative action from executive, legislative and judicial action. These exclusions encompass executive powers and functions at national, provincial and local levels, legislative functions at all three levels, and judicial functions. In accordance with the approach of the Constitutional Court, the wording of the Act suggests that what is decisive is not the functionary but the nature of the particular function. Thus it is possible for a Judge to perform administrative action (when issuing a warrant, for example) despite being a member of the judiciary.

The four remaining exclusions are:

- decisions to institute or continue a prosecution (thus implying that decisions *not* to prosecute *may* amount to administrative action);
- decisions relating to appointment of Judges by the Judicial Service Commission;
- decisions taken under the Promotion of Access to Information Act 2 of 2000 (which are subject to special statutory review in terms of that statute), and
- any decisions taken under section 4(1) of the Administrative Justice Act.

The definition of administrative action contains several key terms such as ‘decision’ and ‘empowering provision’. Some of these terms are themselves defined in the Act, and these additional definitions introduce further significant elements. For example, the definition of a ‘decision’ indicates that only decisions ‘of an administrative nature’ will qualify. A further complication is some rather haphazard borrowing from Australian and German federal law. The definition of ‘decision’ comes from an Australian statute, the Administrative Decisions (Judicial Review) Act of 1977, while the concept of ‘direct, external legal effect’ is unknown in our common law and was borrowed from the German Federal Law of Administrative Procedure. The inclusion of the Australian definition is not particularly helpful, since it is so wide as to be almost meaningless: it includes decisions of every conceivable kind whether they are ‘made, proposed to be made or required to be made’. The German addition makes things even

<sup>4</sup> The most significant judgments are those in *Fedsure Life Assurance Ltd v. Greater Johannesburg Transitional Metropolitan Council* 1998 (2) SA 374 (CC); *President of the Republic of South Africa v. South African Rugby Football Union* 2000 (1) SA 1 (CC) and *Pharmaceutical Manufacturers Association of SA: In re Ex parte President of the Republic of South Africa* 2000 (2) SA 674 (CC).

more confusing, since ‘direct’ seems to introduce a requirement of finality. Thus the Act seems to contemplate contradictions such as final decisions that are yet to be made.

Although the Act generally defines administrative action very narrowly, it is generous in acknowledging that administrative action may be performed not only by organs of State but also by natural and juristic persons. In accordance with this, the definition of an ‘empowering provision’ is not confined to legislation but also encompasses ‘an agreement, instrument or other document’ in terms of which the action was taken. Action taken in terms of a contract could thus amount to administrative action, provided of course that the power being wielded or the function being performed is of a public nature. The real difficulty lies in determining what makes a power or a function ‘public’. In this regard, a case decided by the Supreme Court of Appeal<sup>5</sup> (before the Act came into force) established that an administrator’s cancellation of a contract on the ground of fraud did not amount to the exercise of a public power, and was thus not administrative action. The administrator was not acting in terms of its statutory powers in cancelling the contract, and furthermore was not acting from a position of superiority or authority – it was no stronger position than if it had been a private institution.

One of the most problematic parts of the definition in the Act is the reference to action ‘affecting rights’. The reference to ‘rights’ was the product of a clear decision on the part of the legislature not to include the broader term ‘interests’ or the intermediate term ‘legitimate expectations’, both of which had appeared in a draft of the Act. The main question is in what sense such rights must be ‘affected’. This raises an unresolved debate in South African law between the ‘deprivation’ theory, which says that rights are affected only if they are violated or abolished; and the ‘determination’ theory, which sees rights as being affected even by action that merely establishes or determines what a person’s rights are. The potential effects of adopting one theory or the other are well illustrated by the example of an application for a licence. The applicant has no right to the licence until the licence has actually been granted. The application for the licence would thus amount to administrative action in terms of the determination theory, but not in terms of the deprivation theory. Only the withdrawal of the licence or a refusal to renew it would count as ‘deprivation’.

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<sup>5</sup> *Cape Metropolitan Council v. Metro Inspection Services Western Cape CC 2001 (3) SA 1013 (SCA). See also *Logbro Properties CC v. Bedderson NO* 2003 (2) SA 460 (SCA), [2003] 1 All SA 424 (A).*

The adoption of the deprivation theory would seem to exclude all decisions relating to applications for licences, permissions, concessions or benefits (including jobs) – that is, where the applicants generally have no right to what is being applied for, but merely an interest in the outcome of the application. The Act would then fail to apply to a vast category of persons who are subject to administrative decision-making. On the other hand, the determination theory might impose an intolerable burden on administrative agencies by casting the net of administrative action too widely. It is not entirely clear which way our Courts will lean in future, but the existing jurisprudence suggests that they may well favour the deprivation approach coupled with (and softened by) a generous reading of ‘rights’. In other words, the ‘rights’ in question may be taken to include one’s constitutional rights generally, and possibly even the right to administrative justice itself. This was the approach adopted by the Supreme Court of Appeal in a case decided before the Act came into force. The matter involved a request for reasons for a bidder’s failure to win a tender to supply gold watches. Here the unsuccessful bidder’s rights to lawful and fair administrative action in the transitional administrative justice provision (essentially section 24(a) and (b) of the interim Constitution) were held to entitle it to its right to reasons (essentially section 24(c) of that Constitution).<sup>6</sup> The majority of the Court reasoned that if the bidder were not given reasons for its failure to be awarded the tender, the bidder would have no way of knowing whether its rights to lawful and fair administrative action had been violated.

### C. Judicial Review and the Principle of Legality

Even if one adopts a generous approach to rights, the definition of administrative action in the Act remains a rather parsimonious one and has attracted considerable criticism for this reason. Some commentators take the view that the Act may be unconstitutional for its failure to ‘give effect to’ section 33 of the Constitution, since so much is excluded from the purview of the Act. However, it is important to appreciate that our administrative law no longer applies in the all-or-nothing fashion that was so characteristic of the pre-democratic era. Even if the Act does not apply in a particular case, and even if special statutory review is not available, there remains a safety net in the form of the broad principle of legality. This principle of legality is part of the doctrine of the rule of law and is

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<sup>6</sup> *Transnet Ltd v. Goodman Brothers (Pty) Ltd* 2001 (1) SA 853 (SCA).

implicit in the Constitution. It applies to the exercise of all public power, including exercises that do not amount to administrative action. The principle has been held to require the holder of public power to act within its lawful powers, to act in good faith and not to misconstrue its powers. It has also been held to require rationality in the sense that a decision must be rationally related to the purpose for which the power was given. The principle of legality thus replicates some of the ‘regular’ administrative law contained in the Act, and it means that no exercise of public power is entirely immune from judicial scrutiny. However, the principle of legality is by no means as extensive or as searching as the many grounds of review to be found in the Act, and it is unlikely to become so in future.

#### D. The Grounds of Review

It is both appropriate and convenient to group the various grounds of review in the broader context of section 33(1) and (2) of the Constitution: the right to administrative action that is lawful, reasonable and procedurally fair, and the right to reasons for administrative action. Each of these areas is described briefly below, regard being had not only to the contents of the Act but also to the common law. As the Constitutional Court has made plain, the vast store of our common law will continue to inform the content of administrative law in the democratic era and will contribute to its future development. The common law will thus influence the interpretation of the various grounds of review listed in section 6 of the Act. It should also be noted that the non-specific or catch-all ground of review in section 6, which refers to action that is ‘otherwise unconstitutional or unlawful’, offers an explicit avenue for taking account of the common law as well as the body of constitutional law.

As one would expect, there are areas in which the pre-democratic common law and the new administrative law represented by the Constitution (and now by the Act) are not in harmony. In such cases the Constitution obviously takes precedence. Not only is it the supreme law, but section 39 of the Constitution actually enjoins Courts, when developing the common law, to ‘promote the spirit, purport and objects of the Bill of Rights’. In particular, the Constitution places great constraints on the legislature’s freedom to exclude judicial scrutiny and to decide what counts as lawful in a particular case – a freedom much exercised before 1994. ‘Ouster’ or privative clauses in legislation, for example, will amount to a violation of the right to lawful administrative action, and will have to be justified in terms of the limitation clause (section 36 of the Constitution).

### *1. Lawful administrative action*

The right to ‘lawful’ administrative action implies that administrative action must be authorised by law and that any statutory formalities, requirements or preconditions must be observed. The many common-law grounds of review that developed in response to the idea of lawfulness have been codified in the Act. They include grounds relating to lack of authority, unauthorised delegation of power, contravention of law, failure to comply with a mandatory and material procedure or condition prescribed by an empowering provision and the material influence of an error of law. The Act also lists grounds relating to what has traditionally been called ‘abuse of discretion’, which could equally well be treated as aspects of ‘reasonable’ administrative action. (As is generally the case with common-law systems of administrative law, the classification and arrangement of the grounds of review is not clear-cut matter. Much depends upon the personal judgment of the classifier.) Abuse of discretion would include cases in which administrative action has been taken:

- for an unauthorised reason;
- for an ulterior purpose or motive;
- in bad faith;
- arbitrarily or capriciously;
- where irrelevant considerations have been taken into account or relevant considerations not considered, or
- as a result of the unauthorised or unwarranted dictates of another person or body.

As is evident, this list is a rather comprehensive one that results in a considerable degree of overlap: a single piece of administrative action might easily fall foul of several grounds of review at once. Missing from the list is any specific mention of fettering of discretion, a ground of review that is very well established at common law. (Our case law is rich in examples of administrators who have fettered their discretion by rigid adherence to a policy or precedent.) However, it could simply be implied into the Act by means of the catch-all ground in section 6(2)(i).

A noteworthy feature of the Act is section 6(2)(g), which allows for review where ‘the action concerned consists of a failure to take a decision’. This ground is further elaborated in section 6(3), which distinguishes between two situations – where the law prescribes a period within which an administrator is required to act, and where there is no such period. In the first case, review proceedings may

be instituted for failure to take the action within the period, while in the second case, review will take place on the ground of unreasonable delay. In accordance with these provisions, special mention is made in section 8 of the Act of appropriate remedies in such cases, including orders directing the taking of administrative action. Such grounds are not new to our law, since it has always been possible to insist on action from a slow or reluctant administrator in terms of the common law. But the common-law basis for doing so has never been well known, whereas the statutory provision is both simple and accessible. Administrative tardiness and foot-dragging have become a serious problem in the democratic era, especially in the area of social welfare, and section 6(2)(g) may prove to be a very useful innovation.

It has already been noted that our democratic Constitution constrains the legislature's freedom to decide what counts as lawful in a particular case. A good example is the interpretation of subjectively phrased clauses, which were often used by the legislature in the pre-democratic era in order to limit the scope of judicial review. Expressions like 'if the administrator is satisfied that' and 'if in the administrator's opinion' were liberally used to ensure that compliance with the law depended on the administrator's idea of what was appropriate, and not on that of the Courts. The existence of a constitutional right to lawful administrative action means that the Courts are now entitled to satisfy themselves as to the lawfulness of administrative action, as opposed to accepting an administrator's opinion on the subject. Furthermore, there are Constitutional Court cases indicating that it is inappropriate for the legislature to confer wide and entirely unguided powers (subjectively phrased or not) on administrators. This is because such unfettered powers are more likely to result in the violation of rights, and facilitating such violation would be at variance with the duty on the State to 'respect, protect, promote, and fulfil' the rights in the Bill of Rights (section 7(2) of the Constitution).

## 2. *Reasonable administrative action*

In the pre-democratic era a rigid and artificial system of classifying administrative functions was used as a limiting device to ensure that the administration was not overburdened by the demands of administrative law and to give effect to the prevailing attitude of exaggerated deference to the executive branch of Government. The 'classification of functions' was applied with particular vigour in the areas of procedural fairness (dealt with under the next heading) and reasonableness. Thus the Courts applied three different tests to assess the reasonableness of administrative action according to whether the action could be classified as 'legislative', 'purely judicial', or 'purely administrative' in nature.

From the earliest days it was accepted that legislative action, or delegated legislation, could be set aside on grounds of discrimination, bad faith and oppressiveness, and also for vagueness or uncertainty. In such cases the Courts reasoned that Parliament could not have intended its delegated law-making powers to be exercised unreasonably. ‘Purely judicial’ action, by which was meant decisions characterised by the application of legal rules rather than policy, could be impugned if it was not reasonably supported by the evidence before the administrator (though this test became fully recognised only in 1976). Here the Courts reasoned that their own institutional competence to interpret rules justified them in their interference. But ‘purely administrative’ action could only be set aside if it were so grossly unreasonable as to allow an inference to be drawn of one of the traditional grounds of abuse of discretion – ulterior motive, *mala fides* or failure to apply the mind. This test of what came to be called ‘symptomatic unreasonableness’ applied in policy-laden areas such as licensing, transport, immigration, rent control and national security – in the majority of administrative situations, in fact. It reflected the Courts’ reluctance to confront unreasonableness directly and thus to risk usurping the role and expertise of the administration.

The constitutional era brought with it a great innovation in the form of a general right to reasonable administrative action. This has virtually done away with the practice of classifying functions – or at least of attaching significance to the labels used. However, the existence of a constitutional right to reasonable administrative action has tended to provoke widely varying responses from the Courts. Some have continued to rely on reasoning associated with symptomatic unreasonableness; others have asserted that the constitutional right to reasonable administrative action does away entirely with the distinction between appeal and review. As regards the meaning of the term ‘reasonable’ in section 33 of the Constitution, there is widespread agreement that it demands a degree of rationality. There is also considerable support, both amongst academics and in the Courts, for a component of proportionality. Rationality is understood as relating essentially to the structure of a decision, while proportionality has more to do with its effects.

Rationality is expressly listed as one of the grounds of review in section 6(2)(f)(ii) of the Administrative Justice Act. This provision allows for judicial review of administrative action that is not rationally connected to:

- the purpose for which it was taken;
- the purpose of the empowering provision;
- the information before the administrator, or
- the reasons given for it by the administrator.

This ground replicates the content of grounds that are familiar at common law, many of which are themselves listed elsewhere in section 6 of the Act (and dealt with under the previous heading), such as arbitrariness and ulterior purpose. However, the provision relating to rationality certainly encourages methodical and searching scrutiny of administrative action by the Courts.

The other provision in the Act that relates most obviously to unreasonableness is contained in section 6(2)(h). It provides for judicial review where administrative action ‘is so unreasonable’ that ‘no reasonable person’ could have taken it. This provision harks back to ‘symptomatic unreasonableness’ by suggesting that an egregious degree of unreasonableness is required before judicial review may take place. This is unfortunate, since a requirement of egregiousness is incompatible with a constitutional ethos that values the accountability of public officials. Furthermore, any action falling foul of this provision would be likely to fall foul of several other more specific grounds of review associated with lawfulness. Like its common-law counterpart in English law, *Wednesbury* unreasonableness, the test in section 6(2)(h) of the Act seems to set a standard that is too low to be of much use.

Another unfortunate feature of the Act is its deliberate failure to say anything about proportionality. The legislature in fact deleted a provision relating to proportionality just before passing the Act. However, such a ground could be read into the catch-all provision (‘otherwise unconstitutional and unlawful’) in section 6(2)(i) of the Act.

### 3. Procedurally fair administrative action

In common law, procedural fairness is better known as natural justice and it encompasses two well-known maxims: *audi alteram partem* (‘hear the other side’) and *nemo iudex in sua causa* (‘no-one should be the judge in his or her own cause’). *Audi alteram partem* has to do with providing a fair hearing, whereas the *nemo iudex* principle calls for an impartial decision-maker.

At the very least, a fair hearing entails adequate notice of impending action, being apprised of the information and reasons that underlie an impending decision, and an opportunity to make representations. A hearing before the decision is taken is always preferable, but a subsequent hearing may suffice where a prior hearing is impracticable. In addition, our law has always recognised that further elements such as an oral hearing, legal representation and a right to cross-examine may be required by the circumstances (such as the seriousness and complexity) of the particular case. The hallmark of the *audi alteram partem* principle is its flexibility.

The Courts have long since resolved a debate in our common law about the nature of the test for partiality or bias. While actual bias is of course outlawed, it is not necessary to establish the actual existence of bias; a mere appearance of partiality will suffice to impugn an administrative decision. The standard is a ‘reasonable suspicion’ of bias. It is understood that operative bias may arise from any source, but the categories of partiality particularly well established in our jurisprudence relate to financial interest, personal interest and bias on the subject matter (prejudice). Official or institutional bias is also recognised: there are cases in which officials have been judged as unable to be impartial owing to their allegiance to a particular governmental department.

In the pre-democratic era the practice of classifying administrative functions was employed to limit the application of both the *audi alteram partem* principle and the *nemo iudex* principle. A fair hearing and an impartial decision-maker were thus demanded only if the administrative action was of a ‘quasi-judicial’ nature – and not if the action were ‘administrative’ or ‘legislative’ in nature. A quasi-judicial decision was one that prejudicially affected an individual’s property, liberty or other ‘existing rights’. This meant that applicants for licences, permissions and benefits generally were not entitled to natural justice, since they could not establish that they had an existing right to the benefit being applied for. Rather, they had a mere interest in the application. Preliminary, advisory or investigative action also did not attract natural justice, since any existing rights would only be affected by the final decision. Even a decision to expropriate property did not entitle an expropriated party to a hearing where it was not directed against an *individual* but happened to affect the property rights of an entire community.

It is not surprising that in the 1980’s the Courts finally began to rebel against this brand of conceptualism by borrowing two ideas from English law. The first was a general and overarching duty to act fairly which would apply to all administrative action, but whose *content* was variable; and the second was the legitimate expectation doctrine, which recognised a sort of halfway house between existing rights and mere interests of the sort held by applicants. Today both of these ideas have become important features of the Administrative Justice Act. It should be noted, however, that legitimate expectations have so far attracted only procedural protection in our law, and not substantive protection.

Another reform dating from the early 1990’s was the recognition that procedural fairness should apply at least some of the time to administrative action of a legislative nature. This, too, has become a feature of the Act, albeit not a mandatory one. By means of section 33 of the Constitution and the provisions of the Act, South African administrative law has at last managed to rid itself of the

rigidity and stultification that characterised the law relating to procedural fairness in the past.

Section 6 of the Act contains two grounds of review dealing with fairness: one relating specifically to bias and one relating more generally to action that is ‘procedurally unfair’. The Act also contains provisions in sections 3, 4 and 5 that impose duties on administrators to proceed fairly and to give reasons. Thus section 3 imposes a duty to act fairly in relation to administrative action affecting individuals, section 4 governs fairness in administrative action affecting the public, and section 5 imposes a general duty to provide written reasons on request for administrative action. Sections 3 and 4 merit a brief description here, while section 5 will be dealt with separately at VI.D.4. below.

Section 3 states that administrative action which has a ‘material and adverse’ effect on the ‘rights or legitimate expectations’ of any person must be procedurally fair. Acknowledging that what fairness requires depends on the circumstances of each case, the section lists five mandatory requirements that may be tailored to the circumstances of the particular case. These are:

- adequate notice of the administrative action;
- a reasonable opportunity to make representations;
- a clear statement of the administrative action;
- adequate notice of any right of review or internal appeal, and
- adequate notice of the right to request reasons in terms of section 5.

In addition, the administrator is invited in section 3(3) to consider giving further procedural opportunities to obtain assistance and, in serious cases, legal representation; to present and dispute information and arguments, and to appear in person. These are discretionary rather than mandatory features, and will again depend on the circumstances of each case.

In the light of its enthusiastic reception by our Courts, one would naturally expect a reference to the doctrine of legitimate expectations somewhere in the Act. The reference appears in section 3 – thus mitigating what would otherwise be a rights-based approach sadly similar to that of the pre-democratic era. But the reference is problematic in light of the narrow definition of administrative action in section 1 of the Act. That section requires administrative action to affect *rights* adversely. (As noted earlier in this chapter, the terms ‘interests’ and ‘legitimate expectations’ were deliberately deleted from section 1.) It is of course a logical contradiction to include legitimate expectations in section 3 when they are not referred to in section 1. Action only qualifies as administrative action if it affects rights, so by definition there is no such thing under the Act as

‘administrative action which adversely affects the rights or legitimate expectations of any person’ (section 3(1)). Put simply, section 3 provides that action not covered by the Act is nevertheless required to be fair. This is a puzzle that has yet to be solved by the Courts.

Section 4 is directed at situations where administrative action materially and adversely affects the rights of ‘the public’, which is defined in section 1 to include a group or class of the public. Section 4(1) requires administrators to decide whether to hold a public inquiry, to hold a notice and comment procedure, to do both, to follow a different but fair procedure laid down in any other empowering provision, or to follow any other appropriate procedure which is fair. Subsection (2) then lays down general requirements in respect of public enquiries – which must include a public hearing – and subsection (3) does the same in relation to notice and comment procedures. As already noted, action taken in terms of section 4(1) is expressly excluded from the definition of ‘administrative action’ in section 1 of the Act. Since the Act, and therefore judicial review, applies only to ‘administrative action’, this means that the initial duty imposed by section 4(1) cannot be judicially enforced. Use of a public inquiry or a notice and comment procedure is thus entirely optional. However, an administrator that has chosen to embark on a public inquiry or a notice and comment procedure may be held to the procedures laid down in subsections (2) and (3).

Apart from the fact that section 4(1) is not enforceable, there are two other ways of lessening or escaping altogether the duties imposed in sections 3-5 of the Act. First, each of these sections allows for departures from their provisions where it is reasonable and justifiable in the circumstances, and with reference to factors such as the nature, purpose, likely effect and urgency of the administrative action. Secondly, section 2 of the Act makes provision for the Minister of Justice, with the approval of Parliament, to grant exemptions from or permissions to vary the requirements of those sections. It is not easy to see why it was thought necessary to supply so many escape routes, particularly in relation to section 3 – whose requirements are intrinsically flexible – and section 4, whose initial requirements are entirely voluntary. However, in practice it seems that the Minister’s permission is likely to be granted under section 2 only in rare cases.

#### 4. Reasons for administrative action

The giving of reasons is an important aspect of procedural fairness. This is recognised in section 3 of the Administrative Justice Act, which says that one of the basic requirements of fairness is giving notice of the right to reasons. But the giving of reasons is dealt with separately in section 33(2) of the Constitution, and

perhaps deserves to be treated separately here. Certainly it is an especially significant and noteworthy innovation in South African administrative law. Before 1994 the common law sometimes required reasons to be given in particular circumstances, such as in the case of arrest, and sometimes legislation required reasons in certain cases. In addition, the Courts would occasionally draw an adverse inference from a failure to give reasons even in the absence of an express duty to give them. However, there was no general right to reasons for administrative action.

Section 33(2) of the Constitution gives a right to written reasons where *rights* have been adversely affected by administrative action. This provision contrasts with section 33(1), which is not similarly unqualified. The requirement of rights is found again in section 5 of the Act. As we have seen, however, a case decided by the Supreme Court of Appeal under the transitional provision gives ‘rights’ a very wide meaning, and indeed seems to imply that the right to reasons in section 33(2) will apply automatically to anyone to whom the right in section 33(1) applies.<sup>7</sup> On this approach the right to lawful, reasonable and fair administrative action inevitably entitles one to the right to reasons, since the section 33(1) right will always be adversely affected by a failure to give reasons.

Section 5 of the Act describes a request-driven procedure applying to persons whose rights have been materially and adversely affected by administrative action. If such a person has not already been given reasons for the action, he or she has 90 days within which to request written reasons from the relevant administrator. The administrator then has a maximum of 90 days in which to furnish ‘adequate’ reasons. In the case of a failure to provide reasons, a Court is entitled to presume that the action was taken without good reason. As with sections 3 and 4, the administrator may depart from the requirements of section 5 if it is ‘reasonable and justifiable’ to do so having regard to certain factors, and it may also follow a procedure that is ‘fair but different’. Finally, the Minister is empowered to publish lists indicating classes of administrative action in respect of which reasons will be given automatically.

## E. Standing

In South African law, any litigant requires *locus standi in iudicio* or ‘standing’ in order to litigate. This is partly a matter of capacity to litigate, and partly a matter of being able to demonstrate a legally recognised interest in the litigation.

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<sup>7</sup> See n. 6 above.

At present there is a degree of contradiction in our law between the sort of interest that will qualify at common law and the more relaxed rules introduced by the Constitution in this regard.

The common-law rules require a sufficient, personal and direct interest in the matter, which implies considerably more than just a concern with legality. An applicant for judicial review must be personally affected by the offending conduct in the sense that his or her rights are being infringed or his or her financial interests prejudiced. Some cases have imposed an even stricter requirement of ‘special damage’, meaning that if members of a class are all affected then the would-be litigant has to demonstrate damage over and above that sustained by the rest of the class. At common law, the *actio popularis* (action for the people) is obsolete and it has not been possible to sue on behalf of others except in rare and well-defined cases. The requirements for standing have tended to be applied strictly and have often prevented deserving cases from receiving the attention of the Courts.

Section 38 of the Constitution introduces an entirely different approach whenever a right in the Bill of Rights is being vindicated. The provision reads as follows:

‘Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights.

The persons who may approach a court are—

- (a) anyone acting in their own interest;
- (b) anyone acting on behalf of another person who cannot act in their own name;
- (c) anyone acting as a member of, or in the interest of, a group or class of persons;
- (d) anyone acting in the public interest; and
- (e) an association acting in the interest of its members.’

The result is that very generous terms apply to litigants who wish to defend fundamental rights. In cases not involving the Bill of Rights, however, the far stricter common-law rules continue to apply – and will do so until those rules are brought into line with the Constitution. Section 39(2) of the Constitution demands that Courts and tribunals promote the ‘spirit, purport and objects’ of the Bill of Rights whenever they interpret legislation or develop any aspect of the common law. As the Constitutional Court has made clear, this ensures that the common law will evolve within the framework of the Constitution.

As far as administrative law is concerned, applicants for judicial review under section 33 of the Constitution or under the Administrative Justice Act must be equally able to enjoy the benefits of section 38. A reference to section 38 in the Act itself would have put the matter beyond doubt. However, the legislature's deliberate decision not to refer to the section cannot change the fact that the Act 'gives effect to' the constitutional right and thus entails the indirect application of the constitutional right. On the other hand, applicants not seeking to vindicate a right in the Bill of Rights, and most notably those seeking review in terms of the common law, will be subject to the common-law rules of standing.

## F. Remedies and Procedures

Judicial review of administrative action has in the past always been available as an incident of the inherent jurisdiction of the various divisions of the Supreme Court – now the High Courts – to set aside or correct administrative action in terms of common-law grounds of review. At common law the main remedy is 'setting aside', which means declaring the administrative action invalid and (usually) remitting the matter to the administrator for reconsideration. 'Correcting', or substituting the Court's own decision for that of the administrator, is also an important common-law remedy, though the Courts' respect for the distinction between appeal and review means that they will use this power only occasionally. Other common-law remedies include interdicts, both mandatory and prohibitory, and declaratory orders.

Today, for the most part, judicial review takes place on statutory grounds under the Administrative Justice Act. (If the Act were repealed, review would take place in terms of section 38 of the Constitution.) Section 8 of the Act includes all the remedies familiar in our common law and adds a few less familiar ones, such as a new remedy for the failure to give reasons and specific remedies connected with the 'new' ground of unreasonable delay contained in section 6(3). It also allows for the payment of compensation, but only in exceptional cases – proceedings for review are not well suited to claims for damages, which should rather be brought in delict or contract. A Court is not restricted to the list of specific remedies, but has the power in terms of section 8(1) to grant any order that is 'just and equitable'.

The Act envisages something entirely new to our law, which is that review powers may be exercised not only by High Court Judges but also by specially designated magistrates. The Promotion of Administrative Justice Amendment Act 53 of 2002 has introduced a new section 9A into the principal Act regarding the designation and training of magistrates for this purpose. Furthermore, new

procedural rules have been drawn up to replace the old High Court procedure contained in Rule 53 of the Uniform Rules.

Section 7 of the Act deals with two important procedural issues relating to the timing of judicial review. Section 7(2) states that review may not take place ‘until any internal remedy provided for in any other law has first been exhausted’, but allows a Court to exempt an applicant from the duty to exhaust such internal or domestic remedies ‘in exceptional circumstances’. Section 7(1) requires review proceedings to be brought without unreasonable delay, and in any event not later than 180 days after internal remedies have been exhausted. Where there are no such remedies, the period begins to run from the date on which the applicant was informed of the action or might reasonably have been expected to become aware of it. The common-law rules in this regard are much less demanding – review proceedings must simply be brought without unreasonable delay, and the duty to exhaust domestic remedies is a weak one. The more stringent requirements laid down in the Act are thus controversial and, some commentators believe, unconstitutional.

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# *Chapter 4*

## **Family Law**

***Brigitte Clark\****

### **I. INTRODUCTION**

#### **A. Constitutional and International Influences**

The Constitution of the Republic of South Africa, Act 108 of 1996 with its entrenched Bill of Rights has had and will continue to have a profound impact upon the development of South African family law. Not only does it require the Courts to interpret political, social and economic constitutional rights in a manner that gives effect to the broad purpose of a constitutional and democratic order, but it also demands that legislation should be implemented in a way that promotes the spirit, purport and objects of the Bill of Rights.<sup>1</sup> The inclusion of children's rights at the constitutional level has already provided many opportunities for constitutional litigation. Another important factor affecting South African family law is the ratification by the South African Government of a number of international conventions. In June 1995, South Africa ratified the United Nations Convention on the Rights of the Child (hereafter the CRC). This was followed by the ratification of the Hague Convention on the Civil Aspects of International Child Abduction, the Convention on the Elimination of All Forms of Discrimination Against Women as well as the African Charter on the Rights and Welfare of the Child.

The South African Courts, especially the Constitutional Court, have played a definitive role in utilising the right to equality enshrined in the Constitution to reinterpret some of the principles of family law so as to address past discriminatory practices. The listed grounds of discrimination include, *inter alia*, marital status,

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<sup>1</sup> S. 39(2).

sexual orientation, sex and gender, culture and religion. All of these grounds have begun to have a significant influence on the development of South African family law.

Moreover, legislation, such as the Employment Equity Act 55 of 1998 and the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, has further implemented these constitutional guarantees. These statutes suggested an extension of the listed grounds of discrimination so as to include the grounds of ‘family responsibility’ and ‘family status’.

## B. Diversity and Pluralism in South African Family Law

Diversity and divergence characterise South African family law. The Roman-Dutch based system of civil law operates as the mainstream law governing marriages and children of persons classified as white. The Recognition of Customary Marriages Act 120 of 1998 gave customary marriages equal status to civil marriages. There are separate rules regulating the lives of those living under customary law, which in some respects leave so-called ‘illegitimate’ children in a vulnerable position in so far as their inheritance rights are concerned, as illustrated in the decision of the Supreme Court of Appeal in *Mtembu v. Letsela*.<sup>2</sup> Persons married in terms of Muslim and Hindu rites unaccompanied by a civil law ceremony are also excluded from the civil system of family law. These persons are not treated as legal spouses or family members for the purposes of a number of South African laws. Law reform is in progress to address these problems and the formal recognition of such marriages has been recommended.<sup>3</sup> Furthermore, the Constitutional Court has displayed a sensitivity towards recognising the importance of the family, whilst not entrenching any particular form of family at the expense of another.<sup>4</sup>

<sup>2</sup> 2000 (3) SA 867 (SCA). Cf. a very recent landmark case, however, where the Cape High Court declared that male primogeniture in customary law was unconstitutional (unreported, see Legalbrief 7 October 2003). See also South African Law Commission, Issue Paper, *Succession in Customary Law* (April 1998); South African Law Commission, Project 90, Discussion Paper 93, *Customary Law: Succession* (August 2000).

<sup>3</sup> See South African Law Commission, Project 59, *Islamic Marriages and Related Matters Report* (July 2003). See also South African Law Commission, Project 59, Discussion Paper 101, *Islamic Marriages and Related Matters* (2002).

<sup>4</sup> See *Dawood, Shalabi & Thomas v. Minister of Home Affairs* 2000 (3) SA 936 (CC).

### C. Family Court System

The South African Courts dealing with family-related matters are fragmented. High Courts deal with many divorce and custody issues and have exclusive jurisdiction in respect of the Hague Convention matters. Divorce Courts at Regional Court level have jurisdiction to grant divorces and ancillary relief, but no jurisdiction to deal with maintenance, custody or access if not linked to a divorce action. Special Maintenance Courts deal only with claims of child and spouse support and special Children's Courts deal only with child welfare matters.

It is generally recognised in South Africa today that there is a need for a specialised Family Court system with jurisdiction to deal with all family-related issues. However, the South African Government, especially the Departments of Justice and Social Development, lack the funds to implement such a system and to train and equip the necessary staff. As early as 1983, a Commission of Enquiry into the Court structure proposed a Bill to create Family Courts manned by specialised judicial officers and enjoying specialised jurisdiction.<sup>5</sup> Although this Bill never became law, work continued on the establishment of a specialised Family Court – culminating in the abortive and disappointing enactment of the Magistrates' Courts Amendment Act of 1993 that was never brought into operation. Instead, in 1997, the special 'black divorce Courts' were deracialised by the amendment of the old Black Administration Act and opened to all races. These Courts became a component of five pilot Family Courts established mostly in large urban areas to provide integrated family law services to the public. In practice, this created a two-tier system of divorce adjudication with wealthier litigants making use of the High Courts (staffed by Judges) and poorer litigants proceeding by way of the Family Courts (staffed by magistrates).

The Maintenance Courts are by far the most extensively used Courts within the legal system dealing with family law. The problems of overcrowding, inefficiency and bureaucracy are well documented and the Constitutional Court has recently stated that the administrative problems within the maintenance system constitute a denial of the human rights of women and children.<sup>6</sup> Resources are urgently required to improve these facilities and the quality of South African legal remedies in this field.

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<sup>5</sup> First Hoexter Report: *The Commission of Enquiry into the Structure and Functioning of the Courts* (1985).

<sup>6</sup> *Ballantyne v. Ballantyne* 2003 (2) BCLR (CC).

Research at the University of Cape Town has established that the divorce rate in South Africa is as high as 50 per cent in some sectors of the population. Before a divorce can be granted, the Court must be satisfied that the arrangements for the children are either satisfactory or the best possible in the circumstances.<sup>7</sup> Where practicable, a consent paper incorporating arrangements agreed to between the parents is handed to the Court. The Court is not obliged to implement these arrangements and will usually refuse to do so where they are vague or undesirable on any ground. The Mediation in Certain Divorce Matters Act 24 of 1987 led to the introduction of the office of the Family Advocate into the South African legal system in 1990 with the primary purpose of identifying and establishing what is in the best interests of the children concerned. The function and duty of the Family Advocate is to investigate, report, and make recommendations regarding the welfare of children involved in divorce. The Family Advocate is assisted by family counsellors (who are usually qualified social workers), clinical psychologists, psychiatrists, educational authorities, ministers of religion and other persons with knowledge of the physical and spiritual needs or problems of the children and their parents or guardians. The function of these persons is to assist the Family Advocate in weighing up and evaluating all relevant facts and circumstances relating to the welfare and interests of the children concerned.

In divorce proceedings, family advocates, whose competence has, since 2001, been extended to include the Family Courts, may request the Court's permission to institute an enquiry and furnish the Court with a report and recommendations on any matter concerning the welfare of minor children. The plaintiff is required to submit a completed questionnaire to which the defendant may reply. Most arrangements are found to be *prima facie* satisfactory, although the Family Advocate may query them. The main criticism of this system is that the information contained in these forms does not facilitate a rational solution. There is no requirement that the defendant is to be present in Court to question statements made by the plaintiff and the plaintiff's replies are usually geared to obtain a divorce. Moreover, the Family Advocate is often over-worked and ill equipped to handle the complexity of many disputed custody cases. Research on disputed cases at the Center for Socio-Legal Research in Cape Town indicates that the process does not really involve a full investigation into the child's best interests. More often than not it is influenced by dubious assumptions by privately

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<sup>7</sup> Divorce Act 70 of 1979, s. 6(1)(a).

employed professional psychologists and other professionals as to what the Family Advocate is likely to consider as decisive to the welfare of the child.

In its *Review of the Child Care Act 74 of 1983*, the South African Law Commission<sup>8</sup> proposed a new Court structure, which is now embodied in a draft Children's Bill (2002). It envisages the establishment of a Child and Family Court at District Court level (similar to the present Children's Court but with expanded jurisdiction). This Court would have the power to deal with uncontested cases involving the assignment of parent responsibilities or rights as well as the restriction, suspension or termination of a person's parental responsibility and some other matters including certain specified contested matters. However, disputes involving parental responsibility or parental rights, contested paternity suits, serious child abuse allegations, cases with international ramifications, and disputes involving issues related to guardianship, would be reserved for the Court at the next level, namely the proposed Child and Family Court with regional jurisdiction. This Court would operate as a Court of Appeal as well as a Court of first instance for matters excluded from the lower Court. It is proposed that the High Court would continue to enjoy its existing jurisdiction in relation to child and family matters, but would serve mainly as an Appeal Court or referral forum from the District and Regional Child and Family Court for complex matters requiring a decision. Provision is also made for the use of lay forums and alternative dispute resolution mechanisms such as mediation and family group conferences and the resolution of issues in traditional customary structures.

## II. LAW OF PARENT AND CHILD

### A. New Concepts of Parenthood

The legal concept of parenthood has in the past been linked to the model of a nuclear family, consisting of father, mother and child. This no longer corresponds with the reality of many homes in South Africa, where social or psychological parenthood may be more common in an extended family or a family where a divorce has occurred. Furthermore, there is evidence that responsibility for children in South African society is increasingly being separated from social and biological parenthood, largely due to the HIV/AIDS crisis and the resultant

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<sup>8</sup> Project 110, (2002).

lack of parental care for children. This epidemic has had a catastrophic effect on South African family life. It is estimated that by 2005, more than one million children under the age of 16 would have lost their parents due to HIV/AIDS, and that by 2010, the number would have risen to more than two million. Non-biological parents will increasingly be required to fill the role of parent. In cases where there is no one at all to assume the role of biological, social or even psychological parent, the State will be obliged, in terms of its constitutional and international duties, to assume the role of provider. The epidemic also resulted in the rise of a new form of family in South African society, namely a family headed by children.

### **B. From Parental Authority to Responsibility – New Concepts of Guardianship**

The traditional reference to the parent/child relationship in terms of parental ‘power’ is presently not only outdated but also unhelpful to solve modern problems. Consequently, the recent South African Children’s Bill 2002 replaced the common law concept of parental power with the concept of parental responsibility. While acknowledging the diversity of family forms in South African society, the Children’s Bill also offers a new definition of ‘family member’. It includes any person who has parental responsibilities and rights in respect of a child and any other person with whom the child has developed a significant relationship based on psychological or emotional attachment.<sup>9</sup> Under these proposals, parental responsibility will include three core concepts: care of the child, contact with the child and acting as guardian of the child. The intention of the proposed Bill is to create the possibility of allocating different parts of ‘parental responsibility’ to different caregivers. Precedents for such an approach already exist in South African case law that recognises that more than one person may have parental rights and responsibilities.<sup>10</sup> The Courts also increasingly recognise that parenthood is more concerned with duties and responsibilities than with powers.<sup>11</sup> Furthermore, the Guardianship Act 192 of 1993 and South Africa’s ratification of the United Nations Convention on the Elimination of All Forms of Discrimination

<sup>9</sup> Children’s Bill 2002, s. 1(1).

<sup>10</sup> *Ex parte Kedar* 1993 (1) SA 242 (W); see also *P v. P* 2002 (6) SA 105 (N).

<sup>11</sup> See *V v. V* 1998 (4) SA 169 (C); United Nations Convention on the Rights of the Child, arts 5 and 18.

Against Women gave formal recognition to the fact that parental power vests equally in both parents of a child born in wedlock.

### C. The Best Interests of the Child and Competing Custody and Access Rights

The Constitution of South Africa enshrines the principle that a 'child's best interests are of paramount importance in every matter concerning the child'. Whilst there may be problems with the application of this essentially individualistic principle and its potential for conflict with customary law, it has been boldly utilised by the Courts in a number of cases. At first, after the enactment of the Bill of Rights, Judges tended to avoid engaging with the constitutional implications of this section,<sup>12</sup> apparently on the assumption that it was simply a declaration of the welfare principle.<sup>13</sup> However, in the past seven years, the Constitutional Court has, on the whole, developed a proactive approach to this principle<sup>14</sup> in order to justify a fairly expansive interpretation.<sup>15</sup> As such, it has been used to strike down legislation and to remedy unconstitutionality by expanding the scope of legislation.

Increasingly it would appear that the constitutionally enshrined 'best interests of the child' (although frequently an illusory concept in South Africa), rather than the parental right to custody, will be the major focus of the Court. In the past, custody of very young sons and daughters of all ages was awarded to the mother, unless there were convincing reasons not to do so: an application, thus, of the 'maternal preference rule'.<sup>16</sup> Under the Constitution, neither parent is deemed to be inherently more suited to be the custodian parent and undue weight given to the role of the mother will be branded as constitutionally outlawed discrimination.<sup>17</sup> It is increasingly recognised that maternity is no more than a

<sup>12</sup> See *J v. Commissioner of Child Welfare* [1996] 2 All SA 259 (W); *Klink v. Regional Court Magistrate NO* [1996] 1 All SA 191 (SE).

<sup>13</sup> *Krasin v. Ogle* [1997] 1 All SA 557 (W); *H v. R* 2001 (3) SA 623 (C).

<sup>14</sup> *Minister of Welfare and Population Development v. Fitzpatrick* 2000 (3) SA 422 (CC); *Fraser v. Naudé* 1999 (1) SA 1 (CC); *Belo v. Commissioner of Child Welfare, Johannesburg, Belo v. Chapelle* [2002] 3 All SA 286 (W).

<sup>15</sup> *Du Toit v. Minister of Welfare and Population Development* 2002 10 BCLR 1006 (CC).

<sup>16</sup> *Goodrich v. Botha* 1954 (2) SA 540 (A); *Madden v. Madden* 1962 (4) SA 654 (T).

<sup>17</sup> *Ex Parte Critchfield* [1999] 1 All SA 319 (W).

mere factor in the decision to serve the best interests of the child.<sup>18</sup> Although no provision is made for joint custody in the Divorce Act, it is settled law that a Court may grant joint custody to both parents of a child.<sup>19</sup>

#### **D. Homosexual Parenting**

South African Courts have already decided that it is unconstitutional to discriminate against gay or lesbian biological parents on the ground of their sexual orientation in relation to contact or access to the child. Consequently, a parent's sexual orientation does not preclude him or her from being awarded custody: the only criterion is whether such custody would be in the child's best interests in which value-judgments about a parent's sexual orientation should not play a role.<sup>20</sup>

In *Van Rooyen v. Van Rooyen*,<sup>21</sup> decided prior to the implementation of the interim Constitution, Flemming J used the fact that the non-custodial mother was a party to a lesbian relationship as a ground for restricting her access to the child. In a later case heard after the enactment of the South African Constitution, this decision was considered to be unduly restrictive of the mother's personal liberty.<sup>22</sup>

Although the Child Care Act provided for the adoption of children by single or divorced individuals, it did not allow unmarried couples to adopt jointly. In this context the Constitutional Court faced the constitutional challenge and developed a new concept namely the permanent, same-sex life partnership and clothed it with certain rights.

In *Du Toit v. Minister of Welfare and Population Development*,<sup>23</sup> one partner in a long-standing lesbian relationship had formally adopted two children. The couple then wanted to extend adoptive rights to both of them so as to protect their shared parenting role in respect of the children. The Constitutional Court struck down certain provisions of the Child Care Act 74 of 1983<sup>24</sup> and of the

<sup>18</sup> *Van Pletzen v. Van Pletzen* 1998 (4) SA 95 (O).

<sup>19</sup> See *Corris v. Corris* 1997 (2) SA 930 (W); *V v. V* n. 11 above.

<sup>20</sup> *V v. V* n. 11 above.

<sup>21</sup> 1994 (2) SA 325 (W).

<sup>22</sup> *Van Rooyen v. Van Rooyen* [2001] 1 All SA 37 (T).

<sup>23</sup> 2002 (10) BCLR 1006 (CC).

<sup>24</sup> Ss 17(a)(c) and 20(1).

Guardianship Act 192 of 1993<sup>25</sup> because it found that these provisions were unconstitutional in not allowing members of permanent same-sex life partnerships to jointly adopt children and assume equal guardianship, while permitting such powers to married couples who adopt. The Court pointed out that, upon termination of the relationship or upon the death of one of the partners, the other partner, if unrelated to the child, would have neither rights nor maintenance obligations towards the child. This would be regardless of the fact that the adoption was a ‘joint undertaking’ and that such partner may have, in all respects, been the primary caretaker of the child. Moreover, in the event of the breakdown of the relationship, the adopting parent (who is the child’s guardian) could also refuse access to his or her partner, even where both partners have raised and cared for the child. Excluding such partners from adopting children jointly was thus held to be in conflict with the principle of the best interests of the child enshrined in the Constitution. It was, furthermore, a limitation of the one partner’s right to human dignity in that it denied him or her due recognition and status as parent of the adopted child, even though he or she may have played a significant role in the child’s upbringing.

The effect of this decision is that such an adopted child is deemed to be the adopted child of both partners who share joint guardianship, which may then be exercised independently, except in respect of those matters for which the consent of both partners is required.<sup>26</sup> The Constitutional Court has thus further developed the concept of a same-sex life partnership.<sup>27</sup> Although such concept awaits comprehensive definition, it seems that some form of joint sharing of lives is required in the form of a physical, moral and spiritual community of life (a *consortium omnis vitae*),<sup>28</sup> which involves an element of dependency and a reciprocal duty of support.<sup>29</sup> In assessing whether such a relationship has been established, the Court must consider the length of the relationship, its exclusive nature, the existence of shared family responsibilities, the extent to which the couple was

<sup>25</sup> S. 1(2).

<sup>26</sup> Guardianship Act 192 of 1993, s. 1(2).

<sup>27</sup> This was commenced in *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 2000 (2) SA 1 (CC) and continued in *Satchwell v. President of the Republic of South Africa* 2002 (6) SA 1 (CC).

<sup>28</sup> See *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* n. 27 above.

<sup>29</sup> See *Satchwell v. President of the Republic of South Africa* n. 27 above.

recognised by friends and family as life partners, and the mutual provision made for the surviving partner after the death of the other. This list is not exhaustive and these factors are not necessarily decisive.

In a recent Constitutional Court case,<sup>30</sup> the constitutionality of certain provisions of the Children's Status Act 82 of 1987, dealing, amongst other matters, with the status of children conceived by artificial insemination, was challenged. The case involved two women applicants who, since 1995, had been partners in a same-sex life partnership. In 2001, one of the partners ('the birth mother') gave birth to twins who had been conceived by artificial insemination using male sperm obtained from an anonymous donor and female ova from the other partner ('the genetic mother'). Both women wished to be registered and recognised as the parents of the twins. There was no legal impediment for the woman who had given birth to the twins being registered as the mother of the twins.<sup>31</sup> However, the regulations and the forms provided for the registration of only one male and one female parent. As a result, the 'genetic mother' was unsuccessful in her attempt to be registered as a parent of the twins. The couple then sought an order requiring the Director General of the Department of Home Affairs to issue birth certificates to both the applicants in respect of each of the children reflecting their 'birth mother' as their mother and the 'genetic mother' as their parent. They also sought to have section 5 of the Children's Status Act declared unconstitutional for being inconsistent with rights entrenched in the Bill of Rights. The High Court granted both orders and decided that the surname of the children should be that of the genetic mother.

The couple then approached the Constitutional Court for confirmation of the order relating to section 5 of the Children's Status Act. They relied on the fact that section 5 unfairly discriminates against permanent same-sex life partners by not allowing the genetic mother the same rights as a married woman, namely to become a legitimate parent of the child.<sup>32</sup> They contended that the consequences of section 5 should be the same for permanent heterosexual life partners and for same-sex partners and that the words 'permanent same-sex life partner' should be interpreted as 'permanent life partner'. The Court, however, felt that that it

<sup>30</sup> *J & B v. Director General, Department of Home Affairs CCT 46/02 unreported.*

<sup>31</sup> See regulations under Births and Deaths Registration Act 51 of 1992, s. 32.

<sup>32</sup> S. 9(3) of the Constitution of the Republic of South Africa, Act 108 of 1996 prohibits the State from discriminating directly or indirectly against anyone on the ground of sexual orientation.

would be assuming legislative powers if it were to grant relief in a case so far remote from the matter at issue.<sup>33</sup> Instead, it made an urgent plea for comprehensive legislation to normalise relationships between gay and lesbian persons. It pointed out that it was not the Court's function to determine the details of the relationship between same-sex (or for that matter heterosexual) partnerships or the details of the relationship between any such partners and their children. Those are matters for the legislature to consider when drafting comprehensive legislation to regulate these relationships.

### **E. The Position of the Unmarried Father**

Constitutional litigation has inspired some revision of the position of unmarried fathers. One suggestion was that the new children's statute should provide for further improvements in an unmarried father's legal rights in respect of his child.<sup>34</sup> The present South African position is that an unmarried father neither has parental authority over an extra-marital child,<sup>35</sup> nor an inherent or a *prima facie* right to access.<sup>36</sup> Accordingly, if the mother of the child refuses access, he has to apply to the High Court under the Natural Fathers of Children Born Out of Wedlock Act 86 of 1997 for an access order.<sup>37</sup> Under this Act the father is now recognised as a 'third party in a special position' in relation to the child.<sup>38</sup> Although the unmarried father does not bear an evidentiary burden, the Court will have to be satisfied that custody, guardianship or access granted to the father would be in the best interests of the child.<sup>39</sup> In reaching a decision, the Court will take the following factors into account:

<sup>33</sup> In this respect the Court followed the dictum in *Satchwell v. President of the Republic of South Africa* n. 27 above.

<sup>34</sup> See South African Law Commission , Project 110, *Review of the Child Care Act 74 of 1983* (2002), par 8.5.2.4.

<sup>35</sup> *Bethell v. Bland* 1996 (2) SA 194 (W); *B v. S* 1995 (3) SA 571 (A).

<sup>36</sup> *B v. S* n. 35 above; *Fraser v. Naudé* 1997 (2) SA 261 (CC).

<sup>37</sup> A father married in terms of an Islamic marriage must also bring his application for access under this Act since such a marriage does not enjoy legal recognition at present: see *I v. S* 2000 (2) SA 993 (C). Reform of this area of the law, however, seems imminent.

<sup>38</sup> *Bethell v. Bland* n. 35 above.

<sup>39</sup> See *B v. S* n. 35 above; *Fraser v. Naudé* n. 36 above.

- the relationship between the father and the mother;
- whether there is any history of domestic violence between the parents of the child;
- the relationship between the child and the father, the mother and any other interested party;
- the effect of separation from his or her mother, father or any prospective adoptive parent on the child;
- the attitude of the child;
- the degree of commitment shown by the father towards the child as indicated by his contribution made towards the lying-in expenses of the mother, and
- any contribution to the maintenance of the child by the father.<sup>40</sup>

The Court will have regard to the nature of the relationship of the child with each of his or her parents and with other persons. Here the fact that the father, mother and child previously lived together as a family unit could be an important factor.<sup>41</sup> It will also consider the likely effect of any changes in the child's circumstances, for example a separation from either his or her parents or any other child or person with whom he or she has been living.<sup>42</sup>

This position, however, may be qualified by the promulgation of the new comprehensive Children's Bill (2002). As a forerunner of this Bill, the South African Law Commission recommended that certain categories of unmarried fathers should be granted automatic parental responsibility:

- where such father had acknowledged paternity of the child and supported such child financially;
- where he had cohabited with the child's mother for a period which amounts to not less than one year, or
- where he had cared for the child on a regular basis for not less than one year with the informed consent of the mother.

<sup>40</sup> Natural Fathers of Children Born out of Wedlock Act 86 of 1997, s. 2(6).

<sup>41</sup> See *T v. M* 1997 (1) SA 54 (A) at 58C; *B v. S* n. 35 above; *Chodree v. Vally* 1996 (2) SA 28 (W) at 32A.

<sup>42</sup> See *B v. S* n. 35 above.

In exceptional cases, for example where children have been conceived through rape or incest, the procedure would not be open to fathers.<sup>43</sup>

## F. Child Support and the Socio-Economic Rights of Children

Where parents cannot meet their obligations, the State's international and constitutional commitment to its children becomes especially significant in order to give effect to children's rights. In *Government of the Republic of South Africa v. Grootboom*,<sup>44</sup> the Court related this obligation to the implementation of the State's duty to devise within its available resources, a comprehensive and co-ordinated programme to realise the right of access to adequate housing for people who live in intolerable circumstances without any access to land and shelter. The Constitutional Court further considered the relationship between the general right to housing and children's right to shelter. The Court held that, as a result of the overlap between the provisions on the general right to housing and children's right to shelter, neither set of provisions should be interpreted as providing for the establishment of separate rights. The 'separate rights' approach would ultimately nullify the carefully constructed constitutional scheme for the progressive realisation of socio-economic rights, since the children's right to shelter is not subject to progressive implementation and available resources. This section did not generally create a direct claim upon the State by children in need. Such a right had to be interpreted in the context of the primary duty of parents to provide for their children. However, where children were orphaned or abandoned and without parents or families, the responsibility for implementing this right rests upon the State.

Currently 4.6 million children under the age of six and 12 million children under the age of 18 live in extreme poverty in South Africa. Just over half of the South African population earn less than \$2 per day, and about 12 million people are very poor, existing on under \$1 per day. This situation has been exacerbated by the impact of HIV/AIDS and there are reports of child-headed households with no access to food. The absence of effective measures to prevent mother to child transmission of the virus has meant that 30 to 35 per cent of babies born to HIV infected women are themselves infected.

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<sup>43</sup> Report of the South African Law Commission, Project 110, *Review of the Child Care Act 74 of 1983* (2002).

<sup>44</sup> 2001 (1) SA 46 (CC).

In January 2001, the South African Government at last agreed (tentatively) to the free treatment of HIV pregnant women and the provision of the anti-retroviral drug known as Nevirapine.<sup>45</sup> This was, however, only a pilot project in 18 pilot training centres that would reach only ten per cent of the population. In December 2001, the High Court ordered that the Government had a duty to provide Nevirapine to HIV-positive women giving birth in State institutions with the medical capacity to provide the drug. The Court also ruled against the present system of providing the medication only at certain pilot sites and ordered the Government to present an outline of how it planned to extend the provision of the medication to its birthing institutions countrywide. The State did not implement the order despite the convincing evidence that a comprehensive 'Mother to Child Transmission Prevention Programme' would save resources in the public sector when compared to the costs associated with the illness and death of HIV-positive children.

Against this High Court ruling, the Department of Health then lodged two appeals with the Constitutional Court in *Minister of Health v. Treatment Action Campaign*.<sup>46</sup> Anti AIDS campaigners, such as the members of the Treatment Action Campaign (TAC), accused the Government of deliberately hampering efforts to combat AIDS in South Africa, which has one of the highest number of persons infected in the world.

The Constitutional Court applied the test of reasonableness to determine whether the Government's programme was consistent with its obligation in terms of section 27 of the Constitution. The Court held that legislative action is insufficient: it has to be accompanied by appropriate, well-directed policies and programmes implemented by the Executive. It further held, as the *Grootboom* case highlighted, that accessibility to housing, health care, food, water and social security should be progressively realised through the provision of facilities and that only the available resources thereof dictate the pace.

The Court concluded that the Government's failure to develop a comprehensive extension of the 'Mother to Child Transmission Prevention Programme' could not be justified as either one of several legitimate policy choices or by the

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<sup>45</sup> The use of Nevirapine is approved by the World Health Organisation and has been registered by the Medicine Control Council in South Africa since 1998. Nevirapine had been demonstrated to halve the risk of mother to child transmission of AIDS. Moreover, the cost of providing Nevirapine is less than the cost of treating HIV positive children, especially after the offer by the manufacturer of a free supply for five years.

<sup>46</sup> (No 1) 2002 (5) SA 703 (CC), (No 2) 2002 (5) SA 721 (CC).

claim that resources are insufficient. The cost of Nevirapine was at that time negligible and the public health care sector had the capacity to extend the Programme, as was evidenced in the Western Cape Province which managed to reach 50 per cent of its population. The Court's decision followed the principles laid down in the *Grootboom* case, but avoided the critical question of just how far the Government has to go to achieve the progressive realisation of a socio-economic right.

## G. Children's Right to Autonomy

The focus of article 12.1 of the Convention on the Rights of the Child on the constitutional rights of children has highlighted the issue of child autonomy in taking decision for themselves. The most pertinent of these issues is whether a child under the age of 14 has the legal capacity to take independent medical decisions outside the area of abortion. The somewhat anomalous position has arisen that, in the area of abortion, the Choice on Termination of Pregnancy Act 92 of 1996, bestows total autonomy upon minors without any limitation on age<sup>47</sup> to terminate pregnancy without parental or guardian's consent.<sup>48</sup>

Apart from abortion, children under the age of 14 apparently have no legal capacity to consent to any medical procedure or operation. That leaves the decision as to appropriate medical treatment or procedures totally in the hands of the child's parents or guardians or the medical profession, who is under a professional obligation to act in the best interests of the patient. Children between 14 and 18 are competent to consent to any medical *treatment* without the consent of their parents.<sup>49</sup> However, they are still incompetent to consent unilaterally to the performance of an *operation* upon themselves.

Children above 18 are competent to consent to the performance of any medical procedure or operation upon himself or herself. Although 'children' under the Constitution (section 28(3)) are considered children up to the age of 18, they are legally considered to be minors up to the age of 21. Since the High Court is the upper guardian of all minors, it can always be approached to intervene if it considers that the child's best interests are not being adequately served.

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<sup>47</sup> S. 1(xi).

<sup>48</sup> S. 2(1)(a).

<sup>49</sup> Child Care Act 74 of 1983, s. 39(4)(a) and (b).

The South African Law Commission is currently considering the issue of children's competence in its *Review of the Child Care Act 74 of 1983*.<sup>50</sup> The Children's Bill (2002) envisages that each co-holder of parental responsibility may act unilaterally when exercising ordinary parental responsibilities and rights. However, in 'guardianship' issues such as consent to marriage, adoption, removal from the country, application for a passport and the sale or mortgage of property belonging to the minor, the consent of both holders of parental responsibility is required. In major decisions outside these areas, each bearer of parental responsibility is obliged to give due consideration to any views and wishes expressed by the child (depending on his or her age, maturity and stage of development) as well as by other bearers of responsibility. A major decision would include any decision affecting the health or medical treatment of the child.

## H. Corporal Punishment

It is arguable that the continued right of South African parents to inflict corporal punishment on their child is incompatible with the full implementation of the Convention on the Rights of the Child and probably violates rights contained in the South African Constitution. In *Christian Education SA v. Minister of Education*,<sup>51</sup> the Constitutional Court considered a law which prohibits corporal punishment in schools.<sup>52</sup> The crucial question was whether Parliament violated the rights of parents of children in independent schools which, in line with their religious convictions, had consented to the use of corporal punishment. Having accepted that corporal punishment was not inconsistent with any provision of the Bill of Rights, the Court found that Parliament had prescribed a blanket ban on corporal punishment as part of a comprehensive process of eliminating State-sanctioned use of physical force as a method of punishment. The outlawing of physical punishment in the school accordingly represented more than a pragmatic attempt to deal with disciplinary problems. The Court stated that the purpose of the measure would be disturbed if such punishment was condoned and the State's compliance with its duty to protect people from violence would be undermined. It did not, however, directly state that corporal punishment in the home was a contravention of constitutionally protected rights, but questioned whether or not the common law had to be developed 'so as to further regulate or

<sup>50</sup> Project 110 (2002).

<sup>51</sup> 2000 (4) SA 757 (CC).

<sup>52</sup> South African Schools Act 84 of 1996, s. 10.

even prohibit caning in the home'. Consequently, the constitutionality of the wide discretion bestowed upon parents to (even 'reasonably') chastise their children is questionable in the light of the constitutionally enshrined right to dignity, and the child's constitutional right to protection from abuse, neglect, maltreatment or degradation under the Constitution in section 28(1)(d).

The South African Law Commission<sup>53</sup> proposed that the Children's Bill should prohibit corporal punishment in the home by removing the common law defence of reasonable chastisement without expressly criminalising parents who physically chastise their children. When prosecuted for assault, parents or persons acting *in loco parentis* who physically abuse children would consequently be precluded from arguing that they were merely exercising their parental power to impose reasonable punishment upon the children. This proposal is intended to ensure that children's legal rights to protection from violence and abuse are clearly enunciated and not subject to case law interpretation. The beneficial psychological effect on the way children are treated at home should not be underestimated.

### III. ADOPTION

In an application for adoption, section 18(3) of the Child Care Act 74 of 1983 requires the Children's Court to compare the cultural and religious background of the child and of the natural parents with that of the proposed adoptive parent or parents. South African citizenship is no longer a requirement and all legal barriers to trans-racial adoptions have been removed.<sup>54</sup> However, both parents of a legitimate child must consent to an adoption. For the adoption of a child born out of wedlock, both the mother and the natural father must consent, provided that the natural father has acknowledged his parenthood in writing and has made his identity and whereabouts known. The Constitutional Court, in *Fraser v. Children's Court, Pretoria North*,<sup>55</sup> declared section 18(4)(d) of the Child Care Act that denied such a right to natural fathers, unconstitutional and the Act was amended by the Adoption Matters Amendment Act 56 of 1998. This Act also

<sup>53</sup> Project 110, Discussion Paper 103 (2002).

<sup>54</sup> See *Minister for Welfare and Population Development v. Fitzpatrick* 2000 (3) SA 422 (CC).

<sup>55</sup> 1997 (2) SA 261 (CC).

inserted a new section 19A in the Child Care Act, which provides that a natural father or mother should be notified by the other that he or she has consented to their child born out of wedlock being adopted. It also gives the natural father the opportunity to acknowledge paternity before an order for adoption of his extra-marital child is finalised. A child who is older than 10 and capable of understanding the meaning of his or her consent is also required to consent to the adoption.

#### IV. REPRODUCTIVE ISSUES: ARTIFICIAL INSEMINATION AND SURROGATE MOTHERHOOD

Under the common law, a child born as a result of the artificial insemination of an unmarried woman or of a married woman using the semen of a man other than her husband, was classified as extra-marital, even if the husband consented. This was changed in 1987 when the Children's Status Act 82 of 1987 (section 5) introduced fairly sweeping changes. The legal position at present is that, whenever the gamete or gametes of a third person have been used for the artificial insemination of the woman with the consent of both spouses, or permanent same-sex partners,<sup>56</sup> any child born as a result of such artificial insemination is deemed for all purposes to be the legitimate child of the consenting spouses or permanent same-sex partners. There is a rebuttable presumption that both persons have in fact granted their consent in this regard.

However, this principle does not apply in several 'exclusionary situations'. These are where an unmarried woman has been artificially inseminated or a married woman has been artificially inseminated with donor sperm without her consent or the consent of her husband. The child in question would be classified as extra-marital. The above rule does not apply further to an arrangement involving a 'pure' *ovum* donation<sup>57</sup> or a 'pure' embryo donation.<sup>58</sup> If either of these procedures is used, the legal status of the child born as a result will have to be determined in accordance with the common law. The South African Law

<sup>56</sup> See *J & B v. Director General, Department of Home Affairs* n. 30 above.

<sup>57</sup> This means the extraction of ripe *ova* from the ovaries of one woman using a laparoscopy procedure and the transfer of these *ova* into the uterus of another woman, followed by fertilisation of the *ova* through natural sexual intercourse.

<sup>58</sup> This refers to the flushing and transfer of an embryo that has been created by natural means through fertilisation *in vivo*.

Commission has recommended that the Children's Status Act 82 of 1987 (section 5) be amended to include these exclusionary situations.<sup>59</sup>

Since 1997, married as well as unmarried women have legal access to donor sperm and are legally permitted to undergo artificial insemination procedures.<sup>60</sup> Under the Children's Status Act 82 of 1987 (section 5(2)), there is no legal relationship between a child born from artificial insemination of a woman and the donor of the male or female gametes used for this procedure, except if the donor of the female gametes is the woman who gave birth to the child or the donor of the male gametes (semen) is married to such woman at the time of the artificial insemination. Strict confidentiality applies in that a donor's file may generally not be made available to any other person for inspection.<sup>61</sup> This provision arguably contravenes the basic right of children born of such procedures to have access to information about his or her genetic parents. The position of such a child is in sharp contrast to that of adopted children who do have access to their adoption records once they reach the age of 21.<sup>62</sup>

The South African Law Commission has recommended in the Children's Bill of 2002 (section 53(2)) that all legal ties between a child and a donor of gametes should be severed and that neither the recipient nor the child should have access to the information regarding the donor's identity. However, although no legal relationship is recognised, the Commission believes that children born as a result of artificial insemination procedures should have access to medical and biographical information concerning their genetic parents. The Commission therefore recommends that the confidentiality provisions in the Human Tissue Act 65 of 1983 be amended to allow children over 18 and born of artificial insemination access to such medical and biographical information.

With regard to surrogate motherhood, a distinction is usually drawn between full and partial surrogacy. 'Full' or 'gestational' surrogacy refers to the process where pregnancy is achieved through the implantation of an embryo 'created' by using the gametes of the commissioning person or couple or of donors (or of a combination of these persons). In such cases, the surrogate mother carries and gives birth to a child to whom she is not genetically related.

<sup>59</sup> See also *J & B v. Director General, Department of Home Affairs* n. 30 above.

<sup>60</sup> GN R1354 deleting reg. 8(1) of the Human Tissue Act 65 of 1983 and amending regs 5(d) and 9(e).

<sup>61</sup> Reg. 6(2)(e) of the Human Tissue Act 65 of 1983.

<sup>62</sup> Reg. 28(1)(b).

By contrast, ‘partial’ surrogacy refers to two situations:

- where the surrogate mother’s own *ovum* is fertilised (either naturally or through ‘artificial’ fertilisation) using the semen of the commissioning man or of a donor, or
- where the surrogate mother’s *ovum* is extracted, fertilised *in vitro* using the semen of the commissioning man or of a donor and the resultant embryo is replaced in her womb.

There is a lacuna in this area of the law and, as a result, the commissioning couple is left in a very precarious position. Although the Children’s Status Act 82 of 1987 was not intended to deal with surrogacy, the Act’s definition of ‘artificial insemination’ is broad enough to cover many of the procedures used to implement surrogacy agreements. Where the Act is applicable, the child will be deemed for all purposes to be the legitimate child of the surrogate mother and her husband, provided that both spouses consented to the ‘artificial’ insemination process. The persons whose semen and/or *ova* were used in the conception process have no rights, obligations or duties towards the child, even in a case of ‘full’ surrogacy. The only way in which the commissioning person or couple could become the legal parents of the child is by adopting such child or by applying to the High Court for a guardianship order. If the surrogate mother breaches the agreement and refuses to hand over the child to the commissioning person or couple, the South African Courts might regard the agreement as unenforceable on the grounds of public policy.<sup>63</sup>

The highly precarious position of the commissioning person or couple prompted an investigation by the South African Law Commission into the legal and other implications of surrogate motherhood. In 1995, its *Report* was referred to a parliamentary *ad hoc* select committee who agreed with the Law Commission that surrogacy should not be banned or criminalised but recognised and regulated by legislation. The committee, however, criticised the view of the Law Commission that surrogate motherhood should be restricted as an option to commissioning parents who are lawfully married and act jointly as a couple. The committee felt that refusal to allow single persons or unmarried couples to enter into surrogacy agreements should be based on empirical evidence that such persons are less capable of being parents and that bestowing parenthood on them is not in the best interests of the child. The committee concluded that single persons and unmarried couples should also be allowed to enter into a surrogacy agreement.

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<sup>63</sup> See however *J & B v. Director General, Department of Home Affairs* n. 30 above.

A certain degree of protection would be provided to the child by a compulsory screening process which would eliminate persons who are physically, psychologically or otherwise unfit or unsuitable to be commissioning parents. A further recommendation was that the High Court should scrutinise every surrogacy agreement.

To implement the vision of a single comprehensive children's statute, the South African Law Commission (Project 110 (2002)) has recommended that the provisions in the envisaged new Surrogacy Act on the status of children born of surrogacy should be mirrored in the new children's statute. It recommended that a distinction between full and partial surrogacy be maintained. For full surrogacy, the Commission recommended direct parentage between the child born of surrogacy and the commissioning parent(s) from the time of birth entitling the commissioning parent(s) to register the child immediately as theirs. For partial surrogacy, the Commission recommended a 'delayed direct parentage' model which would automatically allow the commissioning parent(s) to register the child as their child after a short period of grace of 60 days after the birth of the child. During this 'cooling-off period' the surrogate mother would have the right to change her mind and keep the child. Should the surrogate mother decide to keep the child, the commissioning parents would retain no rights in respect of the child.

The South African Law Commission thus favoured direct parentage for children born of both full and partial surrogacy. In full surrogacy, the child will go to the commissioning couple and will grow up with at least one genetic parent, which is not the case where the child goes to the surrogate mother. In partial surrogacy, the child will grow up with at least one genetic parent (either the surrogate mother or commissioning parent(s)). The Commission has also recommended in the Children's Bill of 2002<sup>64</sup> that children born of surrogacy should, like children born of artificial insemination, have access to medical and biographical information about their genetic parents when they reach the age of 18, but without identification of the genetic parents or the surrogate mother.

## V. MARRIAGE AND COHABITATION

### A. Marriage

The Constitution of South Africa has inaugurated an era dedicated to the recognition of diversity. As long as it is in accordance with the Constitution, marriages

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<sup>64</sup> S. 53(1) and (2).

and systems of personal and family law are granted full recognition irrespective of tradition or religion (section 15(3)). The statutory recognition of customary marriages,<sup>65</sup> the proposed legislation on the customary law of succession,<sup>66</sup> and the imminent recognition of Islamic marriages, confirm this diversity. Research by the South African Law Commission on possible legal recognition of domestic partnerships can also be seen as a recognition of family forms that are outside civil law marriages.<sup>67</sup> The unanimous Constitutional Court judgment in *Dawood v. Minister of Home Affairs*<sup>68</sup> further recognised that marriages and the family are social institutions of vital importance which have both public and private significance for the parties concerned.

In *Ex Parte Chairperson of the Constitutional Assembly: In re Certification of the Constitution of the Republic of South Africa, 1996*,<sup>69</sup> the Constitutional Court pointed out that the South African Constitution does not recognise a universal right to family life and marriage. Such a universal right could not be construed on the evidence that it was recognised in numerous international conventions and in the Constitutions of other countries. Furthermore, the Court found that diverse societies tend not to include such a right in their Constitutions for fear of constitutionalising one particular family form to the exclusion of others. By refraining from entrenching the right to family life, the framers of the Constitution have avoided difficult arguments about the protection of the nuclear or the extended family. Human dignity, freedom and equality will, according to the Constitutional Court, play an important role in the protection of marriage and family life and prevent arbitrary State interference in the right to marry or to establish and raise a family. The Court emphasised the important role of the right to dignity in this regard.

The common law defines marriage as ‘the legally recognized voluntary union for life of one man and one woman to the exclusion of all others, while it lasts’.<sup>70</sup> This definition is no longer an accurate description of a large percentage of marriages in South African law particularly since relationships have become increasingly serial and polygamous marriages enjoy some sort of recognition.

<sup>65</sup> Recognition of Customary Marriages Act 120 of 1998.

<sup>66</sup> Customary Law of Succession Bill, 1998.

<sup>67</sup> South African Law Commission, Project 118, *Issue Paper 17, Questionnaire* (2001).

<sup>68</sup> 2000 (3) SA 936 (CC).

<sup>69</sup> 1996 (4) SA 744 (CC) at para. 104.

<sup>70</sup> *Hyde v. Hyde & Woodmansee* (1866) LR [1 P&D] 130 at 133.

The spouses themselves determine many of the patrimonial consequences of marriage in accordance with the legal possibilities available to them. Over the past 20 years, matrimonial property law in South Africa has changed dramatically, largely as a result of legislative changes which began with the Matrimonial Property Act 88 of 1984. There are four different forms of matrimonial property in civil marriages:

- Spouses married under civil law without an antenuptial contract are generally married in community of property. This system is based on equal management and allows each spouse to deal with the property as he or she chooses. However, in order to protect one spouse against misuse of power by the other, each spouse requires the consent of the other in regard to certain important transactions.<sup>71</sup> The obvious advantage of this system is that the husband and wife share equally in each other's financial prosperity. However, they also share each other's financial hardships and possible insolvency and are also restricted in respect of their capacity to perform juristic acts in relation to the joint estate.
- Where the spouses sign a contract prior to the marriage in terms of which the marriage is to be out of community of property but with community of profit and loss. The husband and wife have separate estates, but there is also a common or joint estate which comprises all their assets and liabilities acquired during the marriage. The advantage is that the spouses do not share each other's pre-marital debts, but only share in each other's prosperity during their marriage. This form of marriage, however, seldom occurs in South African law.
- Where the spouses sign a contract prior to the marriage in terms of which the marriage is to be out of community of property and out of community of profit and loss. Prior to 1984, this was the standard form of antenuptial contract. In this matrimonial property arrangement, the estates of the husband and wife were entirely separate and each spouse administered his or her separate estate independently. A clear disadvantage was that a married woman who was not economically active usually did not share in the growth of her husband's estate.
- To combat this disadvantage, a fourth and by now the standard form of matrimonial property system was created, namely the marriage out of community of property and out of community of profit and loss, but with

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<sup>71</sup> Matrimonial Property Act 88 of 1984, s. 15.

the accrual system, made possible by the Matrimonial Property Act 88 of 1984. Upon dissolution of the marriage, the spouse whose separate estate has shown the smaller growth has the right to receive half of the difference between the growth in the estates of the two spouses. This form of marriage attempts to combine the freedom of action associated with a marriage out of community of property with the lack of liability for each other's debts. These benefits are augmented by certain beneficial elements of the marriage in community of property in that a spouse may share in the profit created by the other spouse. The calculation of the spouse's accrual only takes place on termination of the marriage.

## B. Cohabitation

Generally, sexual cohabitation has no status in South African law. The legislature has endowed cohabitation with certain legal consequences in a fairly piecemeal and inconsistent manner. As yet, there is no single statute that regulates cohabitation or addresses the consequences of its breakdown. The victims of the collapse of such relationships are largely without legal redress unless they can bring themselves under one of the statutes that offer limited protection. In this context, the Domestic Violence Act 116 of 1998 offers protection from domestic violence to all persons in domestic relationships, including persons of the same or opposite sex who live or have lived together in a relationship akin to marriage, whether married or not or unable to be married. Cohabitants are thus granted protection from domestic violence on the same basis as spouses.

Several other South African statutes,<sup>72</sup> supplemented by constitutional challenges in the Courts by the gay community,<sup>73</sup> have ameliorated the position of cohabitants. The constitutional validity of a provision of the Aliens Control Act 96 of 1991, which allowed the issue of an immigration permit to the spouse of a person who was permanently resident in South Africa, but did not extend it to a same-sex partner, was also successfully challenged.<sup>74</sup>

<sup>72</sup> See Lotteries Act 557 of 1997, ss 3(7)(a)(ii), 3(8) and 7(5); Basic Conditions of Employment Act 75 of 1997, s. 27(2)(c)(i); Road Traffic Management Corporation Act 20 of 1999, s. 10(2); Housing Act 107 of 1997, s. 8(6)(e)(iii)(a).

<sup>73</sup> See *Langemaat v. Minister of Safety and Security* 1998 4 BCLR 444 (T); see also *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 1999 (3) BCLR 280 (C), 2000 (1) BCLR 39 (CC).

<sup>74</sup> See also *National Coalition for Gay and Lesbian Equality v. Minister of Home Affairs* 1999 (3) BCLR 280 (C).

However, the general rule of South Africa law is that even longstanding cohabitation partnerships do not have any legal consequences unless the partners have formed a universal partnership.<sup>75</sup> Cohabitants do not automatically have property rights and the ordinary rules of contract have to be invoked to enforce rights. The parties to a cohabitation agreement may not contractually bind each other for household necessaries unless each has specifically been appointed the agent of the other<sup>76</sup> or if they are estopped from denying a contract of agency because they created the impression of being legally married. Generally, there is no reciprocal duty of support between heterosexual cohabitants during or after the termination of a domestic partnership by death or otherwise. A Court may not make an order for periodical payments during the joint lives of a cohabiting couple, unless it is for the benefit of the child of the person from whom payment is demanded. Nonetheless, the High Court has recently founded a duty of support in all senses between parties to a same-sex union who occupied a common home for more than a year. It also recognised that parties in a permanent, same-sex life partnership owe each other a reciprocal duty of support.<sup>77</sup>

There is generally no action for damages for loss of support against a third party who unlawfully causes the death of a domestic partner who has been supporting his or her partner. However, in *Amod v. Multilateral Motor Vehicle Accidents Fund (Commission for Gender Equality Intervening)*,<sup>78</sup> the Supreme Court of Appeal recognised a defendant's action for loss of support against a wrongdoer where the defendant was married to the deceased according to Hindu or Muslim rites. The Court laid down the following tests for establishing a duty of support:

- did the relationship between the deceased and the claimant give rise to a duty of support?;
- was such a duty legally enforceable?, and
- was the claimant's right to support worthy of protection by the law and justified by public policy?

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<sup>75</sup> See *Ally v. Dinath* 1984 (2) SA 451 (T).

<sup>76</sup> See *Thompson v. Model Steam Laundry Ltd* 1926 TPD 674.

<sup>77</sup> See *Langemaat v. Minister of Safety and Security* 1998 (3) SA 312 (T) at 316H-I; *Satchwell v. President of the Republic of South Africa* n. 27 above.

<sup>78</sup> 1999 (4) SA 1319 (SCA).

The South African Law Commission is investigating whether ‘established relationships between people of the same or opposite sex’ should be legally recognised and regulated. This is combined with a closely related investigation as to which rights, obligations and benefits require registration or marriage and which would depend on the existence of a domestic relationship only.<sup>79</sup>

In the interests of justice, it is desirable that legislation should regulate the fair distribution of assets on the breakdown of cohabitation, taking into account the economic position of the parties.<sup>80</sup> However, it is debatable in how far this should mirror the position of couples seeking a divorce. Applying a contractual model in respect of these relationships may not address the economic inequalities that are often prevalent between cohabiting South African women and men. Where same-sex ‘permanent’ partners wish to enter into marriage on the same basis as heterosexual partners, the denial of such status to same-sex partners would amount to unfair discrimination on the grounds of sexual orientation. This would not only be difficult to justify constitutionally, but would also constitute a violation of the constitutionally enshrined right to dignity.

## VI. DIVORCE AND ITS CONSEQUENCES

### A. Grounds of Divorce

Since the coming into operation of the Divorce Act in 1979, only two grounds for divorce have been recognised in South African law, namely irretrievable breakdown of the marriage, and mental illness or unconsciousness.<sup>81</sup> Both grounds embody the general principle that a marriage comes to an end when the core of the marriage relationship has ceased to exist. Irretrievable breakdown will generally, but not always, be caused by the conduct of one or both parties to the marriage, while mental illness or unconsciousness will obviously be due to circumstances beyond their control. A Court has no discretion to refuse a divorce where there is evidence that the marriage has broken down irretrievably.<sup>82</sup> However, the Court may postpone the granting of a decree of divorce if the possibility

<sup>79</sup> Project 118, *Issue Paper on Domestic Partnerships 17, Questionnaire*, (2001).

<sup>80</sup> See *J & B v. Director General, Department of Home Affairs* n. 30 above.

<sup>81</sup> Divorce Act 70 of 1979, ss 3-5.

<sup>82</sup> *Levy v. Levy* 1991 (3) SA 614 (A) at 622-625.

arises that the parties might become reconciled through marriage counsel, treatment or reflection, or if the Court is not satisfied that the interests of dependent and minor children have been properly safeguarded.<sup>83</sup> A Court may also refuse to grant a decree of divorce if it appears that, despite the order of civil divorce, one of the spouses, by reason of his or her religious beliefs, will not be free to remarry. The Court may require the spouse in whose power it is to have the religious impediment removed, to take all the necessary steps to dissolve the religious marriage and to remove the religious barriers to remarriage.<sup>84</sup>

The publication of proceedings in divorce actions is closely regulated by section 12 of the Divorce Act. The concern for over-regulation and consequent restriction of the press to report on divorce actions resulted in a recommendation by the South African Law Commission that the publication of such proceedings should lie in the discretion of the Judge making the order of divorce. In deciding on publication, the Judge should balance the interests of the parties and the freedom of the press.<sup>85</sup>

Although the Court has wide discretionary powers to determine the reasons for the breakdown, it must be satisfied that the parties' marriage has reached such a state of disintegration that there is no reasonable prospect that a normal marriage relationship can be restored. The cause of the breakdown is not significant but legislative guidelines have been laid down to assist the Court in determining a *prima facie* case for divorce.<sup>86</sup> Evidence of adultery is acceptable as proof of irretrievable breakdown of the marriage where the Court is convinced that as a result of the adultery, the plaintiff finds life with the defendant intolerable. Although a subjective test is generally applied, the Court might be more objective in determining reconciliation possibilities.

## B. The Proprietary Consequences of Divorce

Where the parties were married in community or property, whether before or after 1 November 1984, their joint estate will be divided equally between them, provided there is no forfeiture order. Such division is based on the principle that

<sup>83</sup> Divorce Act 70 of 1979, s. 6(1) and (2).

<sup>84</sup> Divorce Act 70 of 1979, s. 5A; see also *Amar v. Amar* 1999 (3) SA 604 (T).

<sup>85</sup> South African Law Commission, Project 114, *Publication of Divorce Proceedings Report: Section 12 of the Divorce Act* (2002).

<sup>86</sup> See Divorce Act 70 of 1979, s. 4(2).

the parties to a marriage in community of property are co-owners in undivided shares of the joint estate with the exclusion of certain assets.

Parties married after 1 November 1984 under the standard form of antenuptial contract, which excludes community of property, profit and loss, will share equally in the difference between the gains or accruals in their respective estates provided there has been no divorce settlement, forfeiture order, or prior division.<sup>87</sup> For marriages concluded before 1 November 1984 under an antenuptial contract by which the community of property, profit and loss, as well as accrual sharing in any form, are excluded, the Court may grant a redistribution order under section 7(3) of the Divorce Act. The redistribution order entitles the successful applicant to a share of the other spouse's estate, which would normally be precluded by the antenuptial contract. Under section 7(2) spousal maintenance may be utilised in the same way.

Previously, a South African Court could not grant a redistribution order in respect of a couple married in England without an antenuptial contract, even though the effect of such a marriage is the same as a South African marriage concluded prior to 1984 with an antenuptial contract. Legislation has now been amended to bestow the same power on a South African High Court as a competent Court of the foreign State concerned would have to order that assets be transferred from one spouse to the other. The party in whose favour the order is granted must have 'contributed directly or indirectly to the maintenance or increase of the estate of the other during the subsistence of the marriage. This could have been either by services rendered or expenses shared which would otherwise have been incurred in any other manner. The Court must be satisfied that it is just and equitable for the contribution to be taken into account before it can grant a redistribution order. Such a contribution need not be quantifiable in monetary terms and could include contribution as a homemaker.<sup>88</sup>

Recently the provisions of the Divorce Act regarding the redistribution order have been expanded to permit a spouse to share in the pension interest of the other spouse by deeming such interest to be an asset of the estate. A pension interest is that amount which a member of a pension fund would have received if he had resigned as a member of the fund on the date of divorce. The definition of a pension interest in the Divorce Act does not, however, refer to the right to a

<sup>87</sup> See Matrimonial Property Act 88 of 1984, s. 8.

<sup>88</sup> See *Beaumont v. Beaumont* 1987 (1) SA 967 (A) at 996-997; *Katz v. Katz* 1989 (3) SA 1 (A) at 15.

pension that has already accrued to the beneficiary. A Court is empowered to make an order that the part of the pension interest of the member to be assigned to the other party be paid out to him or her, and that an endorsement to this effect be made on the records of the relevant pension fund. Such funds need only be paid out when such benefits accrue to the member, and the member is not liable to pay interest on the amount from the date of divorce until the time the fund is paid out. The Court will not hesitate to exercise its inherent jurisdiction to order the pension fund to which the husband belongs to disclose to the wife the amount of the pension. However, the cases are divided on the issue of whether the pension benefit automatically forms part of the assets susceptible to division, or whether an application to this effect must be made specifically.<sup>89</sup>

The South African Law Reform Commission has proposed that the issue of the distribution of pension benefits should be dealt with in separate and specific legislation.<sup>90</sup> The Law Commission is also critical of the fact that shared pension benefits are calculated at present as if the husband had resigned from the fund at the time of divorce.<sup>91</sup> This prevents one spouse (usually the wife) from sharing in the husband's increased earning power.

The Court granting a divorce on the grounds of irretrievable breakdown also has the power to order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other.<sup>92</sup> The Court may order forfeiture only if it is satisfied that the one party will, in relation to the other, be unduly benefited. Factors to be considered are the duration of the marriage, the circumstances that gave rise to the breakdown of the marriage and any substantial misconduct on the part of either of the parties. Even so, a finding of substantial misconduct is not a *sine qua non* for the granting of a forfeiture order.<sup>93</sup> However, a forfeiture order may not be granted simply to equalise the differing contributions of the spouses.

<sup>89</sup> See *Sempapalele v. Sempapalele* 2001 (2) SA 306 (O); cf *Maharaj v. Maharaj* 2002 (2) SA 648 (D), which held that a pension interest should always be taken into account in the division of a joint estate, even where there was no reference thereto in the application.

<sup>90</sup> Project 112, *Sharing of Pension Benefits Report* (1999).

<sup>91</sup> *Ex Parte Randles: In re King v. King* [1998] 2 All SA 412 (D).

<sup>92</sup> Divorce Act 70 of 1979, s. 9.

<sup>93</sup> See *Wijker v. Wijker* 1993 (4) SA 720 (A).

### C. Maintenance for Children and Custodian Parents

The procedural mechanisms for claiming and enforcing maintenance have improved considerably since the implementation of the Maintenance Act 99 of 1998. However, the burden of instigating prosecution for failure to pay or instituting claims for increased maintenance still rests on the claimant (usually the woman). Poor and illiterate women suffer particularly in these circumstances as they may lack access to Courts and experience difficulty in understanding Court procedure. A reciprocal duty of support exists between spouses during the marriage, which may in some cases continue after death or divorce dissolves the marriage.

## VII. DOMESTIC VIOLENCE

### A. Legal Remedies

Although reliable statistics on the incidence of family violence are difficult to obtain, it is generally accepted that the levels of domestic violence in South Africa are unacceptably high. A Court survey of divorce files indicated that domestic violence occurs in almost 50 per cent of all divorce cases and it has been estimated that 30 per cent of South African women are subjected to such violence. The Domestic Violence Act 116 of 1998 attempts to offer such victims the maximum protection that can be afforded within legal constraints. This legislation defines domestic violence as ‘any controlling or abusive behaviour that harms the health, safety or wellbeing of the applicant or any child in the care of the applicant’. Behaviour that will constitute domestic violence, includes, but is not limited to:

- physical abuse or threat of physical abuse;
- sexual abuse or a threat of sexual abuse;
- emotional, verbal and psychological abuse;
- economic abuse;
- intimidation;
- harassment;
- stalking;
- damage to or destruction of property, or
- entry into the applicant’s residence without consent where the parties do not share the same residence.

‘Emotional, verbal and psychological abuse’ is in turn defined as:

‘degrading or humiliating conduct that includes but is not limited to . . . repeated insults, ridicule or name calling . . . repeated threats to cause emotional pain; or . . . the repeated exhibition of obsessive possessiveness or jealousy, which is such as to constitute a serious invasion of the applicant’s privacy, liberty, integrity or security’.

The Act defines ‘harassment’ as

‘engaging in a pattern of conduct that induces the fear of harm and includes but is not limited to . . . watching or loitering outside of or near the building or place where the applicant resides, works, carries on business, studies or happens to be; . . . repeatedly making telephone calls or inducing another person to make telephone calls to the applicant, whether or not conversation ensues; . . . repeatedly sending, delivering or causing the delivery of letters, telegrams, packages, facsimiles, electronic mail or other objects to the applicant’s home or work’.

The inclusion of stalking (‘repeatedly following, pursuing or accosting the applicant’) and intimidation (‘uttering, conveying or causing any person to receive a threat which induces fear’) is significant.

The Domestic Violence Act makes provision for the granting of an interim protection order upon application to a Magistrate’s Court. The respondent has the opportunity to appear on a return date. If the respondent does not appear, the interim order is confirmed. The Domestic Violence Act, in addition, provides for the protection of children by extending *locus standi* to them. The Act also recognises the need for effective liaison between domestic violence Courts and other Courts dealing with maintenance, custody and access issues. It grants the Court the power to deny or impose conditions on the respondent’s contact with any child if it is indicated that such contact is contrary to the child’s best interests. However, in *Andrews v. Naradien*,<sup>94</sup> the Court held that orders concerning access to a minor child by the Magistrate’s Court can only be made if ancillary to a protection order under section 7(1) of the Domestic Violence Act.

The remedies provided by the Domestic Violence Act unfortunately appear to be inadequate to combat domestic violence effectively. Frequently, the victims

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<sup>94</sup> 2002 (1) SACR 336 (C).

have nowhere to go. Calls for a multi-disciplinary, holistic approach have been raised to solve this problem which has reached crisis proportions.

### B. Child Abduction and Domestic Violence

In the Constitutional Court case of *Sonderup v. Tondelli*,<sup>95</sup> Goldstone J stated that recognition must be given to the role played by domestic violence in inducing mothers, especially of young children, to seek protection for themselves and their children by escaping to another jurisdiction. The continuing lack of protection for sufferers of violence, of a sanctuary for abused women with children and of understanding domestic violence, exacerbates this situation. South Africa ratified the Hague Convention on Child Abduction in 1997. This Convention applies to children under the age of 16 taken from South Africa to another country that has implemented that Convention (known as a ‘contracting State’) and *vice versa*.

In this context, issues of domestic violence may be disregarded in the belief that the Courts of the State of habitual residence will protect the mother and child adequately on their return. The psychological impact of the return on the abducting mother may be down played by the Convention’s emphasis on the return of the abducted child. The Court of the State which houses the mother and child has the power to refuse to return the child only if such action would create a grave risk of exposing the child to physical or psychological harm or place the child in an intolerable situation.

## VIII. CONCLUSION

South African family life is extremely heterogeneous, without uniformity of lifestyle, morality, child-rearing practices, or religion. The fluidity, mobility and dispersion of caring relationships in South Africa complicate the definition of family or household. Many families maintain relationships across long distances. Furthermore, many domestic arrangements are in a continual state of flux, with some members migrating to urban areas to sustain the household and children being cared for by relatives or grandparents in rural areas or following their mothers to urban areas. Children from such families temporarily, but sometimes over a long term, become part of new households. The care arrangements for

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<sup>95</sup> 2001 (1) SA 1171 (CC).

such children often interfere with parent-child relationships: the mother may have to accept another person to look after her child. Consequently, the definitions of 'family', 'dependency' and 'responsibility' become extremely discrete. Many wealthier working mothers are not in fact the primary caregivers of their children, but leave this task to a domestic worker or child-minder.

Partly in response to this heterogeneity, South African family law is undergoing significant change. Already, important judicial decisions and legislative reforms have seen major shifts in the notion of what constitutes a 'family' under South African law. The quest for physical, financial or psychological independence is inappropriate for many South African families where reciprocity and a sense of long-term obligation to care for, in return for having been cared for, has frequently been the norm. Although the broadening of access of children to State-provided social security will obviously have large-scale fiscal implications for the State, new approaches towards child maintenance need urgent attention in South Africa with the predicted catastrophic effects of the HIV/AIDS virus on family life. This would include the identification of a minimum core of the State's obligations in this context. However, further attempts to alleviate family poverty and to satisfy the rights promised in the Constitution need urgent solutions to the problems of administrative lack of fairness, delays and corruption in the delivery of welfare benefits for families.<sup>96</sup> It is hoped that the enactment and implementation of the Children's Bill will go some way towards alleviating the present inadequate provision for remedies in family law.

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<sup>96</sup> See *Mahambehlala v. MEC for Welfare, Eastern Cape* 2002 (1) SA 342 (SE); *Mbanga v. MEC for Welfare, Eastern Cape* 2002 (1) SA 359 (SE).

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# *Chapter 5*

## **Law of Succession**

**M.J. de Waal\***

### **I. GENERAL INTRODUCTION**

The South African law of succession is a typical product of the country's mixed legal system – 'mixed' in the sense of a significant combination of civil law and common law elements.

As in other civilian systems, the Roman-Dutch law of succession that was introduced into South Africa in the 17th century was based on the principle of universal succession. This meant that upon adiation (or acceptance) and without any form of transfer, the heir succeeded to the deceased's assets and liabilities. The heir as universal successor was the person who had to wind up the deceased estate by, for example, paying creditors out of the estate and delivering legacies to legatees.<sup>1</sup> In South Africa all of this changed when Cape Ordinance 104 of 1833 replaced the system of universal succession with the English system of executorship. Under the system of executorship the executor acts as an intermediary between the deceased and the beneficiaries. One implication of this system is that an heir or legatee does not automatically become owner of an estate asset at the moment of the deceased's death. The most that the heir or legatee can obtain at the death of the deceased in modern South African law is a personal right against the executor of the estate.<sup>2</sup> Only after the executor has administered the estate in terms of the Administration of Estates Act 66 of 1965, and assuming that the estate's assets exceed its liabilities, will transfer of particular assets to heirs or legatees take place (see VII. below). That is also the earliest moment at which ownership can pass. The question as to who owns the estate assets in the

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<sup>1</sup> For the difference between heirs and legatees, see V.B. below.

<sup>2</sup> *Greenberg v. Estate Greenberg* 1955 (3) SA 361 (A).

period between the deceased's death and the transfer of assets to beneficiaries has, however, not yet been settled.

South African law follows the very general pattern of dividing the law of succession into intestate and testate succession. If a person dies without leaving a valid will or an antenuptial contract containing provisions for inheritance,<sup>3</sup> or if the will that has been left, is or becomes inoperative, the person's assets are distributed in accordance with the rules of the law of intestate succession (see III. below). These rules are contained in the Intestate Succession Act 81 of 1987. The basic pattern of distribution in this Act can be traced back to indigenous systems of intestate succession applicable in the province of Holland in the Netherlands in the 16th century. This old system of intestate succession, as introduced into South Africa, has been amended at various occasions by legislation. It was finally amended and consolidated by the Intestate Succession Act.

In the law of testate succession, South Africa inherited various forms of will known to Roman and Roman-Dutch law. In addition to these forms of will, the English statutory or underhand will was introduced in the various provinces of South Africa in the 19th and early 20th century. These provincial ordinances were to a large extent based on the English Wills Act of 1837. The Wills Act 7 of 1953 repealed all the old Roman and Roman-Dutch forms of will and the statutory or underhand will remained the only form of will in South Africa. However, whereas current testamentary formalities have their origin in English law, the possible content of wills is still largely based on Roman and Roman-Dutch law. Testamentary institutions such as the *fideicommissum*, *usufruct*, *dies* and *modus* are therefore often encountered in South African wills (see V. below).

Regarding the content of wills, it should be pointed out that a high premium is still placed on the principle of freedom of testation in the South African law of succession. This means that a testator's wishes in disposing of his or her assets will be carried out except in as far as the law places a limitation on this freedom. These limitations are found both in common law (for example, the minor children's claim for maintenance) and in legislation (for example, the surviving spouse's claim for maintenance in terms of the Maintenance of Surviving Spouses Act 27 of 1990).<sup>4</sup> The whole issue of succession and freedom of testation can also not be

<sup>3</sup> Regarding the possibility of testamentary provisions in an antenuptial contract, see VII.B.3. below.

<sup>4</sup> Note, therefore, that the South African law of succession does not make provision for a prescribed legitimate (reserved) portion or *Pflichtteil* for certain near relatives of the deceased.

detached from the fundamental rights of the individual that are guaranteed in the Constitution of the Republic of South Africa, Act 108 of 1996. It is possible that these fundamental rights can now limit a testator's freedom of testation, especially with regard to the attachment of conditions to testamentary bequests (see further V.C. below).

From this brief introduction it should be clear that the law of succession also reflects the uncodified nature of South African law. In order to construct the content of the law of succession one must therefore have regard to the Roman-Dutch common law, legislation (occasionally inspired by English legislation) and judicial precedents. However, despite this fragmentation of sources, the final product has retained much of the systematic rigour characteristic of civilian systems.

## II. CAPACITY TO INHERIT

### A. Introduction

In principle every person alive<sup>5</sup> at the moment the estate falls open (normally the moment of the deceased's death) is capable of being a testate and/or intestate heir of the deceased. 'Person' in this context includes both natural and juristic persons (such as companies or clubs). The capacity to inherit must exist at both the moment of vesting of rights and the moment the beneficiary adiates (accepts) the benefit. A person who alleges that a beneficiary does not have the capacity to inherit, carries the burden to prove the allegation.

There are a number of common law and statutory exceptions to the general principle that all persons may inherit. These exceptions may mean that a person is not entitled to an intestate inheritance or to take a testamentary benefit. The most important of these exceptions are discussed in the following paragraphs.

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<sup>5</sup> There are two exceptions to the rule that a person must be alive at the moment the estate falls open in order to be able to inherit. First, South African law recognises the so-called *nasciturus* fiction. In terms of this doctrine a person who has already been conceived (but not yet born) at the moment the estate falls open, can inherit. Secondly, a testator can make it clear in his or her will that persons only born in the future may qualify as beneficiaries in terms of the will.

## B. Common Law Exceptions

### 1. Unworthy persons

A person who has unlawfully and intentionally caused the death of the deceased or the deceased's *conjunctissimus* is unworthy to inherit from the deceased.<sup>6</sup> The deceased's *conjunctissimi* are persons closely related to the deceased, namely his or her parents, spouse or children.

At common law somebody who has negligently caused the death of the deceased was also unworthy of inheriting from the victim. It has been decided that this common law rule still applies in modern South African law.<sup>7</sup> However, the scope of application of this extension of the rule cannot be regarded as settled.

South African Courts proceed from the basis that the Courts are not restricted to the grounds of unworthiness mentioned specifically in the common law sources, but that these grounds can be expanded on the basis of public policy. In general the behaviour of the possible beneficiary towards the deceased is scrutinised in order to determine whether the beneficiary is unworthy or not. For example, a person who allowed a testator to lead an immoral life and who encouraged her alcohol abuse was declared unworthy to inherit.<sup>8</sup> A person who forged the will of a deceased was likewise declared unworthy to be an intestate heir of the deceased.<sup>9</sup>

### 2. Guardians, curators and administrators

In terms of section 12 of the Perpetual Edict of 1540, any bequest by a minor person of immovable property to his or her curator, guardian or administrator, or to the children of such persons, or to the minor's godparents was impermissible and invalid. In a decision of the Appellate Division it was assumed, without deciding the point, that this rule still applies in modern South African law.<sup>10</sup>

<sup>6</sup> See especially *Ex parte Steenkamp & Steenkamp* 1952 (1) SA 744 (T).

<sup>7</sup> *Casey NO v. The Master* 1992 (4) SA 505 (N).

<sup>8</sup> *Taylor v. Pim* (1903) 24 NLR 484.

<sup>9</sup> *Pillay v. Nagan* 2001 (1) SA 410 (D).

<sup>10</sup> *Spies NO v. Smith* 1957 (1) SA 539 (A).

### C. Statutory Exceptions

#### 1. Persons participating in the execution of a will

Section 4A of the Wills Act 7 of 1953 stipulates that the following persons who participate in the process of the execution of a will are in principle disqualified from inheriting:

- a person who signs a will as a witness;
- a person who signs a will in the presence of and by the direction of the testator;
- a person who writes out the will or any part thereof in his or her own handwriting, and
- a person who was the spouse of any of the persons mentioned above at the time of the execution of the will.

However, the section contains the following exceptions to the disqualification of the persons mentioned:

- a Court may declare a person competent to receive a benefit from the will if the Court is satisfied that the person did not defraud or unduly influence the testator in the execution of the will;
- a person will not be disqualified from inheriting if that person would have been an intestate heir had the testator died intestate, provided that the value of the benefit received does not exceed the value of the intestate share the person would have been entitled to in terms of the law of intestate succession, and
- in the case of a witness that witness or his or her spouse will not be disqualified if the particular will has been signed by at least two other competent witnesses who do not receive any benefit from the will.

For the purposes of this section the nomination in a will of a person as executor, trustee, or guardian is regarded as a benefit received from that will.

#### 2. Adopted or extra-marital (illegitimate) children

As will be indicated in III.B. and C. below, all discrimination against the adopted or extra-marital child in the law of intestate succession has been removed. In the law of testate succession the freedom of testation of the testator remains decisive. Section 2D of the Wills Act confirms that the fact of adoption or extra-marital status will be ignored in the interpretation of a will, unless the will makes it clear that the testator intended not to benefit the adopted or extra-marital child.

### III. INTESTATE SUCCESSION

#### A. Basic Pattern of Distribution

The basic pattern of distribution in terms of the Intestate Succession Act 81 of 1987 is as follows:

- If the deceased is survived by a spouse but not by descendants, the surviving spouse inherits all the assets.
- If the deceased is survived by descendants but not by a spouse, the descendants inherit all the assets. Distribution among descendants takes place *per stirpes*<sup>11</sup> and representation (see III.D. below) is allowed.
- If the deceased is survived by a spouse as well as descendants, the spouse inherits a child's portion of the assets or the amount that the Minister of Justice determines from time to time by way of a notice in the Government Gazette (currently R125 000), whichever of these amounts is the greater. A child's portion is calculated by dividing the monetary value of the assets by a number equal to the number of *stirpes* of the deceased, plus one. The residue of the assets (if any) is distributed among the descendants *per stirpes* and representation is allowed.
- If the deceased is not survived by a spouse or descendants but by both parents, the parents inherit the assets in equal portions.
- If the deceased is not survived by a spouse or descendants but by one parent and the descendants of a predeceased parent, the surviving parent inherits half of the assets and the descendants of the predeceased parent the other half. Distribution among the descendants of the predeceased parent takes place *per stirpes* and representation is allowed. If the predeceased parent is not survived by descendants, the surviving parent inherits all the assets.
- If the deceased is not survived by a spouse, descendants or parents but by descendants of both predeceased parents, the assets are split into two equal halves. One half of the assets is distributed among the descendants of the one parent and the other half among the descendants of the other parent. Distribution among these descendants takes place *per stirpes* and

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<sup>11</sup> Every surviving child of the deceased, as well as a predeceased child survived by descendants, is counted as a *stirps*.

representation is allowed. If the deceased is survived only by descendants of a predeceased parent who are related to him or her only through that parent, those descendants inherit all the assets.

- If the deceased is not survived by a spouse, descendants, parents or descendants of parents but by blood relations in the third or further parentals,<sup>12</sup> the assets are divided equally among those relations most closely related in degree to the deceased. In other words, in the third or further parentals the assets are not distributed *per stirpes* by representation but *per capita* according to the principle that ‘the nearest blood inherits’.

### B. The Position of the Adopted Child

Seeing that at common law intestate succession is based on blood relationship, the position of the adopted child had to be specifically regulated by legislation. The current position, as confirmed in the Intestate Succession Act, is that the adopted child is regarded for all purposes as the natural child of the adoptive parents. The adopted child can thus be an intestate heir of the adoptive parents and their blood relations and *vice versa*. On the other hand, all links between the adopted child and the natural parents and their blood relations are severed by an adoption order (except in the case of a natural parent who is married to the adoptive parent at the time of the adoption). The adopted child can thus not be an intestate heir of the natural parents and their blood relations and *vice versa* (except in the one exceptional case mentioned above).

### C. The Position of the Extra-Marital (Illegitimate) Child

At common law an extra-marital child could not be the intestate heir of his or her father or the latter’s blood relations and *vice versa*. However, the same disqualification did not apply to the extra-marital child of the mother and maternal blood relations. In other words, an extra-marital child could be the intestate heir of the mother and maternal blood relations and *vice versa*. The common law position was changed in the Intestate Succession Act with the effect that a person’s extra-marital status can no longer be a disqualification in the law of intestate succession. The discrimination against the father and his extra-marital child has thus been removed.

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<sup>12</sup> The deceased’s grandparents and their descendants form the third parental, the deceased’s great-grandparents and their descendants form the fourth parental, etc.

## D. Representation in the Law of Intestate Succession

Section 1(7) of the Intestate Succession Act (partly confirming and partly amending the common law) stipulates that representation in the law of intestate succession can take place in the following circumstances:

- if an heir has predeceased the deceased;
- if an heir has been disqualified from inheriting, or
- if an heir has repudiated (renounced) his or her right to receive an intestate benefit.

However, the provision with regard to representation in the case of repudiation is qualified by section 1(6) of the Act. Section 1(6) concerns repudiation by a descendant of a deceased (excluding a minor or a mentally ill descendant) who is entitled to an intestate benefit together with the surviving spouse of the deceased. In such a case repudiation will not result in the person being represented by his or her descendants, but in the benefit vesting in the deceased's surviving spouse.

## E. No Intestate Heirs

If a person dies without any intestate heirs, the assets will be sold and the money will in terms of the Administration of Estates Act 66 of 1965 be paid into the Guardian's Fund. Money in this Fund that has not been claimed after 30 years is forfeited to the State.

## F. The Law of Intestate Succession and Black Customary Law

The provisions of the Intestate Succession Act are not relevant in cases where black customary law is applicable. However, black customary law (that is, in effect also intestate succession) is based on completely different premises than the system described above. The most important differences between the two systems are that in black customary law:

- a much wider definition of the concept 'family' is used;
- males receive preferential treatment, and
- the first-born child receives preferential treatment (primogeniture).

These differences have made it extremely difficult to bring about a synthesis between the two systems. Particularly the unequal treatment of men and women creates difficulties in the light of the equality clause contained in the Constitution of the Republic of South Africa, Act 108 of 1996. Currently a Bill that attempts to address this whole issue is available for discussion.

## IV. TESTATE SUCCESSION: FORMALITIES

### A. Testamentary Capacity

#### 1. *Formal testamentary capacity*

In order to execute a valid will, the testator must have the necessary testamentary capacity at the time of executing the will. If this capacity is absent in any particular instance, the supposed will is invalid *ab initio*. The Wills Act 7 of 1953 governs the formal capacity of a testator to execute a will. It provides in section 4 that ‘every person of the age of sixteen years or more may make a will unless at the time of making the will he is mentally incapable of appreciating the nature and effect of his act’. The section further provides that the burden of proof that the testator was mentally incapable at the appropriate time rests on the person alleging it.

The ‘mental incapacity’ referred to in the section can have a variety of causes. Obvious examples include mental illness, the influence of alcohol or drugs and the effect of age, illness or medication. Every case must be judged on its own facts and the decisive question is always whether the effect of the particular condition was such that the testator could not appreciate the nature and effect of his or her testamentary act.

#### 2. *Factors influencing a free testamentary expression*

The fact that a testator had the formal capacity to make a will does not guarantee the validity of the will. Any impairment of the testator’s free testamentary expression at the execution of the will may result in the will being invalid. Factors that may be relevant in this context include undue influence, duress or mistake.

Of these possible factors, undue influence in the testamentary context has received the most extensive judicial attention in South Africa. The question whether another person has unduly influenced a testator seems to depend on whether a so-called ‘displacement of intention’ has taken place – in other words, whether the will does not contain the wishes of the testator but those of someone else.<sup>13</sup> The facts of each individual case are decisive but factors such as:

- the mental state of the testator;
- his or her ability to resist influence;

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<sup>13</sup> See *Spies NO v. Smith* 1957 (1) SA 539 (A).

- the relationship between the parties, and
- the period between the execution of the will and the death of the testator, can all play a role in this regard.

### *3. Delegation of testamentary power*

One of the fundamental principles of the South African law of succession is that a testator must himself or herself exercise testamentary power. This power can therefore in principle not be delegated to someone else to be exercised on behalf of the testator. There are, however, a number of exceptions to this principle in South African law. Perhaps the most important exception is the conferment of a so-called ‘power of appointment’ in a will. In terms of such a power the grantee of the power can appoint beneficiaries on behalf of the testator and after the latter’s death.

In South Africa, the conferment of powers of appointment was initially restricted to fiduciaries (in terms of a *fideicommissum*) and usufructuaries (in terms of a usufruct). In an important Court decision it was also extended in a more limited form to the trustees of a testamentary trust.<sup>14</sup> Important rules regarding the exercise of powers of appointment have also developed through case law.

## **B. Execution of Wills**

### *1. Formalities*

Section 2(1)(a) of the Wills Act 7 of 1953 stipulates the following requirements for the execution of a valid will:

- the will must be signed (including initials for all parties and also, only for the testator, a mark) at the end thereof by the testator or by some other person in the testator’s presence and by his or her direction;
- the signature must be made or acknowledged by the testator or the other person in the presence of two or more competent witnesses present at the same time;
- the witnesses must sign the will in the presence of the testator and of each other and, if the will is signed by the other person, also in the presence of such person;

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<sup>14</sup> *Braun v. Blann & Botha NNO* 1984 (2) SA 850 (A).

- if the will consists of more than one page, each page other than the page on which it ends, must also be signed by the testator or the other person anywhere on the page, and
- if the will is signed by the testator by the making of a mark or by the other person in the presence of and by the direction of the testator, a commissioner of oaths must append a certificate to the will certifying that he or she has satisfied himself or herself as to the identity of the testator and that the will so signed is the will of the testator.

A ‘competent witness’ is defined in section 1 of the Wills Act as ‘a person of the age of fourteen years or over who at the time he witnesses a will is not incompetent to give evidence in a court of law’.

## 2. *The Court’s power to condone a formally defective will*

The non-compliance with any of the above formalities results in the invalidity of the particular will. Before 1992 there was no way of saving such a will. However, in 1992 the Wills Act was amended by, among others, the introduction of a power for the Court to condone a formally defective will. If the following requirements are met, a Court can condone such an invalid will in terms of section 2(3) of the Wills Act:

- there must be a document, drafted or executed by a person who has died since the drafting or execution thereof, and
- the Court must be satisfied that the document was intended to be the deceased person’s will.

Since its introduction the Courts have already applied this section at numerous occasions.

## C. Amendment of Wills

### I. Formalities

A testator is free to amend a will at any time provided that he or she has the necessary testamentary capacity. Amendments made to a will before its execution (that is, the formal signing of the will) can be effected without any formalities. However, section 2(2) of the Wills Act 7 of 1953 provides that any amendment made in a will shall be presumed, unless the contrary is proved, to have been made after the will was executed.

Section 2(1)(b) of the Wills Act contains the formalities that must be complied with if a will is amended after its execution. ‘Amendment’ is defined as any ‘deletion, addition, alteration or interlineation’. The gist of these formalities is that any such amendment must be ‘identified’ by the signature of the testator or the signature of some other person made in the testator’s presence and by his or her direction as well as by the signatures of two or more competent witnesses. If the testator has signed by the making of a mark or the other person has signed on the testator’s behalf, a certificate in the form required at execution must also be appended by a commissioner of oaths.

## *2. The Court’s power to condone a formally defective amendment*

Section 2(3) of the Wills Act, dealing with the Court’s power to condone a formally defective will, also applies to the amendment of wills. An amendment that does not comply with the requirements can therefore still be given effect to if a Court applies its power of condonation in terms of the section.

## **D. Revocation of Wills**

### *1. Introduction*

A will can lose its legal force if a testator with the necessary capacity and intention (*animus revocandi*) revokes it before his or her death. Unlike the position with regard to the execution and the amendment of wills, the revocation of wills is still largely regulated by common law. The different ways in which a will can be revoked are therefore still derived from common law. However, as will be indicated below, the Wills Act 7 of 1953 does contain two important provisions relevant to the revocation of wills.

### *2. Ways of revoking a will*

Wills can be revoked either expressly or tacitly. Express revocation can occur in one of the following ways:

- by the execution of a subsequent will, antenuptial contract or other formally executed revocatory document<sup>15</sup> that contains an explicit revocatory clause, or
- by the destruction of a will with the accompanying intention of revoking it.

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<sup>15</sup> That is, a document that is formally executed but that contains no provisions other than the testator’s intention to revoke a previous will.

In terms of common law, destruction entails either physical destruction (by, for example, tearing up or burning the document) or symbolic destruction (by, for example, drawing lines through the pages of the document or erasing the signatures appearing in it).

Tacit revocation can also occur in one of two ways:

- by the execution of a subsequent will or antenuptial contract containing provisions that cannot be reconciled with that of the earlier will, or
- by the testator voluntary alienating the subject-matter of legacies during his or her lifetime (the so-called ademption of legacies).

Through the amendment of the Wills Act 7 of 1953 a further possibility of the tacit revocation of a will (or of a provision in it) has been introduced into South African law. Section 2B of the Act now provides that if a person dies within three months after his or her marriage was dissolved by a divorce or an annulment by a competent Court and that person had executed a will before the date of such dissolution, the will shall be implemented as it would have been implemented if the person's previous spouse had died before the date of dissolution concerned. However, the section makes it clear that this provision will not find application if it appears from the will that the testator intended to benefit the previous spouse notwithstanding the dissolution of the marriage.

Note that a will cannot be revoked orally in South African law.

### *3. The Court's power of condonation at revocation*

Problems with regard to the revocation of wills have been obviated by an amendment to the Wills Act that gives the Court the power to condone certain cases of express revocation not recognised as such at common law. Section 2A of the Act now gives the Court the power to condone the following acts as effective acts of revocation if it is satisfied that the testator intended to revoke a will or a part of it through the particular act, although the common law requirements for revocation have not been met:

- if the testator has made a written indication on the will or before his or her death has caused such an indication to be made;
- if the testator has performed any other act with regard to the will or before his or her death has caused such act to be performed which is apparent from the face of the will, or
- if the testator has drafted another document or before his or her death has caused such document to be drafted in which an intention to revoke is indicated.

## V. TESTATE SUCCESSION: THE CONTENT OF WILLS

### A. Introduction

As indicated (at I. above), a testator in South African law has, within certain limits, much freedom in disposing of his or her assets in a will. Despite this freedom, a number of testamentary institutions that have been developed in the common law do occur regularly in wills. In this paragraph, the most common of these institutions will be discussed briefly.

### B. Heirs and Legatees

Because of the replacement in South Africa of the civilian system of universal succession with that of the English system of executorship (see I. above), the importance of the distinction between heirs and legatees has largely disappeared. Nevertheless, this distinction is still formally adhered to in South African law and beneficiaries are still categorised as either heirs or legatees. An heir is a person who inherits the entire estate, a proportional part of the estate or the residue of the estate. A legatee, on the other hand, inherits a specific or determinable asset (such as a farm or a car) or a specific sum of money.

### C. Conditions and Time Clauses (*Dies*)

It is not uncommon for South African testators to attach conditions and/or time clauses to testamentary bequests.

A conditional bequest is a bequest that is linked to an uncertain future event. There are various ways of categorising testamentary conditions, but the most important categories are those of suspensive and resolutive conditions. In the case of a suspensive condition both the moment of vesting of the beneficiary's right (*dies cedit*) and the moment that the right can be enforced (*dies venit*) are postponed until the condition is fulfilled. A resolutive condition, on the other hand, does not have the effect of postponing either *dies cedit* or *dies venit*. In such a case, the possibility exists that a right that has already vested may fall away if the condition is fulfilled. The possibility has already been mentioned that a testator's freedom to attach conditions to testamentary bequests may now be more limited due to the guarantee of certain fundamental rights in the Constitution of the Republic of South Africa, Act 108 of 1996 (see I. above). This may specifically affect conditions based on considerations such as race, religion, political rights and sexual orientation.

Unlike a condition, a time clause or *dies* is linked to a future event that will definitely occur, although it may be uncertain when. Examples are a future date or the death of a named person. Time clauses can also be either suspensive or resolutive. In the case of a bequest subject to a suspensive time clause only *dies venit* and not *dies cedit* is postponed. In the case of a bequest subject to a resolutive time clause it is certain that the vested right will fall away in future.

#### D. The *Modus*

A testator may make a testamentary bequest subject to a *modus*. A *modus* is a burden or obligation placed on the beneficiary to do something, not to do something or to execute a performance of some or other nature. The most typical example is a bequest to a beneficiary (the appointed beneficiary) subject to the obligation to pay somebody else (the favoured beneficiary) a sum of money. The attachment of a *modus* to a bequest does not affect the vesting of the appointed beneficiary's rights (that is, it must not be confused with the attachment of a suspensive condition to a bequest).

#### E. Direct Substitution

Direct substitution occurs if a testator nominates a beneficiary as well as a substitute or substitutes for the instituted beneficiary in case the latter cannot or does not wish to take the benefit. Direct substitution is therefore a way of making provision for alternative beneficiaries. If the instituted beneficiary takes his or her benefit, the substitute falls away.

#### F. Fideicommissary Substitution (the *Fideicommissum*)

##### 1. Introduction

A *fideicommissum* is a legal institution in terms of which a person (the *fideicommittens*) transfers a benefit to a particular beneficiary (the fiduciary or *fiduciarius*) subject to a provision that, after a certain time has elapsed or a certain condition has been fulfilled, the benefit must go over to a further beneficiary (the fideicommissary or *fideicommissarius*). Thus, whereas a direct substitution makes provision for alternative beneficiaries, a fideicommissary substitution makes provision for successive beneficiaries.

##### 2. Requirements for a valid *fideicommissum*

In general the following requirements must be met for the creation of a valid *fideicommissum*:

- the will must make it clear that the testator intended to create a *fideicommissum*;
- there must be an effective ‘gift over’ in favour of the fideicommissary upon fulfilment of the fideicommissary condition, and
- the will must give a clear indication of the fideicommissary assets, the fiduciary and the fideicommissary.

### *3. Creation of a fideicommissum*

A *fideicommissum* is usually expressly created in a will. However, tacit (implied) creation is also possible. This can be done either by a so-called *si sine liberis decesserit* clause or by a prohibition against alienation in the will. An example of a *si sine liberis decesserit* clause would be the following: ‘I bequeath my farm to A. If A dies childless after my death, the farm must go to B’. The italicised phrase (the *si sine liberis decesserit* clause) could in certain circumstances imply a *fideicommissum* in favour of A’s children. Uncertainty regarding the precise effect of this type of clause in South African law has been removed by the Appellate Division in its decision in *Du Plessis NO v. Strauss*.<sup>16</sup>

### *4. Limitation on the duration of a fideicommissum*

A *fideicommissum* in terms of which the fideicommissary assets must be transferred to a succession of fideicommissaries is known as a *fideicommissum multiplex*. A *fideicommissum simplex*, on the other hand, is a *fideicommissum* in terms of which there is only one transfer of fideicommissary assets.

At common law there was no limitation as to the number of successive fideicommissaries for which a testator could make provision. This was changed by legislation in South African law with regard to immovable property. The Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965 provides in section 6 that a *fideicommissum* of immovable property will be limited to two successive fideicommissaries.

### *5. The legal position of a fiduciary*

Once transfer has taken place after the administration of the estate, a fiduciary becomes owner of the fideicommissary assets. As the owner of the assets, the fiduciary can use and enjoy them and also take their fruits.

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<sup>16</sup> 1988 (2) SA 105 (A).

However, the fiduciary's ownership is subject to several limitations. First, the fiduciary is subject to a limitation in the use and enjoyment of the assets. The fiduciary must use the assets in such a way that they can still be transferred *salva rei substantia* (maintaining their essential quality) to the fideicommissary. Secondly, the fiduciary does not in general have the power to alienate the fideicommissary assets. Unless the will gives the fiduciary a power of alienation (in the case of a so-called *fideicommissum residui*, see V.F.7. below), alienation can only take place with the permission of the Court. The Court derives its power to sanction the alienation of assets in terms of both the common law and, in the case of immovables, the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.

#### 6. *The legal position of a fideicommissary*

There has been a great deal of speculation about the precise nature of the fideicommissary's legal position prior to the fulfilment of the fideicommissary condition. The traditional view is that the fideicommissary only has a hope (*spes*) with regard to the fideicommissary assets. In the light of certain judicial pronouncements by the Appellate Division,<sup>17</sup> it is now probably more correct to accept that the fideicommissary does have a personal right against the fiduciary. It remains uncertain, however, whether this is a vested right (subject to a resolutive condition) or a contingent right (subject to a suspensive condition).

Upon fulfilment of the fideicommissary condition, the fideicommissary can claim transfer of the fideicommissary assets. Upon transfer, the fideicommissary will become owner of the assets. The view that ownership passes automatically upon fulfilment of the condition (that is, without any act of transfer or registration) cannot be supported.

#### 7. *The fideicommissum residui*

A *fideicommissum* in which the testator has given the fiduciary a power of alienation is known as a *fideicommissum residui*. The exact scope of the fiduciary's power of alienation has to be determined from the terms of the will. In this regard the will can grant a general or a very limited power of alienation. If the will contains no clear indication as to the scope of the power of alienation, the old Roman legal rule (contained in Justinian's 108th Novel) becomes applicable. In terms of this rule the fiduciary is restricted to the alienation of a maximum of

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<sup>17</sup> *Barnhoorn NO v. Duvenage* 1964 (2) SA 486 (A).

three-quarters of the particular assets. The fiduciary's power to alienate assets must in all cases be exercised *inter vivos* and in good faith.

#### *8. Termination of a fideicommissum*

There are a variety of factors that can lead to the termination of a *fideicommissum*. Examples include the following:

- if the fideicommissary condition has been fulfilled and no provision has been made for a further fideicommissary substitution;
- if the fideicommissary assets have been destroyed without fault on the part of the fiduciary;
- if all the interested parties, provided they are majors and of full capacity, agree to termination, or
- as a result of the application of the relevant provisions of the Immovable Property (Removal or Modification of Restrictions) Act 94 of 1965.

### **G. Usufruct**

A usufruct is a personal servitude in terms of which the usufructuary is given the right to use another person's property and to take its fruits with the obligation to return the property eventually to the owner, having preserved its substantial quality. Being a personal servitude, the usufruct is therefore normally discussed in detail in works on the law of property as one of the so-called limited real rights. Works on the law of succession deal with the usufruct because it is often granted in wills. To the extent that is considered at all, the emphasis normally falls on problems of interpretation in distinguishing between a *fideicommissum* and a usufruct. For purposes of this chapter, the discussion will also be restricted to this issue.<sup>18</sup>

Whether a usufruct or a *fideicommissum* has been created in cases where a benefit devolves upon successive beneficiaries depends above all on the intention of the testator as it appears in the particular will. In cases where this intention is not clear, certain indications can assist in the interpretation effort. For instance, the conferment of ownership on the first beneficiary is an indication that the testator had a *fideicommissum* in mind. On the other hand, if it is clear that the ultimate beneficiary must become owner of the assets subject to their use and enjoyment by an intermediate beneficiary, this is an indication that the testator

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<sup>18</sup> For more on the usufruct as such, see Chapter 6 VII.C.

had a usufruct in mind. Granting the first beneficiary a power of alienation is of course an indication that he or she cannot be merely a usufructuary. In cases of real doubt about whether the testator intended to create a usufruct or a *fideicommissum*, there is a presumption in favour of the latter.

## H. The Trust

### I. Introduction

The conventional view is that the trust is a special institution of the English common law and that one cannot therefore talk of a proper trust law in legal systems where the private law is based on civilian principles. This view has been shown to be a gross oversimplification and South Africa provides an excellent example of a mixed jurisdiction with a developed trust law. The trust as an institution is indeed often used in South Africa, also in the context of the law of testate succession. This is done if a testator (the founder) wishes to benefit a particular beneficiary (the trust beneficiary) but wants to place ownership or control over the assets in the hands of some else (the trustee).

The trust as an institution was introduced into South Africa in the course of the 19th century when British settlers started to make use of the trust in, among other things, their wills and contracts. However, because of the English concept of a dual or divided ownership, the English trust could not simply serve as the basis of a South African law of trusts. The Courts therefore found appropriate civilian niches for the South African trust – for the testamentary trust the *fideicommissum* and for the *inter vivos* trust the contract for the benefit of a third party (*stipulatio alteri*). The idea that the testamentary trust is based on a *fideicommissum* has since been disavowed by the Appellate Division as being historically and jurisprudentially incorrect.<sup>19</sup> It was held that the Courts have evolved, and are still in the process of evolving, a unique South African law of trusts by adapting the ‘trust idea’ to the principles of South African law.

Nevertheless, in terms of both these constructions of the trust, the concept of an ownership divided between the trustee and the trust beneficiary could be avoided. In case of the normal trust, the trustee is the owner of the trust assets in his or her official capacity and the trust beneficiary is the holder of a personal right against the trustee. Reference is made to the ‘normal’ trust as South African law also recognises the *bewind* trust in terms of which the trust beneficiary is the owner of the trust assets and the trustee is merely an administrator.

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<sup>19</sup> *Braun v. Blann & Botha NNO* 1984 (2) SA 850 (A).

## 2. Formation of a trust

A trust can be created in a will, by means of a contract, by an order of Court or by statute. In this chapter the focus will, of course, specifically fall on trusts created in wills.

Although there are no formalities prescribed for the formation of a trust, a will in which a trust is created must obviously comply with the requirements for a valid will (see IV.B.1. above). In the case of a trust created by means of a contract, no formalities need to be complied with. An *inter vivos* trust can even be created orally. However, a trust instrument that is in writing (such as a will), must be lodged with the Master of the High Court in terms of section 4 of the Trust Property Control Act 57 of 1988. These trust instruments must be lodged with the Master and they are open for inspection by any person who can show a sufficient interest in the matter.

## 3. Requirements for a valid trust

In general the following requirements must be met for the creation of a valid trust:

- the founder must intend to create a trust;
- the founder must express his or her intention in a mode that creates an obligation regarding the carrying out of the intention;
- the trust assets must be identified with reasonable certainty;
- the trust object (either personal or impersonal) must be defined with reasonable certainty, and
- the trust object must be lawful.

## 4. The legal position of a trustee

In the case of a testamentary trust, the testator (the founder) normally appoints the trustee in the will itself. But there are also other possibilities. For example, trustees can also be appointed by the Master of the High Court or by the Court itself.

A person who is appointed as trustee can act in that capacity only if authorised thereto in writing by the Master. It has been decided that any juristic act by a trustee before authorisation will be regarded as void *ab initio* and that such an act will not be capable of subsequent ratification or validation.

It is a common law requirement that a trustee must furnish security for the proper execution of his or her duties. A trustee can be exempted from this obligation by either the trust instrument or by the Court. Although the Court

retains its wide common law powers regarding security, the Trust Property Control Act now regulates the matter. In terms of the Act, the Master has been given wide discretionary powers with respect to the furnishing of security by trustees. The Master may, for example, dispense with security by a trustee, reduce or cancel any security furnished or order a trustee to furnish additional security.

#### *5. The administration of a trust*

The issue of the administration of a trust is one of the core themes in the law of trusts. It is therefore understandable that a vast body of law has evolved in connection with the duties and powers of trustees in the administration of a trust. A discussion of these duties and powers falls outside the scope of this chapter. Suffice it to say that in South Africa the law regarding this issue has developed over a long period through case law and *ad hoc* legislation. Important aspects in connection with trust administration are now also regulated in the Trust Property Control Act.

#### *6. Termination of and the filling of vacancies in trusteeship*

Obvious instances where a trustee would lose his or her office include death, termination of the trust and situations where a trust instrument provides for vacation of the office after a specified time or at the occurrence of a certain event.

At common law a trustee could not resign without the Court's authorisation unless the trust instrument specifically provided for this. The Trust Property Control Act now regulates this matter. In terms of section 21 of the Act a trustee may resign by notice in writing to the Master and the ascertained beneficiaries, whether or not the trust instrument provides for resignation.

The Court has the common law power to remove a trustee from office if it is convinced that removal would serve the best interests of the trust and its beneficiaries. This common law power of the Court is now confirmed in section 20 of the Act. The same section also provides for the removal of a trustee by the Master in certain specified instances.

If the office of trustee cannot be filled or becomes vacant and the trust instrument does not provide for such an eventuality, the Act stipulates in section 7 that the Master must appoint a new trustee after consultation with as many interested parties as is deemed necessary.

#### *7. The legal position of a trust beneficiary*

Much of the law in connection with the legal position of a trust beneficiary is concerned with the protection of a trust beneficiary in cases of breach of trust.

The Trust Property Control Act does not contain any substantial provisions in this regard and the important remedies for trust beneficiaries are all derived from general common law principles. The appropriate remedy in a particular case of breach of trust would also depend on the type of trust at issue (see V.H.I. above). In the case of a normal trust, the trust beneficiary's protection would be based on his or her personal right against the trustee. A trust beneficiary under a *bewind* trust would generally be in a stronger position as such a beneficiary is owner of the trust assets.

Seeing that in the case of a *bewind* trust the trust beneficiary is the owner of the trust assets, the trustee's insolvency cannot harm the beneficiary. Unfortunately this is not true in the case of the normal trust where the trustee is the owner of the trust assets. After some *ad hoc* efforts in case law and legislation to effect some protection for the trust beneficiary in cases of the insolvency of the trustee, the legislature effectively addressed the problem in section 12 of the Trust Property Control Act. This section provides that trust assets shall not form part of the personal estate of the trustee except in so far as he or she as trust beneficiary is entitled to the assets. However, for the effective operation of this provision it is important that trust assets must be identified as such as required in section 11 of the Act.

#### 8. *The variation of a trust*

The founder of an *inter vivos* trust may in the trust instrument reserve for himself or herself the right to vary the trust unilaterally during his or her lifetime. An *inter vivos* trust can also under certain circumstances be varied by agreement between the founder and the trustee or trustees.

The above methods of variation are obviously not applicable in the context of testamentary trusts. However, a will in which a trust is created can contain a provision empowering a trustee to unilaterally vary the trust. In such a case the trustee must exercise the power of variation within the limits set out in the will (the trust instrument). The beneficiaries of a trust can also vary the terms of a trust if they are all of full age and capacity and immediately entitled to the *corpus* of the trust property.

The Court's common law power to vary trusts is very limited. First, the Court has the power to vary a trust *ob causam necessariam* (if there exists a necessary cause for doing so). Secondly, a Court may vary a trust if due to a change of circumstances not foreseen by the founder the trust as created has become unfeasible. Thirdly, the Court may in the context of charitable trusts apply the so-called *cy près* doctrine if the requirements for the application of this doctrine are satisfied. This doctrine entails that in the case of the failure of a charitable

trust, a Court can authorise the trust assets for a purpose *cy près* (meaning ‘as near as possible’) to the original trust object or in a mode that still serves the founder’s overriding charitable purpose.

The Court’s common law power to vary trusts has been considerably extended by legislation. The most important legislative mechanism for the variation of trusts is contained in section 13 of the Trust Property Control Act. This section gives the Court a wide discretion to vary (and even terminate) trusts if the requirements of the section are met.

#### 9. *The revocation and termination of a trust*

The Anglo-American ‘rule against perpetuities’ does not apply in South African law. A trust can therefore in principle be of unlimited duration.

Depending on the circumstances, a trust can be revoked by the founder (in the case of an *inter vivos* trust), the trustee or the beneficiaries, or a combination of these parties. The rules applicable in the case of revocation are the same as those that apply in the case of variation by these parties. A will can, for example, provide the trustee of a trust with a unilateral power to revoke the trust.

There are diverse ways in which a trust can terminate (other than by revocation). The following are examples:

- a trust will terminate if the trust object has been fulfilled or the trust has been set up for a limited period of time and that period has expired;
- a trust will come to an end if the trust assets have been destroyed without fault on the part of the trustee, or
- a Court can make an order terminating a trust in terms of section 13 of the Trust Property Control Act.

## VI. TESTATE SUCCESSION: GENERAL ISSUES

### A. ELECTION, JOINT OR MUTUAL WILLS AND MASSING OF ESTATES

#### 1. *Election*

When an estate falls open in South African law (normally at the deceased’s death) a beneficiary must make an election: he or she must either adiate (accept) or repudiate (renounce) the intestate or testamentary benefit. There is no other option available. Normally a beneficiary will only benefit by adiation, as there is no possibility that a person can be saddled with the deceased’s debts. The

executor must pay debts out of the deceased estate. This is one of the consequences of the system of executorship that was introduced into South Africa via English law (see I. above). However, repudiation may be attractive under a variety of circumstances. One example could be where a *modus* is attached to a bequest, for a beneficiary cannot adiate the benefit but repudiate the burden. Another example could occur in the case of the massing of estates, which is discussed below.

### 2. *Joint or mutual wills*

A joint will is a single document in which more than one testator have made known their respective testamentary wishes. Only two competent witnesses are required, regardless of the number of testators involved. The joint will represents as many wills as there are testators. Each testator is free to amend or revoke his or her will at any time, without the collaboration or even knowledge of the other testators.

A joint will in which two or more testators have mutually benefited one another is termed a mutual will. Except in one particular situation, which is discussed in the next paragraph, each testator is once again free to amend or revoke his or her will as contained in the mutual will.

### 3. *Massing of estates*

The exception mentioned in the previous paragraph concerns the situation in which a so-called massing of estates has been effected. In general, a massing of estates occurs if two or more testators consolidate the whole or portions of their respective estates into a single unit for the purpose of testamentary disposal.

What normally happens in practice is that two spouses (but it can also be unmarried persons) execute a mutual will in which they consolidate their estates in this way, also stipulating that at the death of the first-dying spouse the surviving spouse will inherit the whole consolidated estate. There will also be a further stipulation that at the death of the surviving spouse the whole estate (or what remains of it) will go to indicated further beneficiaries. At the death of the first-dying spouse the surviving spouse must either adiate or repudiate the benefit. In the case of adiation, the surviving spouse loses the power to amend or revoke the mutual will and he or she must allow the whole estate (including his or her own assets) to be distributed in terms of that will. In the case of repudiation, the surviving spouse will not be able to take any benefit in terms of the mutual will, but he or she will retain the power to make a new will for the distribution of his or her own assets.

Over the years a number of problems have occurred with common law massing of estates. In order to obviate these problems, the effect of massing is now regulated in section 37 of the Administration of Estates Act 66 of 1965.

## B. Succession by Contract (the *Pactum Successorium*)

### 1. Introduction

One of the implications of the principle of freedom of testation in South African law is that a testator has the power to make, amend or revoke a will at any time before death (except in the case where a beneficiary has accepted a benefit in terms of a mutual will in which a massing of estates has been effected) (see VI.A.3. above). Therefore, a contract in terms of which the parties attempt to regulate the devolution of the whole or a part of the assets of one or both parties (a so-called *pactum successorium*), is in principle invalid as being against public policy (*contra bonos mores*). The invalidity of such a contract is based on two considerations. First, it places an unacceptable limitation on a person's freedom of testation. It is obvious that the contract not only limits the person's power to dispose freely of his or her assets in a will, but also restricts the person's power to amend or revoke testamentary provisions. Secondly, it amounts to an attempt to circumvent the formalities necessary for the execution of wills.

Although the principle at issue is thus clear enough, it is not always easy to identify a particular contract as an invalid *pactum successorium*. Another problem is that there are two forms of the *pactum successorium* that are not regarded as invalid. These two problems will be dealt with briefly in the following paragraphs.

### 2. The identification of an invalid *pactum successorium*

The question whether a particular contract is an invalid *pactum successorium* or not depends on the interpretation of the particular contract. If, for example, a contract can be revoked at any time, it cannot in general be regarded as an invalid *pactum successorium*. In such a case there is, to begin with, no limitation on a person's freedom of testation.

However, the identification test that has now received the approval of the highest Court is the so-called 'vesting test'.<sup>20</sup> In terms of this test the decisive

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<sup>20</sup> See *McAlpine v. McAlpine NO* 1997 (1) SA 736 (A).

question is whether the right to the promised benefit vests in the beneficiary during the lifetime of the giver (*inter vivos*) or only at or after the death of the giver (*mortis causa*). If the right vests *inter vivos*, the contract cannot be an invalid *pactum successorum*. If, on the other hand, the right vests only at or after the death of the giver, the contract is an invalid *pactum successorum*.

### 3. Valid forms of the *pactum successorum*

The two valid forms of the *pactum successorum* that are recognised are the *donatio mortis causa* and testamentary provisions in an antenuptial contract.

A *donatio mortis causa* is a donation made in contemplation of the death of the donor. As it is still a contract, a valid *donatio mortis causa* is based on an offer by a donor that is accepted by a donee. Further special features of a *donatio mortis causa* are the following:

- the expectation of the donor's death is the motive for the donation;
- the donation is given out of pure altruism, and
- the donation can be revoked by the donor at any time.

A *donatio mortis causa* will only be valid if it has been executed in accordance with the normal testamentary formalities. This might make it difficult to distinguish it from a normal testamentary bequest.

A second exception to the invalidity of a *pactum successorum* is that testamentary provisions in an antenuptial contract are valid. This form of the *pactum successorum* can be constructed in a variety of ways. The way in which it is constructed in a particular instance will in turn influence the power or otherwise of the parties to amend or revoke the *pactum*. It is important to note that it is not necessary to execute the antenuptial contract in accordance with the normal testamentary formalities in order to make the testamentary provisions in it valid. The contract is thus not converted into a will through the inclusion of the testamentary provisions.

## C. Accrual

The right of accrual (the *ius accrescendi*) is the right of a beneficiary to succeed proportionately to a benefit that another beneficiary in the same will cannot or does not want to take. Accrual can, for example, become a possibility if a beneficiary

- repudiates;
- has predeceased the testator;

- is disqualified from inheriting, or
- cannot inherit because a suspensive condition attached to the bequest has not been fulfilled and the testator has not made provision for any of these eventualities in the will.

Whether or not accrual will operate in a particular instance, depends primarily on the intention of the testator as this appears in the will. There will thus be no problem if the will clearly states the testator's intention in this regard. It is possible, for example, that the testator can state explicitly that accrual must take place in a particular case. On the other hand, the naming of substitutes in a will is a clear indication that the testator had no intention that accrual should operate.

In cases where the testator's intention is not clear from the will, certain indications (so-called *coniecturae*) are used to ascertain his or her intention. Traditionally the most important indication of a testator's intention with regard to accrual is the way in which co-beneficiaries have been joined in the will (the 'method of joinder'). But the method of joinder is not regarded as conclusive. Other *coniecturae* that must be taken into account include:

- the scheme of the will as a whole;
- the presumption against partial intestacy;
- the presumption of equal benefits to children;
- the nature of the assets concerned, and
- considerations of consistency and reasonableness.

## D. Interpretation and Rectification of Wills

### 1. Introduction

The point of departure in South African law is that a testator who has made a will intends his or her assets to be distributed according to the provisions contained in the will. If the testator has succeeded in expressing his or her intention clearly, it will be easy to carry out the provisions of the will. But if the testator has not succeeded in doing this, the Court will have to be approached to establish the elusive intention. This process by which a Court establishes the intention of a testator is called *interpretation*.

The *rectification* of a will by a Court, on the other hand, is a different matter. Rectification can be defined as the correction of a mistake in a will by a Court after a testator's death. Rectification shares with interpretation the quest to give effect to a testator's real intention.

## 2. Interpretation

In the process of interpretation, the will remains the primary source for the determination of the testator's intention. In this regard a number of important rules of interpretation have developed. Important examples include the following:

- the will must be read in its entirety;
- the so-called 'dominant clause' of the will must be established;
- in determining the true intention of the testator from the words used in the will, a Court must be guided by the so-called 'plain meaning' rule;
- the decisive issue is not what the words in the will mean, but what the testator intended by using the words;
- if both written and printed words appear in a will and they cannot be reconciled, precedence must be given to the former, and
- in general, the moment at which the estate falls open (normally when the testator dies) is also the decisive moment with reference to which interpretation must take place.

There are clear rules guiding a Court in its use of evidence outside the will (extrinsic or *aliunde* evidence) in the interpretation process. One form of extrinsic evidence that is always allowed, is so-called 'armchair' evidence. This is evidence about facts and circumstances the testator knew about or had in mind or should have borne in mind when the will was drafted. Evidence admissible on this basis includes the testator's age, state of health, life expectancy, habits, level of education, relationship with his or her family, social position and family structure.

Other extrinsic evidence is only admissible in cases where a will is so ambiguous, unclear or vague that the testator's intention cannot be established otherwise. Extrinsic evidence is, for example, admissible to determine the meaning of illegible or incomprehensible words; to determine what abbreviations, nicknames, words in foreign languages or technical or scientific terms mean; or to give meaning to terms used in the context of a particular business environment, region or religious group. However, only in a case of a so-called 'equivocation' will evidence concerning direct statements by the testator regarding his or her intention be admissible (and then only if all other resources have failed). An 'equivocation' occurs if words in a will are equally applicable to two or more persons or objects.

Another tool in the interpretation of a will is the use of presumptions. However, presumptions may only be used as a last resort if the testator's intention

cannot be established in any other way. Examples of presumptions that are used in South African law include the following:

- the presumption against onerous provisions (such as the presumptions against *fideicomissa*,<sup>21</sup> postponement of *dies cedit*, massing of estates and conditional bequests);
- the presumption against disinheritance;
- the presumption against intestate succession, and
- the presumption that provisions in a will are valid rather than invalid.

Section 2D(1) of the Wills Act 7 of 1953 contains three further statutory provisions that may be applied in the interpretation of wills. These presumptions concern the position of adopted and extra-marital children in the law of testate succession (see II.C.2. above) as well as the difficult issue of so-called ‘class bequests’.

### 3. *Rectification*

As indicated, rectification concerns the correction of a mistake in a will by the Court after a testator’s death. A Court may embark upon the process of rectification if it is presented with evidence on the fact that there is a mistake in a will, what the nature of the mistake is and how it could be rectified. A Court is much less restricted in its use of extrinsic evidence in the process of rectification as is the case in the process of interpretation. For example, direct statements by the testator regarding the content of his or her will is as a rule permissible when a Court is asked to rectify a will.

In general a Court can rectify a will in one of the following ways:

- by correcting ordinary mistakes in the will, such as typing errors or incorrect descriptions;
- by deleting words that have been added to the will inadvertently, or
- by inserting words that have been left out of the will inadvertently.

Rectification falling in the first two categories above has never caused real problems in South African law. However, there was for a time uncertainty as to whether a will could be rectified by inserting words into it (the third category above). The balance of authority now seems to favour rectification of this nature.

<sup>21</sup> Unless it is a case where the uncertainty exists between a *fideicommissum* and a usufruct, when there is a presumption in favour of a *fideicommissum*: see V.G. above.

## VII. ADMINISTRATION OF DECEASED ESTATES

### A. Introduction

The administration of an estate can be described as the process by which a deceased person's liabilities are settled out of the estate and the residue (that is assets that remain available for distribution) is awarded and transferred to the beneficiaries. As has already been mentioned, the civilian system of universal succession has been replaced in South Africa by the English system of executorship (see I. above). Under this system an executor, who acts as an intermediary between the deceased and the beneficiaries, takes control of the administration of the estate. The actual administration of the estate is done either by the executor or by an administrator under his or her control. This is done under general supervision of the Master of the High Court and according to the provisions of the Administration of Estates Act 66 of 1965.

### B. The Master

A Master is appointed for the area of jurisdiction of each provincial division of the High Court. The Master is the head of an office of trained staff who (under the general control of the Master) supervises the administration process in the role of examiners.

### C. The Executor

Every deceased estate must have an executor. A deceased can leave a will in which a valid appointment of an executor has been made. An executor appointed in a will is known as an executor testamentary. If the deceased has not named an executor, has made an invalid appointment, has died intestate or the appointed executor declines the appointment, the Master must nevertheless appoint an executor. An executor appointed by the Master is known as an executor dative. The Master officially authorises both types of executor through the issuing of letters of executorship.

### D. The Liquidation and Distribution Account

The main task of the executor is the drawing up of a liquidation and distribution account. The liquidation account sets out the deceased's assets and liabilities. In the assets column, immovable assets, movable assets and claims in favour of the estate are distinguished. The total of these assets reflects the gross value of

the estate. In the liabilities column, administration costs, claims against the estate and estate tax are deducted. The balance of the liquidation account (assets minus liabilities) then remains for distribution among beneficiaries.

The balance reflected in the liquidation account is transferred to the distribution account. This account indicates how the assets are going to be distributed among the beneficiaries.

#### E. Inspection and Finalisation of the Account

After the liquidation and distribution account and the estate tax certificate have been submitted to the Master, an examiner will check the account. Upon approval of the account the executor has to advertise in the Government Gazette and in a local newspaper that the account will be available for inspection for a period of 21 days at the Master's office as well as at the magistrates' office of the district in which the deceased had been resident in the period preceding his or her death.

If no objections are raised during the period the account has been available for inspection, certain final tasks (such as the submission of bank statements and the payment of Master's fees) can be performed. The Master will then approve the account and it will be ready for implementation.

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# *Chapter 6*

## **Law of Property**

**C.G. van der Merwe\***

### **I. SOURCES OF SOUTH AFRICAN LAW OF PROPERTY**

The South African law of property is mainly influenced by Roman-Dutch law and is thus closer to European civilian systems than to English law. Roman law influence is illustrated by:

- the clear distinction between ownership and possession and between ownership and limited real rights;
- the perception that ownership is an indivisible right which confers the widest possible powers on an individual;
- the emphasis on delivery as a prerequisite for the transfer of ownership in a movable;
- the original modes of acquisition of property, and
- the various forms of real security.

Roman-Dutch law added:

- the clear distinction between movables and immovables;
- the system of land registration;
- the development of notarial bonds as real security;
- restrictions on an owner's absolute right of pursuit in favour of certain *bona fide* acquirers;
- the recognition that a long lease of land creates a real right, and
- the recognition of a way of necessity out of landlocked land.

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Limited English law influence is evidenced by:

- forms of land tenure like quitrent and leasehold;
- the penetration of the English tort of nuisance into neighbour law;
- the recognition of ‘attornment’ as a mode of delivery of movables;
- the adoption of technical aspects of Australian Torrens land registration, and
- legislation on apartment ownership.

The advent of the new constitutional order in South Africa coupled with new land reform policies underscore the dichotomy between individual security and freedom reflected by traditional property concepts on the one hand and the obligatory social and public function of property on the other. The harmonious resolution of this dichotomy is still being worked out in South Africa.

## II. THE CONCEPT OF PROPERTY

The word ‘property’ (from the Latin word *proprietas*) has a variety of meanings, which defies an accurate definition. Everyday usage is indiscriminate in denoting both objects of rights and rights as ‘property’. Thus farms and motor vehicles as well as rights such as ownership, servitudes, leases and copyright are classified as ‘property’. This confusion adopted in many civilian systems goes back to Roman law.

When signifying legal objects, the word ‘property’ includes any asset in an estate. Consequently, it comprises both corporeal objects like land and motor vehicles and incorporeal objects like claims (personal rights), shares in a company and patent rights. In this sense the law of property comprises not only the law relating to corporeal things, but also the law of intellectual property and of obligations. By contrast, the meaning of the word ‘thing’ is less complex since it denotes only the object of a right and refers only to corporeal objects. For dogmatic and systematic reasons, some South African writers draw a distinction between the law of things (*sakereg*) and the law of property (*vermoënsreg*).

Traditional South African property law adopted the medieval distinction between real and personal rights drawn from the Roman distinction between real and personal actions (*actiones in rem* and *actiones in personam*). In theory, a real right prevails against the world, while a personal right avails against a particular person. However, in practice, the distinction is blurred and real rights often fall short of their prototype, while personal rights may have a wider application than that of entitling a person to a performance on the part of one or more

particular person(s). Thus there are limitations on the universal right of vindication in the case of real rights, while the party who acquires a real right with notice that he is infringing another's personal right against the transferor will be bound by virtue of the doctrine of notice.

### III. CLASSIFICATION OF PROPERTY

The most important South African division of property is that between moveables and immovables. Following Roman-Dutch practice, South African law applies this distinction to both corporeal and incorporeal property. The broad principle is that a personal right is movable while a real right is movable or immovable depending on the nature of the object of the right. Thus registered mining leases, long leases of immovable property, mortgage and praedial servitudes are regarded as immovable, while claims and personal servitudes on moveables (for example a herd of cattle), are considered movable.

In Romanist tradition, corporeal property is further classified according to whether or not it is susceptible to private ownership. Common things such as the air, the sea and running water, and public property such as the seashore, public rivers and public roads, are unsusceptible to private ownership. Though public property belongs to the State, it is open to public use. The *Butgereit* case<sup>1</sup> thus precluded riparian owners from interfering with canoeists practising on a public river. The Roman classification of divine property pertaining to churches, city walls and gates and burial grounds was already obsolete in Roman-Dutch law and never formed part of South African law. Property susceptible to private ownership is either privately owned or ownerless property (*res nullius*).

### IV. POSSESSION

#### A. General

Possession consists of the factual control (*corpus*) over an object coupled with the will to possess (*animus possidendi*). South African law also recognises quasi

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<sup>1</sup> *Transvaal Canoe Union v. Butgereit* 1986 (4) SA 207 (T); *Butgereit v. Transvaal Canoe Union* 1988 (1) SA 759 (A).

possession of incorporeals and the right to possession (*ius possidendi*) of a lessee or usufructuary. Emphasis on the fact of possession easily leads to the conclusion that possession is a fact; emphasis on the rights flowing from possession leads to an approximation of possession to real rights. Possession of property has various consequences:

- possession is a prerequisite for various modes of acquisition of ownership, for example occupation, prescription and transfer;
- various remedies are available to protect possession in order to restrain self-help and create a peaceful society;
- possession serves a real security function in being required for the constitution and continued existence of a valid pledge and a right of retention;
- certain kinds of possessors are accorded a right to compensation for improvements;
- the possessor of a movable is presumed to be the owner thereof, and
- possession is an element of various statutory crimes, for example the possession of unlicensed firearms.

The manifold legal functions of possession require more than one definition to encompass its divergent consequences. Whereas bodily control (*corpus*) is always required, the will to possess (*animus*) varies according to the function served by possession.

In practice, possession and ownership often coincide. A farmer normally occupies the farm he owns and a person normally owns the motor vehicle in his or her garage. However, where squatters occupy a part of farmland, the farmer will remain the owner of that part and the squatters will be the possessors. Likewise, if the motor vehicle in A's garage was bought on hire purchase, the motor dealer will still be the owner, and A will be the possessor. Possession differs from ownership in the following ways:

- possession signifies a primarily factual relationship between a person and an object whereas ownership signifies a legal relationship based on the legal right;
- possession requires a will to possess (*animus possidendi*) which is not required for ownership;
- lost possession can be regained by a speedy motion procedure whilst a cumbersome action procedure is required for the recovery of lost ownership, and

- possessory remedies are only enforceable against the dispossessor while ownership remedies are available against whoever is in control of the property.

## B. Elements of Possession

Possession consists of both an objective (*corpus*) and a subjective element (*animus possidendi*). The degree of physical control required depends on the nature of the object, whether possession is acquired through occupation or transfer and whether one deals with the acquisition or the retention of possession. Possession ceases once a movable has been lost or destroyed or a movable or farm seized by an intruder. An agent could exercise physical control on behalf of a principal. Simultaneous possession of the same property is excluded, but the law recognises joint possession in the case of partners and spouses.

The will to possess requires the capacity to have such a will, an intention directed towards exercising control and an awareness of control over the property. For acquisition of ownership an *animus domini* or the intention to be owner is required in addition; for protection of possession, the will to secure a benefit for oneself (*animus ex re commodum acquirendi*) is sufficient. For certain statutory offences only an awareness of possession is required. Servants or agents who hold property merely with the intention of holding it on behalf of another (*animus non sibi sed alteri possidendi*), do not have the required possession to protect their physical control over the object.

## C. Protection of Possession

The *mandament van spolie*, a Roman-Dutch remedy, derived from canon law, plays a prominent role in the protection of possession. This remedy is based on the maxim *spoliatus ante omnia restituendus est* – before the question of title can be resolved, the person deprived of possession must be restored to his previous position. Its main purpose is to prevent people from disturbing the peace by taking the law into their own hands.

In spoliation proceedings, the applicant must show unlawful deprivation of peaceful and undisturbed possession. The deprivation need not be by force or stealth but must be against the will of the possessor. Thus a messenger of the Court who gains possession of property by an invalid writ of execution and State officials who cause squatters to surrender shacks under duress, commit acts of spoliation. Spoliation is absent where the applicant has freely consented to surrender possession or where the ‘spoliator’ was authorised by the Court or by statute to dispossess the applicant.

The respondent is not allowed to raise a defence on the merits of the case, for example that he was the owner of the property or that he had a contractual claim to the property. Even an owner is not allowed to exercise self-help and must proceed through the Courts. However, the respondent can validly raise the defence that restoration of the property is objectively impossible because it was destroyed, materially damaged or alienated to a *bona fide* third party. In *Fredericks v. Stellenbosch Divisional Council*,<sup>2</sup> it was suggested that substitute materials of equivalent size and efficacy could be used to restore possession. This ignores the speedy nature of spoliation proceedings as well as the principle that the *mandament* is primarily aimed at the restoration of the factual relationship between the *spoliatus* and particular property.

In a successful application, the respondent is obliged to restore the spoliated property to its former condition, for example to repair a fence damaged in spoliating a farm.

A possessor may resist illegal attempts to disturb his or her possession and if deprived, may exercise self-help to regain possession (counter-spoliation). Recovery must be *instanter* (immediate) and still part of the original breach of the peace. If the situation has stabilised, action on the part of the *spoliatus* amounts to a new act of spoliation entitling the first spoliator to a spoliation order. South African Courts have decided that counter-spoliation need not be violent but could amount to mere protest or objection without causing an affray. Thus an engineer was found to act in counter-spoliation when he replaced locks installed by the spoliator after dark with the very aim of avoiding a bout of fisticuffs. In *Mbangi v. Dobsonville City Council*,<sup>3</sup> where squatters invaded city council land, the council held consultations with the squatters, tried for five days to reach a negotiated settlement and postponed demolition in order to allow the squatters to remove their shacks themselves. The Judge held that this was still counter-spoliation and lauded the commendable social responsibility with which the council handled this politically sensitive issue.

Modern South African law discarded Roman possessory interdicts and opted instead for English interdicts on nuisance and trespass. A person with a right to possession (for example a lessee) can recover possession from anyone with a lesser title to possession.

<sup>2</sup> 1977 (3) SA 113 (C).

<sup>3</sup> 1991 (2) SA 330 (W).

## V. OWNERSHIP

### A. Nature

Ownership compared with limited real rights like servitudes and security rights is potentially the most extensive private right that a person can have with regard to property. In principle, ownership entitles the owner to deal with property at pleasure within the limits allowed by law. The owner has a right to use (*ius utendi*) and enjoy the fruits (*ius fruendi*) and consume (*ius abutendi*) property, as well as a right to possess (*ius possidendi*), dispose of (*ius disponendi*), reclaim it from anyone in wrongful occupation (*ius vindicandi*) and resist any unlawful disturbance of his or her property (*ius negandi*).

Nevertheless, ownership had never been regarded as absolute. During the Middle Ages, ownership was divided into *dominium directum* (vested in the absentee landlord) and *dominium utile* (vested in the vassal or tenant who physically occupied the land). At the close of the feudal period, the tenant's interest came to be identified as true ownership subject to a servitude or charge in favour of the former landlord. The French Revolution abolished most of the feudal tenures and charges upon land and regarded private ownership as holy and inviolable, an idea espoused by natural lawyers like Grotius and the Pandectists. Since then, the growth of socialism and the notion that owners should be regarded as custodians of resources for future generations, increasingly hollowed out the almost absolutist notion of ownership until only a shadow of its former grandeur remained.

With the development of new patterns of land-ownership, such as sectional title, group and cluster housing, property time-sharing, nature conservation areas and ownership of air space, it became apparent that the traditional perception of ownership as an absolute, exclusive right was no longer consonant with modern socio-economic reality. Planning law, especially conservation legislation, placed severe restrictions on unencumbered exploitation of property and in the course of time an owner's power to vindicate property was eroded. Social, economic and political forces exposed the social obligations inherent in ownership and necessitated an adaptation to meet modern requirements. Consequently, ownership is no longer perceived as a universal and timeless set of abstract and neutral principles based on the authority of rational and scientific reasoning. Instead, it is seen as a functional notion adaptable on moral and expediency grounds to fulfil the changing needs of society.

The new South African Constitution introduced a wider notion of property that combines the individual freedom promoted by traditional ownership and

the obligatory social welfare function of property. A person's property rights are curtailed by limitations in the public interest comprising not only restrictions *vis-à-vis* an arbitrary State authority but also restrictions to counteract an inequitable balance of power between individuals *inter se*. By applying the constitutional values of equality and human dignity, the State is enjoined to correct imbalances resulting from an emphasis on private autonomy and individual freedom. This might involve restrictions on the resale or disposal of property and the subjection of individual interests to controls, regulations, restrictions, levies and other measures, possibly (albeit controversially) with lesser or even no compensation.

## B. Limitations

The property clause of the South African Constitution allows the deprivation or expropriation of property if certain requirements are met. In addition, various statutes restrict the ownership of movables, land in general and of agricultural and residential land in particular.

Private law restrictions are contained in the rules of neighbour law, which are culled from both the law of property and the law of delict. The result is a mixture of archaic Roman property remedies and the English tort of nuisance. Both the Roman and English remedies are apparently based on the age-old maxim 'use your property in such a way as not to injure your neighbour'.

'Nuisance' in the strict sense refers to activities that interfere with a neighbour's health, convenience, comfort and well being, like smells, smoke, noise or indecent displays. In its wider sense, nuisance connotes abnormal or unusual use of land causing actual damage or threatening potential harm. Examples are the planting of trees with extensive root systems that threaten the foundations of a neighbouring house and careless construction of buildings making collapse imminent. This broader concept has a close affinity with the doctrine of abuse of rights, which renders the exercise of normal powers of ownership subject to attack if it is exclusively aimed at causing injury to a neighbour. Traditional examples are the erection of a dummy chimney with the sole purpose of impairing a neighbour's view and the sinking of a borehole aimed at cutting off a neighbour's water supply.

The Courts balance the conflicting interests of neighbours on the objective criterion of reasonableness: it enquires whether a particular activity is proper and socially appropriate in view of the prevailing views of the community (*secundum bonos mores*). From the plaintiff's perspective, the question is whether the nuisance is *plus quam tolerabile*, in other words, more than could reasonably be

tolerated. The following factors are considered to determine whether the activity complained of was objectively reasonable:<sup>4</sup>

- the locality of the nuisance;
- the benefit flowing from the activity in proportion to the harm suffered by the plaintiff;
- the sensitivity of the plaintiff and of the activities conducted on the neighbouring land;
- the motive behind a certain activity as well as the social utility of the activity;
- the possibility that the same goal could have been achieved by less harmful means, and
- whether the neighbour ‘came to the nuisance’.

Where an actionable nuisance is proved, the plaintiff can either apply for an interdict to stop the nuisance, and/or, if appropriate, institute a delictual action for damages. These remedies are available to landowners as well as to certain occupiers such as lessees.

In addition, certain traditional neighbour law remedies are employed to remedy a breach of the following duties:

- the duty of lateral support of neighbouring land;
- the duty to prevent buildings or trees from encroaching on neighbouring land;
- the duty not to divert water onto neighbouring land, and
- the duty to prevent buildings from collapsing.

## C. Original Acquisition of Ownership

### 1. Introduction

South African law distinguishes between original acquisition of ownership where a totally new right is acquired in property and derivative acquisition where ownership is derived from the ownership of a previous owner. Original modes of acquisition include occupation; treasure trove; alluvion and avulsion along rivers; accession of movables to movables; accession of movables to immovables; specification; mingling of solids and mixing of fluids; gathering of fruits;

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<sup>4</sup> See *Gien v. Gien* 1979 (2) SA 1113 (T) at 1123.

prescription, and expropriation. Since most of these methods retained their Roman features and requirements in modern South African law, only a few modern developments will be examined.

## 2. *Occupation*

The Game Theft Act of 1991, aimed at the protection of the lucrative game-farming industry in South Africa, qualified the principle that the person who takes physical control of a wild animal acquires ownership wherever caught and even if captured in contravention of game laws. In order to eradicate poaching, the Act provides that the owner of game escaping from a camp or kraal certified as *sufficiently enclosed*, retains ownership of the animals. The application of the Act is restricted to game, that is, to animals kept or held for commercial or hunting purposes in an enclosed camp. This would exclude giraffes, monkeys and baboons, which are not hunted for either sport or food. Fish kept enclosed in rivers or lakes and game kept in nature reserves for ecological reasons, are also excluded.

Whereas abandoned property becomes the property of the first taker, lost property is not ownerless and a finder can only acquire ownership by prescription. A finder must advertise his find in local newspapers or hand over the object at the nearest police station. Shipwrecks and flotsam and jetsam are, without proof of abandonment and subject to special statutory qualifications, treated the same as lost property. For fiscal control, the Customs and Excise Act 91 of 1964 requires salvagers to obtain a salvage licence for searching and salvaging wrecks along the South African coastline.

## 3. *Accession*

The most important form of accession in South African law is *inaedificatio* or accession by building. Under the Roman maxim *superficies solo cedit*, everything built on the soil forms part of the soil. The accessories, whether they are building materials, oil tanks, windmills, irrigation or refrigeration systems, lose their individuality and become part of the land. To determine attachment, three factors are considered, namely:<sup>5</sup>

- the nature and purpose of the movable;
- the degree and manner of its attachment, and
- the intention of the owner of the movable.

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<sup>5</sup> See *Macdonald Ltd v. Radin and the Potchefstroom Dairies and Industries Co Ltd* 1915 AD 454 at 466.

Building materials, windows and doorframes are capable of attaching to land. Windmills and irrigation systems are destined to serve agricultural (and oil tanks industrial) premises, but temporary shacks and prefabricated houses are not considered to serve the land. The movable must be securely attached to the land, for example bolted onto a concrete floor. The attachment could, however, also be by mere weight, for example where massive oil tanks are sunk into the soil to such a degree that a feat of engineering is required to remove them. The attachment is considered sufficient if the article loses its identity and becomes an integral part of the immovable or if separation would cause substantial damage to either the land or the accessory. Modern technical advances have made the criterion of removability questionable and emphasis is now placed on functional rather than physical integration. The third factor, namely the intention at the time of attachment, is, rather surprisingly, based mainly on American case law. Originally, the intention of the annexor was taken into account but later the intention of the owner of the movable became paramount. The rationale is that the owner of a movable should not lose his ownership by the mere fact of attachment. The Courts invariably found that the owner of a movable, sold for example on hire purchase, could never have intended the attachment to be permanent.<sup>6</sup> In other words, the owner never intended to lose ownership until he was fully paid.

The interaction between these factors resulted in two approaches. The traditional approach ignores the intention of the owner of the movable if the first two factors, namely the nature and purpose of the movable and the manner of attachment, are unequivocal. Intention, however, becomes paramount if these two factors are indecisive. The new approach focuses on the intention of the owner of the movable reducing the first two factors to external indicia from which such intention can be inferred. Ultimately the inferred or imputed intention must be weighed against the *subjective* intention to determine on a balance of probabilities the *real* intention at the time of the attachment.

The emphasis on intention is criticised for being contrary to Roman-Dutch sources, which emphasised the function of the movable instead. Again, the intention of the owner plays a significant role in derivative acquisition and not in original acquisition where acquisition is by operation of law. Moreover, emphasis on intention conflicts with the publicity principle and contradicts the impression created by a firm attachment.

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<sup>6</sup> See *Konstanz Properties (Pty) Ltd v. Wm Spilhaus & Kie (WP) Bpk* 1996 (3) SA 273 (A).

South African law accepts that although the landowner acquires ownership, a lessee has the right to remove (*ius tollendi*) useful and luxury improvements before expiry of the lease without causing damage. The presumption is that these improvements were only intended to be temporary.

#### *4. Specification*

South African examples of specification are where a table is constructed from scrap metal and stolen iron bars<sup>7</sup> or where a motor vehicle is built up from the parts of two wrecked vehicles.<sup>8</sup> The outdated requirement of non-reducibility, which for instance denies specification where a silver goblet can be melted down to its original materials, still forms part of South African law. South African law apparently accepts the theory that the creator should be rewarded for skill and creativity as the rationale for acquisition of ownership by *specificatio*. Consequently, it is immaterial whether the creator acted in good faith. *Mala fides* only affects the remedies available against the maker. An owner who lost his material through specification can claim compensation on the ground of unjust enrichment. A maker in bad faith may in addition be sued delictually for loss suffered, and in appropriate circumstances for theft.

#### *5. Prescription*

In South Africa, ownership is acquired by prescription through uninterrupted possession of movable or immovable property for 30 years. The rationale for prescription is not to penalise an owner for negligent omission to guard property but rather to perpetuate the factual impression of ownership created by long and uninterrupted possession. The incorrect impression created by negligence rather than negligence itself is emphasised.

Historically, the South African Prescription Act 68 of 1969 harks back to the Theodosian institution of ‘very long prescription’ (*praescriptio longissimi temporis*) and the Roman-Dutch institution of ‘long prescription’ (*lange verjaring*). The Act converted the traditional requirement of possession without force, stealth or permission (*nec vi nec clam nec precario*) into the basically similar requirement of open possession ‘as if he (the possessor) were the owner’. Consequently, possession must be patent and visible *vis-à-vis* the general public and further without permission, sufferance or consent of, and ultimately adverse to, the

<sup>7</sup> *S v. Riekert* 1977 (3) SA 181 (T).

<sup>8</sup> *Khan v. Minister of Law and Order* 1991 (3) SA 180 (T).

owner. Therefore a lessee or usufructuary does not qualify for prescription. Neither just title nor *bona fides* is required.

The possession must be uninterrupted for a period of 30 years with or without the addition of the possession of a predecessor in title. Natural interruption is recognised, but interestingly, mere temporary dispossession is ignored if the possessor regains possession by legal proceedings within six months or by any other lawful means within a year. Prescription is judicially interrupted by the commencement of an ownership claim for the property resulting in a final judgment. Prescription then has to start *de novo* from the day the final judgment is given.

The Prescription Act of 1969 recognises several grounds of suspension of prescription to protect persons (for example minors) who are not in a position to interrupt prescription by Court action. Interestingly, the Act only takes cognisance of a ground of suspension, which exists within the last three years from completion of prescription and postpones the period with three years from the time when the ground of suspension ceases to exist. The owner is thus allowed a three year period to enforce rights once capacity is regained.

Once prescriptive title has been acquired, the former owner, though still registered, loses his ownership and the possessor automatically becomes the new owner. The Registrar of Deeds, however, needs an order of Court to make the necessary entries. Registration facilitates transfer and other transactions with regard to the land.

## 6. *Expropriation*

Ownership is acquired by expropriation when the State acquires private property in the public interest, usually against payment of compensation determined by market value. The Expropriation Act 63 of 1975 regulates expropriation. Ownership passes to the State on the date of expropriation, but registration in the name of the State is required for transfer of the property.

The South African Constitution lays down the following requirements for expropriation:

- it must be authorised by a particular law that has general application and does not single out particular individuals;
- it must be for public purposes, which includes expropriation for building a road, a bridge or a hospital but excludes expropriation specifically for the benefit of a private individual; expropriation for purposes of redistribution as part of the land reform programme is regarded as in the public interest and thus constitutionally permissible, and
- if no agreement can be reached between the expropriating authority and the expropriatee, compensation must be agreed upon or ordered by a Court.

Under the property clause, the amount of compensation and the time and manner of payment must be just and equitable, reflecting an equitable balance between the public interest and the interests of those affected. Circumstances to be considered are the market value; current use; history of the acquisition and use; the extent of direct State investment and subsidy in the acquisition and capital improvement of the property, and the purpose of the expropriation. The following circumstances would justify an amount of compensation below market value:

- where a landowner holds large tracts of unused land for speculative purposes in an area of great urban homelessness (current use);
- where people were forcibly removed from their land under the old Government and the State now wishes to restore such land to those dispossessed (history of acquisition and use), and
- where there is an urgent social need for land (purpose of expropriation).

## **D. Derivative Acquisition of Property**

### *I. General*

The most important derivative modes of acquisition of ownership are delivery in the case of movables and registration in the case of immovables. Ownership passes automatically in the case of a marriage in community of property, insolvency and death, but delivery or registration is required in the case of a State grant and division of common property.

Unlike under English and French law, ownership does not pass on mere agreement between the parties but only on delivery or registration. As in German law, the agreement only creates personal rights and obligations and an additional legal transaction is required for the transfer of ownership to give publicity to the change. With movables, delivery transfers both factual control and ownership; with land, registration transfers title whereas factual control is acquired when the transferee enters into possession.

Like Germany, South Africa follows an abstract system of transfer of property in that the passing of ownership is wholly abstracted from the agreement giving rise to the transfer.<sup>9</sup> Transfer occurs irrespective of whether the antecedent agreement is void, voidable, putative or fictional. In fact, all that is required is a

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<sup>9</sup> See most recently *Air-Kel (Edms) Bpk h/a Merkel Motors v. Bodenstein* 1980 (3) SA 917 (A) at 923; *Krapohl v. Oranje Koöperasie Bpk* 1990 (3) SA 848 (A) at 864; *Bank Windhoek Bpk v. Rajie* 1994 (1) SA 115 (A) at 141.

real agreement, that is, a serious intention to transfer and receive ownership. Once ownership has passed to the transferee, he can in turn validly transfer to a third party. The original owner loses ownership and he has to fall back on a personal claim based on unjust enrichment. On insolvency of the original transferee, the original owner has no claim on the property, but becomes a concurrent creditor. Since South African law does not automatically protect the *bona fide* acquisition of a movable, the reinforcement of legal certainty in commercial dealings by an abstract system is highly significant.

The abstract system requires a real agreement for the transfer of ownership. If the real agreement is merely voidable (for example as a result of undue influence), ownership will pass, provided the agreement is not vitiated before transfer. If, however, the real agreement is void, for example on account of fraudulent misrepresentation or mistake, ownership will not pass. Thus where the transferor signs a deed of transfer in the belief that the deed only extends the transferee's option on the farm, the transfer will be void. In certain types of contract, such as illicit diamond dealings or sale of liquor to a person on the so-called black list, the vitiating element attaches to both the preceding contract and the real agreement.

## 2. *Delivery*

Movable corporeals are transferred by actual or constructive delivery. South African law recognises five forms, namely:

- *clavium traditio* or the delivery of the content of a warehouse by handing over the keys;
- *traditio longa manu* or the delivery of heavy objects by pointing them out in the presence of the transferee;
- *traditio brevi manu* or the delivery of property already in the possession of the transferee;
- *constitutum possessorium* or the delivery of ownership while retaining possession under a valid *causa detentionis*, and
- attornment.

Transfer of ownership in terms of a hire-purchase agreement is usually construed as an instance of *traditio brevi manu*. A hire-purchaser already has physical control of the property when the last instalment is paid, and as long as he has the intention to be owner at that stage, actual delivery is not required. In the field of financing, the institution of *constitutum possessorium* has up to now been rejected on the ground that the antecedent transaction is simulated.

Attornment, a device transplanted from English law, occurs when property in the control of a third party, is transferred. It requires a tripartite agreement between the parties that the holder will henceforth hold the property on behalf of the transferee. If A wants to transfer his motor vehicle left with a panel-beater for repairs to B, attornment is effected when A instructs the panel-beater to hold the motor vehicle henceforth on behalf of B and the panel-beater agrees. The tripartite agreement need not be arrived at simultaneously. The holder may consent in advance to hold in the transferee's name if and when the real agreement to transfer and to accept transfer is entered into.

In *Caldeon & Suid-Westelike Distrikte Eksekuteurskamers Bpk v. Wentzel*,<sup>10</sup> it was questioned whether the conscious co-operation of the holder is really necessary and it was suggested that mere notification to the holder, coupled with a *cession of the right of vindication* to the transferee, could be sufficient for transfer. Such an approach recognises a completely new form of constructive delivery modelled on the Dutch *cessio iuris vindicationis*. However, dogmatically only personal rights can be assigned and transfer of a right of vindication in reality amounts to transfer of the property itself for which a recognised form of delivery is needed. But commercial practice ignores dogmatic inconsistency in search of a more streamlined mode of delivery free from archaic requirements. If recognised, the crucial question is whether this new type of delivery should be restricted to the sphere of hire purchase or granted general application.

### 3. Registration

The South African registration system, by which immovable property is transferred, dates back to a statute of Emperor Charles V in 1529. The Deeds Registries Act of 1937 established a uniform system of land registration for the whole of South Africa.

The purpose of a registration system is to compile a complete register of all land, indicating title and limitations in order to avoid double sales and to publish the legal position to creditors and prospective security creditors. The new constitutional dispensation with its professed policy to move away from a system of tenuous occupancy rights based on permits and official licences to a system of registration of ownership and other real rights increased the role of registration. The architects of the new land policy accept that the main system of surveying and registration as embodied in the Deeds Registry Act could, with minor

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<sup>10</sup> 1972 (1) SA 270 (A).

adjustments, accommodate its aims of restitution, redistribution and new forms of land tenure.

The nine South African recording offices keep registers of carefully surveyed agricultural and urban plots under their jurisdiction. State land is transferred by a deed of grant and any subsequent transfer is effected by a deed of transfer prepared by a conveyancer practising within the recording district. The transferor (or rather the duly authorised conveyancer) executes deeds of transfer in the presence of the Registrar who effects registration by affixing his signature to the deed. Recently, microfilming and computerisation have drastically modernised deeds registration.

Following the Roman-Dutch precedent, South Africa adopted a negative system of registration. The State does not guarantee the correctness of the land records and State officials are not liable for incorrect registration. This system favours the true owner rather than the *bona fide* possessor. Real rights in land acquired by prescription, expropriation and statute or as a result of a marriage in community of property are not reflected in the land records. Consequently, the true owner can trump a *bona fide* possessor who acquired the property from a registered 'owner'. Moreover, several modes of termination of real rights, like abandonment, confusion and the extinction of a principal debt secured by a bond are not immediately reflected in the land records. Inadvertent mistakes also occur, for example where the transferor does not have the capacity to transfer the property, the signature of the transferor is forged or the transferor was fraudulently induced to sign a transfer deed in the belief that it was another type of document. Despite these deficiencies, the South African land records create virtual security of title for the following reasons:

- nobody can claim that he has acquired ownership of, or a real right in, land unless it is registered in his name;
- persons who have acquired ownership by prescription or expropriation or whose land has been freed from limited real rights by abandonment or confusion usually apply for rectification of the deeds registry records as soon as possible;
- though the Registrar and his officials have become mere registration officers, they remain very alert and careful to avoid incorrect registration, and
- a landowner that has for a long time neglected to rectify an incorrect entry may in appropriate circumstances be estopped from asserting his ownership.

The dual purpose of the land records is to serve as a public or quasi-judicial forum for transfers of title by the registration of duly executed deeds and to maintain as

far as practicable an accurate public record of title. Registration as owner is, with the few exceptions mentioned above, considered proof of ownership. However, although the land record is public, the public is not deemed to have constructive knowledge of every real right registered in respect of a particular plot of land.

## **E. Protection of Ownership**

### *I. Rei vindicatio*

The *rei vindicatio* is the most important remedy for the protection of ownership in South African law. An owner can vindicate his movable or immovable property from whoever is in possession. The owner must prove the following:

- his or her title by defeating the presumption that the possessor is owner of a movable and by showing that he or she is the registered owner of land;
- that the property is still in existence and clearly identifiable, and
- that the defendant is in possession of the property.

If the owner concedes that the defendant obtained possession in terms of a contract, he or she must prove that the contract is no longer valid.

- Defences against the *rei vindicatio* are the following:
- the defendant had acquired the property by prescription;
- a third party is the owner;
- the property was alienated or destroyed, or
- the defendant has a superior contractual right to possession.

In principle the right of possession of a third person cannot be raised as a defence against a *rei vindicatio*. Recognition of such a defence confuses the English delictual action of trespass with the Romanist proprietary *rei vindicatio*.

The *rei vindicatio* is primarily aimed at restoration of the property along with its fruits or the value of the property at the time of the judgment. However, the Courts have frequently confused the *rei vindicatio* with the action to exhibit (*actio ad exhibendum*) and allowed the *rei vindicatio* for the value of the property against a *mala fide* possessor who has fraudulently ceased to possess property or a thief who has lost the property through chance.

The scope of the owner's right of vindication is in general limited by the Germanic rule, 'moveables can not be pursued' (*mobilia non habent sequelam*) which protects the *bona fide* acquirer of movable property. South African law restricts the *mobilia* rule to the law of pledge and does not protect *bona fide*

purchasers who acquire property at open markets or *bona fide* pawnbrokers who receive stolen merchandise in pledge. Even so South African law still protects persons to whom property is awarded by the Court or who acquires property at judicial or pound sales or property sold by trustees of insolvent estates, liquidators of companies or the treasury. In addition, stolen money and negotiable instruments payable to bearer (*toonderdokumente*) cannot be recovered from a person who has received them in good faith and for valuable consideration. The English doctrine of conversion is not applied in South African law and this precludes the owner of money or negotiable instruments made payable to bearer from claiming objects bought with stolen money or the proceeds from stolen movables. Where movables entrusted to an agent for sale or a factor are sold and delivered to a *bona fide* purchaser, the owner cannot vindicate his movables from the purchaser without offering the price he received. This exception differs from the limitation on the *rei vindicatio* by way of estoppel in that no proof of negligence on the part of the owner is required.

The most important limitation on the *rei vindicatio* is based on the doctrine of estoppel, a conglomeration of the Roman-Dutch *exceptio doli* and the English institution of 'estoppel by representation'. It limits the availability of the *rei vindicatio* when an owner by misrepresentation culpably induces an outsider to believe that a third party is the owner of property or has the power to dispose of it. In such circumstances the owner is estopped from denying that the third party had the right to dispose of the property against a *bona fide* purchaser who acted in reliance on the representation to his detriment.

Estoppel traditionally is regarded as a shield and not a sword. If successfully pleaded, it renders the *bona fide* acquirer immune to a further *rei vindicatio* on account of the rule that one cannot sue twice on the same cause (*ne bis in idem*). However, subsequent purchasers cannot successfully plead estoppel *vis-à-vis* the true owner. The Courts have so far refused to accept that a successful plea of estoppel vests ownership in the *bona fide* acquirer and thus to introduce a new (derivative) mode of acquisition of property.

In a recent South African case,<sup>11</sup> the Supreme Court of Appeal highlighted the limitations on the *rei vindicatio* introduced by the recent Prevention of Illegal Evictions from and Unlawful Occupation of Land Act 19 of 1998 in eviction proceedings. At first at least 14 days' notice must be given to the unlawful occupier and the municipality concerned. Then the Court is given the discretion to consider whether it is 'just and equitable' to evict the unlawful occupier. All

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<sup>11</sup> *Ndlovu v. Ngcobo, Bekker v. Jika* [2002] 4 All SA 384 (SCA).

the relevant circumstances must be considered, including the rights of the elderly, children, disabled persons and households headed by women. If the period of occupation exceeds six months, the Court must in addition consider whether the municipality or another party could make land available for relocation of the unlawful occupier. The protection of the Act also benefits so-called holdover occupiers, for example a tenant whose initial occupation was lawful but who refuses to leave the premises after the termination of the lease.

## 2. *Other remedies*

An owner can protect his property with the following additional remedies:

- a prohibitory or mandatory interdict to restrict any physical disturbance of land or movables or to remove an obstacle placed on the land;
- an action for disclosure (*actio ad exhibendum*) against a *mala fide* possessor who has fraudulently alienated the property;
- a delictual claim for damages against a (*bona fide*) possessor who negligently consumed, destroyed or damaged the property;
- a delictual action for theft (*conductio furtiva*) against a thief or his or her heirs for the patrimonial loss suffered as a result of the theft, and
- an enrichment action where a sum of money has been acquired without consideration (*causa lucrativa*) or where property is lost on account of accession or specification.

# VI. CO-OWNERSHIP AND SECTIONAL TITLES

## A. Ordinary Co-Ownership or *Communio*

Ordinary co-ownership refers to the situation where two or more co-owners own property in abstract undivided shares. It differs from common ownership of property in a marriage in community of property or a partnership. Co-ownership is more individualistic: any co-owner can dissolve the community of property and each co-owner is allowed to use and enjoy the common property in accordance with his or her undivided share. The conflicting individualistic and universalistic aspects inherent in co-ownership gave rise to the maxim: *communio est mater rixarum* – co-ownership is the mother of disputes.

The co-operation of all the co-owners is needed for alienation, lease and mortgage of the common property. Likewise judgment must be obtained against

all the co-owners for a sale in execution. Co-operation is also required for administrative decisions concerning the exploitation, alteration or improvement and any individualistic act can be interdicted. By contrast, each co-owner is entitled to claim the return of the common property by *rei vindicatio* or a possessory remedy, defend a claim by a third party, incur necessary (and useful) expenses for its maintenance and apply for an interdict to ward off damage.

Co-owners acquire undivided shares in fruits on separation, for example in rent received from the lease of a farm held in common. In the absence of an agreement, a co-owner is not allowed to exploit the common property on his or her own or to claim exclusive use of a portion. All profits resulting from unfair or disproportionate exploitation must be divided proportionately amongst all the co-owners. Every co-owner is further obliged to contribute proportionally to necessary and perhaps also useful expenses including taxes and maintenance expenses but excluding luxurious expenses. The co-owners must share losses and charges, except if the loss is imputable to the bad faith or negligence of one of them. Contribution of fruits, profits and losses can be claimed during the existence of co-ownership.

Each co-ownership share can be alienated, burdened with a real right or bequeathed freely. A judgment creditor can likewise attach a co-ownership share and each co-owner is entitled to vindicate his share. No right of pre-emption exists in respect of the shares of fellow co-owners.

To avoid disputes, any co-owner may demand partition of the common property if no agreement can be reached. The Court has a wide discretion to effect an equitable division amongst the co-owners. If physical division is uneconomical or inequitable (for example in the case of a building or a painting), the Court may allot the property to one co-owner accompanied by an order of compensation to the other. If a farm of one of the co-owners borders on a farm held in common, the Court will usually allot an adjacent portion to the co-owner concerned. In appropriate circumstances the Court will decree the sale of the common property by public auction with a division of the proceeds amongst the co-owners. In the partition of a farm between two co-owning brothers, the Court decided that the most equitable solution was to hold a closed public auction with only the two brothers bidding.<sup>12</sup> The Court also has the discretion to postpone partition or sale of the common property if these will prejudice any co-owner.

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<sup>12</sup> *Kruger v. Terblanche* 1979 (4) SA 38 (T).

## B. Sectional Titles or Apartment Ownership

South Africa needed legislative intervention to breach the principle of accession that prevents ownership of parts of a building. The Sectional Titles Act was promulgated in 1971 and modernised in 1986. Its aim is to accommodate the shortage of housing; to satisfy the social and psychological desire for home-ownership; to provide homebuyers with a hedge against inflation, and to encourage redevelopment of city centres and slum areas. Moreover, the existing alternative to sectional titles, namely ‘ownership’ of shares in a share block company, was fraught with financial risks for the potential buyer. Although sectional ownership was primarily intended for residential use, it also caters for commercial, industrial or professional use (*inter alia* by medical doctors and lawyers) and the development of resort condominiums.

Sectional ownership consists of three elements, namely:

- individual ownership of a section (flat or commercial unit);
- joint ownership of the common parts of the sectional title scheme, and
- membership of a managing body consisting of all the sectional owners.

An owner accordingly owns the section (apartment), jointly owns the common parts of the scheme and is a member of the body corporate. These elements are inextricably linked, cannot be disposed of separately and reciprocally influence each other.

The Sectional Titles Act created a completely new type of composite property, namely a unit, consisting of a section of a building and an undivided share in the land and the common parts of the building. This is supplemented by a new type of composite ownership consisting of individual ownership of a section coupled with joint ownership of an undivided share in the common property. A sectional owner’s rights of use and disposal of his or her section are to some extent limited by the provisions of the Act, the rules of the scheme and the resolutions of the body corporate. Nevertheless, sectional ownership is still regarded as genuine ownership since these restrictions are regarded as inherent in the destructibility of the building, the structural interdependence of units and the intensified sectional title community of which they form part.

The joint ownership in respect of the land and the common parts of the building differs materially from traditional co-ownership in so far as:

- the sectional title community is not easily dissolved;
- a sectional owner is not allowed to dispose of his undivided share independently of the section, and

- a permanent administrative body is established to regulate the management and use of the common property.

Membership of the body corporate also differs from membership of a social club or a limited company in that:

- it is inextricably linked to ownership of a unit;
- unlike shareholders of a limited company, the members of the body corporate remain personally, albeit only accessorially, liable for the unsatisfied debts of the body corporate;
- voting at general meetings is not a one man one vote system but in important decisions related to participation quotas, and
- a unanimous resolution or Court order is needed to dissolve the body corporate.

The Act allocates certain parts of the land and building to either sections for individual use, to common property for collective use or as exclusive use areas to particular owners. The land must be within the jurisdiction of a local authority and the buildings must be of a permanent nature. The participation quota or share value of a section is calculated according to the proportionate floor area of each section in residential schemes and determined by the developer in commercial schemes. This quota determines the value of the vote of an owner at general meetings, the undivided share in the common property, the proportional contribution to common expenses and the proportional liability for the debts of the body corporate.

At the outset the developer must consider how the scheme is to be financed and particularly whether it is necessary to develop it in stages. Thereafter he must instruct a land surveyor and an architect to prepare a draft sectional plan. If an existing rental building is being converted to sectional title, he must comply with the statutory requirements to acquaint existing tenants with the proposed scheme. He must then investigate whether the scheme complies with relevant planning statutes and building by-laws and in case of inconsistencies apply to the local authority for condonation. The draft sectional plan must then be submitted to the Surveyor-General for approval and finally to the Deeds Registry for registration and the opening of sectional title records.

To protect tenants in residential rental buildings that are converted to sectional title:

- the developer must inform existing tenants of the essential particulars of the proposed conversion at a special meeting;
- existing tenants are granted a right of pre-emption (for 90 days) of their units, and

- tenants are allowed a period of grace (a further 180 days) for finding alternative accommodation.

The Act and the model rules contain several sanctions for non-compliance with financial and other obligations as well as an arbitration procedure for the settlement of disputes. The Act further provides for the subdivision and consolidation of sections; the sale of a part of the common property; the extension of sections; the addition of land to the common property; the creation of new exclusive use areas, and the development of a scheme in phases.

The regulations contain a set of model management and conduct rules for the control of the scheme. Sectional owners are organised in a central management body, the body corporate, with the trustees as executive and the general meeting as legislative organs. The scheme can be dissolved in appropriate circumstances by unanimous resolution or a Court order.

## VII. SERVITUDES

### A. Praedial and Personal Servitudes

South African law distinguishes between praedial servitudes that are constituted in favour of the successive owners of land and personal servitudes that are constituted in favour of a particular person. Praedial servitudes are further perpetual while personal servitudes are extinguished by the death of the holder or, in the case of a juristic person, after 100 years. The object of praedial servitudes is always immovable property while personal servitudes can have a movable as object. Praedial servitudes are alienated on alienation of the dominant land, while personal servitudes are inextricably bound to a person and are therefore inalienable. Finally, praedial servitudes are indivisible, while the most important personal servitude, usufruct, is divisible.

The holder of a servitude is entitled to unrestricted enjoyment of the servitude but must exercise it *civiliter modo*, that is, in a civilised, considerate manner. The servient owner may only exercise powers consistent with the servitude.

### B. Praedial Servitudes

A praedial servitude is a real right held by the owner of dominant land (*praedium dominans*) over a servient tenement (*praedium serviens*). It serves the dominant land, follows the dominant land on alienation and consequently burdens the servient land irrespective of the identity of its owner.

To avoid proliferation and undue encumbrance of land, South African law requires:

- two tenements belonging to different owners and situated sufficiently close to reasonably enhance the utility or enjoyment of the other (*vicinitas*);
- the servient tenement to be capable of serving the dominant tenement on a permanent basis (in other words, it must have a perpetual cause) and thus a right of sailing can only be established in respect of a permanent lake and a servitude of leading water only in respect of water from fountains or springs;
- the servient tenement to offer some permanent utility (*utilitas*) or benefit to the dominant landowner *qua* owner and not merely to serve his personal pleasure.

Roman law already ruled out a praedial servitude to pick fruit, promenade or dine on a neighbour's land. However, South African law accepts that utility can be accompanied by pleasure, for example the servitude of view that simultaneously guarantees a free supply of light, and a servitude of drawing water from a leaping fountain that also provides water for irrigation. The utility need not be strictly agricultural, but could also advance the economic, industrial or professional potential of the dominant land like the right to trade on neighbouring land.

Finally, in accordance with the passivity principle, no positive obligation may be imposed on the owner of the servient tenement. Such obligations are more appropriate in the sphere of personal rights that are primarily concerned with the performance of obligations. Positive obligations have, however, always accompanied the servitude of support (*servitus oneris ferendi*) and the enigmatic Roman-Dutch *servitus altius tollendi* that obliges the servient owner to raise a building and to keep it raised in order to protect the dominant tenement against hazardous weather conditions. South African Courts regard the passivity principle either as an essential tenet of praedial servitudes or as a mere guideline in the interpretation and application of servitudes.<sup>13</sup> In an attempt to overcome this impasse, an amendment of the Deeds Registries Act in 1973 allows the Registrar to register a condition containing a positive duty if he or she considers the condition 'complementary or otherwise ancillary' to a registrable condition. Commentators agree that this proviso does not undermine the passivity principle but merely provides a practical solution to the problems encountered in case law.

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<sup>13</sup> See *Schwedhelm v. Hauman* 1947 (1) SA 127 (E); *Van der Merwe v. Wiese* 1948 (4) SA 8 (C).

Ultimately the passivity rule tries to safeguard landed property against a proliferation of positive obligations in order to facilitate its commercial convertibility.

Peculiar South African praedial servitudes are *trekpath*, similar to the Australian cattle tract, and *outspan*, which entitles the dominant owner to unyoke or unharness draught animals and to rest and graze them on the servient land. The practical importance of *trekpath* and *outspan* waned when horse-carts and ox-wagons were replaced by motor vehicles, trucks and trains and when provincial ordinances introduced public *outspans*. South African law also recognises a way of necessity (*via ex necessitate*) to provide landlocked land with the shortest route to the nearest public road along a road that causes the least damage to the servient tenement. A peculiar South African water servitude is the servitude to have land submerged by water.

The principal urban servitudes are servitudes of light, view and projection. These servitudes lost their importance with the modernisation of building methods and the advent of planning law. Since the late 19th century, private restrictive conditions were registered against the title deeds of all the plots of land (*erven*) in a particular township in order to preserve its typical characteristics. These conditions are classified as negative urban servitudes simultaneously benefiting and burdening all the plots of land in the township. However, fundamental differences with urban servitudes makes a classification as real rights *sui generis* more appropriate.

### C. Personal Servitudes

Roman law recognised a *numerus clausus* of personal servitudes, namely usufruct, use and habitation. Modern South African law in addition developed so-called irregular servitudes that are praedial, but constituted in favour of a particular person.

Usufruct is a highly personal limited real right that entitles a person (the usufructuary) to have the use and enjoyment of another's property and to take its fruits without impairing the substance. A classic usufruct is where a testator for example wishes to provide an income after his death for his spouse, but desires the property itself to devolve upon his son. Being a highly personal real right, a usufruct cannot extend beyond the lifetime of the usufructuary.

A usufruct is usually constituted over unconsumable property, which may be a single object, like a ship or a farm, or an aggregate of objects, such as a herd of animals, a library or a whole estate. A usufruct covers the object together with its accessories and pertinences. A quasi usufruct can be established over consumables like money and monetary claims (debts). In a quasi usufruct of debts, the holder

may call in the debt and invest the money for interest, but the capital sum must be restored when the usufruct expires.

The usufructuary is entitled to the enjoyment of the property and its natural and civil fruits. Ownership of natural fruits (for example crops and the young of animals) is acquired by gathering and of civil fruits (rent and interest) as they fall due. In a usufruct of a flock, herd, orchard or vineyard, the usufructuary must keep the entity intact by replacing dead animals or trees. South African law accepted the Roman-Dutch idea that only self-renewing (*renascentia*) minerals are natural fruits and thus due to the usufructuary, whereas he is only entitled to interest on the yield of non-self-renewing minerals. Up to now only salt has been regarded as renewing itself. The usufructuary may work existing mines, prospect for minerals and open up new mines subject to mining legislation.

Although constrained by the highly personal character of usufruct from alienating the usufruct as such, a usufructuary is entitled to alienate, pledge or mortgage, rent out, lease or lend the usufructuary interest or allow it to be sold in execution. Still, the interest gained by a third party terminates when the usufruct expires.

The owner of the property may not interfere with or diminish the usufructuary's right of use and needs the consent of the usufructuary for the sale, mortgage, the granting of prospecting rights and other dealings with the property. Even so, these dealings are always concluded subject to the usufruct. In principle, the usufructuary is required to exercise his or her rights like a sensible person and exploit the property in accordance with custom and the destiny of the property. Since the usufructuary has to restore the substance of the property (*salva rei substantia*), he or she is not allowed to destroy, consume, impair its value or change its character. A new exploitation is, however, permitted if sensible under the circumstances, for example if sale of the property is critical and clearly to the advantage of minor heirs.

The usufructuary must normally frame an inventory and provide security for proper use and restoration on expiry, subject to ordinary wear and tear. Non-compliance with a Court order to furnish an inventory and security entitles the owner to an order of ejectment. The usufructuary is responsible for ordinary repairs and normal maintenance but not to insure against fire or to maintain an existing insurance policy. Neither the usufructuary nor the owner is obliged to replace buildings which have fallen into disrepair through age or which have been accidentally destroyed.

The lesser personal servitude of use (*usus*), entitles the usuary to use the property but not to appropriate its fruits (except for domestic use). The usuary of a house may occupy it with his family and guests and may let out part of the house. A usuary may neither alienate the property nor (in contrast to usufruct), transfer the

use of the property to a third party by sale, gift, hire or otherwise. The personal servitude of habitation (*habitatio*) entitles the holder to live in a building. Unlike *usus*, the holder of the right of habitation may sublet the whole building.

#### **D. Constitution of Servitudes**

Praedial and personal servitudes are most commonly established by registration against the title deeds of the servient land or by delivery of movables. In subdivisions of land, a praedial or personal servitude is frequently constituted by a so-called *deductio servitutis*, literally by deduction of the servitude. The reason (*causa*) for acquisition of a servitude may be either a contract, a last will, a judgment in a partition action, or an arbitration award. Although an unregistered servitude does not burden the servient land, any person who acquires the ‘servient’ land by lucrative title or with knowledge of an unregistered servitude is bound to cooperate in the registration of the servitude.

A positive servitude is acquired by *prescription* if a person has exercised the rights inherent in that servitude openly and as if he were entitled to do so for an uninterrupted period of 30 years. To acquire a negative servitude, the acquirer must apparently first obtain a temporary interdict against his neighbour restraining him from exercising a certain right (for example to refrain from building higher). Thereafter the neighbour must acquiesce in the prohibition for the prescriptive period of 30 years.

#### **E. Extinction of Servitudes**

Servitudes are terminated by registration of abandonment in the land records, extinctive prescription, merger, permanent impossibility to exercise the servitude and the death of the holder of a personal servitude. A positive servitude is extinguished by prescription if the servitude is not exercised for an uninterrupted period of 30 years and a negative servitude, if the owner of the servient land acts adversely to the servitude causing the non-exercise of the servitude for the same period. In a permanent merger of the dominant and servient land, both registered and unregistered servitudes should only revive on separation if they are expressly reconstituted. Mere reference to the notarial deed that contained the servitude should not be considered sufficient.

#### **F. Remedies**

The holder of a servitude may approach the Court for a declaration of rights if his or her rights are threatened or have been infringed. He or she can apply for a

mandatory interdict compelling the wrongdoer to restore the status quo and/or a prohibitory interdict to prevent future infringements. An action for damages is available if appropriate and a *mandament van spolie* can be instituted where the actual use of a servitude is disturbed.

### **G. Public Servitudes**

Public servitudes in the form of public roads, footpaths and *outspans* are established over private property in favour of the general public. They are constituted by reservation over land granted by the State to private persons, a bequest in a will followed by registration against the title deeds of private land, a statute and immemorial user by the public. They are neither praedial nor personal nor even private real rights, but rather public powers granted by a public authority.

Although not extinguished by non-user or extinctive prescription, public servitudes are terminated if the exercise of the servitude had been precluded by the landowner without objection for the prescriptive period.

## **VIII. REAL SECURITY**

### **A. General**

South African law recognises mortgage, pledge, notarial bonds, judicial pledge, cession *in securitatem debiti*, tacit hypothec and lien as forms of real security. The primary aim of real security is to isolate a specific asset as security for a loan extended by a creditor. Being inextricably linked to the secured claim, a security transaction embodies both a personal and a real right.

### **B. Mortgage**

A mortgage is a real right in respect of specified immovable property securing a principal obligation between a creditor and a debtor. The complex of incorporeal rights inherent in a mortgage is regarded as movable if the focus is on the principal obligation (incorporeal movable) and as immovable if the focus is on the real right of security (incorporeal immovable). A notarially executed mortgage bond records both the contractual and security features of a mortgage. Conveyancing practice usually includes an unqualified admission of liability in the bond, rendering it a liquid document directly executable on default of the debtor.

Any corporeal or incorporeal immovable asset (for example a usufruct) can be mortgaged, but a mortgage on an existing mortgage is impossible. Nevertheless, the secured debt together with its attendant real right can be ceded *in securitatem indebiti*. A number of immovable assets can be mortgaged simultaneously, but a general mortgage covering all the immovable assets of the mortgage debtor is not permitted.

An owner or titleholder can constitute a mortgage. If constituted by more than one debtor, release of a debtor or portion of his property is subject to the written consent of the other mortgage debtors. Any lawful obligation, civil or natural, absolute or conditional, present or future can be secured by way of mortgage. In practice the obligation is usually expressed as a liquid debt in order to facilitate provisional sentence proceedings. The mortgage secures the principal obligation and all its incidents including interest and cost of preservation and enforcement.

Two distinct legal acts are necessary for the constitution of a mortgage, namely an agreement to mortgage and the constitutive act of registration. The agreement must reveal an intention to grant real security by isolating a specific immovable asset. Although the mortgage agreement only creates personal rights, it binds persons who acquire the property with lucrative title or knowledge of the mortgage agreement. Since registration is abstract in nature, the validity and effectiveness of the constitutive act of registration do not depend on the validity of the underlying causa.

A *pactum commissorium* or a clause granting the mortgage creditor ownership of the mortgaged property on default of the debtor is invalid. The rationale is that a creditor should not exploit the weak financial position of the debtor to obtain an undeserved windfall. However, the parties may agree after default that the creditor can take over the asset or sell it at a fair valuation. A clause that entitles the mortgage creditor to resort to *parate executie* (execution without recourse to the Court) on default of the debtor by taking possession of the property and selling it privately is also considered invalid. The rationale is that unscrupulous mortgage creditors can exploit impecunious debtors by taking the law into their own hands. An agreement for an extra-judicial sale of immovable property will, however, be valid if made after default of the debtor.

Once the mortgage is registered, a limited real right of security is created in favour of the mortgage creditor and the proceeds of the mortgaged property and all its accessions are earmarked for the satisfaction of the principal debt to the exclusion of other creditors. The mortgage creditor can interdict any action of the mortgage debtor that purports to infringe this security. The mortgage debtor retains possession and must employ the care of a reasonable person in safeguarding

the mortgaged land, but need not put the land to its most beneficial use. He or she normally has to account for fruits and profits. He or she may grant a lease over the property, encumber it with a further mortgage or utilise it for mining purposes without the consent of the mortgage creditor provided he or she does not impair the mortgage creditor's security.

A mortgage creditor has the right of pursuit. If the owner alienates the mortgaged land or burdens it with a servitude, the creditor's prior security right enjoys preference in accordance with the maxim 'first in time is stronger in right' (*qui prior est tempore, potior est iure*). The owner does not need the consent of the creditor to grant a lease over the land, but the lease will yield to the mortgage. When the property is sold in execution or on insolvency, it must normally first be put up for sale subject to the lease and only if the highest offer is insufficient, free from the lease.

Second or third mortgages over the property rank according to their time of registration. In the event of insolvency of the mortgage debtor or execution against the property, the proceeds of a sale is used to satisfy the first mortgage creditor and subsequent mortgagees according to their ranking. Provided the first creditor acts in good faith, he or she is not liable for the losses flowing from the exercise of his or her rights. A subsequent mortgage creditor is not entitled to set a reserve price but is allowed to foreclose on the mortgage and execute against the property, in which case the first creditor may set a reserve price.

A mortgage creditor has a secured claim which ranks higher than that of an unsecured creditor even if perfected in a judicial pledge. If on sale in insolvency or on default, the proceeds are insufficient to satisfy the secured debt, the property may be sold free from existing burdens like a lease or usufruct. If a deficit still exists thereafter, the mortgage creditor ranks as a concurrent creditor for the deficit. To avoid foul play, the Insolvency Act 24 of 1936 provides that a mortgage constituted to secure a previously unsecured debt more than two months before the bond is lodged for registration, will not secure any preference if the debtor's estate is sequestrated within six months after the bond is lodged. A lien holder ranks higher than a mortgage creditor to the extent of the enhanced value of the property.

On default of the debtor, the mortgage creditor can call up (foreclose) the mortgage. The mortgage creditor must first obtain judgment for the amount due as basis for a writ of execution to obtain a judicial sale. Apart from insisting on a reserved price, the mortgage creditor may buy the property at the sale and set off the secured claim against the purchase price. Although special circumstances are needed to stay foreclosure, the Court has a discretion to refuse eviction from residential premises *inter alia* if no other accommodation is available.

Termination of the principal obligation by payment, release, novation, compromise, set-off, merger (confusion) or prescription extinguishes a mortgage. In practice a mortgage is also terminated by merger, a sale in execution of the mortgaged property and expiry of a mortgaged interest like a usufruct.

A *kustingsbrief* (first mortgage) is a special kind of mortgage over immovable property executed simultaneously with transfer in favour of the seller for the unpaid part of the purchase price. A covering bond secures a future or existing claim increased by future advances. Preference on insolvency is gained if the bond expressly secures future debts and fixes the maximum amount. The preference in insolvency dates from the moment of registration of the bond. Under a participation bond scheme, funds entrusted to financial institutions by investors are lent to borrowers against the security of mortgages over their immovable property. These bonds are either in favour of the financial institution as nominal holder or of investors who are furnished with letters of participation upon registration of the mortgage. Since 1981 the Participation Bonds Act 55 of 1981 regulates these bonds extensively.

### C. Pledge

A pledge is a security right in a movable asset constituted by delivery of the asset to the pledge creditor. The fact that the pledge creditor is not allowed to exploit the object in his possession seriously affects the commercial significance of pledge. This caused the development of pseudo security devices to reconcile the beneficial exploitation of movable assets by the debtor with their usefulness as security. One such device, the reservation of ownership under an instalment sale transaction to secure the seller's claim to the unpaid balance, is well established in the context of hire purchase. The other device, namely a *fiducia cum creditore contracta*, or a transfer of ownership of a movable asset as security, is disapproved of by the South African Courts as simulated pledges disguised as sales.

The object of a pledge is a single or composite movable or an aggregate of individual objects (*universitas rerum distantium*) such as a flock of sheep, the stock-in-trade of a business or an art collection. The pledge covers the aggregate as a fluctuating mass. The close identification of the (incorporeal) rights embodied in negotiable instruments with the document means that the pledge of these instruments results in these rights forming part of the security of the pledge creditor. The recognition of a sub-pledge (*onderpand*) appears questionable.

A pledge is constituted by an agreement to pledge, followed by delivery, or in the case of incorporeals, cession, of the pledged object. The doctrine of notice binds a person who acquires possession of the object with knowledge of the

pledge-agreement. Whereas the constructive forms *traditio brevi manu*, *clavium traditio* and attornment are accepted without question for the delivery of a pledge, *constitutum possessorium* and *traditio longa manu* are frowned upon because of the opportunity for fraud.

The validity of a *parate executie* clause (see VIII.B. above) is now challenged in the light of section 34 of the South African Constitution, which provides that everyone has the right to have any dispute that can be resolved by the application of law decided before a Court. Although a clause restricting the debtor's capacity to satisfy the secured claim and to redeem the pledge cannot validly be inserted in a pledge agreement, the parties may agree that the pledged object may not be redeemed before a specific day or the expiry of a specific notice. If not *in fraudem creditoris*, the parties can validly agree after maturity of the debt that the creditor can retain the pledged object in satisfaction of the debt.

The pledge creditor is entitled to interdict a threatened interference with possession and to recover the property by the *mandament van spolie* in case of wrongful deprivation (see IV.C. above). However, the pledge creditor's right of pursuit is restricted by the maxim *mobilia non habent sequelam* (movables cannot be pursued) where he or she has voluntarily parted with possession. In principle, the pledge will not revive by the mere retrieval of possession, except perhaps if no real right has been established over the asset in the interim.

The pledge gives the pledge creditor a right of preference on the proceeds of a sale in execution or on insolvency of the debtor. The proceeds of the pledged object are first applied to the satisfaction of the principal obligation and only the surplus is available for distribution amongst other creditors. The fact that the pledge creditor must retain possession of the object makes further pledges of the same object difficult and thus avoid intricate ranking amongst several pledge creditors.

On default, the pledge creditor may proceed to realise his security by levying execution according to prescribed Court procedures. The asset must be sold at a public auction to the highest bidder unless some other arrangement has been made. Once the creditor is satisfied, the surplus goes to the pledge debtor. If there is a deficit, the pledge creditor remains an ordinary unsecured creditor with regard to the balance.

In principle the pledge creditor is eventually obliged to restore the object together with its fruits. Until then he or she must exercise the care of a reasonable person and will be liable for loss arising from destruction and deterioration of the asset due to his or her *dolus* or negligence. If dereliction of duty is apparent, the debtor may demand security against depreciation. On termination, the pledge creditor has a claim for necessary expenses together with a right of retention until such expenses are paid.

As in the case of mortgage, a pledge is terminated if the main obligation is extinguished, for example if the debt is paid in full. Redelivery of the pledged object must take place *pari passu* with the extinction of the debt. The unprincipled view that the pledged property may be retained until payment of other liquid debts is unacceptable. Further grounds of termination are destruction of the pledged property, merger, renunciation and extinction of title and the acquisition of the pledged property by prescription.

#### **D. Notarial Bond**

To thwart the delivery requirement for pledge, South African law allows a mortgage debtor to register a notarial bond over either specific movables or over all his or her movable assets (including liquor licences, book debts and goodwill) as security. However, the constitution of a general mortgage bond over all the movable and immovable assets of the debtor is not allowed. For enforceability against third parties, the bond must be registered at the place of residence as well as the place of business of the debtor within three months after execution.

Before 1993 a general or special notarial bond registered over movables only provided real protection if the creditor took possession of the bonded property in terms of a perfection clause in the bond. The Security by Means of Movable Property Act 57 of 1993 rendered this clause unnecessary in a bond hypothecating specified, readily recognisable, corporeal movable property because such movables are deemed to have been pledged to the bondholder. The Act ranks a pledge of specified property above a landlord's hypothec and the hypothec of the owner of goods in an instalment sale.

#### **E. Cession in Securitatem Debiti (Cession of a Claim as Security for a Debt)**

Incorporeal assets like book debts, insurance policies and shares may be ceded as security. Such a cession is either construed as an out-and-out cession subject to an undertaking (*pactum fiduciae*) that the cessionary will restore the principal claim to the cedent on satisfaction, or as a pledge of an incorporeal movable (claim). Under the pledge construction the cessionary is regarded as 'holding' the claim merely as security with the cedent divesting himself or herself merely of the capacity to enforce the claim.

The conglomeration of incongruous elements involved in security cession, forced South African Courts to opt for either the pledge construction or the out-and-out cession construction. With one exception, the Courts have up to now

refused to acknowledge that depending on the intention of the parties, a cession *in securitatem debiti* could amount to either a pledge or an out-and-out cession. By not distinguishing clearly between these two forms of security cession, the Courts have in effect created a pledge *sui generis* to satisfy the needs of practice. This ‘pledge’ requires no publicity for its constitution, and vests *locus standi* to sue to the pledge creditor. However, it tempers the inequitable results of such complete transfer by falling back on the pledge construction to protect the interests of the debtor and his or her creditors in the event of the debtor’s insolvency or judicial attachment of the claim (see further Chapter 7. VII).

## F. Tacit Hypothecs

Roman and Roman-Dutch law recognised a large number of general and special tacit hypothecs and privileges. Because of hardship flowing from their non-publication, most of these security devices have either fallen into disuse, been abolished by later legislation, included in later statutory enactments or have been watered down to mere rights of retention. The Insolvency Act expressly confirmed two tacit hypothecs, namely the landlord’s tacit hypothec over the *invicta et illata* of his tenant and the tacit hypothec of the hire-purchase seller over the objects sold. In addition, at least three statutory hypothecs have been introduced to secure agricultural advances made by certain statutory bodies. Finally, the Deeds Registries Act 47 of 1937 and other subordinate legislation created a *sui generis* type of tacit hypothec for arrear taxes in favour of the State and regional and local authorities.

## G. Judicial Pledge

A creditor who fails to obtain satisfaction for a monetary judgment may approach the Court for a writ of execution entitling a Court official to attach sufficient movable property (or if insufficient, immovable property) to satisfy the judgment debt and costs by public sale. Upon attachment (judicial pledge), the possession, custody and control of the property pass to the officer of the Court. The judgment debtor may redeem the property before the sale by paying the full judgment debt and costs involved in the execution. He or she is entitled to any surplus and the return of unsold property. The attachment creates a preferential right over unsecured creditors in respect of the proceeds of the sale. This preference does not prevail against a prior mortgage or pledge creditor. In addition, attachment by other creditors diminishes the preferential right of the first creditor to a pro rata share in the proceeds of the sale. Finally, sequestration of

the debtor's estate terminates the preferential right, except with regard to the costs of the proceedings and execution.

## H. Lien or Right of Retention

A right of retention or lien entitles a creditor to retain another's movable or immovable property as security for a debt. The retention of possession distinguishes it from a tacit hypothec. A lien is further inalienable and merely a weapon of defence to ward off the *rei vindicatio* of the owner.

South African law recognises two main kinds of lien, namely salvage and improvement liens based on the principles of unjustified enrichment and debtor and creditor liens based on the contractual relationship between the parties. The extremely limited protection by a lien boils down to a mere defence against the *rei vindicatio* of the owner. On insolvency of the debtor, the lien holder has a preferential right to the proceeds of the property. Loss of possession extinguishes the lien, which does not automatically revive if possession is subsequently regained.

A lien is terminated by extinction of the principal obligation, total destruction of the property subject to the lien, merger (confusion) and renunciation (waiver). Loss of title by the owner of the property subject to the lien does not affect an enrichment lien. However, it terminates a debtor and creditor lien if the new owner acquired the property *bona fide* without actual or constructive knowledge of the lien. A lien may be terminated by the provision of adequate security for payment of the secured claim.

# IX. OTHER REAL RIGHTS

## A. General

The most important remaining real rights are mineral rights, perpetual quitrent, leasehold and long and short-term leases. Numerous Roman-Dutch feudal real rights like a tithe right (*tiendrecht*), a petty customs and excise right (*cijnsrecht*) and a right to build on the surface of the land (*superficies* or *huisgebouwrecht*) have not been accepted in South African law.

## B. Mineral Rights

The importance of the mining industry for the national economy prompted the development of special mineral rights in South Africa. Since the early discovery of precious stones, the State regulated the search for and the exploitation of the

vast mineral wealth of the country. This culminated in the Minerals Act 50 of 1991 which reflects current mining policy, namely to harmonise State control with private enterprise by allowing the private sector to conduct mining with its attendant risks, while the State reaps considerable income from royalties and taxes.

After the British annexation the Cape Colony accepted the English practice to reserve mineral rights in favour of the Crown in State grants. However, economic realities soon dictated that large mining companies had to be invested with a distinct real right as compensation for their huge outlays in the exploitation of minerals. South African practice rejected the English law notion of horizontal layers of land beneath the soil and structured mineral rights as distinct limited real rights that could exist side by side with ownership in the same land.

Mineral rights are constituted by:

- reservation on registration of transfer of the property;
- the cession of mineral rights by a notarial deed of cession, and
- the owner obtaining a mineral right distinct from ownership.

The landowner normally severs mineral rights by entering into prospecting contracts or mineral leases with mining companies. A prospecting contract contains two elements, namely the right to prospect and the option to acquire ownership of the land, the mineral rights or a mineral lease. In a mineral lease, the lessor confers the right to prospect, search for, mine and dispose of the minerals for the lessee's own account. Both prospecting contracts and mineral leases must be notarially executed and registered in the land records.

Mineral rights should be classified as real rights *sui generis* rather than as personal quasi servitudes. They differ from personal servitudes in being freely transferable and transmissible to heirs and are not exercised *salva rei substantia*. Moreover, contrary to personal servitudes, mineral rights may themselves be subject to the personal servitude of usufruct.

Broadly speaking, the holder of mineral rights enjoys a preference over the landowner, both with regard to underground mining operations and the use of the surface for prospecting and mining activities. These rights must, however, be exercised in a reasonable manner that causes the least injury to the landowner. Once minerals have been discovered, and especially once a public mine has been proclaimed, the common law rights of the landowner are suspended and regulated by legislation. Besides the right to reserve for himself or herself a house, certain buildings, cultivated land and water rights, the landowner is entitled to the payment of hire and licence moneys and may demand that his or her land be adequately supported to avoid subsidence.

### C. Perpetual Quitrent

The State or other public authorities originally granted citizens unimproved land in perpetual quitrent (a mixture of the Roman *emphyteusis*, the Roman-Dutch *erfpagrecht* and English quitrent) almost indefinitely to stimulate improvement on condition that all improvements would remain for the benefit of the State. In South Africa the State used to reserve mineral rights in the land and the right to expropriate part of the land without compensation for future road building. The abolition of quitrent in the 1930's led to the belief that the quitrenter was the real owner, subject to the rights reserved in favour of the State. Legislation now regulates the grants of State land and has from time to time provided expressly for the conversion of perpetual quitrent to ownership.

### D. Leasehold

Leasehold in the form of a perpetual lease, a 99-year lease or a lease for an indefinite period coupled with a right of renewal, is another English transplant to South Africa. Prevalent in the Cape Province, Natal and the mining areas of Kimberley and Johannesburg, the Courts either equates very long leaseholds with ownership or reasons that the leaseholder has *dominium utile* and the State *dominium directum*. The tendency to equate leaseholders with owners led to the statutory conversion of certain leaseholds to ownership.

Leasehold was reactivated in 1978 when the apartheid Government adopted leasehold to render the tenure of urban Blacks in large cities like Soweto more secure. Under the apartheid system, Blacks in white urban areas were regarded as temporary sojourners who needed either a permit or a certificate to occupy sites. Since ownership of Blacks was anathema to the apartheid policy, the South African legislator settled for statutory leasehold. Special land records were created where 'competent' Blacks could register leasehold on the sites they were occupying. Although the site remained the property of the local authority, a certificate of registration entitled the holder to erect, occupy, alter or demolish buildings on the site, grant a mortgage, usufruct or other real right on the leasehold and sublet, alienate or transmit it to the holder's heirs. Since 1986, Blacks were allowed to obtain ownership in 'black' areas or to convert leasehold to ownership.

### E. Long-Term and Short-Term Leases of Land

South African law accepted the Roman-Dutch rule 'lease breaks sale' (*huur gaat voor koop*) based on Germanic and Old Dutch customary and statutory rules. This rule vests a real right in the lessee of land and buildings, which can be enforced against a subsequent purchaser or any other successor of the lessor.

In the case of leases shorter than ten years, a real right is constituted as soon as the lessee acquires possession of the property. In a lease for longer than ten years, a real right is acquired on registration of a notarially executed lease. In case of non-registration, the lessee in possession is protected for the first ten years. Without possession or registration, a short-term or long-term lessee is still protected under the doctrine of notice.

The lessee can enforce his lease against any successor-in-title of the lessor, including a subsequent purchaser and the person to whom the land is sold in execution. It is disputed whether a tenant of leased property that is sold during the lease must automatically continue with the lease or can elect not to continue. The lessee is entitled to obtain an order of ejectment against a person who occupies the land unlawfully, or a *mandament van spolie* against a person who has disturbed his possession (see IV.C. above).

The lessee is allowed to exploit the land according to its existing use. The long-term lessee can effect alterations on the condition that he or she restores the status quo on termination. Improper use is not allowed and the lessee must exercise due care to prevent damage to the land.

The grant of a long-term lease does not amount to the alienation of property because the reversionary content of a lessor's ownership remains intact. The lease expires on agreement, on merger, when possession is lost in the case of a short lease, or when the registration of a long lease is cancelled.

## X. LAND REFORM

### A. Background

The programme of land reform introduced by the African National Congress (ANC) in the early 1990's had a considerable impact upon land law in particular and upon Roman-Dutch based property law in general. Before the 1990's, property law was dominated by the Roman-Dutch concept of absolutist land ownership based on a comprehensive land recording system that in conjunction with apartheid legislation produced a rigidly enforced system of State controls to limit land ownership on a racial basis. In rural areas, white registered landowners dominated the land rights of black labourers and in urban areas Blacks were only allowed lesser unregistered tenure.

The interim Constitution of 1993 and especially the Constitution of 1996 permitted expropriation and deprivation of property for a public purpose or in the public interest with land reform as a high priority. The Constitution also recognises a right of access to adequate housing and combats forced removals

by precluding eviction from or demolition of a home without an order of Court and without having considered all the relevant circumstances. In the interest of economic stability, the Government opted to maintain the existing land law as far as possible in its efforts to replace racially based control of land by an open access to land and land rights.

## B. Land Reform Programme

In terms of a Land Policy White Paper published in 1997, the land reform process concentrated on restitution, redistribution and tenure reform. The aim of restitution is to restore land dispossessed by virtue of racial apartheid laws passed after 1913. Consequently, the Restitution of Land Rights Act 22 of 1994 established a Land Claims Court to arrange negotiations and to adjudicate on restitution. Once it is established that the claimant qualifies for restitution, a process of negotiation with the local Land Claims Commissioner's Office commences. Each claimant is treated in a manner appropriate to his or her circumstances and the merits of the case. In appropriate cases actual restoration can be substituted with payment of compensation, provision of alternative land, a combination of the above, or priority access to State resources in the allocation of housing and land in a development programme. At the other end of the spectrum, compensation is made available to landowners whose land is expropriated during the restitution process. Though compensation must be just and equitable, it could be less than market value in the light of the history of the property.

*Restitution* endeavours to strike a balance between maintaining stability, continuity and 'public confidence in the land market', and a complete break with the past. To counter arguments based on ethnic and racial grounds and in recognition of the fact that South Africa's history of conflict and major migrations impede the prioritisation of conflicting title claims, restitution claims are limited to post-1913 dispossession. The 1913 limitation implies that African customary land tenure is rejected in favour of the European individual ownership model; moreover, it conflicts with the main thrust of the Communal Property Association Act whose aim is to restore land to these very communities. In the landmark case of *Richertsveld Community v. Alexkor Ltd*,<sup>14</sup> the Land Claims Court decided that the question whether the international law doctrine of aboriginal title could be utilised as an alternative to restitution under the Act, fell outside its jurisdiction. Consequently it is ultimately left to the Constitutional Court to determine whether the doctrine is compatible with the Constitution's comprehensive provision for land reform.

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<sup>14</sup> 2000 (1) SA 337 (LCC), 2001 (3) SA 1293 (LCC).

Up to now the restitution process has yielded satisfactory results. In a speech in Parliament the Minister of Agriculture and Land Affairs stated that 36 488 claims have been settled to date in terms of the restitution programme.<sup>15</sup>

*Redistribution* is an actively directed administrative process to provide the landless – especially the poor, labour tenants, farm workers, women and emergent farmers – with access to land for residential and productive uses. It is based on willing-buyer willing-seller arrangements aided by Government subsidies for acquisition of land and the required planning process. Redistribution links up with the Communal Property Associations Act 28 of 1996, which directs communities to pool their resources to negotiate, buy and jointly hold land under a formal title deed. It also draws on the Development Facilitation Act 67 of 1995, which introduced fast track conveyancing to facilitate funding and the provision of serviced land for low-income housing.

*Land tenure reform* is more complex and generally aimed at providing meaningful legal rights in urban and rural areas. The earliest tenure reforms include the device of upgrading lesser rights to ownership and the facilitation of acquisition of land by tenants. These programmes are supplemented by the Communal Property Associations Act 28 of 1996, which enables a group or community to acquire land as a legal entity and the concept of ‘initial ownership’, which allows a type of preliminary ownership in land. However, the fundamental common law concept of a real right in land superior to lesser personal rights and reflected in an officially registered title deed, remains central to the philosophy of the reform process. Tenure reform has been implemented by *inter alia* the Upgrading of Land Tenure Act 112 of 1991, the Development Facilitation Act 67 of 1995, the Land Reform (Labour Tenants) Act 3 of 1996 and the Extension of Security of Tenure Act 62 of 1997.

### C. Conclusion

The measures outlined above addressed the racially skewed pattern of land holding in South Africa by making full ownership of land available to all and by adjusting the correlative position between landowner and occupier in a range of contexts. Millions of South Africans previously restricted to lesser, often precarious, forms of land tenure, now have access to full legal title facilitated by ‘fast-track’ conveyancing. Significantly, lesser rights of occupation are enhanced at the expense of the all-powerful right of ownership and the absolutist right of

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<sup>15</sup> [http://land.pwv.gov.za/publications/news/speeches/DLA\\_budget\\_vote\\_speech\\_01\\_04\\_2003.htm](http://land.pwv.gov.za/publications/news/speeches/DLA_budget_vote_speech_01_04_2003.htm).

vindication. The new process is, nevertheless, realised within the basic principles of South African property law as interpreted in the light of the Constitution.

The 1990's reforms were an attempt to implement the ANC's reconstruction and development programme in its application to land. Long-standing social demands have finally become ruling political priorities. Thus the Subdivision of Agricultural Land Repeal Act 64 of 1998, which would have been perceived as detrimental to agricultural productivity, is now seen as the removal of a barrier to the necessary redistribution of farmland. The Land Claims Court plays a prominent role in the land reform process by actively facilitating rights which reflect the ethos of the land reform legislation. It is hoped that a swift implementation of this radical socio-political reform would avoid the land reform implementation crisis experienced in Zimbabwe.

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# *Chapter 7*

## **Law of Contract**

***Gerhard Lubbe\** and *Jacques du Plessis\*\****

### **I. INTRODUCTION**

The South African law of contract has been forged from rules derived mainly from 17th century Roman Dutch civil law and 19th century English common law. This hybrid system is rather unusual from the perspectives of both traditions: while civil lawyers might find it strange that so many rules or principles which they would normally expect to find in codes, derive their force from cases and the older authorities, common lawyers may in turn not be accustomed to the relatively high degree of abstraction and systematisation which at times characterises the presentation of contract rules in the case law and academic writings. It is consequently understandable that the South African experience of having to deal with such a remarkable variety of sources from two major legal families has attracted the attention of comparatists – especially those interested in the development of a European private law.

However, even though the South African law of contract that governs virtually all commercial exchanges is undoubtedly European in origin and character, an indigenous or customary system of contract is at times applicable in the restricted context of certain disputes between black people.<sup>1</sup> Unfortunately, this terrain is still largely unexplored. It has developed in virtual isolation from the ‘mainstream’ law of contract, and a proper exposition and analysis of these indigenous rules is traditionally the domain of customary law. It will not be explored further here.

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<sup>1</sup> Cf s. 1 of the Law of Evidence Amendment Act 45 of 1988; *Maisela v. Kgolane NO* 2000 (2) SA 370 (T), [2000] 1 All SA 658 (T).

Systematically, the South African law of contract forms part of that branch of private law known as the law of obligations that deals with duties to perform. The distinctive feature of contractual obligations is that they arise from agreement or consent. This, however, need not be actual consent – it will be indicated below that in certain circumstances contractual liability can arise where consent is deemed to exist. The complexity, incidentally, of this aspect of the South African law of contract is testimony to the difficulties which can sometimes be experienced in the mixing of civil and common law. It should also be pointed out at the outset that not all contractual obligations share the same characteristics – while ‘civil obligations’ are enforceable, contracts of wager or gaming, for example, merely create ‘natural obligations’, which entitle the recipient to keep what has been performed, but do not give rise to an enforceable claim for performance. The contracts that are important in practice, such as sale, lease, loan, employment, providing services and suretyship, all create civil obligations. Furthermore, not all agreements create contracts – in South African law, the contractual agreement is quite distinct from the real agreement whereby ownership is transferred, the debt extinguishing agreement required for proper performance (see VI.A. below), and the marriage agreement whose unique features place it in a separate category.

Ideologically, the modern South African law of contract still bears the imprint of the 19th century classical approach to contract: freedom of contract is broadly interpreted and individual autonomy and personal responsibility are regarded as crucial underlying values, with the result that the grounds for escaping from liability where there has been actual or ostensible assent are limited. Although there have been some attempts to prevent the enforcement of contracts where doing so would violate good faith, these have been largely unsuccessful (see II.B. and IV. below) and the Supreme Court of Appeal is particularly wary of good faith being used as a ‘free floating’ principle that Judges can resort to as justification for refusing to enforce contractual obligations. At best, good faith is accorded the status of an underlying principle that can be used to facilitate legal development. However, creative recourse to good faith in this guise has been limited markedly.

Legislation aimed at consumer protection is also sparse compared to the detailed provisions on unfair contract terms in many modern jurisdictions. It is generally accepted that the Bill of Rights contained in the Constitution of the Republic of South Africa, Act 108 of 1996, does not only provide persons with rights against the State, but also against other persons. It applies to all law, which naturally includes the law of contract, and the Courts are constitutionally obliged to apply and, if necessary, develop the common law of contract to the extent that legislation does not give effect to a specific constitutional right. In developing

the common law, Courts are further obliged to promote the spirit, purport and objects of the Bill of Rights. In essence, the potential exists to mitigate some of the harshness of the modern law of contract by recourse to constitutionally entrenched rights. However, it remains to be seen to what extent the broadly formulated rights expressly contained in the Bill, as well as other principles implicitly recognised by it, can be catalysts for effective rules of contract aimed against contractual unfairness.

## II. REQUIREMENTS FOR A VALID CONTRACT

### A. Consensus and Deemed Consensus as the Cornerstones of Liability

Contractual obligations arise from consensus or a meeting of the minds. This view is the result of the development in the civilian tradition away from a fragmented approach whereby only certain specific contracts are recognised, to a unified approach whereby mere agreement or consent should in itself be sufficient to conclude a binding contract. In line with some modern systems, South African law does not attach much weight to the notion that a contract should have some sort of *causa*, and certainly does not require it to be supported by a *quid pro quo* or consideration.<sup>2</sup>

However, some complex problems are hidden behind the rather straightforward façade that consent binds. Most notably, it is not settled that consensus is determined by establishing the actual subjective intentions of the parties. At least partly under English influence, it has been indicated in a number of cases that consent is in fact determined ‘objectively’, in other words, that it is ostensible and not actual consent that binds. Not too much turns on this difference of opinion though.<sup>3</sup> A relatively simple reconciliation can be achieved by taking the subjective approach as point of departure and supplementing it with an objective approach. In other words, liability can primarily be established by trying to determine whether there has been actual subjective consensus, and if this is not the case, liability can then still be imposed if consensus can be deemed to exist on objective grounds. A mechanism which has been used traditionally to impose such objective liability, is a dictum of Blackburn J in the English case of *Smith v.*

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<sup>2</sup> See *Conradie v. Rossouw* 1919 AD 279.

<sup>3</sup> See R. Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (1990) 585-587.

*Hughes*,<sup>4</sup> which essentially states that a person who creates the reasonable reliance of an intention to assent to terms proposed by another will be held liable, even though such intention was absent.

In line with a number of systems, South African law recognises the usefulness of working with the notions of offer and acceptance in determining consensus, although it does not require that every case of consensus has to be traced back to an offer and corresponding acceptance. The requirements for a valid offer include a declaration of will; an intention to create an obligation (*animus contrahendi*); a complete and certain exposition of the proposed terms; an addressee, and a ‘readiness’ or ‘openness’ to create obligations through acceptance. Unlike some civilian systems, offers can be revoked at any time prior to acceptance, unless the offeror has contractually divested himself or herself of the right to revoke. This is done by way of an option agreement, which is generally distinguished from (other) contracts creating a preference to contract on the ground that it already contains a valid offer. Apart from revocation, other causes for the lapsing of offers include rejection by the addressee, the death of either the offeror or the addressee, and the passing of time.

Valid acceptance in turn requires a declaration of will; the intention to accept; knowledge of the offer (this presents difficulties in cases of offers for reward); acceptance of the terms contained in the offer; the capacity to accept by virtue of being a competent addressee, and compliance with formalities required for acceptance, if any. In this regard, the ‘default’ rule in South African law is that liability only arises once the offeror is informed of acceptance. However, under English influence, the ‘mailbox’ rule is applied if the offer and acceptance take place by post.<sup>5</sup> The legislature has recently enacted that liability would arise at the moment of receipt of the acceptance in the case of certain electronically concluded transactions.<sup>6</sup>

The effect of a mistake (defined as being in a state of mind not conforming with reality) on contractual liability is a notoriously difficult problem. In essence, the position in South African law is that certain mistakes are so serious as to exclude liability altogether – it is rather inelegantly said that they render a ‘contract’ void. According to the *iustus error* doctrine, these mistakes need to be both material (that is, they need to relate to the nature of the contract, the identity of the parties, or the subject matter of the contract) and reasonable or *iustus*. One

<sup>4</sup> (1871) LR 6 QB 597.

<sup>5</sup> See *Cape Explosives Works Ltd v. SA Oil and Fat Industries Ltd* 1921 CPD 244.

<sup>6</sup> See s. 22(2) of the Electronic Communications and Transactions Act 25 of 2002.

factor that could play an important role in determining whether a mistake is reasonable, is whether it was induced by a misrepresentation.

Mere mistakes in motive, even though they could technically influence the decision to contract, are not serious enough to exclude liability and thus give rise to a void contract. At best, if induced by a misrepresentation, they could render a contract voidable, that is, valid until reduced at the option of the innocent party. This issue is dealt with in more detail in II.B. below.

South African Courts sometimes distinguish between unilateral mistakes (where only one party is mistaken), common mistakes (where both parties make the same mistake), and mutual mistakes (where the parties are at cross-purposes and it cannot be determined who is right and who is wrong). The usefulness of this distinction is debatable.

## B. Consensus must be Obtained in a Proper Manner

### 1. General

The mere determination that actual or deemed consensus exists (whether by following either the subjective or the objective approach), does not dispose of the question whether there should be liability. Early in the civilian tradition it had already been accepted that certain methods of obtaining consent were serious enough to affect liability. In modern South African law, these methods can be grouped together as the various grounds that render a contract voidable, namely misrepresentation inducing an error in motive (*wanvoorstelling* in Afrikaans), duress (*vreesaanjaging*), and undue influence (*onbehoorlike beïnvloeding*), the latter being a common law import.

### 2. Misrepresentation inducing an error in motive

For a misrepresentation inducing an error in motive to render a contract voidable, certain requirements have to be met. Although the misrepresentation does not have to be made fraudulently or negligently (again due to the influence of English law), it must have been intended to induce the person to whom it was made to enter into the transaction and it has to be material – in other words, it has to be such to have influenced a reasonable person to enter into the contract. This requirement presents problems in cases of fraudulent misrepresentation, since it can be said that the reasonableness of the victim's conduct is then less significant. A misrepresentation further need not necessarily consist of a positive action: it can even arise from an omission to remove another's mistaken impression, as long as there was a duty to speak. Special legislative provisions govern the duty to disclose information in the context of insurance contracts.

### 3. *Duress*

Duress consists of an unlawful threat of harm which induces another to contract. The application of the requirement of unlawfulness has given rise to some difficulty. Although sufficiently flexible to accommodate threats of economic harm, it is not clear why the victim at times has to prove that he or she acted under protest. The highest Courts further have not ruled definitively on the application of the requirement of unlawfulness in the case of the threat to inform the authorities that a crime has been committed unless it is agreed to compensate the victim of the alleged crime. It is probable, though, that such agreements would be regarded as valid as long as the parties agree to compensate only actual losses, and no further benefit is obtained under the contract.

In addition to unlawfulness, it is also required that the threat has to be one of immediate, unavoidable and substantial harm, and that the victim actually had to suffer harm. It is further said that the victim's fear had to be reasonable, but here a very low benchmark is used.

### 4. *Undue influence*

Although this is not recognised in the *locus classicus* of *Preller v. Jordaan*,<sup>7</sup> the South African law of undue influence was received from the 19th century common law to fill a gap that existed between the civil law of fraud and duress. In essence, it ensures that relief is provided where a person assumes a position of influence over another which renders that person's will pliable and weakens his ability to resist. This influence is then exerted unconscionably in order to persuade such a person to agree to a detrimental transaction which would not have been concluded with normal volition. These cases do not involve the making of false statements (telling of a falsehood) or threatening conduct, thus rendering both the law of fraud/misrepresentation and duress inapplicable.

### 5. *Effect of voidable contract*

A voidable contract remains in force until the innocent party has elected to rescind it. Such rescission takes place extra-judicially and results in the termination of the obligations. The victim's inability to restore what has been obtained under the contract does not preclude rescission, but could prevent the victim from reclaiming what was performed. However, the Courts treat this inability to restore what was performed or inability to ensure that there is *restitutio in integrum* flexibly, and can excuse such an inability on equitable grounds. Quite independent

<sup>7</sup> 1956 (1) SA 483 (A).

of any right to make use of these contractual remedies, the victim of the use of improper methods to obtain consent is further entitled to claim damages based on delict if the requirements of fault, wrongfulness, causality and harm or damage are met. Such a claim for damages is useful where the victim does not seek rescission, but still seeks to be compensated for entering into a contract with terms less advantageous than those that would have been agreed upon, had it not been for the improper conduct.

#### *6. Non-recognition of ‘improperly obtained consent’ as ground of rescission*

South African law does not recognise ‘improperly obtained consent’ as a general or residual ground for rescission. This can give rise to particular difficulty in cases where one party is in a weak or unequal relationship due to, for example, inexperience, ignorance, distress or need. The solutions followed in some systems whereby the weak party is aided if the superior party abuses such weakness in order to conclude a strongly disadvantageous contract, are not unknown. In essence, the victim has only two avenues of escape. On the procedural level, he or she can rely on the three grounds for rescission set out above or argue that consent was absent. In this regard the Courts sometimes assist a party whose attention was not drawn to an unfair standard contract term. On the other hand, the victim can seek to attack the contract term on the substantive ground that its content is so unfair that it violates public policy. This is dealt with in II.F. below.

#### *7. Culpa in contrahendo*

Finally, South African law does not explicitly recognise a doctrine of *culpa in contrahendo*. As indicated above, there exists the possibility of a claim in delict if a party is guilty of making use of certain standard improper methods of obtaining consent, but thus far there has been no indication that a delictual action would succeed on the ground that someone has not acted reasonably in the pre-contractual stage.<sup>8</sup> In accordance with the classical approach, parties are further accorded significant freedom to terminate negotiations with impunity. The possibility cannot be excluded, however, that Courts could in future provide a delictual remedy where a party who has created the impression that a contract would be concluded, has terminated negotiations for no apparent valid motive and has thus saddled the victim with significant expenses which are now rendered valueless.

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<sup>8</sup> See *Murray v. MacLean NO* 1970 (1) SA 133 (R); but see *Olitzki Property Holdings v. State Tender Board* 2001 (3) SA 1247 (SCA) about possible delictual liability due to breach of a statutory duty by a State organ in the tender process.

### C. Parties must have the Capacity to Contract

Since contractual capacity is presumed, it is up to the party alleging a defect in the capacity to prove it. Examples of such defects in the capacity of natural persons include minority (minors under seven years of age have no capacity, while those between seven and 21 generally have only limited capacity), insanity, intoxication, insolvency and prodigality. The marital power which husbands used to enjoy over their wives has been abolished by statute. Detailed rules of corporate law regulate the ability of corporate entities such as companies and close corporations represented by natural persons. South African law recognises agency or representation, and also the *stipulatio alteri* or contract concluded for the benefit of a third party (see III.D. below). The State can conclude contracts by virtue of a common law prerogative as well as through legislation. In the wake of the new constitutional dispensation, new rules of administrative law have been introduced which govern more closely the procedures that certain institutions of the State have to follow in order to conclude valid contracts.

### D. Performance must be Possible

In line with the civilian maxim of *impossibilium nulla obligatio est*, initial absolute impossibility of performance at the time a contract is entered into voids it at that date. Nonetheless, liability could still be imposed in certain exceptional cases, the most significant being when a party contemplated such impossibility at the time of conclusion of the contract without making any provision against the event.<sup>9</sup> A party would also not be relieved if he or she caused the impossibility, or if he or she expressly or tacitly warranted that performance would be possible.

Some uncertainty exists as to the difference between legal impossibility of performance and illegality (see II.F. below). The borders between cases void due to impossibility and void due to a common mistake or the failure of an assumption, are also not clear.

### E. Performance must be Certain or Capable of being Rendered Certain

The requisite certainty of performance can either be reflected directly in the agreement itself, or be established by some mechanism which renders performance

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<sup>9</sup> See *Wilson v. Smith* 1956 (1) SA 393 (W).

certain. Generally, in accordance with the principle *ut res magis valeat quam pereat*, Courts would interpret contracts in a manner which renders them valid rather than void. Support for this approach is also derived from the common law, which has long recognised that ‘the law may not incur the reproach of being the destroyer of bargains’. Nonetheless, the parol evidence rule (dealt with in III.C. below), does serve to limit the capacity of Courts to interpret contracts in line with this approach.

As far as achieving certainty by recourse to external mechanisms is concerned, South African law follows the civil law maxim of *id certum est quod certum reddi potest*, that is, that which can be rendered certain, is certain. Simple examples of such mechanisms include references to documents or prevailing price lists. It is also acceptable to agree that the performance shall be determined by an identifiable third party. Whether parties can agree on a ‘reasonable price’ depends on the circumstances – it is acceptable in contracts to perform a service, but generally a sale at ‘a reasonable price’ or lease at ‘a reasonable rental’ is invalid. Parties can further enjoy discretions to determine the acceptability of another’s performance, but not to determine what they themselves have to perform. A sale at a price to be determined by the seller is invalid, as is a lease where the landlord can unilaterally vary the rental. However, criticism has been expressed against adopting a rigorous approach which does not provide for such a discretion to be validly exercised as long as it can be controlled objectively. In this regard it has relatively recently been held that banks may unilaterally vary interest rates in terms of provisions in mortgage bonds granting them such a discretion.<sup>10</sup>

## F. The Content and Purpose of the Contract must be Legal

### 1. Introduction

Although the South African law of contract holds the value of individual autonomy and the concomitant principles of freedom of contract and *pacta sunt servanda* in high regard, it does recognise that the content or purpose of certain contracts violate public interest in such a way that they should be void, or at least unenforceable. In this regard a distinction is drawn between common law illegality and statutory illegality.

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<sup>10</sup> See *NBS Boland Bank Ltd v. One Berg River Drive CC 1999 (4) SA 928 (SCA).*

## 2. Common law illegality

The touchstone for common law illegality is whether the contract is contrary to public policy or *contra bonos mores*.<sup>11</sup> Although it is recognised that public policy is a fluid and elusive notion – especially in such a diverse and heterogeneous society as that of South Africa – the following public interests have traditionally been regarded as important:

### a. The protection of the judicial process

This requires that self-help mechanisms such as clauses entitling a landlord to evict a tenant extra-judicially, or empowering a creditor automatically to sell immovable property in execution, shall be void. It also requires that banks cannot bind debtors to clauses stating that certificates of which the bank are the sole author shall be conclusive proof of the measure of indebtedness.<sup>12</sup>

### b. The protection of the freedom of trade

In principle, agreements which attempt to restrain a person's freedom to be engaged in a particular trade, profession or business, or any other economic activity, are valid. However, the person bound by such a clause can seek to escape liability by indicating that it violates public policy. This would be the case if the effect of the restraint would be unreasonable. Reasonableness in turn is evaluated by taking into account the broader interests of the community (these require that agreements be enforced, but also that economic productivity be enhanced), as well as the conflicting interests of the parties. In the latter context it is particularly important whether the person who seeks to enforce the agreement in restraint of trade has interests worthy of protection.<sup>13</sup> Examples of such interests include trade secrets or confidential information, goodwill and trade connections. The desire to restrain someone purely in order to eliminate competition, is insufficient.

Traditionally, Courts have not regarded the mere fact that the purpose or content of an agreement is unfair or unreasonable as sufficient to render it contrary to public interest and hence unenforceable. It has been said repeatedly that the right to strike down a provision should be exercised sparingly. However, in certain clear

<sup>11</sup> In *Sasfin (Pty) Ltd v. Beukes* 1989 (1) SA 1 (A) these expressions were treated as essentially interchangeable.

<sup>12</sup> See *Sasfin (Pty) Ltd v. Beukes* n. 11 above; *Ex parte Minister of Justice: In re Nedbank Ltd v. Abstein Distributors (Pty) Ltd* 1995 (3) SA 1 (A).

<sup>13</sup> See *Basson v. Chilwan* 1993 (3) SA 742 (A).

cases of extremely harsh and oppressive provisions, the Courts had been willing to provide relief. For example, in *Sasfin (Pty) Ltd v. Beukes*,<sup>14</sup> certain clauses in a finance agreement which were severely detrimental to a debtor were struck down. But, more recently, the Supreme Court of Appeal was willing to uphold an exclusionary clause which indemnified a private hospital from any liability due to the negligence of its medical personnel – even where such negligence caused personal physical harm.<sup>15</sup> From this case it is also clear that it would not avail the weaker party to rely on the notion of good faith in these circumstances.

### 3. Statutory illegality

A contract which violates a statutory provision could be illegal. As in other jurisdictions, it can be rather problematic to determine when such a violation is at hand, as well as to what extent the illegality impacts on the validity and enforceability of the contract.<sup>16</sup>

### 4. Impact of illegality

It is crucial to distinguish between the impact of illegality on a claim for enforcement as opposed to its impact on a claim for restitution of what had been performed in fulfilment of an illegal agreement. The general principle is that once it has been determined that an agreement is illegal, it automatically is unenforceable. There is no room for judicial discretion as in some systems. When an agreement is void, the obligations that are supposed to underlie transfers made in purported fulfilment thereof are retained without legal ground. The enrichment remedy traditionally used to obtain restitution in these circumstances is termed the *condictio ob turpem vel iniustum causam*. It is not, however, available as of right. South African Courts disapprove of attempts by those tainted with immorality to make use of the judicial machinery. By relying on the maxim of *in pari delicto potior est conditio defendantis* (an old travelling partner of the *condictio ob turpem vel iniustum causam*), a Court can refuse to grant restitutionary relief if both parties are tainted by turpitude. A Court is not, however, bound to do so. In *Jajbhay v. Cassim*,<sup>17</sup> it was held that the operation of the *in pari delicto* rule could be relaxed if public policy and ‘simple justice between

<sup>14</sup> N. 11 above.

<sup>15</sup> *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA).

<sup>16</sup> See R.H. Christie, *The Law of Contract in South Africa* (4th ed, 2001) 392-398.

<sup>17</sup> 1939 AD 537.

man and man' so require. Although this test has been criticised for being vague and lacking authority, it does serve a useful purpose and is firmly established in the modern law.

## **G. The Requisite Formalities have to be Complied With**

Contracts generally do not have to be cast in any specific form in order to be valid.<sup>18</sup> It is only necessary when the parties intend it to be the case or when it is required by a statutory provision.

It would usually be inferred that the parties intended that writing would fulfil the purpose of facilitating proof of the agreement by providing some sort of record, rather than to make it a constitutive requirement. More difficult in practice is the clause which requires that all variations of the contract have to be in writing. Where the parties subsequently conclude an oral agreement without also changing the written document, two considerations compete: on the one hand, the oral agreement is the most recent reflection of what the parties desire, while on the other hand it cannot be ignored that the parties previously decided that it is precisely in these circumstances that they want a written record. Recently, in *Brisley v. Drotsky*,<sup>19</sup> it was confirmed that South African law favours the latter approach: the clause requiring variations to be in writing has to be upheld except in highly exceptional cases such as fraud. Under English influence, the Courts have attempted to distinguish between a variation and a waiver, the idea being that a waiver would not fall foul of a non-variation clause.<sup>20</sup> However, such a distinction can be rather tenuous.

The most notable statutory provisions requiring that contracts need to comply with certain formal requirements are the Alienation of Land Act 68 of 1981, which requires that an alienation of land has to be contained in a deed signed by the parties or their agents; the Credit Agreements Act 75 of 1980, which requires that a credit agreement has to be reduced to writing and signed by the parties; the General Law Amendment Act 50 of 1956, which *inter alia* requires that unexecuted donations and contracts of suretyship have to be in writing and signed by the donor or surety, respectively; and the Formalities in Respect of Leases of Land Act 18 of 1969, which prescribes certain formalities for leases of ten years and longer.

<sup>18</sup> See *Goldblatt v. Fremantle* 1920 AD 123.

<sup>19</sup> 2002 (4) SA 1 (SCA).

<sup>20</sup> See *Van As v. Du Preez* 1981 (3) SA 760 (T).

Non-compliance with the required formalities generally render the contract void. Performances can be reclaimed by using enrichment remedies, but special rules apply when dealing with void alienations of land. There the claims for restitution are circumscribed by statute, and if full performance has already taken place, an action for recovery is excluded. The alienation shall then deemed to be valid in all respects from the outset.<sup>21</sup>

### III. THE OPERATION OF CONTRACTS

A contract results in obligations between the parties thereto, there being as a general rule an obligation in respect of each discrete performance envisaged by it. There may be more than one party on either side of a contractual obligation. Three forms of co-liability and co-entitlement exist, namely the simple joint relationship, the solidary (joint and several) relationship and the so-called common joint liability or entitlement. Under the simple joint relationship, the parties are regarded as independent creditors or debtors for a proportionate share. Parties to a common joint relationship are required to act in concert to enforce their rights, and as co-debtors, have to be sued collectively in respect of their debts. Under the joint and several relationship, a number of parties are collectively, but also singly, entitled to or liable for the same performance which is, however, only due once. Although each may sue or be sued for the whole performance, performance made to one creditor extinguishes the rights of other co-creditors, and performance by one co-debtor enures to the benefit of the other joint and several co-debtors.

#### A. Obligations Arising from Contract

Apart from a distinction between fully enforceable (civil) obligations and natural obligations that are unenforceable for policy reasons (see I. above), obligations are classified as positive or negative according to whether the relevant performance consists of a positive act or requires the debtor to refrain from doing something. A further distinction is between obligations that entail a once-off performance and those of a continuing nature. Whether performance in terms of a contract is indivisible or divisible so that aspects of it may be dealt with independently, is of importance when deciding whether an illegal, uncertain or an impossible aspect of a transaction can be severed from the rest, and whether a

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<sup>21</sup> S. 28(2) of the Alienation of Land Act 68 of 1981.

partial breach will affect the contract as a whole. On account of the principle of reciprocity, obligations under a contract that are undertaken in exchange for one another are interdependent in a number of ways. Reciprocity determines the order of performance, when performance is due, and is also of importance in determining the consequences of initial impossibility and effect of subsequent events.<sup>22</sup> The liability for damages on account of a breach of contract results from a secondary obligation of a contractual nature arising from the breach.<sup>23</sup>

### **B. Contractual Terms: *Essentialia*, *Naturalia* and *Incidentalia***

The primary obligations under a contract are those that cumulatively express the basic economic purposes of the parties. In relation to various nominate or specific contract types, the *essentialia* express the basic economic function of the contract and also determine its legal nature. The primary obligations may be supplemented by subsidiary obligations and additional legal consequences. These arise in part by operation of law. The civilian notion of contractual consequences as naturally incidental to particular contract types (the so-called *naturalia* of the contract) has been received in South Africa. The parties may agree to supplement (and supplant) such natural incidents by means of incidental provisions – the so-called *incidentalia* of the contract. Considerable scope exists for regulating the consequences of contracts by means of terms stipulating the time, place and manner of performance or imposing additional duties of performance such as warranties of quality, preparatory duties, or a duty to care for or insure the subject matter of the contract. The operation of a contract may be qualified by means of a suspensive or resolutive condition relating to uncertain future events, or by way of a supposition relating to a present fact or past events. An exemption clause may be included to limit or exclude a liability that might otherwise exist or arise, and the consequences of breach might be regulated by means of a penalty, forfeiture or an acceleration clause. Provisions which seek to allocate the risk of impediments to performance arising after the breach are common, as are escalation clauses which seek to adjust performances due in the light of subsequent events. In addition, contractual terms might invest one or other of the parties with a power to affect the legal relations between them, for example to

<sup>22</sup> *BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A).

<sup>23</sup> S.W. van der Merwe, L.F. van Huyssteen, M.F.B. Reinecke & G.F. Lubbe, *Contract: General Principles* (2nd ed., 2003) 305-308.

adapt the contractual content or to cancel it on account of a breach by the other party (see II.E. above).

### C. Determinants of Contractual Consequences

From the above it is apparent that the consequences of contracts result from an interplay between the agreement of the parties and normative considerations imposed by law.

#### 1. Policy considerations

It is recognised that the so-called *naturalia* of the various specific contracts known to South African law derive from romanistic notions of reasonableness and fairness. As such they constitute an objective determinant of the contractual content based on considerations of policy and the dictates of good faith.<sup>24</sup> Despite the notion that Courts do not make contracts for parties, the notion of contractual *naturalia* has been judicially developed to the point that it has been explicitly recognised that these consequences are not of a static or closed nature, but dynamic and changeable over time and even geographical area.<sup>25</sup> It may well be that the notion of *naturalia* may provide one of the mechanisms for the realisation of those fundamental rights which by virtue of section 8(2) of the Constitution of the Republic of South Africa, Act 108 of 1996 enjoy direct horizontal application in private relations.

#### 2. The agreement of the parties

The agreement of the parties constitutes the principal determinant of the consequences of a contract, as is apparent from the freedom accorded to parties to override the natural incidents of contract by means of qualifications or exclusions of liability that would otherwise exist. South African law, unlike many other jurisdictions, has not yet limited this aspect of freedom of contract by means of a general regulatory statute. Pending the adoption of a draft Bill on The Control of Unreasonableness, Unconscionableness or Oppressiveness in Contracts or Terms Act, legislative control of exemption clauses is, apart from the possibility of having them proscribed as a harmful business practice under the Consumer

<sup>24</sup> *Alfred McAlpine & Son (Pty) Ltd v. Transvaal Provincial Administration* 1974 (3) SA 506 (A).

<sup>25</sup> *Par Excellence Colour Printing (Pty) Ltd v. Ronnie Cox Graphic Supplies (Pty) Ltd* 1983 (1) SA 295 (A).

Affairs (Unfair Business Practices) Act 71 of 1988, restricted to provisions in consumer protection legislation prohibiting the inclusion of such clauses in consumer credit transactions.<sup>26</sup> Judicial control over exemption clauses is exercised by means of a variety of devices. In respect of standard form contracts, application of the reliance doctrine may yield the conclusion that such a clause has not been incorporated into the relationship of the parties (see II.A. above). It is also well-established that the notion of public policy operates as a general standard not only for the enforceability of contracts but also for the operation of terms such as exemption clauses. Although, in theory, exemption clauses may therefore be nullified if their effect is so unconscionable as to be grossly exploitative of the party hit by the exemption, the approach of the Courts, coupled with the rejection of a general standard of good faith, severely limits the scope for judicial control in this way.<sup>27</sup> To the extent that they are relied upon to protect against the consequences of intentional misconduct, such provisions are of no effect. An exclusion of liability for gross negligence is acceptable, and there is no substantive rule preventing an exclusion of liability for a fundamental breach of contract. Apart from the possibility that the Bill of Fundamental Rights may be utilised to control contractual exemptions – a development that was envisaged in the separate concurring judgment of Cameron JA in *Brisley v. Drotsky*<sup>28</sup> – one of the legacies of the *Brisley* decision would seem to be a renewed emphasis on a restrictive or ‘wary’ interpretation of exemption clauses.

In respect of the interpretation of contracts, South African Courts purportedly seek to establish the intention of the parties,<sup>29</sup> an endeavour in which they are hampered by an emphasis on the linguistic treatment of the document and the parol evidence rule which restricts recourse to evidence extrinsic to the document to instances of ambiguity and then only admits evidence relating to surrounding circumstances.<sup>30</sup> The overall impression is that the process is often

<sup>26</sup> See generally the Credit Agreements Act 75 of 1980 and chap. III of the Alienation of Land Act 68 of 1981.

<sup>27</sup> See II.F. above on *Afrox Healthcare Bpk v. Strydom* 2002 (6) SA 21 (SCA).

<sup>28</sup> 2002 (4) SA 1 (SCA).

<sup>29</sup> *Coopers & Lybrand v. Bryant* 1995 (3) SA 761 (A).

<sup>30</sup> *Delmas Milling Co Ltd v. Du Plessis* 1955 (3) SA 447 (A), but see *Cinema City (Pty) Ltd v. Morgenstern Family Estates (Pty) Ltd* 1980 (1) SA 796 (A) for intimations of a more liberal approach, and *Coopers & Lybrand v. Bryant* n. 29 above on a move to admit evidence of so-called background circumstances even in the absence of ambiguity.

of a normative nature, requiring an evaluative judgment from the Court regarding the putative intention of the parties, rather than a historical psychological enquiry regarding the existence of an intention actually entertained by them.

The development of a normatively conditioned notion of contractual intention has been influenced in another way by English law. In respect of the implication of tacit, that is, unexpressed, incidental terms into contracts as a gap-filling measure, the Courts supposedly seek to establish the actual but unexpressed intention of the parties, primarily by means of the application of the ‘bystander test’ enunciated in *Reigate v. Union Manufacturing Co (Ramshbottom) Ltd.*<sup>31</sup> This often results in the imputation to the parties of an intention which they never entertained at the time of contracting: gaps in the agreement of the parties are filled with reference to normative factors such as business efficacy and reasonableness.<sup>32</sup>

#### D. Contractual Privity: the Contract for the Benefit of a Third Party

South African law restricts the legal consequences of a contract to those participating in it as principals. A contract cannot be used to impose legal duties on an outsider, and the Courts have not adopted the view of De Wet<sup>33</sup> that Roman-Dutch law recognised that a third party might derive rights directly under a contract for his or her benefit concluded by others. As a result of the flirtation with the English doctrine of consideration (see II.A. above), the Courts, to some extent, have developed a construction of the contract for the benefit of a third party (*stipulatio alteri*) which does not constitute an exception to the notion of contractual privity. Legal relations between the third party and the promisor depend on the acceptance by the third party of a contractual offer which the promisor is bound to make in terms of the contract for the benefit of the former. This construction amounts to a variant of the option contract and accords with some Roman Dutch authority.<sup>34</sup>

<sup>31</sup> [1918] 1 KB 592.

<sup>32</sup> *Van den Berg v. Tenner* 1975 (2) SA 268 (A) at 277, but see *Wilkins NO v. Voges* 1994 (3) SA 130 (A) for a more conservative approach.

<sup>33</sup> *Die Ontwikkeling van die Beding ten Behoeve van'n Derde* (1940).

<sup>34</sup> See Grotius *De Jure Belli ac Pacis* (1631) 2.11.18; R. Zimmermann, n. 3 above, 43-45.

## IV. BREACH OF CONTRACT

### A. A ‘Fissured’ Concept of Breach

Although breach of contract is variously defined in general terms as involving conduct that infringes a contractual right, or conflicts with a contractual duty or any conduct contrary to the intention of the parties, the most striking feature is the adherence to a fissured or fragmented concept of breach.<sup>35</sup> In contrast to a tendency, for instance in the Vienna Convention on the International Sale of Goods, 1980, towards the development of a unified notion of breach, South African law distinguishes five forms of breach of contract, the perception being that different rules and consequences characterise each manifestation of breach. These are:

- positive malperformance;
- *mora debitoris* (delay by the debtor);
- repudiation;
- prevention of performance, and
- breach of a duty by the creditor to facilitate performance by the debtor.

The various manifestations of breach are reducible to two broad categories, namely malperformance and anticipatory breach, both of which may pertain to either a breach by the debtor or the creditor.

### B. Malperformance

Malperformance consists of either a performance which does not conform in substance to the requirements of the contract (positive malperformance), or a failure to render timeous performance (negative malperformance or *mora debitoris*). Positive malperformance depends largely on the matter of interpretation of the precise requirements of the contract and the evidence to establish whether these have been complied with. *Mora debitoris* entails a culpable delay on the part of a debtor to perform a debt that is due and enforceable. Whether there has been a delay depends on whether a date has been set in the contract

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<sup>35</sup> See A. Cockrell, ‘Breach of Contract’ in R. Zimmermann & D.P. Visser (eds), *Southern Cross: Civil Law and Common Law in South Africa* (1996) 303.

(*mora ex re*) or whether, where no date has been set, the debtor failed to comply with a demand for performance setting a reasonable date (*mora ex persona*).

### C. Anticipatory Breach

Anticipatory breach comprises instances of repudiation and prevention of performance which are thought to be related in so far as both cases involve conduct which envisages, with reasonable or absolute certainty, respectively, that malperformance will occur. The doctrine of anticipatory breach, and in particular that of repudiation, is an importation from English law which has been fitted into the dogmatic structure of South African law in order to satisfy the commercial need for certainty. The test for repudiation is an objective one, depending on the reasonable impression on the part of the aggrieved party that the contract will in all probability not be performed, rather than an actual, subjective intention on the part of the debtor to repudiate. Remarkable also is the rejection of the notion that repudiation entails an offer to the aggrieved party enabling him or her to terminate the contract by acceptance. Instead, it is recognised as an immediate breach of a separate duty arising from the notion of good faith underlying contractual relations not to create uncertainty regarding the performance of a contract. The aggrieved party is afforded a choice to cancel the contract where the repudiation amounts to a material breach.

### D. Fault

Fault as a requirement for breach remains controversial. According to the Courts, liability for breach is strict, with no need on the part of the plaintiff to show that the breach was either negligent or wilful.<sup>36</sup> This, however, is an oversimplification. Both the form of the breach and the nature of the duty have a bearing on the matter. Thus fault is irrelevant where the undertaking of the debtor is in the nature of a guarantee to bring about a particular result or that a certain state of affairs exists or will come about. On the other hand, there are cases where the very tenor of the contractual duty is to act in a manner that conforms to a certain standard of care, so that negligence, in the sense of a failure to meet such a standard, is of the very essence of breach. In respect of repudiation and positive malperformance, the question of fault is not enquired into, but on the other hand, *mora debitoris* and prevention of performance are regarded as forms of breach which require fault,

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<sup>36</sup> *Administrator, Natal v. Edouard* 1990 (3) SA 581 (A).

even though the approach is that it is not for the aggrieved party to establish a culpable breach, but for the party tasked with breach to establish an excuse.

## V. REMEDIES PURSUANT TO BREACH

In addition to a triad of remedies comprising a claim for specific performance, the cancellation of the contract and a claim for damages, parties might regulate the consequences of breach by means of their contract. Penalty and forfeiture clauses are common, and recognised as valid by the Conventional Penalties Act 15 of 1962, albeit subject to a discretionary judicial power to mitigate an agreed on penalty which is disproportionate to the actual prejudice suffered by the aggrieved party. Acceleration clauses, which render a postponed performance immediately due on breach, are common in instalment sales transactions and are not subject to statutory regulation.

### A. Specific Performance

Obtaining specific performance of a contract by way of a judicial decree to this effect is regarded as the principal or ‘natural’ contractual remedy under the South African law of contract.<sup>37</sup> The received law reveals an interesting mix of the Roman Dutch notion that a party to a contract has a right to the specific performance thereof, and the English equitable doctrine that this remedy is within the discretion of the Court. As a result of the fusion of these viewpoints, South African Courts accept that the right to specific performance is not absolute, but subject to a judicial discretion to refuse the decree, which entails a reversal of the content of the discretion under English law. From English law was also imported a catalogue of variable, and to some extent overlapping, circumstances regarded as relevant to the exercise of the Court’s discretion. Circumstances which either singly or in combination might influence a Court not to grant the remedy, include the following: the nature of the contract; the difficulty of overseeing its performance; the ability of an award of damages to compensate the complainant adequately; the fact that the subject matter of the contract is readily available elsewhere; hardship to third parties or the party in breach if the decree of enforcement is granted, and the fact that the contract was fundamentally unfair.<sup>38</sup>

<sup>37</sup> *Benson v. SA Mutual Life Assurance Society* 1986 (1) SA 776 (A).

<sup>38</sup> *Haynes v. Kingwilliamstown Municipality* 1951 (2) SA 371 (A).

These circumstances address not only efficiency and other policy concerns, but also the interests of the party in breach, especially in so far as cognisance is taken of the existence of a hardship breach or a substantively unfair contract. Notwithstanding the denial of a judicial power to strike down a contract on grounds of unfairness (see II.F above), the Courts have been steadfast in asserting the existence of this remedial discretion and in resisting the tendency to develop the abovementioned factors into rules governing the availability of the remedy.<sup>39</sup>

### **B. The *Exceptio non Adimpleti Contractus***

Related to the issue of specific performance is the operation of the so-called *exceptio non adimpleti contractus*, embodying the power of a party to a reciprocal agreement to withhold performance on account of the failure of his or her opposite number to perform.<sup>40</sup> The application of the *exceptio* in cases where the plaintiff has not performed at all, is unproblematic, but the question whether it is available against a plaintiff who has performed, albeit defectively, has proved more difficult to resolve. In *BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms)*,<sup>41</sup> the Appellate Division rejected the view that the malperforming plaintiff was entitled to relief on the basis of unjustified enrichment as well as the proposal that the English doctrine of substantive performance should determine the availability of the *exceptio* in this type of case. Instead, the *exceptio* was portrayed as deriving from the principle of reciprocity, that is, founded on the exchange of performances agreed to by the parties. In essence, the *exceptio* is a self-help mechanism to ensure complete performance of the contract by the debtor. To this end, it is in principle available against a malperforming plaintiff irrespective of the seriousness of the breach. The need to prevent unfairness to the malperforming plaintiff is addressed by the recognition of a judicial discretion to relax the principle of reciprocity on equitable grounds so as to permit the malperforming plaintiff a contractual claim, albeit only for a reduced contract price. Because a decision not to exercise the discretion in effect forces the plaintiff to perform properly in order to obtain payment, the discretion is essentially

<sup>39</sup> *Benson v. SA Mutual Life Assurance Society* n. 37 above.

<sup>40</sup> *BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms)* 1979 (1) SA 391 (A); *Thompson v. Scholtz* 1999 (1) SA 232 (SCA).

<sup>41</sup> 1979 (1) SA 391 (A).

similar to that exercised by the Court in cases where a decree for specific performance is sought by the aggrieved party.

### C. Cancellation

Cancellation as a remedy for breach of a contract was fashioned by the Courts by means of a fusion of Roman-Dutch and English notions at the turn of the 19th century.<sup>42</sup> The test for the availability of this remedy in the absence of a contractual provision to that effect has been a source of difficulty and confusion. In respect of *mora debitoris* (see IV.A. and B. above), the introduction of the doctrine of ‘time being of the essence of the contract’ from English law to demarcate those instances where delay is so vital as to justify cancellation, has not been without difficulties. In respect of other forms of breach, the cases reveal a number of formulations suggesting that the breach has to be of a sufficiently serious nature to warrant such a drastic remedy.<sup>43</sup> Indications of the development of a judicial discretion to control the exercise of a power to cancel was realised in *Singh v. McCarthy Retail Ltd t/a McIntosh Motors*.<sup>44</sup> This serves to confirm the willingness of the Courts to subject the availability of contractual remedies to a balancing out of the interests of the parties, at least where the contract does not contain a cancellation clause (*lex commissoria*). In such a case, any breach within the ambit of the clause, irrespective of the seriousness thereof and the nature of the term breached, invests the aggrieved party with a power to cancel. Cancellation of the contract takes place extra-judicially by the aggrieved party informing his or her opposite number of his or her decision to do so. Any subsequent approach to a Court is merely to confirm that a cancellation has taken place and to enforce the consequences thereof. Cancellation terminates duties which must still be performed at the time of cancellation. Rights that have accrued under the contract at that stage remain enforceable, at least to the extent that they are independent of the executory portion of the contract. To the extent that the contract has been performed, mutual duties to make restitution of what has been received arise for both parties unless excused by circumstances not due to the fault of the aggrieved party or excluded by a forfeiture clause in the

<sup>42</sup> *Stewart Wrightson (Pty) Ltd v. Thorpe* 1977 (2) SA 943 (A); J.R. Harker, ‘The Nature and Scope of Rescission as a Remedy for Breach of Contract in American and South African Law’ 1980 AJ 61.

<sup>43</sup> *Erasmus v. Pienaar* 1984 (4) SA 9 (T).

<sup>44</sup> 2000 (4) SA 795 (SCA).

contract. The duties to make restitution are regarded as contractual in nature, rather than based on unjustified enrichment.<sup>45</sup> To the extent that the nature of what was received precludes restitution, a party may be bound on the grounds of unjustified enrichment to account for benefits retained by him or her.<sup>46</sup>

#### D. Damages

An action for damages resulting from a breach of contract may be brought in conjunction with either a claim for specific performance or restitutary relief following on the cancellation of a contract, or as a stand-alone remedy. The plaintiff is restricted to a claim for financial loss occasioned by the breach and is not entitled to be compensated for the infringement of immaterial interests.<sup>47</sup> Traditionally, the so-called *interesse* principle (theory of difference) has been the basis for the nature and assessment of patrimonial loss. In contract, the so-called positive *interesse* standard requires the award of a sum of money calculated to put the injured party in as good a financial position as he or she would have been in, had the contract been performed properly. On the understanding that the plaintiff is entitled to full compensation, the assessment may be based on the subjective interests of the plaintiff in the fulfilment of the contract. However, certain standard measures of quantification, which assess loss on an objective basis with reference to losses typically experienced in certain common instances of breach, may be resorted to to obviate problems of proof.

Difficulties in the application of the *interesse* approach may also be countered by a resort to the Roman-Dutch concept of the compensation of the *id quod interest* of the injured party. This comprises the cumulative recovery of both the actual loss (*damnum emergens*) and prospective loss (*lucrum cessans*) caused by the breach, an approach that bears a more than superficial resemblance to the assessment law of loss in Anglo-American law with reference to the interests of the aggrieved party.<sup>48</sup> Because the extent of a plaintiff's actual, out-of-pocket losses, including reliance losses, determines his or her actual position after a

<sup>45</sup> *Baker v. Probert* 1985 (3) SA 429 (A).

<sup>46</sup> *BK Tooling (Edms) Bpk v. Scope Precision Engineering (Edms)* n. 40 above.

<sup>47</sup> *Administrator, Natal v. Edouard* n. 36 above.

<sup>48</sup> Cf L.L. Fuller & W.R. Purdue, 'The Reliance Interest in Contract Damages' 1936 *Yale LJ* 52, 54, which was treated with apparent approval in *Mainline Carriers (Pty) Ltd v. Jaad Investments CC* 1998 (2) SA 468 (C).

breach, such losses are of necessity comprised within the notion of positive interesse, so that the recovery of actual loss in a contractual claim does not amount to a departure from contractual principles. Despite some terminological confusion, South African law subscribes to the view that a plaintiff who seeks to recover actual losses only is never entitled to be placed in a better position than he or she would have been had the contract been performed. If, therefore, the contract is a loss-making one from the plaintiff's point of view, the net loss on the transaction is to be deducted from the amount of the actual loss suffered.<sup>49</sup> The notion that the aggrieved party is entitled to his or her negative interesse upon cancellation in the sense of a restitutive award designed to place him or her in the position he or she was in prior to the conclusion of the contract, implies that actual losses may be recovered in full irrespective of any loss that would have been suffered by the innocent party had the contract been fully performed. This is not borne out by authority and is contrary to principle.<sup>50</sup>

A party who commits breach of contract is liable only for the factual consequences of his or her conduct, but not invariably for all such consequences. It must be established that a sufficiently close relationship exists between the breach and the loss so as to constitute the conduct of the defendant as the legal cause of the loss. Although these rules are of English derivation, the adoption in *Lavery v. Jungheinrich*<sup>51</sup> of the rule in *Hadley v. Baxendale*,<sup>52</sup> has been shown to amount to nothing more than the rediscovery of rules of civilian origin.<sup>53</sup> The general test is that of foreseeability, determined by the kind of loss experienced in a particular case. Loss which occurs typically and directly as a result of a particular kind of breach and which is therefore presumed to have been foreseen (general or intrinsic loss) is always recoverable. An atypical loss, arising in an indirect manner, usually on account of a particular subjective interest of the aggrieved party in the performance of the contract, is typified as special or extrinsic in nature. Losses of this kind are recoverable only when, at the time of the conclusion of the contract,

<sup>49</sup> *Masters v. Thain t/a Inhaca Safaris* 2000 (1) SA 467 (W).

<sup>50</sup> See G.F. Lubbe, 'The Assessment of Loss upon Cancellation for Breach of Contract' 1984 SALJ 616.

<sup>51</sup> 1931 AD 156.

<sup>52</sup> (1854) 9 Ex 341.

<sup>53</sup> R. Zimmermann, 'Der Einfluss Pothiers auf das römisch-holländische Recht in Südafrika' 1985 *Zeitschrift der Savigny-Stiftung für Rechtsgeschichte (Germanistische Abteilung)* 163 et seq.

the party in breach was aware or ought to have been aware of the risk of such a loss ensuing from the breach, and the contract was concluded on that basis. *Shatz Investments (Pty) Ltd v. Kalovyrnas*<sup>54</sup> requires a contractual assumption of liability for such loss (the convention principle).

It has been said that the problem of remoteness of loss in contract concerns itself not only with the scope of the protection afforded to the plaintiff, but with whether the party in breach is responsible for the kind of loss that has arisen.<sup>55</sup> Also important is the causation question, which is concerned with determining the causal significance of the defendant's conduct in relation to other contributing factors. South African law has concentrated on the former issue. The result is a dearth of authority and a lack of clarity regarding the problems of multiple causes, hypothetical causality and collateral benefits. Especially problematic is the case where the plaintiff has contributed to the loss. *Thoroughbred Breeders' Association v. Price Waterhouse*<sup>56</sup> takes an unduly restricted view in denying the causal relevance of conduct of the plaintiff and in asserting that the Apportionment of Damages Act 34 of 1956 is inapplicable to a claim for contractual damages. Whether the suggestion that the supple and open-ended policy approach of the law of delict in regard to questions of legal causation should in future be adopted in the field of contract will be conducive to conceptual clarity, is doubtful. That the conduct of the plaintiff subsequent to the breach has a bearing on the extent of his or her recovery, is well-established and encapsulated in the rule requiring the aggrieved party to take reasonable steps in mitigation of his or her loss.<sup>57</sup>

## VI. TERMINATION

Obligations are terminated by a juristic act or by operation of law.

### A. Termination by Discharge and Agreement

Termination by juristic act comprises the discharge of an obligation by performance, its termination by an agreement of release, novation or compromise and,

<sup>54</sup> 1976 (2) SA 545 (A).

<sup>55</sup> H. McGregor, *McGregor on Damages* (16th ed., 1997) para. 126.

<sup>56</sup> 2001 (4) SA 551 (SCA).

<sup>57</sup> *De Pinto v. Rensea Investments (Pty) Ltd* 1977 (2) SA 1000 (A).

more indirectly, its termination on account of a resolute time clause or the operation of a condition in a contract. A power to terminate obligations unilaterally by notice may be conferred by a term in a contract, or arise by operation of law (see II.B. and V.C. above).

Performance is a juristic act, requiring in most cases the participation of both the creditor and the performer. Apart from an objective element – the giving and receiving of the performance due in terms of the obligation – the parties must, according to the Courts, concur in the intention to extinguish the obligation by the performance.<sup>58</sup> The subjective intention of the parties is said to be relevant where a payment is to be appropriated to a number of debts between the parties, and to determine whether the transaction amounts to an attempted payment or an agreement of settlement where the debtor offers to pay the creditor a lesser amount and proffers a cheque ‘in full and final settlement’. Although performance is ordinarily made by the debtor, an obligation may also be extinguished through performance by a third party, provided that the performance is capable of being rendered by another. In general, performance must be made to the creditor or to someone entitled to receive it on his or her behalf. In certain circumstances, the debtor has a right to perform to someone other than the creditor or his or her agent (a so-called *adiectus solutionis causa*).

An agreement of release (waiver) frees the debtor from an obligation. Such an agreement may totally extinguish all the obligations arising from a contract, or only effect a partial release. Novation is an agreement whereby an obligation is extinguished and replaced by a new relationship of a different nature or content, or otherwise takes the form of a delegation with a new party being substituted for one of the original parties. Compromise or settlement (*transactio*) is an agreement whereby a dispute, characterised by uncertainty as to the existence or terms of a legal relationship, is settled by the parties agreeing to regulate their relations in a particular way, often by creating a new set of obligations between them. A compromise serves to avoid uncertainty and the inconvenience, costs and risk inherent in other methods of resolving disputes. It follows that, unlike novation, a compromise does not depend either on an intention to novate an existing debt or on the existence of a valid obligation between the parties. Although any legal bond that may exist between the parties will be extinguished by a compromise and replaced by a new relationship, the uncertainty present in all cases of compromise excludes any possibility of an *animus novandi* or intention to novate.

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<sup>58</sup> *B & H Engineering v. First National Bank of SA Ltd* 1995 (2) SA 279 (A), but see J.E. du Plessis, ‘Die Regsaard van Prestasie’ 2002 THRHR 59 for a critical assessment.

## B. Extinction by Operation of Law

Extinction by operation of law primarily takes place by supervening impossibility of performance, extinctive prescription and by set-off.

Extinction on account of supervening impossibility requires that a performance becomes objectively or absolutely impossible after the conclusion of the contract due to *vis maior* or *casus fortuitus*, that is, events that are unforeseen or unforeseeable and beyond the control of the ordinary person. In such cases, the duty to perform and the corresponding right to claim performance fall away, and with it also any obligation reciprocal to the affected one.<sup>59</sup> Whether performance has become objectively impossible is determined with reference to a pragmatic standard. Therefore, apart from instances of actual physical impossibility, objective possibility also encompasses a performance which, although physically possible, cannot be regarded as a practical proposition in view of costs and risks attached to it. Whether a party may be released from a contract in consequence of the frustration by subsequent events of the contractual purpose only, is controversial.<sup>60</sup>

When two persons are mutually indebted to each other in their personal capacities, the obligations may be extinguished by set-off provided that the debts are of the same kind, are fully due and liquidated and there is no consideration of public policy that excludes it. There is uncertainty regarding the theoretical nature and effect of set-off, but the weight of authority is that it operates automatically without it being necessary for either of the parties to rely on it.<sup>61</sup>

The general provisions of South African law with regard to extictive prescription are embodied in chapter III of the Prescription Act 68 of 1969. In order to ensure finality and certainty in business affairs, to promote efficiency and to protect debtors against fraudulent claims, it is accepted that the existence of obligations should be limited as to time. To this end, section 11 of the Prescription Act provides a range of prescriptive periods for various categories of debts, the general period being three years. The period commences as soon as the

<sup>59</sup> *Peters, Flamman & Co v. Kokstad Municipality* 1919 AD 427.

<sup>60</sup> The existence of the doctrine of frustration was denied in *Techni-Pak Sales (Pty) Ltd v. Hall* 1968 (3) SA 231 (W), but affirmed in *Kok v. Osborne* 1993 (4) SA 788 (SEC).

<sup>61</sup> *Great North Farms (Edms) Bpk v. Ras* 1972 (4) SA 7 (T). This also seems to have been the position in Roman-Dutch law (*Southern Cape Liquors (Pty) Ltd v. Delipcus Beleggings BK* 1998 (4) SA 494 (C)).

debt becomes due, but where the debtor wilfully prevents the creditor from becoming aware of the debt, it commences only when such knowledge is obtained. Under section 12(3) a debt is not deemed to be due until the creditor has knowledge of the identity of the debtor and of the facts from which the debt arises, unless the creditor could have acquired such knowledge earlier by exercising reasonable care. A debt is extinguished upon the completion of the relevant period of prescription (section 10(1), embodying the common-law principle of 'strong' prescription). The interests of creditors are protected by section 13, which provides that circumstances which impede the capacity of a creditor to enforce the claim by legal proceedings will delay the completion of the prescriptive period. Interruption of prescription, which results in the commencement of a new prescriptive period, occurs under section 14 upon the acknowledgment of liability by the debtor. Section 15 provides for the judicial interruption of prescription by the initiation of legal proceedings against the debtor.

Apart from Act 68 of 1969, a range of specific statutes provide for prescription in particular circumstances. By virtue of section 16, such measures take precedence over the provisions of the Prescription Act, at least to the extent that they are inconsistent with it. Statutes regulating delictual claims against Government departments, parastatal entities as well as provincial and local governments, frequently provide for so-called expiry periods. These entail relatively short periods within which action has to be instituted to prevent rights from lapsing, and also require defendants to be notified in writing of the institution of legal proceedings. Traditionally these statutes made no provision for circumstances affecting the interests of creditors. Apart from their great number and obscurity, expiry periods operate unfairly and have consequently become targets of constitutional attack and the subject of legislative reform.<sup>62</sup>

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<sup>62</sup> S. 113(1) of the Defence Act 44 of 1957 was struck down in *Mohlomi v. Minister of Defence* 1997 (1) SA 124 (CC) and in *Moise v. Greater Germiston Transitional Local Council: Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curiae)* 2001 (4) SA 491 (CC). A similar fate befell s. 2(1)(a) of the Limitation of Legal Proceedings (Provincial and Local Authorities) Act 94 of 1970. The present Police Service Act 68 of 1995 reveals a more flexible approach and the Institution of Legal Proceedings against Organs of State Act 40 of 2002, which is not yet in force, will contribute to a uniform approach in this area.

## VII. TRANSFER OF CONTRACTUAL RIGHTS: CESSION

### A. Introduction

Cession is the transfer of a personal right from the estate of a creditor (cedent) to that of another (cessionary). In order to facilitate the mobility of personal rights as incorporeal assets, it is accepted that a debtor need not participate in or be aware of the cession of the right against him or her.<sup>63</sup> The interests of the debtor are, however, taken into account and protected in a number of ways.

### B. Requirements

Cession is constituted by a transfer agreement, that is, an agreement concluded between the cedent and the cessionary evincing an intention to give and to accept transfer of a right. In general, no formalities are prescribed for a cession.<sup>64</sup> The cession may relate to a particular right or to a number of rights. Also possible is a cession of all the existing or future rights of the cedent within a circumscribed category. All personal rights are capable of transfer except where statutory prohibitions or the highly personal character of some claims (for example rights to maintenance, delictual claims for pain and suffering, and claims under the *actio iniuriarum*) stand in the way of a cession. A contractual prohibition on cession (*pactum de non cedendo*) also precludes a cession, provided the debtor has an interest in the restriction on the creditor's capacity to cede. Cession agreements that are contrary to public policy, such as those concluded as a result of a speculation in lawsuits and those which unreasonably restrict the capacity of individuals to dispose of their professional income, are without effect.<sup>65</sup> The fundamental need to protect the interests of the debtor manifests itself in the requirement that a cession should not make the debtor's position more burdensome. The ambit of the rule is uncertain, but a cession which exposes the debtor to a multiplicity of actions or increased costs, for example where a creditor purports to split a right to a divisible performance by means of a cession, is prohibited.<sup>66</sup>

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<sup>63</sup> *LTA Engineering Co Ltd v. Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A).

<sup>64</sup> *Botha v. Fick* 1995 (2) SA 750 (A).

<sup>65</sup> *Sasfin (Pty) Ltd v. Beukes* 1989 (1) SA 1 (A).

<sup>66</sup> *Anglo-African Shipping Co (Rhod) (Pvt) Ltd v. Baddeley* 1977 (3) SA 236 (R).

### C. Publicity and Notice to the Debtor

Cession is fully effective even though the transfer takes place without any publicity. In particular, it is not a requirement that the debtor should receive notice of the cession or consent thereto. The interest of the debtor is, however, protected by the rule that a payment in good faith to the cedent immunises the debtor against liability towards the cessionary. The protection of the debtor has been extended to other situations, such as where the debtor, in good faith, concludes a compromise with the cedent, obtains a release from him or her, is granted an extension of time or attempts in good faith to set off against the cedent a claim which only became liquidated after the cession. In all these cases, the debtor is treated *vis-à-vis* the cessionary as if the cedent is still the creditor with whom the debtor could have transacted the extinction of the debt.

### D. Causa of the Cession

A cession is concluded to give effect to an underlying duty to transfer the right to the cessionary, usually arising from a contract concluded between the cedent and the cessionary and which constitutes the underlying *causa* or reason for the cession. A variety of *causae* may give rise to cessions. The cession may be undertaken to effect an alienation of the right, as in the practice of discounting or factoring, or to provide security for a loan by means of a cession to the lender of claims against the borrower's debtors. A cession for collection occurs to facilitate the carrying out of a collection agent's mandate to collect a debt by instituting action against the debtor in his or her own name. There is some support in the case law for the principle of abstraction, namely that the efficacy of the cession is to be evaluated independently of that of the *causa*.

A cession by way of security may amount to a pledge of the personal right<sup>67</sup> or a complete transfer of the right to the cessionary for purposes of security only.<sup>68</sup> Controversy persists in respect of the nature of a pledge constituted by a cession. It seems clear that in spite of the cession, the substantive right remains an asset in the estate of the cedent, but that the cedent is incapable of exercising any of the capacities of the creditor. The cessionary, as pledgee, is the holder of

<sup>67</sup> *Leyds v. Noord-Westelike Koöperatiewe Landboumaatskappy Bpk* 1985 (2) SA 769 (A).

<sup>68</sup> *Holzman v. Knights Engineering and Precision Works (Pty) Ltd* 1979 (2) SA 784 (W).

'the exclusive right to claim and receive . . . the amounts owing' and, if need be, is entitled to institute action and to realise the right of pledge upon default by the cedent.<sup>69</sup>

### E. Consequences of Cession

A cession other than one made by way of a pledge effects a complete transfer of the right to the cessionary.<sup>70</sup> If there is no contrary intention, all the advantages of the creditor and rights which are accessory to the subject-matter of the cession pass to the cessionary. Cession has a proprietary and an obligation aspect: the ceded right, viewed as an asset, forms part of the estate of the cessionary who is also substituted as creditor in place of the cedent.

Cession does not cure defects in the title of the cedent. Circumstances relating to the existence, operation or voidability of the ceded right, or its operation, constitute defences *in rem*, which may be raised against the cessionary unless he or she is precluded from doing so by the doctrine of estoppel. Defences flowing from the personal circumstances of the cedent cannot be raised against the cessionary. An exception exists in respect of the so-called reconvention procedure whereby a debtor, in proceedings against him or her by his or her creditor, can raise against the latter any illiquid counterclaim from whatsoever cause. Where the cession was *mala fide*, that is, purposively entered into with a view to preventing the debtor from resorting to the reconvention procedure, the debtor is entitled to an order suspending the claim by the cessionary until such time as judgment is given in his or her claim against the cedent.<sup>71</sup>

A cession prevents a cedent from subsequently dealing with the right as creditor. The cedent cannot therefore initiate an action or continue with an existing action in his or her own name. Competing claims resulting from multiple cessions of the same rights are governed by the principle of priority. Apart from the slender possibility of an estoppel against a first cessionary, for example where a second cessionary has given notice and received payment made in good faith from the debtor, there appears to be very little room for circumventing the principle of priority. In view of this, financial institutions providing finance

<sup>69</sup> *Bank of Lisbon and South Africa Ltd v. The Master* 1987 (1) SA 276 (A).

<sup>70</sup> *Johnson v. Incorporated General Insurances Ltd* 1983 (1) SA 318 (A).

<sup>71</sup> *LTA Engineering Co Ltd v. Seacat Investments (Pty) Ltd* 1974 (1) SA 747 (A) with reference to D 3.3.34.

against a cession of rights guard against the possibility of prior cessions by carefully evaluating the integrity of prospective cedents. As a further protective measure, the cession agreement may be phrased to operate as a cession of the cedent's residual interest in the subject-matter of the cession should it previously have been ceded to another.

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# *Chapter 8*

## **Law of Delict**

***Max Loubser\****

### **I. DEVELOPMENT AND STRUCTURE**

#### **A. Sources**

The South African law of delict can be described as a mixed system that developed from a civilian (Roman-Dutch) background with some measure of English law grafted on to it. The Roman-Dutch law of delict was the product of an action-based Roman law (in particular the *actio legis Aquiliae* and the *actio iniuriarum*) that was generalised and shorn of its penal elements to provide general rules for compensation in respect of damage caused intentionally or negligently.<sup>1</sup> The general principles underlying these main forms govern the whole field of delictual liability in modern South African law. Delictual liability for the wrongful causing of patrimonial loss is derived from the Roman delict of *damnum iniuria datum* and the *actio legis Aquilia* while the Roman delict of *iniuria* and the *actio iniuriarum* form the basis of delictual liability for wrongful infringement of interests of personality.

Certain other actions were received into Roman-Dutch law from Germanic customary law and subsumed under the umbrella of Aquilian liability. They were the action of dependants for loss caused on account of the wrongful death of a breadwinner and the action for pain and suffering on account of bodily injury. Another action developed in Roman-Dutch law which still figures in modern South African law is the action granted to parents for loss of income and medical expenses on account of wrongful injury to their child. Its counterpart, however, namely an action for loss of services on account of wrongful injury to a slave,

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<sup>1</sup> See F.H. Lawson & B.S. Markesinis *Tortious Liability for Unintentional Harm in the Common Law and the Civil Law*, vol. 1 (1982) 39-41.

was never transposed into a modern South African action available to employers for wrongful injury to employees.<sup>2</sup> The importance of a few other Roman actions that found their way through Roman-Dutch law into South African law has declined as a result of the ever-widening scope of the Aquilian action for patrimonial loss. These actions include, amongst others, the *actio Pauliana* for recovery of an object (or its value) alienated by a debtor in fraud of a creditor; the *actio ad exhibendum* for recovery of an object (or its value) held or alienated *mala fide*, and the *condictio furtiva* for recovery of loss as a result of theft. Finally, certain Roman actions involving strict liability still form part of South African law, as set out in VI. below.

For the most part, the South African law of delict, unlike most other civilian systems, continues to exist in an uncodified form as *ius commune*, or common law. Certain areas of the law of delict are governed by legislation, but the common law and decided cases constitute the basic sources of law. Judges' reasoning 'from case to case', in the tradition of the English common law, shapes the development of the law.

## B. Development of General Principles

In Roman-Dutch law the principles of delictual liability were generalised to the extent that every wrongful and blameworthy causing of harm was in principle regarded as a delict. Acts of commission or omission and spoken words could give rise to delictual liability. Although wrongfulness and fault were not clearly distinguished, both were by implication recognised as elements of delictual liability. A causal connection between conduct and harm was required.

The generalisation of the principles of liability distinguishes modern South African law of delict from the English law of torts. The South African law consists of a body of principles and concepts founded on historically developed broad bases of liability, resembling the European civilian systems of law. Consequently, South African law approaches a new problem in the continental rather than the English way, because in general all damage caused wrongfully and culpably is actionable.<sup>3</sup> Although the general principles of delictual liability are adaptable to novel situations, the Courts adopt a conservative approach and only extend delictual liability if demanded by considerations of public policy, practical

<sup>2</sup> *Union Government v. Ocean Accident & Guarantee Corporation Ltd* 1956 (1) SA 577 (A).

<sup>3</sup> *Perlman v. Zoutendyk* 1934 CPD 151.

convenience and, above all, by what is considered just and equitable. The tests for wrongfulness, negligence and legal causation in particular have a strong policy-base. The determination of wrongfulness by application of the general criterion of reasonableness – rooted in public policy, the legal convictions of the community or *boni mores* – plays a dominant role in fixing and limiting liability, in many instances replacing the traditional focus on foreseeability of harm.

The Bill of Rights in the Constitution of the Republic of South Africa, Act 108 of 1996 guarantees and reinforces certain fundamental rights in section 7(2). In section 39(2) it obliges the Courts to promote the spirit, purport and objects of the Bill of Rights when applying and developing the common law so as to give effect to the Bill of Rights. Section 39(1)(a) requires the Courts to infuse into the common law ‘the values that underlie an open and democratic society based on human dignity, equality and freedom’. This infusion gives content to and shapes the general or open-ended principles of the law of delict.

The purpose of the law of delict is to harmonise the conflicting interests of plaintiff and defendant by determining which individual or entity should bear a loss. The general principles of delictual liability are not ends in themselves, but serve as criteria or guidelines to achieve a fair allocation or distribution of risk and loss.

## II. DELICT AND OTHER AREAS OF LAW

### A. Delict and Breach of Contract

Both delict and breach of contract concern the recovery of compensation for the wrongful causing of loss or harm. However, there are some important differences:

- a delictual remedy is directed at compensation for infringement of a right or breach of a duty, whereas a contractual remedy is aimed at enforcement of the contract or compensation for the non-fulfilment of its terms;
- in delict there is a right of recovery for patrimonial or non-patrimonial harm (such as pain and suffering or injury to reputation), whereas in contract there is no right of recovery for non-patrimonial harm;<sup>4</sup>

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<sup>4</sup> *Administrator Natal v. Edouard* 1990 (3) SA 581 (A) at 595-596.

- fault is generally required for delictual liability, whereas liability for breach of contract is generally not based on fault;
- the Apportionment of Damages Act 34 of 1956 applies to actions based on delict and not to actions based on contract;
- the time for computation of damages may differ;
- claims in delict and contract may be subject to the jurisdiction of different Courts;
- the extent of vicarious liability in delict is different from that in contract;
- claims in delict and contract are subject to different rules of private international law;
- contractual claims are actively transmissible, whereas some delictual claims are not, and
- where the same facts form the basis for actions both in contract and in delict, the onus of proving or disproving negligence may differ according to the choice of action, as in the case of damage caused to goods deposited with another.

Loss or harm culpably caused by breach of contract may give rise to a delictual action by one contract party against another. This may either be as an alternative to an action for breach of contract in cases where professional services are performed negligently, or as an exclusively delictual action, for example where the defendant in the pre-contractual phase negligently or intentionally misrepresented facts, inducing the plaintiff to enter into the contract.<sup>5</sup> The negligent performance of contractual duties that causes loss or harm to a person outside the contractual relationship may also give rise to a delictual action by the outsider in cases of misrepresentation, negligent advice, defective workmanship or in the ‘disappointed beneficiary’ cases.<sup>6</sup>

Where the same conduct constitutes either a breach of contract or a delict, there may be a concurrence of actions affording the plaintiff a choice of proceeding either in delict or in contract against the same defendant. Such concurrence is particularly relevant in cases involving liability for negligent performance of professional services. The contractual relationship between a professional and

<sup>5</sup> *Bayer SA (Pty) Ltd v. Frost* 1991 (4) SA 559 (A) at 570.

<sup>6</sup> See *Pretorius v. McCallum* 2002 (2) SA 423 (C); *BOE Bank Ltd v. Ries* 2002 (2) SA 39 (SCA).

his or her client generally implies that the professional has a duty to act with reasonable care and skill, but the relationship may also give rise to a delictual duty with a similar content.

In South African law concurrence of contract and delict has been recognised in relationships between doctor and patient where the alleged harm was physical and not purely economic<sup>7</sup> and in relationships between attorney and client in respect of pure economic loss.<sup>8</sup> However, in the leading cases concerning the liability of attorneys<sup>9</sup> and engineers<sup>10</sup> to their clients for pure economic loss (as opposed to physical damage or personal injury), the clients' actions were treated as contractual actions.

In a contractual context, the same set of facts may give rise to both an action in contract and in delict as in the case where breach of contract causes patrimonial loss and also injury to dignity or reputation. Both a contractual action for recovery of patrimonial loss and a delictual action (the *actio iniuriarum*) for recovery of compensation for the infringement of personality rights may be available.<sup>11</sup>

## B. Delict and Insurance

If loss or harm caused by a delict is covered by insurance, both a delictual action against the wrongdoer and a contractual claim against the insurer will be available. The insured (plaintiff) is then entitled to both the damages recovered from the wrongdoer and the proceeds of the insurance claim. However, in the case of indemnity insurance, the insured who has recovered damages equal to or in excess of the insurance payment from the wrongdoer is obliged under the insurance contract to repay the insurance benefit in order to prevent double compensation. Alternatively, where the insured has not claimed damages from the wrongdoer, the insurer will be entitled to proceed under the principle of subrogation against the wrongdoer in the name of the insured, without cession of

<sup>7</sup> *Van Wyk v. Lewis* 1924 AD 438.

<sup>8</sup> *Rampal (Pty) Ltd v. Brett Wills & Partners* 1981 (4) SA 360 (D).

<sup>9</sup> *Mouton v. Die Mynwerkersonie* 1977 (1) SA 119 (A); *Bouwer v. Harding* 1997 (4) SA 1023 (SEC).

<sup>10</sup> *Lillicrap, Wassenaar & Partners v. Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A).

<sup>11</sup> *Ndamse v. University College of Fort Hare* 1966 (4) SA 137 (E).

action.<sup>12</sup> In liability insurance this principle also entitles the insurer to defend a delictual claim in the name of its insured so as to limit or exclude liability.

By operation of the principle of subrogation, many delictual actions ostensibly instituted by the person who suffered harm, or ostensibly defended by the wrongdoer are in fact conducted by insurance companies. In many cases no delictual action would have been instituted were it not for the existence of indemnity insurance.

### C. Delict and Criminal law

The law of delict is essentially directed at protecting private interests and providing compensation for loss or harm, whereas the criminal law is directed at protecting the public interest and imposing penal sanctions on the wrongdoer. However, the wrongful causing of loss to another will in many cases constitute both a delict and a crime, for example in cases of theft, fraud, assault and intentional damage to property. Even so, many delicts like adultery, breach of promise, negligent damage to property and negligent causing of bodily harm, are not crimes. Conversely, many crimes such as treason, interfering with the course of justice and trading in prohibited substances, are not delicts.

The Criminal Procedure Act 51 of 1977, in section 300(1), allows an award of compensation in criminal proceedings to the victim of crime involving damage to or loss of property (including money) and for the theft of property.

### D. Delict and the Constitution

The relationship between the law of delict and the Constitution concerns the extent to which the Bill of Rights affects a delictual action between private parties. The values recognised in fundamental rights provisions may have an indirect affect on the interpretation or content of private law norms.

The application of the Constitution to a delictual action between private persons is illustrated by *Khumalo v. Holomisa*<sup>13</sup> which considered whether the plaintiff in a defamation action should be required to allege and prove that the defamatory statement is untrue. The defendants challenged the common law rule that the plaintiff must only allege and prove the publication of a defamatory statement pertaining to him or her, leaving it for the defendant to allege and prove that the statement was true and that the publication was in the public interest. The

<sup>12</sup> See *Commercial Union Insurance Company of South Africa Ltd v. Lotter* 1999 (2) SA 147 (SCA) at 154.

<sup>13</sup> 2002 (5) SA 401 (CC).

defendants alleged that this rule was in conflict with the right of freedom of expression guaranteed by section 16 of the Constitution. The plaintiff responded that the rule was justified on the basis of the protection of human dignity (including reputation and privacy) guaranteed by section 10 of the Constitution.

The Constitutional Court found that its determination involved two stages. First, it had to consider whether and to what extent section 8(2)<sup>14</sup> bound private persons by these constitutional rights. This depended on the nature of the rights and any correlative duties. The Court identified a clear constitutional right to freedom of expression on the part of the defendants as members of the media that are affected by the law of defamation. Given the ‘intensity’ of the constitutional right in question, coupled with its potential invasion by persons other than the State or organs of State, the Court held that the right to freedom of expression is of direct horizontal application in this case as contemplated by section 8(2) of the Constitution.<sup>15</sup>

Secondly, when a constitutional right does apply to private persons, as in this case, the Court is required to apply or develop the common law to give effect to that right. The Constitutional Court here considered whether the common law rule that the defendant must allege and prove truth and public benefit in a defamation action unjustifiably limits the right to freedom of expression. If it did, it would be necessary to develop the common law in the manner contemplated by section 8(3) of the Constitution,<sup>16</sup> including a possible limitation of a conflicting right in accordance with section 36(1) of the Constitution.<sup>17</sup> The Court held that the

<sup>14</sup> S. 8(2) of the Constitution provides that certain constitutional rights apply directly to ‘a natural or a juristic person’, but only ‘if and to the extent that it is applicable’ to those ‘taking into account the nature of the right and the nature of any duty imposed by the right’. The Courts will be required to decide in an ad hoc manner whether or not a particular constitutional right binds a private natural or juristic person.

<sup>15</sup> At para. 33.

<sup>16</sup> S. 8(3) of the Constitution applies only where a Court seeks to apply a provision of the Bill of Rights to a natural or juristic person in terms of s. 8(2). S. 8(3) directs a Court to apply (or, if necessary, develop) the common law where the legislation fails to give effect to a constitutional right which binds a private person and to develop rules of the common law so as to limit constitutional rights applicable to private persons in accordance with s. 36(1) of the Constitution.

<sup>17</sup> S. 36(1) states that the rights in the Bill of Rights may be limited only in terms of a law of general application to the extent that the limitation is reasonably justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors. See in general, Chapter 2 above.

common law rule in question does not unjustifiably limit the constitutional right to freedom of expression mainly because a defendant who cannot establish the truth, or finds it disproportionately expensive or difficult to do, may show that in all the circumstances the publication was reasonable. To determine this, a Court will have regard to the individual's interest in protecting his or her reputation and privacy in the context of the constitutional commitment to human dignity.

The application of the Bill of Rights will not necessarily involve extensive development of the law of delict. The general principles of delict contain criteria to harmonise conflicting rights and to achieve an equitable distribution of risk and loss. Many of the specific rights that have now been constitutionalised are already recognised and harmonised with competing rights. Nonetheless, the impact of the Bill of Rights on the law of delict is already experienced in the style of judicial reasoning, inasmuch as the Courts more often engage with normative issues rather than to search for authority in a formalistic way. The general or open-ended principles of the law of delict, in particular the element of wrongfulness, will now be informed by applicable constitutional values.

### III. GENERAL PRINCIPLES

#### A. Conduct

A delict involves human conduct whereby the actor (or perpetrator) wrongfully and culpably causes damage or harm to another. The act or conduct required is a voluntary, human, positive act or omission that might involve the use of instruments to cause harm.

Conduct is voluntary if it is subject to the control of the actor's will. This implies mental capacity at the time of conduct to direct muscular activity or to refrain from such activity. An act that is physically enforced (that is, where there is absolute compulsion or *vis absoluta*), reflexive or performed in a state of unconsciousness as during sleep, amnesia, epileptic fits, extreme intoxication, an extremely emotional state, a heart attack, or hysterical dissociation, will not be regarded as voluntary. However, impulsive or spontaneous acts are not genuinely reflexive and are therefore voluntary, as for example where the driver loses control of a vehicle when reacting to a bee sting or a to a burning match falling into his lap.

A person who voluntarily enters into a state of unconsciousness, for example self-induced intoxication, with the intention of causing harm to another in that

state (conduct known as *actio libera in causa*) will be liable in delict on the basis of the voluntary conduct preceding the state of unconsciousness. Similarly, liability will ensue where a person negligently allows a state of unconsciousness to develop, for example by falling asleep while driving, or by failing to prevent a reasonably foreseeable health-related condition. In *Wessels v. Hall and Pickles (Coastal) (Pty) Ltd*<sup>18</sup> the defendant, while driving a vehicle, suffered a hypoglycaemic attack resulting in a diabetic coma, lost control and caused an accident. The defendant who was aware of his diabetic condition and of the possibility of sudden attacks was held to have been negligent for failing to take reasonable precautions. The circumstances at the time of the preceding voluntary conduct will be taken into account to determine whether the state of unconsciousness and the concomitant possibility of harm to others were reasonably foreseeable and preventable.

Delictual liability may be based on either a positive act (physical activity or statement) or an omission. This distinction presents particular difficulty in cases involving a continuous course of conduct, where the failure to take precautionary measures along the way may be seen as an omission or as legally deficient positive conduct. For example, failing to stop at a stop sign and colliding with an oncoming vehicle constitutes positive conduct (driving), but also an omission (failing to stop). The failure to stop indicates deficient (negligent) positive conduct. In such a case it is legally irrelevant whether the occurrence is described as an omission or as positive conduct. However, an action based on the failure to take precautionary action that would not have been an integral part of the course of conduct in which the defendant was engaged, would essentially be based on an omission. Examples are a delictual action against a jogger who sees a child drowning in a river but makes no attempt to rescue him or her, or against a policeman who fails to assist a person being assaulted.<sup>19</sup>

Liability for harm attributable to omissions is limited, because there is no general duty to prevent harm to others – one is generally not compelled to be one's brother's keeper. The same applies to liability for harm attributable to statements, because the harmful effects of the spoken or written word may be widespread. Liability is therefore imposed only in special circumstances where there is a duty to prevent harm.

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<sup>18</sup> 1985 (4) SA 153 (C).

<sup>19</sup> *Minister van Polisie v. Ewels* 1975 (3) SA 590 (A).

## B. Wrongfulness

### 1. General nature

The second requirement for delictual liability is that the act or conduct must wrongfully cause harm to another. Wrongfulness involves the question whether the conduct of one person unreasonably causes harm to another by infringement of a legally recognised right or interest. All harm caused is not necessarily wrongful, for instance where justified criticism harms the reputation of another, or fair competition causes financial loss to a trade competitor. Wrongfulness involves violation of the legal criterion or standard of reasonableness or *boni mores*, a criterion that involves an assessment of the legal convictions prevailing in the community with reference to a number of considerations, leading in the final instance to a decision based on public policy.<sup>20</sup> Application of the criterion of reasonableness or *boni mores* thus requires the weighing up and balancing of the interests of the parties concerned in the light of the interests of the community.

Wrongfulness does not concern the act or conduct by itself, but the causal sequence whereby the act or conduct of one person causes harm to another. This differs from the criminal law, where an act by itself is sometimes wrongful, for instance the crime of dangerous driving or of possessing a prohibited substance. Consequently, a delictual act or omission by itself is not wrongful unless it causes harm to a legally protected interest of another.

The act and its consequences that together constitute a delict may be separated in time and space. An act of assault may cause immediate injury, whereas building an unsafe wall may not have harmful effects until much later when the wall collapses.

The general standards for determining wrongfulness, namely reasonableness, the *boni mores* and the legal convictions of the community, are legal and not social, moral, ethical or religious. Legal criteria determine whether there should be compensation for harm done by one person to another, but these criteria are necessarily imbedded in the community served by the legal system. Naturally, therefore, the concept of wrongfulness will be influenced by prevailing ethical and moral views in the society for the law is ‘but a translation of society’s fundamental values into policies and prescripts for regulating its members’ conduct’.<sup>21</sup>

Wrongfulness involves an objective and *ex post facto* assessment of a causal sequence including all relevant facts – also those not known to the parties at the

<sup>20</sup> *Mukheiher v. Raath* 1999 (3) SA 1065 (SCA) at para. 25.

<sup>21</sup> *Clarke v. Hurst* 1992 (4) SA 630 (D) at 652.

time of the alleged delict. The Court must weigh up the interests of the persons involved and also take account of the interests and convictions of the community at large.

Putative (mistaken assumption of) wrongfulness does not make conduct wrongful and putative justification does not render it lawful, although mistake may exclude fault in the form of intent.<sup>22</sup> A motive to cause harm in itself does not make the resulting harm wrongful, although an improper motive may be a factor in the assessment of wrongfulness. For instance, where a landowner exercises his rights of ownership in a manner calculated to cause extensive harm to a neighbour, with little benefit to himself, his motive to harm may lead to a decision that the harm was caused wrongfully.<sup>23</sup> In the field of wrongful competition a motive to harm rather than to compete will also play a role in determining wrongfulness.<sup>24</sup>

## *2. General criterion for determining wrongfulness*

The general criterion for determining wrongfulness involves the question whether the conduct of one person caused damage or harm to another unreasonably or contrary to the *boni mores* or the legal convictions of the community by infringement of a recognised right or interest. In cases of harm to persons or property, the Courts find wrongfulness without referring to these standards because it is settled law that such harm caused by a positive act is *prima facie* wrongful simply because such conduct involves the infringement of a recognised subjective right to bodily integrity or to property.<sup>25</sup> However, where harm caused to another does not involve the infringement of a right falling within one of the legally recognised categories of rights, the application of a general criterion becomes necessary. Examples are:

- where pure economic loss is caused by misrepresentation;
- where it is not clear that a recognised subjective right has been infringed, for instance where public criticism causes harm to a person's reputation and the issue is whether such criticism is justified;

<sup>22</sup> See *Dantex Investment Holdings (Pty) Ltd v. Brenner* 1989 (1) SA 390 (A) at 396-397.

<sup>23</sup> See *Gien v. Gien* 1979 (2) SA 1113 (T) at 1121.

<sup>24</sup> See *Bress Designs (Pty) Ltd v. GY Lounge Suite Manufacturers (Pty) Ltd* 1991 (2) SA 455 (W).

<sup>25</sup> See *Lillicrap, Wassenaar & Partners v. Pilkington Brothers (SA) (Pty) Ltd* 1985 (1) SA 475 (A) at 497.

- where recognised subjective rights come into conflict, for instance where two neighbours both claim to exercise their rights of ownership and one stands to suffer harm, or
- where liability for an omission, that is, the existence of a legal duty to act to prevent harm to another, is the issue, for instance where a passer-by fails to take positive action to save a drowning child.

In these and other novel cases the content of wrongfulness is refined by the general concepts of reasonableness, the legal convictions of the community (*boni mores*) and public policy. These general criteria create judicial discretion, allow the Courts to take account of policy considerations in developing the law and provide the Courts with ‘a legal standard firm enough to afford guidance to the Court, yet flexible enough to permit the influence of an inherent sense of fair play’ based on ‘the general sense of justice of the community, the *boni mores*, manifested in public opinion’.<sup>26</sup>

Based on these standards and considerations, wrongfulness is assessed by determining either whether a subjective right has been infringed or whether a recognised duty has been breached.

### *3. Wrongfulness as infringement of a right*

Wrongfulness mostly takes the form of the infringement of a right that belongs within one of the settled categories of subjective rights,<sup>27</sup> namely:

- real rights in respect of movable or immovable property;
- personal rights in respect of an act or performance required from another person;
- personality rights in respect of aspects of human personality such as bodily integrity, dignity or reputation, and
- immaterial property rights in respect of intangible products of the human mind such as patents, trade marks or copyright.

Since there is no closed list of subjective rights, these settled categories may be supplemented with sub-categories or new categories of rights, such as:

<sup>26</sup> *Atlas Organic Fertilisers (Pty) Ltd v. Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 188.

<sup>27</sup> See *Universiteit van Pretoria v. Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T) at 387; *Clarke v. Hurst* 1992 (4) SA 630 (D) at 651.

- personal immaterial property rights in the form of the right to earning capacity or personal goodwill;
- the right to information, and
- rights to identity, goodwill and trade secrets.

Infringement of a right involves disturbing or curtailing the ability of the holder to enjoy, use or dispose of the interest that is the object of the right in a manner which is unreasonable in terms of general criteria or standards based on the legal convictions of the community (*boni mores*) and in the final instance on public policy. In cases of bodily injury or damage to property, unreasonableness is easily determined or simply assumed. In other cases the *boni mores* or legal convictions of the community are the standards for determining unreasonableness and wrongfulness. These general standards broadly involve the respective rights and obligations of the parties; the nature and extent of the harm that was caused and the legal, social and economic implications of imposing liability for the infringement. Relevant factual and policy considerations are:

- the extent of the disturbance or harm caused;
- the social or economic value or purpose of the conduct causing the harm;
- knowledge on the part of the person who caused the harm that his conduct could cause the harm;
- fraud or dishonesty;
- practical measures that could have been taken to avert the harm;
- professional competence or skill, and
- the legal, social and economic implications of imposing liability for the infringement.<sup>28</sup>

The Courts shy away from imposing liability, for instance where neither the harm nor the number of persons affected are finite and the recognition of liability raises the spectre of indeterminate liability to an indeterminate class of persons.<sup>29</sup>

<sup>28</sup> See *Universiteit van Pretoria v. Tommie Meyer Films (Edms) Bpk* 1977 (4) SA 376 (T), 1979 (1) SA 441 (A); *Gien v. Gien* 1979 (2) SA 1113 (T).

<sup>29</sup> See *Shell & BP SA Petroleum Refineries (Pty) Ltd v. Osborne Panama SA* 1980 (3) SA 653 (D) at 659-660; *Mpongwana v. Minister of Safety and Security* 1999 (2) SA 794 (C) at 802-803.

#### 4. Wrongfulness as breach of a legal duty

Wrongfulness is often assessed in terms of a legal duty to prevent harm where the harm does not involve the infringement of a clearly identifiable right. Once it is accepted that the defendant had a legal duty to prevent harm to the plaintiff it means in effect that he or she had infringed the right of the plaintiff not to be harmed. This approach simply changes the initial focus of the enquiry. The general criterion remains the same, that is, it involves the question whether the defendant unreasonably or contrary to the legal convictions of the community (*boni mores*) acted in breach of his legal duty to prevent harm to the plaintiff. Relevant considerations include the following:

- a statutory provision indicating a duty;
- the nature and extent of the harm;
- whether the loss is finite;
- whether the number of potential plaintiffs is limited and identifiable;
- the availability of protective measures;
- the ease, cost and the likelihood of success of implementing such measures;
- special skills and responsibilities;
- the relationship between the parties, and
- whether any general considerations of public policy and fairness would favour a denial of a remedy.

The breach-of-duty approach to determining wrongfulness is illustrated by cases involving omissions, statutory duties, and pure economic loss, including misrepresentation (see IV.A. below).

##### a. Omissions

As indicated above, there is no general legal duty to act positively to prevent harm to others. A defendant is only required to act positively where it was unreasonable for the defendant, according to the legal convictions of the community (*boni mores*), to fail to prevent harm to the plaintiff. The assessment of wrongfulness focuses on the existence of a legal duty arising from the circumstances of the case and not on the infringement of a right. The criteria of reasonableness and the legal convictions of the community (*boni mores*) require that the Court make an objective and *ex post facto* assessment of all the facts by weighing up the interests of the persons involved in the light of the interests and convictions of the community at large.

In a long line of so-called ‘municipality cases’, the Courts adhered to the view that liability for an omission can only be imposed on a local authority where prior conduct of its employees had created a risk of harm or a new source of danger and the defendant then failed to prevent the harm from occurring. However, in *Minister van Polisie v. Ewels*,<sup>30</sup> where a person was assaulted by an off-duty policeman in a police station in the presence of a more senior policeman who failed to prevent the assault, the Appellate Division broke away from the ‘prior conduct’ approach and held that delictual liability for a mere omission need not be connected with such prior conduct. The essential question is whether it was reasonable and in accordance with the convictions of the community to expect the defendant to act positively to prevent harm to another in the circumstances. This would be the case where the failure to act evokes not only moral indignation, but is also considered wrongful and subject to redress according to the legal convictions of the community.<sup>31</sup> Specific content is given to this general criterion by taking account of factors such as the extent of the danger, the period of time for which it existed, the resources of the public authority and prior warning. Some (but not all) of the factors relevant to the wrongfulness enquiry will also be relevant to the negligence enquiry. The onus to prove both the existence of the legal duty and negligence prevents the opening of the floodgates in respect of claims against public authorities.<sup>32</sup>

In respect of liability for an omission, the factual and policy considerations that give specific content to the standards of unreasonableness, *boni mores* and the legal convictions of the community include the following:

- prior conduct of the defendant creating a risk of harm;
- control over a dangerous or potentially dangerous object;
- an obligation under common or statute law to act positively to prevent harm;
- a special relationship between the parties;
- an expectation created by the defendant that he would protect the interests of the plaintiff;
- a motive to cause harm;
- prior knowledge or foresight of the possibility of harm;
- practical measures that could have been taken to avert the harm;

<sup>30</sup> 1975 (3) SA 590 (A).

<sup>31</sup> *Cape Town Municipality v. Bakkerud* 2000 (3) SA 1049 (SCA).

<sup>32</sup> *Mostert v. Cape Town City Council* 2001 (1) SA 105 (SCA) especially at 120-121.

- a failure of professional competence or skill;
- a failure to prevent harm in the course of official duties, and
- the legal, social and economic implications of imposing liability for the infringement.

b. Statutory duties

Where the breach of a statutory duty resulted in harm, wrongfulness depends on the content and purpose of the statutory duty and whether such breach could give rise to delictual liability. In *Knop v. Johannesburg City Council*,<sup>33</sup> a local authority erroneously granted an application for subdivision of property. The Court ascertained the legislative intention with reference to the nature of the powers conferred, the nature of the duties involved in their exercise, the procedures prescribed for their exercise and for persons aggrieved to obtain redress, and the objects of the legislature. In *Da Silva v. Coutinho*,<sup>34</sup> it was held that the owner of a motor vehicle was liable in delict for failing to comply with a statutory duty to provide the plaintiff with a declaration of insurance in respect of the motor vehicle, so as to enable the plaintiff to claim compensation from the insurer.

In the context of wrongful competition, a trader may allege that he or she is incurring losses as a result of competition from another trader who does not hold the necessary statutory licence or permit to trade, or who otherwise contravenes a statutory duty or prohibition. In *Patz v. Greene & Co*<sup>35</sup> for instance, a trader who conducted business in the vicinity of a mining compound applied for an interdict against a rival trader who traded on claim land in contravention of a specific statutory prohibition. The Court accepted in principle that it is wrongful to cause loss to a rival trader through conduct expressly prohibited by statute.

The relevant factual and policy considerations in deciding whether the breach of a statutory duty will be regarded as wrongful include the following:

- if the breach caused or materially contributed to the harm;
- if the statutory duty was intended for the benefit of the plaintiff as one of a class of persons;
- if the statute was enacted to protect the public interest as well as individual interests;

<sup>33</sup> 1995 (2) SA 1 (A) at 28.

<sup>34</sup> 1971 (3) SA 123 (A).

<sup>35</sup> 1907 TS 427.

- if the harm suffered by the plaintiff was of a kind that the statute intended to guard against;
- if alternative procedures or remedies are provided in the statute to aid persons aggrieved by the breach of the statutory duty;
- if other sanctions, including criminal sanctions, are provided in the event of breach of the statutory duty, and
- the practical implications of recognising a delictual remedy for breach of the statutory duty.

## C. Justification: Defences

### 1. *Grounds of justification generally*

Grounds of justification or defences are special circumstances that make the infringement of a right or breach of a duty reasonable and therefore lawful.<sup>36</sup> There is no closed list of grounds of justification. Such grounds merely represent applications of the general criterion of reasonableness, justifying an infringement of a right or breach of a duty that would otherwise be unlawful. The onus of proving that the infringement or breach is not unlawful is on the defendant.<sup>37</sup>

The most common grounds of justification are private defence, necessity, provocation, consent, statutory authority, public authority, official command and disciplinary authority.

### 2. *Private defence*

Private defence justifies the protection of a legally recognised interest against actual or imminent unlawful attack. To render his or her action lawful, the defender must prove that he or she defended himself or herself in a reasonable manner against such conduct. In general, reasonableness is judged objectively but the Courts sometimes adopt a qualified objective approach, by taking into account what the defendant could reasonably have known or how he or she would reasonably have reacted to the situation, instead of considering all the facts of the situation as known after the event.<sup>38</sup>

<sup>36</sup> *Clarke v. Hurst NO* 1992 (4) SA 630 (D) at 650.

<sup>37</sup> *Mabaso v. Felix* 1981 (3) SA 865 (A).

<sup>38</sup> Cf. *Ntanjana v. Vorster & Minister of Justice* 1950 (4) SA 398 (C) at 406A-D; *S v. Ntuli* 1975 (1) SA 429 (A) at 437E.

The requirements for a successful plea of private defence are as follows:<sup>39</sup>

- The *attack* must have been *unlawful* and not lawful, for instance against a lawful arrest. An attack by an animal and danger created by forces of nature are not set in motion by human conduct and are therefore not unlawful attacks. Defensive conduct against such dangers can be justified on the ground of necessity. Private defence is, however, appropriate where a person uses an animal as an instrument of attack, for instance inciting a dog to bite. A certain measure of defensive coercion may also be reasonable in cases of an omission involving infringement of rights, for instance where a salesman refuses to leave another person's house, or where a fireman refuses to extinguish a fire on request of a house-owner.
- The attack must be directed against a legally recognised interest, such as life, bodily integrity, honour and property.
- The attack must have commenced or be threatening. Anticipatory defence is not justified – an interdict may be the appropriate remedy. Retaliation against an attack that has already ceased is not justified.
- Fault on the part of the attacker in the form of intent or negligence is not required. Private defence is also justified against an attack by a non-accountable person, such as an insane person.
- The attack need not be directed at the defender. The property of another may be defended against an unlawful attack. A policeman may be justified in using force to ward off an attack on a fellow policeman, and a husband may prevent an infringement of his wife's honour.
- The defence must be directed at the attacker.
- The means of defence must have been necessary and reasonable to ward off the threatened harm. Private defence is not justified when the threat could have been avoided in some non-harmful or less harmful way or where the causing of harm was either unnecessary or disproportionate to the protected interest.

The issues of necessity and proportionality raise several further questions:

- Was it necessary to defend against the attack, or could the defender have protected his interests by taking flight? The Courts have accepted that the

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<sup>39</sup> See *Ntsomi v. Minister of Law and Order* 1990 (1) SA 512 (C) at 526-527.

victim is not expected to flee if flight would be dangerous or if it would amount to a dereliction of duty.<sup>40</sup>

- Should the test be objective? The qualified objective approach referred to above for instance had the result that the use of force by an armed policeman faced with a threat of violence was judged according to the norm of a reasonable policeman.<sup>41</sup>
- The interest that the defender seeks to protect need not be commensurate with or similar in character to the interest of the attacker that is infringed by the defence.<sup>42</sup> However, an extreme imbalance, for instance where the defender fatally wounds the attacker to prevent a petty theft, will indicate that the defence was unreasonable.<sup>43</sup> In *Ex Parte Minister van Justisie: In re S v. Van Wyk*,<sup>44</sup> a shop-owner had set up a gun with a trip-wire to protect his property against thieves when other measures had proved ineffective to protect his shop against repeated burglaries. The gun was set up in such a way that when triggered it would hit an intruder in the legs. He also put up a warning notice on the door of the shop. An intruder set off the gun and was wounded in the hip and later died as a result of the wound. The shop-owner was prosecuted for murder. The Appellate Division found that killing in defence of property can be justified in particular circumstances. The majority also held in essence that, in view of the repeated burglaries and the failure of other methods of protection, the setting up of the gun was a reasonable method of defence. It is questionable whether this judgment will today withstand the scrutiny of a constitutional proportionality test focused on the protection of the right to life.

### 3. Necessity

A state of necessity justifies the infringement of an interest of an innocent person in a situation where such infringement is the only reasonable means of protecting one's own interest or that of another person against danger created by natural phenomena or human conduct. Reasonableness is determined with reference to factors

<sup>40</sup> See *Ntsomi v. Minister of Law and Order* n. 39 above at 530.

<sup>41</sup> *Ntanjana v. Vorster & Minister of Justice* 1950 (4) SA 398 (C); *Ntsomi v. Minister of Law and Order* n. 39 above at 527-528.

<sup>42</sup> *Ex Parte Minister van Justisie: In re S v. Van Wyk* 1967 (1) SA 488 (A) at 496-497.

<sup>43</sup> *Ibid.* at 498.

<sup>44</sup> *Ibid.*

such as the proportionality of the interests involved, the nature and extent of the danger and the available means of protection. The following principles apply:

- There must have been actual danger to a legally recognised interest. The existence and extent of the danger must be determined objectively and not on the basis of the perception or reaction of the person who relies on the state of necessity. However, as in private defence, the Courts have in certain cases adopted a qualified objective approach.<sup>45</sup>
- The endangered interest (for example life, physical integrity and property) can be that of the defendant himself or of another person. Subject to the principle of proportionality, the necessity-induced conduct may also infringe any kind of interest, for instance property, physical integrity, honour, freedom and even life.
- The danger may be created by a natural phenomenon such as fire or flood or by human conduct such as duress,<sup>46</sup> but not by the defendant himself. If in such a situation the defendant causes harm to protect his or her own or another's interest, the focus of the inquiry into wrongfulness should not be restricted to the already-existing situation of necessity.
- The danger must be present or imminent. Anticipatory defensive conduct is generally not justified.
- The person relying on necessity must not be legally obliged to endure the consequences of the dangerous situation.
- There must be proportionality between the protected interest and the interest infringed by the protective conduct. The harm caused to the innocent person should not outweigh the harm prevented by the protective conduct. However, since it is unreasonable to force a person to sacrifice his or her interest in order to protect the endangered interest of another, the protective conduct will not necessarily be justified even if it outweighs the infringed interest. Consequently, a blood donation may not be enforced to save the life of a critically ill person with the same blood group; and a person wearing an expensive leather jacket may not in the event of a sudden rain shower take an umbrella from a person wearing an inexpensive garment. The issue of proportionality raises the question whether the protection of life in a situation of necessity can justify the taking of

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<sup>45</sup> See *R v. Mahomed* 1938 AD 30 at 36; *S v. Pretorius* 1975 (2) SA 85 (SWA).

<sup>46</sup> *S v. Goliath* 1972 (3) SA 1 (A).

another life. In *S v. Goliath*,<sup>47</sup> the Appellate Division held in a criminal case that necessity, in the form of compulsion or duress, could in extreme circumstances be a complete defence to a charge of murder. The Court accepted that an ordinary person generally regards his or her own life as more important than the life of another and that only a person with qualities of heroism will sacrifice his or her own life for that of another. However, since a person acting under duress need only conform to the standard of the average person, the Court decided that compulsion or duress could be a complete defence to a charge of murder. In a minority judgment it was concluded that compulsion couldn't justify the killing of an innocent person, but could lessen and even exclude fault.<sup>48</sup> Consequently, the Courts will be very circumspect in recognising necessity as a defence where the loss of life of an innocent person is concerned, but the standard will still be that of the ordinary, average or reasonable person.

- The necessity-induced conduct must have been necessary or the only reasonable means of protecting the interests concerned. If the defendant could have escaped from the dangerous situation by taking flight, he or she should have done so.<sup>49</sup>

#### 4. Provocation

Provocation, in the form of inciting words or conduct, can be a complete defence to a claim based on alleged infringement of personality rights. In *Bester v. Calitz*,<sup>50</sup> the Court accepted that insulting remarks made in anger as a response to provocative prior conduct and an insult of a similar nature, were not wrongful in terms of the standards of reasonableness and the legal convictions of the community. Account should be taken of human weaknesses and the inclination of the average person to respond angrily to insult or other forms of provocation.

To succeed, the provocation must be of such a nature that the conduct in reaction to it, whether by way of insult, defamation or even physical assault, can

<sup>47</sup> *Ibid.*

<sup>48</sup> Since the person who acted in the *Goliath* case had the will or knowledge that the death of another person would ensue as well as knowledge of the unlawfulness of causing the death, it is not clear on what basis fault could have been excluded on account of compulsion or duress.

<sup>49</sup> See *S v. Bradbury* 1967 (1) SA 387 (A) at 390, 392, 393, 404.

<sup>50</sup> 1982 (3) SA 864 (O) at 880.

be regarded as reasonable, in the sense that a reasonable person in the position of the defendant would have been similarly provoked. The reaction must have been ‘an immediate and reasonable retaliation’<sup>51</sup> and in proportion to or commensurate with the provocation. As a rule verbal provocation will not justify physical assault, even if the verbal provocation was gravely insulting or defamatory. Provocation in the form of physical assault may justify a proportionate retaliatory assault. Disproportionate retaliatory conduct may jeopardise the success of provocation as a complete defence but the damages of the claimant who provoked the retaliation may nevertheless be reduced.

### 5. Consent

The infliction of harm is justified where a mentally capable person indicates to another person his or her willingness to suffer or to run the risk of suffering some harm for a lawful purpose. Consent either involves a waiver of rights in respect of the harm concerned or it renders the causing of harm reasonable in terms of the *boni mores* or the legal convictions of the community.

Consent applies when a specific harm is caused intentionally for a specific purpose as in the case of a medical operation. It also applies where a person accepts the risk that harm may be negligently caused during a dangerous activity, like participation in a sport that involves the risk of injury. Consent in the latter form is sometimes also referred to as voluntary assumption of risk. A particular situation may give rise to both forms of consent. Thus a medical operation may involve not only some pain and inconvenience, but also the risk of complications or even death. Voluntary assumption of risk will not necessarily constitute consent to suffer harm negligently caused by other participants, but the voluntary participation may nevertheless constitute contributory negligence.

The requirements for valid consent are the following:

- Unilateral conduct on the part of the plaintiff whereby he or she indicates a willingness to suffer harm or run the risk of some harm. The defendant must merely prove consent and need not prove consensus between the parties.<sup>52</sup> An agreement between the parties that the one will not hold the other liable for harm that may ensue (*pactum de non petendo*) has the same practical effect as consent. Since consent involves unilateral

<sup>51</sup> *Powell v. Jonker* 1959 (4) SA 443 (T) at 445; *Dzvairo v. Mudoti* 1973 (3) SA 287 (RA).

<sup>52</sup> *SANTAM Insurance Co Ltd v. Vorster* 1973 (4) SA 764 (A) at 780-781.

conduct, it can be revoked at any stage prior to the causing of harm. Consequently, a person who has consented to the publication of an article on her private life can revoke such consent prior to publication and the publication would then be an unlawful invasion of privacy.<sup>53</sup>

- The consenting party must have indicated his or her consent in an externally manifest manner.
- Consent can be given verbally, either expressly or by implication, or tacitly, by conduct. Mere acquiescence or knowledge that harm will ensue is not enough to constitute consent.
- Consent must be given before the harm occurs, but the person who suffers the harm may afterwards also waive the right to claim damages, either unilaterally or by way of an agreement not to claim (*pactum de non petendo*).
- Consent must be given by a person capable of expressing a will with at least the mental ability to appreciate the implications of his or her actions, to distinguish between right and wrong and to act accordingly. Consent by someone not capable of expressing his or her will, such as a young child, may be given by someone such as a parent or guardian who can lawfully express a will on behalf of such person. Where parents refuse to consent to an operation that is considered necessary in the opinion of a physician, or where the parents are deceased or incapacitated, the Minister of Health and Welfare can give the necessary consent. In an emergency, the superintendent of a hospital may consent to the medical treatment of a child.<sup>54</sup> The Mental Health Act 18 of 1973 regulates consent to medical treatment of mentally ill persons. The consent of a parent on behalf of a child must be reasonable and in the interests of the child: consent that the child may participate in a patently dangerous activity that is of no value or benefit to the child will be unreasonable and invalid.
- Consent must be freely and voluntarily given and not as a result of moral, social or economic pressure. An example is where an employee undertakes dangerous work in the course of his employment, or submits to physical punishment.<sup>55</sup>

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<sup>53</sup> *National Media Ltd v. Jooste* 1996 (3) SA 262 (A).

<sup>54</sup> Child Care Act 74 of 1983 s. 39(1) and (2).

<sup>55</sup> *Waring & Gillow Ltd v. Sherborne* 1904 TS 340; *R v. McCoy* 1953 (2) SA 4 (SR); *S v. Collett* 1978 (3) SA 206 (RA).

- Full prior knowledge of the nature and extent of the harm or the risk of harm is required, particularly in the case of medical treatment. In *Castell v. De Greef*,<sup>56</sup> the Court held that consent would only be operative if the patient had sufficient knowledge and appreciation of the nature and extent of the harm or risk and had consented comprehensively thereto covering the entire transaction and its consequences. A doctor is accordingly obliged to warn a patient of a material risk inherent in the proposed treatment. A risk is considered material if a reasonable person in the patient's position, if warned of the risk, would be likely to attach significance to it; or if the medical practitioner is or should reasonably be aware that the particular patient, if warned of the risk, would be likely to attach significance to it. However, this obligation is subject to the so-called 'therapeutic privilege' which permits medical practitioners, notwithstanding inroads on patient autonomy, to withhold disclosures that they consider detrimental to the patient in question.
- The consenting party must have been subjectively willing to suffer the harm. This involves knowledge and appreciation of the potential harm. However, knowledge does not invariably imply appreciation, and both together are not necessarily equivalent to consent. In an assumption of risk of harm, the question is whether the harm that eventually occurred was foreseen and accepted as falling within the ambit of the risk. The enquiry is subjective and foresight of the possible harm is a cardinal feature.

In *Lampert v. Hefer NO*,<sup>57</sup> the plaintiff, a passenger in the sidecar of a motor cycle, was injured in an accident caused by the driver's negligence. The driver was, to the plaintiff's knowledge, in a highly intoxicated state. The Court noted that consent and contributory negligence may often overlap. In respect of consent by assumption of risk the Court remarked that 'serious intoxication in the driver of a motor-vehicle must always involve a risk of accident'<sup>58</sup> and concluded that the plaintiff, who had previously also travelled with the driver while he was intoxicated, must have or should have appreciated the risk of an accident and injury, and that her assumption of risk constituted a complete defence. After the Apportionment of Damages Act 34 of 1956 came into force,

<sup>56</sup> 1994 (4) SA 408 (C).

<sup>57</sup> 1955 (2) SA 507 (A).

<sup>58</sup> *Ibid.* at 514.

contributory negligence ceased to be a complete defence and an apportionment of damages became possible (section 1(1)(a)). However, the Courts have been reluctant to recognise consent in assumption of risk cases where there was negligence on the part of the defendant. They usually conclude that the plaintiff did not consent to the defendant's negligence and that the voluntary exposure to risk amounts to contributory negligence.

The leading case on consent in the form of assumption of risk is *SANTAM Insurance Co Ltd v. Vorster*.<sup>59</sup> The plaintiff, a passenger in one of two cars that participated in an informal race on a country road, was severely injured in an accident caused by the negligence of both drivers. The Court found that, in addition to knowledge and appreciation of danger, the plaintiff, despite his probable protestations, must have foreseen the particular risk that culminated in the harm as part of the inherent risks of the hazardous activity. The Court held that such inherent risks included the possible occurrence of a mechanical defect during the race, but did not include the acts of negligence on the part of the drivers. Consequently the Court rejected the defence of consent but found contributory negligence on the part of the plaintiff as a participant in the hazardous activity.

A participant in sport normally consents to the risk of injuries that occur reasonably within the normal course of a game. The fact that one player causes injury in contravention of the rules of the game, does not necessarily take the injury outside the ambit of another player's consent, because such conduct may be foreseeable in the normal course of a game. The position is different where the injury is caused by gross contravention of the rules or deliberately dangerous conduct. In *Boshoff v. Boshoff*,<sup>60</sup> the Court held that injuries sustained during a game of squash are reasonably to be expected in a social game between amateurs. The defence of consent succeeded on the basis that the concept of volition does not require a positive desire to be injured, but a legal 'will' or acceptance of injury or the risk of injury.

In sports-injury cases it may also be accepted that the injury was caused lawfully because it could reasonably, in accordance with the legal convictions of the community, occur in the normal course of the game. Arguably, consent to the risk of injury in the course of a hazardous activity without any redeeming social value, like a dangerous car race on a country road, or a ride with a drunken driver, should be regarded as *contra bonos mores* and therefore invalid. The

<sup>59</sup> 1973 (4) SA 764 (A).

<sup>60</sup> 1987 (2) SA 694 (O).

injured person's voluntary exposure to such a risk could possibly be seen as contributory negligence.

A prior agreement not to claim damages for harm caused by another person (*pactum de non petendo in anticipando*) is contractual and excludes the recovery of damages for unlawfully caused harm. The practical effect of such an agreement is the same as that of consent in that it provides a complete defence against a claim for damages as a result of the anticipated and later realised harm. However, an undertaking by a breadwinner not to institute a claim in the event of his injury or death, even if it purports to bind his estate and his dependants, will not affect the right of his dependants to claim compensation for loss of support in the event of his death.<sup>61</sup> The Courts appear to accept that a parent or guardian can validly conclude a *pactum de non petendo* on behalf of a minor child, for instance if required by a school or sport club as a condition for the child's participation in an educational activity or sport. The effect of a *pactum de non petendo* will depend on the precise ambit of the agreement and the Courts will tend to interpret such agreements restrictively. An agreement purporting to exclude liability for harm caused intentionally will not be valid.

#### *6. Statutory authority*

The person who purports to act in terms of statutory authority must prove that the causing of harm was within its bounds. Although the normal rules of statutory interpretation are applicable, the Courts have adopted certain guidelines and presumptions in this regard. If the statute is *directory* and does not provide for compensation this will indicate that the infringement of rights and consequent harm is justified. If the statute is merely *permissive* and *general* and does not provide for compensation there is a presumption that the infringement of rights and consequent harm is not justified. However, there is no such presumption where a *public body* is permitted to act in the *public interest* or where the permission to act is *localised* or *specific*. Certain empowering statutes authorise works or acts of an intrinsic physical nature with the result that their execution necessarily and inevitably involves the disturbance of private rights. Thus in *Johannesburg Municipality v. African Realty Trust*,<sup>62</sup> it was held that it was impossible to exercise the power conferred (the construction of streets and drains) without increasing the flow of water onto the plaintiff's land. In *Breede River*

<sup>61</sup> *Jameson's Minors v. CSAR* 1908 TS 575; *Payne v. Minister of Transport* 1995 (4) SA 153 (C).

<sup>62</sup> 1927 AD 163.

(*Robertson*) Irrigation Board v. Brink,<sup>63</sup> it was held that an irrigation canal could not be built for miles across the countryside without interfering with the natural flow of surface drainage water.

The Courts apply the general criterion of reasonableness to determine whether the bounds of statutory authority have been exceeded. In order to determine whether it was reasonably possible to avoid the infringement of private interests or to minimise harm resulting from the exercise of statutory powers, the cost and effectiveness of measures to prevent harm will be relevant.<sup>64</sup>

#### 7. Official capacity

Certain public officials such as Judges, magistrates or members of statutory licensing boards are authorised to perform functions that may detrimentally affect the interests of other persons. Such infringement in the reasonable performance of official duties is justified in the public interest. In *May v. Udwin*,<sup>65</sup> it was held that public policy and sound administration of justice require that a magistrate, in discharging his judicial duties, ‘should be able to speak his mind freely without fear of incurring liability for damages for defamation’. Where official authority is conferred by statute, for example the authority of the police to make arrests and to conduct searches, the rules of statutory authority will apply. An official, who performs official duties with an ulterior motive, malice or dishonesty, acts unreasonably and outside the bounds of his authority and the resultant infringement of private interests will be unlawful.

#### 8. Obedience to orders

Obedience to orders has so far been raised in criminal cases only, but it could also arise as a ground of justification in a civil action. In *S v. Banda*,<sup>66</sup> it was held that obedience to an unlawful order could be a defence where the order was issued by a person with lawful authority over the accused, who had the duty to obey.

The essential problem is whether obedience to a wrongful order can be justified. According to some decisions there can never be a duty to obey a wrongful order, whereas others hold that only the execution of an order which is *manifestly* or *palpably* unlawful in the judgment of a reasonable person, is itself wrongful. The latter approach accords with the approach of the Appellate

<sup>63</sup> 1936 AD 359.

<sup>64</sup> *Johannesburg Municipality v. African Realty Trust* 1927 AD 163 at 172-173.

<sup>65</sup> 1981 (1) SA 1 (A) at 19.

<sup>66</sup> 1990 (3) SA 466 (B) at 480.

Division in *S v. Goliath*,<sup>67</sup> where it was held that the law does not require of a person acting under duress to conform to a higher standard than that of the average person. The defendant must have done no more harm than was necessary in carrying out the order.

#### *9. Disciplinary powers*

Parents, guardians or teachers with lawful authority over children may lawfully administer punishment for purposes of education and correction. In the case of parents and guardians, this may include corporal punishment. The disciplinary authority of persons *in loco parentis* is an original authority and does not derive from delegation by parents, although a parent or guardian may delegate such authority to another person. Delegated authority to discipline cannot be wider or more comprehensive than the original authority and involves a discretion that must be exercised reasonably and not in a capricious manner.

The South African Schools Act 84 of 1996 (section 10) prohibits school principals, teachers and persons in charge of school hostels to administer corporal punishment in public or private schools. By implication, parents may not delegate the power to administer corporal punishment to a person in a public or private school.

The authority to discipline must be exercised moderately and reasonably. Malice or improper motive will indicate unreasonableness. Cruel, inhuman or degrading punishment will be regarded as unreasonable and unlawful.<sup>68</sup>

#### *10. Impossibility*

In cases where it is impossible for the defendant to act in circumstances which require a duty to act positively to prevent harm to another person, the omission will not be considered legally relevant conduct and the failure to prevent harm will not be wrongful.

### **D. Fault**

#### *1. General*

Subject to a number of recognised instances of strict liability, South African law accepts that there can be no liability without fault. Wrongfully caused harm only gives rise to delictual liability if the harmful conduct was also legally

<sup>67</sup> 1972 (3) SA 1 (A).

<sup>68</sup> Constitution of the Republic of South Africa, Act 108 of 1996, s. 12(1).

blameworthy. Legal blameworthiness is indicated either by a reprehensible state of mind, subjectively determined intent or *dolus*, or by a lack of proper care, objectively determined negligence or *culpa*. Fault in either form can be attributed to a person who is accountable (*culpae capax*).

## 2. Accountability

A person is accountable (*culpae capax*) if he or she has the necessary mental ability to distinguish between what is lawful and wrongful and to act in accordance with this distinction.<sup>69</sup> Accountability is determined subjectively and can be deficient on account of youth, mental illness or a drug-induced condition.

The accountability of children is co-determined by certain rules related to their age. A child under seven years of age (*infans*) is not accountable (*culpae incapax*). There is a rebuttable presumption that a child below the age of puberty (*impubes*), that is, between seven and 14 is unaccountable, while a youth between 14 and 21 is presumed to be accountable. The plaintiff must prove that a child under the age of puberty is accountable. In a subjective enquiry the Court has to determine whether the particular child had the ability, at the time when he or she caused the harm, to appreciate the difference between right and wrong and to act in accordance with that ability, including the ability to control impulsive conduct. In assessing the child's ability, the age, intelligence, knowledge, education and maturity of the child are taken into account.

In a road accident involving a child under the age of puberty, for instance, it will be considered whether the child at the time of the accident was old enough to have and had the intelligence to appreciate the particular danger to be avoided; whether he or she had knowledge of how to avoid it or of the precautions to be taken against it, and whether he or she was sufficiently mature to be able to control irrational or impulsive acts. Inherent weaknesses associated with youth, especially the tendency of young children to act irrationally and impulsively, have to be duly considered and factors such as intelligence and education must not be over-emphasised.

The same rules apply to the accountability of a person whose mental ability was impaired as a result of some form of mental illness, severe provocation, or the influence of alcohol or other drugs. Such person must have the necessary mental ability to distinguish between what is lawful and wrongful and to act in accordance with this distinction at the time when harm was caused.

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<sup>69</sup> See in general *Jones v. SANTAM Bpk* 1965 (2) SA 542 (A); *Weber v. SANTAM Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A).

The voluntary consumption of alcohol or drugs by a person who is at that time accountable might in itself be negligent where it was reasonably foreseeable that the resultant impairment of mental ability could have harmful consequences. For instance, a person who drives and causes an accident in a state of intoxication will be liable for setting in motion a course of events leading to the harmful consequences, even though he or she might no longer have been accountable at the time of the accident.

### 3. Intent

Intent (*dolus* or *animus iniuriandi*) requires the will to cause harm and awareness that the causing of harm is wrongful. Intent is determined subjectively and involves a legal conclusion about the state of mind of the defendant at the time of the relevant conduct. Intent is generally a requirement for liability in cases of delicts involving the infringement of personality rights (*iniuria*).

Intent can take different forms. Direct intent or *dolus directus* is present when the actor is aware of the wrongfulness of his or her action and directs his or her will to the attainment of a particular harmful result. Indirect intent or *dolus indirectus* is present where the actor is aware of the wrongfulness of his or her action and directs his or her will to the attainment of a particular harmful result, with whatever motive, while at the same time being aware that another result will inevitably also occur. Intent with knowledge of the possibility of a harmful result or *dolus eventualis* is present when the actor directs his or her will to the attainment of a particular harmful or harmless result, with whatever motive. At the same time he or she must be aware that another harmful result may possibly also occur and that the causing of the other result is or may possibly be wrongful. In *dolus indirectus* and *dolus eventualis*, the defendant must actually be aware that the other harmful result will inevitably (*dolus indirectus*) or may possibly follow (*dolus eventualis*) and that the causing of such other result is or may possibly be wrongful. For *dolus eventualis*, subjective awareness of a possible harmful result is not sufficient: the defendant must also have ‘reconciled’ himself or herself with the occurrence of this result or must have acted with a reckless disregard of the foreseen possible consequences. Lack of the required awareness in circumstances where a reasonable person would have been aware, might constitute negligence.

Motive indicates the actuating impulse or reason for intent. Intent or *animus iniuriandi* does not necessarily imply any ill will or spite towards the person harmed and the motive for intentionally causing harm might even be a laudable one. However, this does not negative the fact that the intended assault might nevertheless be wrongful. An improper motive might be of evidentiary value to prove the existence of intent.

Since awareness of wrongfulness is an element of intent, ignorance of wrongfulness or a mistaken (even if unreasonable) belief in the lawfulness of a course of conduct excludes intent. Logically, any bona fide ignorance or mistake concerning the elements of intent, factual or legal, excludes intent. However, causing harm in the unreasonable belief that it is justified, may entail liability for negligence.

In *Maisel v. Van Naeren*,<sup>70</sup> the owner of an apartment building wrote to a tenant that his conduct constituted a nuisance to fellow tenants. The owner sent a copy of the letter to the Rent Board, thereby publishing its defamatory content, in the honest but mistaken belief that the Board had jurisdiction in the matter and that the publication was therefore privileged. Although the publication was wrongful, the owner was held not to be liable for defamation, because his mistake excluded awareness of wrongfulness as an element of intent.

The onus to prove intent is on the plaintiff. In defamation cases the plaintiff is assisted by a presumption of intent. The plaintiff must allege and prove only that the defendant published defamatory material referring to the plaintiff. This gives rise to two rebuttable presumptions, namely that the conduct was wrongful and that the material was published with intent or *animo iniuriandi*. The onus is then on the defendant to rebut the presumptions by proving a defence that negates the inference of wrongfulness and intent.

#### 4. Negligence

##### a. General

Negligence indicates failure to apply the degree of care that a reasonable person (*diligens paterfamilias*) would have exercised in the same situation. In *Kruger v. Coetze*,<sup>71</sup> the Court authoritatively stated that liability for negligence arises if:

- a reasonable person in the position of the defendant
  - (i) would foresee the reasonable possibility that his conduct could cause patrimonial loss to another by injury to his person or property, and
  - (ii) would take reasonable steps to guard against such occurrence, and
- the defendant failed to take such steps.

This test focuses on three elements, namely reasonable foreseeability of harm, reasonable precautions to prevent the occurrence of such foreseeable harm, and the failure to take the required reasonable precautions.

<sup>70</sup> 1960 (4) SA 836 (C).

<sup>71</sup> 1966 (2) SA 428 (A) at 430.

A reasonable person is expected to be aware of his or her physical inability or lack of skill and experience and to act or take precautions accordingly. Conversely, an expert or professionally qualified person is required to act in accordance with standards of knowledge, skill and care that are reasonable for his or her particular field of expertise. The test for negligence in effect becomes that of a reasonable person endowed with such particular qualities of knowledge and skill.

Any failure to adhere to the standard of a reasonably prudent person, however slight the deviation, constitutes negligence. The degree of deviation becomes relevant in cases of contributory negligence where, for the purpose of an apportionment of damages, the negligence of each of the persons involved is expressed as a percentage of deviation from the applicable standard.

The plaintiff must prove negligence on a balance of probabilities. He or she can invoke the maxim *res ipsa loquitur* when the occurrence indicates the likelihood of negligence, for instance when a vehicle was being driven on the wrong side of the road at the time of an accident. This maxim does not shift the onus of proof to the defendant, but burdens the defendant with an evidential burden to explain his or her apparent negligent conduct and thereby to rebut the inference of negligence.

#### b. The reasonable person

The criterion of the reasonable person is the embodiment of an external and objective standard of care. The qualities, experience, idiosyncrasies and judgment of the particular defendant are in principle irrelevant. The hypothetical reasonable person has been characterised as

‘not that of a timorous faintheart always in trepidation lest he or others suffer some injury; on the contrary, he ventures out into the world, engages in affairs and takes reasonable chances. He takes reasonable precautions to protect his person and property and expects others to do likewise.’<sup>72</sup>

The law of negligence makes no allowance for a person’s lack of intelligence, education or emotional stability, or for any other personal idiosyncrasies. However, physical handicaps and infirmities such as blindness, deafness, and weakness of age or sex, are treated as part of the circumstances to be taken into account by the reasonable person. The conduct of a physically disabled person must be reasonable in the light of his or her knowledge of the disability. The

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<sup>72</sup> *Herschel v. Mrupe* 1954 (3) SA 464 (A) at 490.

reasonable person has no special skills and lack of skill or knowledge is not *per se* negligence. However, the reasonable person will not voluntarily engage in any potentially dangerous activity without the required knowledge or skill. This principle is expressed in the maxim of Roman law: *imperitia culpae adnumeratur*.

### c. Foreseeability of harm

Foreseeability is central to the test for negligence. The question is not whether the reasonable person would have foreseen harm as a likelihood or probability, but whether a reasonable person would recognise the possibility of harm as real enough to warrant precautionary measures. The foreseeability of harm depends on a consideration of all the circumstances, but the Courts focus in particular on the following questions:

- how likely is it that harm might occur?
- if harm does occur, what is the extent of the damage likely to be? and
- what are the costs or difficulties involved in guarding against the risk of harm?

The chance or likelihood of harm and the extent of the possible harm are interrelated factors. A reasonable person would take precautions to prevent foreseeable harm if the risk of harm is high or almost a certainty, even though the extent of the harm that is likely to occur is slight and even though the risk is slight, but the extent of the foreseeable harm is substantial.<sup>73</sup>

The general nature of the loss suffered by the plaintiff and the general manner of its occurrence must have been reasonably foreseeable. The issue is not whether some harm, irrespective of its nature, was foreseeable, but whether the kind of harm, which did occur, was reasonably foreseeable. In nervous or emotional shock cases, for example, the plaintiff must prove that a reasonable person in the defendant's position would have foreseen the possibility of the plaintiff suffering nervous shock. The particular harm that occurred or its particular extent or manner of occurrence need not have been reasonably foreseeable.<sup>74</sup> If the general category or class of persons was reasonably foreseeable, it does not matter that the particular plaintiff ought not to have been part of that class. For example, if the driver of a vehicle could reasonably foresee harm to

<sup>73</sup> See *Lomagundi Sheetmetal & Engineering (Pvt) Ltd v. Basson* 1973 (4) SA 523 (RA).

<sup>74</sup> See also *Mukheiber v. Raath* 1999 (3) SA 1065 (SCA) at 1077E-F; *Sea Harvest Corporation (Pty) Ltd v. Duncan Dock Cold Storage (Pty) Ltd* 2000 (1) SA 827 (SCA) at 839F.

passengers all passengers are foreseeable plaintiffs, even those who had no right to be on board.

#### d. Preventing harm

A reasonable person will take reasonable measures to prevent the occurrence of foreseeable harm. The required standard of conduct is determined by balancing the reasonably foreseeable risk against the social value or utility of the interests served by the defendant's conduct. The cost and burden of possible precautionary measures must also be balanced against the risk. Considerations that might influence the reaction of the reasonable person in a situation posing a foreseeable risk of harm to others therefore include:

- the degree or extent of the risk created by the actor's conduct;
- the gravity of the possible consequences if the risk of harm materialises;
- the utility of the actor's conduct, and
- the burden of eliminating the risk of harm.

The magnitude of the risk must be weighed against the utility of the risk-creating conduct to decide whether 'the game is worth the candle'. Persons engaged in the burning of fire-belts are required to be extremely careful and to take precautions that would eliminate or at least reduce the risk of the fire running out of control. The utility of keeping school lawns tidy by using a lawnmower does not outweigh the risk of injury to children playing in the vicinity. The importance of cattle ranching in South Africa may justify the risk of allowing cattle to roam freely on farmland crossed by an unfenced public road.

Where the risk can be eliminated or minimised without substantial difficulty, disadvantage or expense, a reasonable person would take the necessary precautions.<sup>75</sup>

#### e. Factors relevant to the standard of care

The standard of care required is determined by objective evaluation of whether or not the conduct complied with normal and generally accepted practice. However, such practice is not necessarily conclusive. The overriding standard in every instance is that of a reasonable person in the particular situation.

For some situations the appropriate standard of care is prescribed by statute. A breach of a statutory duty is generally but not always indicative of negligence. Where a statute prescribes certain precautions for the safety of a particular class

<sup>75</sup> See *Maylett v. Du Toit* 1989 (1) SA 90 (T) at 94.

of persons, the failure to act, resulting in injury to a member of that class, will constitute negligence.

Reasonable care also depends on certain legitimate assumptions about the conduct of other persons. Generally a person is entitled to assume that the rules and conventions that normally govern the behaviour of persons in particular situations will be observed (for example traffic signs). However, since the reasonable driver of a motor vehicle will foresee the possibility of negligent conduct on the part of other drivers for example approaching intersections at too high speeds, or suddenly and without warning slow down or stop, he or she should adjust his or her own standard of care accordingly. Generally a reasonable person would not anticipate gross negligence on the part of others.

An error of judgment may be indicative of negligence. However, some errors of judgment, for instance in emergencies or in situations fraught with risk such as a complicated medical procedure, are considered reasonable. Nonetheless, an error of judgment occasioned by a lack of the required degree of knowledge, skill and diligence will constitute negligence.

#### f. Sudden emergency and special dangers

The test for negligence requires that the conduct of the defendant be assessed in the particular circumstances prevailing at the time. The pressure created by a sudden emergency or imminent danger resulting from the careless conduct of another person or from some unforeseeable event, will be taken into account. In general a person confronted by a situation of sudden emergency is not in a position to evaluate carefully the best course of action to follow and an error of judgment is more likely to occur unless the situation was caused by the defendant's own negligence.

In determining whether conduct in a situation of imminent danger was reasonable, the Courts take into account that certain activities, for example the driving of a car, require the ability to cope with dangerous situations that are likely to arise. Motorists are expected to exercise particular care and vigilance in situations generally known to be dangerous. For example, the presence or expected presence of young children at the side of a road requires greater care and precautions against unpredictable behaviour from the reasonable motorist.

#### g. Experts

A person who engages in a profession, trade, calling or any other activity that demands special knowledge and skill must not only exercise reasonable care, but also measure up to the standard of competence of a reasonable person professing such knowledge and skill. The test has two components: the possession of

necessary knowledge and the exercise of necessary care, skill and diligence. The Courts also take into consideration the branch of the profession to which the practitioner belongs. In respect of the medical profession for example, the level of knowledge and skill required will be determined by the kind of practice (general or specialist), and also by the nature of the duties (general or specialist) that the doctor is carrying out at the time.

A reasonable degree of skill and competence can be expected not only from members of the established professions, but also from others with a special competence for performing certain tasks or handling certain equipment. Locality considerations are not taken into account.

#### h. Beginners

Where a beginner's lack of skill exposes the public to a risk of harm (for example an inexperienced doctor or motorist), no allowance will be made for lack of knowledge, proficiency or experience. The relationship between a beginner and his or her victim might exact a lower than the ordinary reasonable standard of care and skill. In *African Flying Services (Pty) Ltd v. Gildenhuys*,<sup>76</sup> a flying instructor was injured as a result of the inexperience of his pupil. The Court held that the instructor had, by knowingly entrusting his aeroplane to his pupil, in effect consented to a lower standard of competence by voluntarily exposing himself to the risks inherent in allowing a novice to fly.

#### i. Children

The negligence of a child could involve accountability, negligence, and, where other persons were also at fault, contributory negligence and apportionment of damages in terms of the Apportionment of Damages Act 34 of 1956.

The accountability of children is determined on a subjective basis, taking into account the mental ability of the child, as set out above. Then the ordinary objective test of negligence is applied and the conduct of the child is tested against the standard of the reasonable person in the particular situation. If another person was also at fault, the contributory negligence of the child is determined by establishing the degree to which his or her conduct deviated from the standard of the reasonable person. However, for these purposes, the Courts have made some allowance for the child's lack of maturity. Where an adult was aware or could reasonably have been aware of the presence or involvement of a child, greater care is required of the adult. Even if this is not the case, the contributory negligence of the child will be considered to be less blameworthy than that of an adult.

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<sup>76</sup> 1941 AD 230.

### E. Contributory Fault and Joint Wrongdoers

In Roman and Roman-Dutch law, contributory negligence on the part of a plaintiff was a complete defence to a claim for damages. To alleviate the inequitable results of this all-or-nothing approach, the Courts in England and South Africa accepted the ‘last opportunity rule’ in terms of which the party who had the last opportunity of avoiding the harmful result, was held to be solely responsible. The rule was difficult to apply and also produced inequitable results. The Apportionment of Damages Act 34 of 1954 (section 1(1)(a)), abolished the common law doctrine of contributory negligence and the last opportunity rule and introduced the principle of apportionment of liability in accordance with the respective degrees of fault of the parties.

This provision applies where the plaintiff has suffered harm partly as a consequence of own fault and partly as a consequence of the fault of another. It involves a comparative evaluation of the respective degrees of fault and a proportionate reduction of the damages recoverable by the plaintiff. If there is no ‘own fault’ on the part of the claimant, damages claimed (for instance the medical costs incurred as a result of the injuries of a child or the loss of support as a result of the death of a parent), cannot be reduced proportionate to the contributory negligence of the injured or deceased person. Instead, the negligent injured person or the estate of the deceased is considered to be a joint wrongdoer in terms of section 2(1B) of the Act, and the defendant has a right of contribution against such a joint wrongdoer. Only in an action based on vicarious liability can a defendant rely on the contributory fault of a person other than the plaintiff to effect a reduction of damages.

The apportionment process in terms of section 1(1)(a) requires an assessment of what is ‘just and equitable having regard to the degree in which the claimant was at fault in relation to the damage’. The Courts initially rejected the view that the term ‘fault’ indicates ‘blameworthiness’, thus introducing moral considerations into the apportionment process and preferred the view that ‘fault’ refers to objectively determined negligence, in particular the proportionate degree of deviation from the standard of the reasonable person. However, since a purely objective standard of comparative negligence may produce unjust results, particularly where children are involved, the Courts are no longer averse to applying the concept of ‘blameworthiness’ in the apportionment process.<sup>77</sup>

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<sup>77</sup> *Weber v. SANTAM Versekeringsmaatskappy Bpk* 1983 (1) SA 381 (A) at 401.

Strictly speaking, section 1(1)(a) does not require a comparative assessment of fault. Courts are not required to compare degrees of fault, but to assess the plaintiff's fault in relation to the loss. The reduction if any should be based upon what the Court considers just and equitable, having considered the plaintiff's contributory fault.

In certain cases the Courts focus on the negligence of the plaintiff and then apparently accept that this determines the negligence of the defendant. However, in *Jones v. SANTAM Bpk*,<sup>78</sup> the Court required that a comparative assessment of negligence should be done by way of the so-called 'mathematical approach'. The respective degrees of fault are determined by assessing the extent (percentage) by which the conduct of both the plaintiff and the defendant deviated from the norm of the reasonable person. The 'fault' of each in relation to the harm is then expressed as a ratio, for example, two equal percentages of deviation represent a 1:1 ratio and the plaintiff's claim will be reduced by 50%, whereas a 60% deviation by the plaintiff and a 20% deviation by the defendant represent a ratio of 3:1 and the plaintiff's claim will be reduced by 75%, or, the plaintiff will be entitled to only one-quarter of the damages claimed.

In *General Accident Versekeringsmaatskappy SA Bpk v. Ujjs*,<sup>79</sup> the Court applied the notion of 'causal negligence' in a case where the plaintiff was a passenger in a vehicle driven by the defendant. The plaintiff had failed to comply with the defendant's request to wear a seat-belt and was seriously injured in an accident caused by the defendant's negligent conduct. The Court found that the plaintiff and the defendant had deviated from the norm of the reasonable person in the same degree. However, justice and equity demanded that the plaintiff's fault be assessed differently, because the plaintiff did not contribute to the accident. A one-third reduction was found to be proper in the circumstances.

It is not necessary to claim or plead an apportionment of damages specifically, provided that the fault of the plaintiff has been placed in issue. The Court must then give judgment in accordance with the imperative of section 1(1)(a). The onus of proving fault on the part of the plaintiff rests on the defendant.

The term 'fault' also refers to intent. A proportionate reduction of damages on account of contributory intent is also possible. Since intent is considered more reprehensible, a defendant who intentionally caused harm to the plaintiff cannot claim a reduction of damages based on the plaintiff's contributory negligence.

<sup>78</sup> 1965 (2) SA 542 (A) at 554-555.

<sup>79</sup> 1993 (4) SA 228 (A) at 235.

However, where both the defendant and the plaintiff acted intentionally, or their employees acting within the scope of their employment intentionally caused harm, the Courts are prepared to apportion damages in terms of the Act.

Section 2(1) of the Apportionment of Damages Act abolishes the common law distinction between joint and concurrent wrongdoers and provides for a right of contribution between joint wrongdoers. A ‘joint wrongdoer’ refers to a person who is allegedly jointly and severally liable to the plaintiff and also to a person who is in fact a wrongdoer.

We have already seen that where there is no ‘own fault’ on the part of the claimant, the negligent injured person or the estate of the deceased is considered to be a joint wrongdoer in terms of section 2(1B) of the Act. The defendant, who is liable to pay damages to a parent for the injuries of a child or to a dependant for the death of a breadwinner, would thus have a right of contribution against the child or the estate of the deceased breadwinner.

Section 2(1) and (2) provides that joint wrongdoers may be sued in the same action and that notice of any action may be given by a plaintiff or any joint wrongdoer sued in the action, at any time before *litis contestatio*, to any other joint wrongdoer not sued in the action; and such a joint wrongdoer may then intervene as a defendant in the action. In terms of section 2(6)(c), a person from whom a contribution is claimed, may raise against the claimant (the other joint wrongdoer) any defence that the claimant could have raised against the plaintiff.

## F. Causation

### 1. General

The existence of a causal nexus between the defendant’s conduct and the harm suffered by the plaintiff is an essential element of a delict. Roman and Roman-Dutch law already recognised that an independent intervening act, which neutralises or substantially reduces the causative effect of another act, interrupts the chain of causation. Thus the negligent intervening conduct of a third party or unforeseen natural phenomena such as wind or lightning, normally interrupt the chain of causation.

### 2. Two elements of causation

The leading case of *Minister of Police v. Skosana*<sup>80</sup> laid down that causation involves two different questions, namely whether the defendant’s conduct

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<sup>80</sup> 1977 (1) SA 31 (A) at 34-35.

factually caused the plaintiff's harm, and whether the defendant should be held legally responsible for such harm.

### 3. *Factual causation*

Factual causation concerns the factual link between the defendant's conduct and the harm suffered by the plaintiff. In *International Shipping Co (Pty) Ltd v. Bentley*,<sup>81</sup> the Court accepted the 'but-for' or *conditio sine qua non* test for factual causation. The conduct complained of can only be a factual cause of the harmful consequence if it was a necessary condition for the existence of that consequence. Consequently, the conduct can only be considered a cause-in-fact of the harmful consequence if the elimination of that conduct would have meant the non-occurrence of the harmful consequence. The application of the 'but for' test therefore requires a process of mental elimination: would the harmful consequence still have occurred if the defendant's positive act is hypothetically eliminated from the complex set of conditions prevailing at the time?

The causative effect of an omission is under the 'but-for' test determined by a mental substitution of the defendant's omission with reasonable positive conduct. If such hypothetical conduct would have prevented the harmful consequence, the omission was a necessary condition and therefore a cause of that consequence. In *S v. Van As*,<sup>82</sup> the issue was whether the failure by policemen to conduct an extensive search for children who had left the scene of an arrest could be regarded as the cause of the death of two of the children by exposure to cold and rain. The Court took into account the hypothetical conduct of reasonable policemen in the situation and decided that such conduct would not have saved the children and that failure to conduct a search was therefore not the cause of the children's death.

The *conditio sine qua non* approach cannot be regarded as the exclusive test for factual causation. As a theory it may be logically flawed in that mental elimination of one factor creates a new causation problem and leads to circular reasoning and it also deals inadequately with multiple contributory causes. The Courts apply common-sense standards and the *conditio sine qua non* approach is in effect a means of expressing an *a priori* conclusion on factual causation, based on knowledge and experience.

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<sup>81</sup> 1990 (1) SA 680 (A).

<sup>82</sup> 1967 (4) SA 594 (A).

#### 4. Legal causation

In addition to factual causation, a legally relevant causal connection is required. According to *International Shipping Co (Pty) Ltd v. Bentley*,<sup>83</sup> this involves an enquiry whether the wrongful act is linked sufficiently closely or directly to the loss or whether the loss is too remote for legal liability to ensue. To solve this basic juridical problem, considerations of policy may play a part. As a matter of policy, legal causation limits the boundaries and does not impose delictual liability for all the harmful consequences.

Historically the Courts approached the question of legal causation either on the basis of reasonable foreseeability or on the basis of responsibility for the direct consequences of one's conduct. Eventually the Courts have opted for a flexible criterion that focuses on whether a sufficiently close connection exists between the conduct and its harmful consequences in view of the surrounding circumstances, policy considerations and concepts such as reasonableness, fairness and justice. Considerations such as reasonable foreseeability and direct consequences consequently become subsidiary to this general, flexible criterion.

The Courts regard the issue as essentially practical, dictated by expedience and good sense. A proper and equitable balance must be struck between the interests of the defendant and that of the plaintiff. Essentially, therefore, the question of legal causation involves not only logical reasoning, but also a moral reaction, involving a value judgment and applying common sense, to assess whether harm can be fairly imputed to the defendant.

In the *Bentley* case, a financing company made facilities available to a group of companies in 1977. From 1979, Bentley, the auditor of the group, issued unqualified financial statements that were to some extent false and misleading. The company alleged that it had relied on these statements to increase its facilities to the group. The financing company suffered loss on account of the group's liquidation in 1981. The Court found that Bentley's conduct was wrongful and blameworthy, and a *conditio sine qua non* of the company's loss. However, a number of other factors intervened:

- the loss was sustained two years after the statements were reported;
- the financing company implemented a support programme in 1980, knowing that the group's position was bleak, when it could have terminated the facility;

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<sup>83</sup> 1990 (1) SA 680 (A) at 700.

- the group's indebtedness was allowed to escalate beyond formally authorised credit limits;
- the support programme changed the relationship between the parties from a financial arrangement at arms length to a kind of unofficial judicial management;
- the company's executives must have been aware of the deceptive conduct of Bentley that also contributed to the company's loss;
- the company must have relied on prior financial statements, and
- generally, the support programme was conducted in an uninhibited manner.

Consequently, the ultimate loss was regarded as being too remote for Bentley to be held liable.

The flexible criterion for determining legal causation based on considerations of legal policy, reasonableness, fairness and justice, resembles the wrongfulness criterion. Essentially these two elements both provide policy-based guidelines to determine whether a sufficiently close relationship exists between the conduct complained of and the loss suffered, so that the defendant should reasonably be held liable for the plaintiff's loss.

#### *5. Intended consequences*

It is generally accepted that intended consequences can never be too remote. This ties in with the flexible criterion for legal causation in that considerations of reasonableness, fairness and justice demand that a person should be held liable for harm deliberately caused. However, in accordance with such a flexible approach, the possibility cannot be excluded that where consequences, although intended, came about in an unusual or unexpected manner, or through the intervention of another causative factor, liability for intentional causing of harm will not be imposed.

#### *6. Novus actus interveniens*

An intervening and independent causative factor or event in the form of a natural phenomenon, conduct by a third party or even the plaintiff's own conduct, may interrupt the chain of causation between the wrongful conduct and the harm. Historically, the concept of an intervening cause or *novus actus interveniens* served primarily to limit liability when the direct consequences test was applied and indicated that the connection between such conduct and the harm suffered was not sufficiently close to impose liability. However, intervening acts or events that were reasonably foreseeable, caused by a situation created by the defendant's conduct, or considered a risk inherent in such a situation, does sever the causal link.

Thus in *Mafesa v. Parity Versekeringsmaatskappy Bpk*,<sup>84</sup> the plaintiff sustained a leg fracture in an accident caused by a person's negligent driving. After the leg had set clinically, the plaintiff was discharged from hospital. Using crutches, the plaintiff negligently walked on a smooth floor, fell and had to undergo a second operation. The Court decided that the plaintiff's negligent conduct was an intervening cause, breaking the causal effect of the original negligent driving. In *Alston v. Marine and Trade Insurance Co Ltd*,<sup>85</sup> the plaintiff suffered a brain injury in an accident caused by another person's negligent driving. The injury led to manic depression that was treated with the drug Parstellin. When the plaintiff ate cheese, he suffered a stroke that was directly attributable to the interaction of Parstellin and cheese. The possibility of this serious side effect was unknown and considered highly extraordinary and unpredictable at the time. The Court held that the stroke was attributable to an intervening cause for which the negligent driver was not responsible.

## G. Damages

### I. General

The main function of the law of delict is to provide compensation or 'damages' for wrongfully caused damage, loss or harm. Damage occurs when a legally recognised patrimonial or personality right or interest is reduced in value, quality or utility or lost. The term 'damages' refers to either or both the monetary equivalent of patrimonial loss, and the monetary compensation awarded as reparation for injury to personality rights.

The Aquilian action is aimed at recovery of damages for patrimonial loss flowing from damage to property, bodily injury or pure economic loss. The purpose is to restore the difference between the plaintiff's patrimonial state after the damage or loss occurred and the patrimonial state as it would have been had the damage or loss not occurred. Present as well as any prospective loss is calculated from the date of the delict. Patrimonial loss occurs when

- property is damaged or lost;
- when the plaintiff for instance incurs medical costs on account of personal injury, or
- when the plaintiff suffers a prospective loss in the form of loss of future income or loss of business or professional profits.

<sup>84</sup> 1968 (2) SA 603 (O).

<sup>85</sup> 1964 (4) SA 112 (W).

The *actio iniuriarum* is aimed at recovery of damages as reparation for harm to personality rights caused by, for example, insult, indignity and impairment of reputation. The award is entirely in the discretion of the Court because it is almost arbitrary and involves an assessment of imponderables and a mere conjectural estimate. Similar cases may serve as an approximate guide, but are applied with circumspection.

The action for pain and suffering has developed in conjunction with the Aquilian action and is aimed at recovery of damages as reparation for emotional harm resulting from physical injury.

## 2. *The once-and-for-all-rule*

In delict, the plaintiff must claim damages in a single action for all harm arising from a particular cause of action including all present damage as well as proven prospective loss. The once-and-for-all rule applies even if the full extent of the damage is not manifest or even if the plaintiff did not know of such further damage at the date of the trial. The policy consideration is to limit litigation. A single cause of action should not give rise to a multiplicity of actions or splitting of claims. Where a damage-causing event gives rise to losses or harm occurring at different times and in different forms, the question is whether one or more causes of action are involved.

The Courts do not approach the ‘cause of action’ concept uniformly. In the ‘single cause’ approach, the Court regards different items of damage arising from the same or substantially the same conduct as elements of the same cause of action. By contrast, in the ‘*facta probanda*’ approach, the emphasis is on the amount of evidence needed to prove different items of damage. The need for substantially different evidence to prove different items of damage will indicate different causes of action, each accruing when the damage occurred and each potentially forming the basis of a separate claim. In deciding whether a single cause or multiple causes of action exist, the Courts will have regard to:

- differences in the nature of the various items of damage;
- the evidence required to prove these items of damage;
- the duration of the conduct that gave rise to the damage, and
- whether the damage arose from a single act or event.

In personal injury cases, medical costs, pain and suffering, and loss of past and future income are regarded as forming part of one cause of action. Where one accident causes personal injury and property damage, there is only one cause of action except in the case of a motor vehicle accident, where damage arising from personal injury

or death is regarded as a separate cause of action under the Road Accident Fund Act 56 of 1996. Where one accident causes both personal injury and loss of support as a result of the death of a breadwinner, there are two causes of action.

### 3. Form of damages

An award of damages must be expressed as a sum of money and will usually be converted into South African currency where the damages are calculable in a foreign currency. The award must be in the form of a lump sum and not a series of periodic payments.<sup>86</sup>

### 4. Collateral benefits

A damage-causing event may also produce some benefit for the plaintiff, for example an insurance payment for the plaintiff's vehicle that was wrongfully and negligently damaged. Should such a benefit reduce the plaintiff's damages, or should it be ignored as collateral benefit (*res inter alios acta*)? The Courts follow a casuistic approach guided by considerations of fairness and justice and that compensation should not exceed actual loss. However, the cases form patterns that provide practical guidelines.

The following benefits are considered collateral or *res inter alios acta*, not to be taken into account to reduce damages:

- life insurance and indemnity insurance benefits (but see II.B. above);
- benefits from a medical fund;
- sick leave benefits provided under a discretion of an employer;
- the contractual right of an owner-seller of property to claim reinstatement from the purchase in the event of damage to the property;<sup>87</sup>
- insurance money and pension payable to dependants upon the death of a breadwinner;<sup>88</sup>

<sup>86</sup> But see the Road Accident Fund Act 56 of 1996, which allows for the payment of future loss of income by installments.

<sup>87</sup> In *Botha v. Rondalia Versekeringskorporasie van Suid Afrika Bpk* 1978 (1) SA 996 (T), X had sold a vehicle to Y, with X retaining ownership and the right to have the vehicle repaired by Y in case of damage. X could still claim full damages from the person who caused the damage.

<sup>88</sup> Under the Assessment of Damages Act 9 of 1969 (s. 1) no insurance money, pension or any benefit from a friendly society or trade union for the maintenance of a member's dependants shall be taken into account in reducing damages.

- a discretionary payment of salary or benefits to an injured person on early retirement, due to an employer's generosity;
- donations or *ex gratia* benefits;
- savings on income tax where the delict has caused loss of income;
- pension payments to a member of the citizen force under legislation on military pensions;
- the benefits of a favourable contract as a result of a delict;
- the earning capacity of a widow who claims for loss of support as a result of the death of her husband;
- the benefit of adoption where a child claims for loss of support on account of the death of its parents; or the right to claim maintenance from a surviving parent where the deceased parent had in fact supported the child, and
- an award received as *solatium* (solace money).

The following benefits have been taken into account to reduce damages:

- medical benefits or sick leave where the medical scheme or employer is contractually or statutorily obliged to allow such benefits;
- a pension paid out to an injured person under a contractual or statutory right;
- compensation received by an injured person under the Compensation for Occupational Injuries and Diseases Act 130 of 1993;
- the benefit to an injured person of receiving medical treatment free of charge in a provincial hospital;
- the actual re-marriage or re-marriage prospects of a widow who claims for loss of support on account of the death of her husband in so far as the actual or prospective re-marriage will restore her financial position as it was before the death of her husband;
- savings on income tax in respect of lost income;
- an amount received by a plaintiff from the liability insurer of the defendant;
- the plaintiff's possible saving on living expenses on account of injuries, and
- accelerated benefits from the estate of a deceased breadwinner.

##### 5. *Mitigation of loss*

A plaintiff cannot recover damages for loss that could have been prevented had the plaintiff taken reasonable steps to limit initial loss or further accumulation of

loss. The duty to mitigate loss arises as soon as the plaintiff suffers loss. The cost of reasonable steps to mitigate loss can be recovered. The onus of proving that the plaintiff did not properly mitigate loss rests on the defendant.

#### *6. Damage to property*

Generally damage to property is assessed according to the reduction in the property's market value at the time and place of the delict. The cost of repairs may be an appropriate indicator, where the repairs were necessary, fair and reasonable, and would in fact restore the thing to its prior condition. It cannot serve as measure where costs exceed the replacement cost or where repairs fail to restore the pre-damage value. The loss to the owner of damaged property may include the cost of hiring a substitute or the loss of future income from loss of the use of the thing. Where the owner mitigates an anticipated loss of income or profits by hiring a substitute, the plaintiff is entitled to damages for reasonable expenses in this regard. A substitute may be hired pending repairs if reasonably within the normal course of the owner's personal or family affairs even where the damaged property was not used for the generation of income. Damages for inconvenience can only be claimed if actual patrimonial loss is suffered.

#### *7. Damages for personal injuries*

Damages for personal injuries can include medical expenses already incurred and other already-manifested patrimonial loss; prospective expenses and loss of earning capacity; and pain, suffering, shock and loss of amenities. The Courts sometimes distinguish between 'general damages' (prospective expenses and loss of income and pain and suffering) and 'special damages' (itemised medical expenses and other manifested patrimonial loss), but these terms have no fixed meaning.

Medical expenses must be reasonably incurred and causally linked to the injury suffered. Future medical expenses are recoverable if there is a reasonable probability that such expenses will be necessary, and the lump sum awarded is often calculated by reducing the total of such expenses in accordance with the percentage chance that they will be incurred.

Loss of earnings must be causally linked to the plaintiff's injuries and it must be determined what past and future earnings would have been were it not for the injuries. Damages for reduced earning capacity can neither be calculated with mathematical precision on an annuity basis or by mere intuitive assessment. While conceding that exact mathematical computation is impossible, a calculation upon an annuity basis is accepted as an appropriate guide. Such an award is intended to provide the plaintiff with a lump sum that will render a periodic income for a specific period until there will be no capital left. This period is

computed on the basis of life expectancy, natural or reduced. The present value of the plaintiff's future income (but for the disability), adjusted according to appropriate contingencies is first calculated and then the present value of the future income with the disability is calculated and adjusted according to appropriate contingencies. The Courts are not bound by a standard method of calculation.

Loss of income from unlawful activity is not recoverable. This principle is also extended to the action of dependants who are not allowed to claim damages from the defendant if the breadwinner supported them with income from unlawful activities. There is also support for the approach that a claim of dependants should be based on the deceased's (lawful) earning capacity and not his or her actual earnings.

A claim for pain, suffering, shock, disfigurement and loss of amenities, is regarded as an extension of the Aquilian action. Pain and suffering include both that experienced at the time of injury and subsequent and prospective discomfort, either physical or mental. The approach is mainly subjective, although damages for loss of amenities have been awarded where the plaintiff is in a coma and unaware of such loss.

#### *8. Damages for loss of support*

Claims by dependants for loss of support resulting from the death of a breadwinner are assessed solely in a patrimonial sense and no *solatium* for loss of comfort and society or other non-patrimonial loss can be recovered. Here also there is general recognition that exact mathematical computation of the loss of future support or maintenance is impossible, but that a calculation upon an annuity basis is an appropriate guide. The principles governing an award for reduced earning capacity are also applicable in this case (see III.G.7. above).

## IV. SOME SPECIFIC FORMS OF AQUILIAN LIABILITY

### A. Pure Economic Loss

Liability for pure economic loss is generally determined with reference to the breach of a duty to prevent financial loss. The leading case of *Administrateur, Natal v. Trust Bank van Afrika Bpk*,<sup>89</sup> laid down that liability for causing pure economic loss by negligent misrepresentation is delictual and not dependent

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<sup>89</sup> 1979 (3) SA 824 (A).

upon any contractual relationship between the parties. Essentially, the plaintiff must prove that the defendant had a legal duty not to cause such financial loss.<sup>90</sup>

In *Franschoekse Wynkelder (Ko-operatief) Bpk v. South African Railways and Harbours*,<sup>91</sup> the plaintiff, a wine-making co-operative, instituted an action for damages against the defendant who sprayed weed-killer on the undergrowth alongside one of its railway lines contaminating the soil of vineyards adjoining the railway line. The owners of these vineyards were members of the co-operative, which under its constitution, obliged members to deliver grapes to the plaintiff for the purpose of making wine. The plaintiff alleged that vines growing on the contaminated soil were destroyed or damaged and that the consequent non-receipt of grapes from such farms caused foreseeable damage to the plaintiff. The defendant excepted on the ground that he was not liable for damages since his conduct was not wrongful *vis-à-vis* the plaintiff. The Court held that there was no allegation of any special relationship between the parties and that the facts or circumstances alleged by the plaintiff did not establish a legal duty to prevent harm to the plaintiff. Since no further public policy considerations justified the recognition of such a legal duty, the exception was upheld.

The relevant factual and policy considerations to establish a breach of duty to prevent pure economic loss to another, include the following:

- the existence of a special relationship between the parties, such as a relationship of trust or authority;
- a statutory duty;
- the extent of the economic loss;
- the social or economic value or purpose of the conduct causing the economic loss;
- knowledge on the part of the defendant that his or her conduct will cause financial loss;
- fraud or dishonesty;
- practical measures which could have been taken to avert the economic loss;
- a failure of professional competence or skill;
- responsibilities of a public office, and
- the legal, social and economic implications of imposing liability.

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<sup>90</sup> *Knop v. Johannesburg City Council* 1995 (2) SA 1 (A) at 27; *Mukheiber v. Raath* 1999 (3) SA 1065 (A).

<sup>91</sup> 1981 (3) SA 36 (C).

## B. Emotional Distress or Nervous Shock

Emotional distress or nervous shock can be regarded as a form of physical or bodily injury. However, in view of the difficulty to determine the existence and extent of this type of harm and liability towards ‘secondary’ victims of accidents who suffer shock, liability is limited to the causing of reasonably foreseeable serious nervous shock, psychiatric injury or post-traumatic stress.<sup>92</sup>

The following factors are relevant to establish reasonable foreseeability:

- the occurrence of an ordinary physical injury;
- apprehension of personal danger;
- the danger of damage to property;
- a close relationship between the secondary and the primary victim of an accident, and
- whether the nervous shock resulted from personal experience and simultaneous sensory perception of the event.

These factors are not exhaustive and a person who has not suffered any physical injury may claim damages for nervous shock as a result of being told afterwards of the death of a close relation, or as a result of witnessing damage to property. Where the nervous shock is caused intentionally, intention will be an overriding factor indicating liability. The principle that ‘you take your victim as you find him’ applies, and if nervous shock was foreseeable, the defendant will be liable also for harm aggravated by a pre-existent condition such as high blood pressure or hypertension.

## C. Wrongful Competition

In general, every person is entitled to carry on his or her trade or business in competition with his or her rivals as long as the competition remains within lawful limits. Wrongful interference with another’s right as trader, constitutes an *iniuria* for which the Aquilian action lies if it has directly resulted in loss.<sup>93</sup>

In competition cases, wrongfulness generally consists in an infringement of the right to trade and to attract custom (goodwill) without interference. These

<sup>92</sup> See *Bester v. Commercial Union Versekeringsmaatskappy van SA Bpk* 1973 (1) SA 769 (A); *Barnard v. SANTAM Bpk* 1999 (1) SA 202 (SCA).

<sup>93</sup> See *Schultz v. Butt* 1986 (3) SA 667 (A) at 678.

rights are subject to the same rights of others and unreasonable infringement is determined by regard to the *boni mores* and the general sense of justice of the community. Important factors are:

- fairness of the conduct and honesty of the defendant;
- the interests of the competing parties;
- the business ethics of the section of the community (the morals of the market place);
- the value of a free market economy;
- the public interest generally;
- whether the subject of the dispute relates to a work of craftsmanship or a work of a technical nature;
- confidentiality;
- the competitor's motive;
- the extent to which the defendant is profiting from his or her own endeavours as opposed to those of the plaintiff;
- whether the parties are engaged in the same field of activity;
- the likelihood of confusion between products or services, and
- the extent of statutory protection that could have been obtained by registration of a patent, trademark or design.

Typical instances of wrongful competition are the following:

- misrepresentation as to quality, character or source of products or services;
- passing off products as being those of a competitor;
- exploiting the reputation of a competitor's trade name, mark or advertising material;
- undue pressure on or bribery of clients of a competitor;
- obtaining or using trade secrets;
- interference with contractual relationships of a competitor;
- disparagement of a competitor's products or services, and
- misappropriation of a competitor's performance.

#### D. Product Liability

The liability of a manufacturer for loss or harm caused by a defective product in South African law is a form of Aquilian liability. Normal requirements for

liability apply, in particular the need to prove fault on the part of the manufacturer and wrongfulness in manufacturing and distributing an unreasonably dangerous product. The Supreme Court of Appeal in 2003<sup>94</sup> refused to recognise that liability for the manufacturing or distribution of defective products is strict, as is the case in various other legal systems.

## V. SOME SPECIFIC FORMS OF *INIURIA*

### A. Defamation

#### 1. Nature

Defamation consists in the wrongful and intentional publication of defamatory matter referring to another person and infringing that person's reputation. The plaintiff has to prove that his or her reputation has been infringed by the publication of defamatory material referring to him or her. Publication occurs where a defamatory statement is made known or an imputation is conveyed by conduct to a person or persons other than the person defamed. A statement is defamatory if a reasonable person of ordinary intelligence might reasonably understand the words or imputation in context to convey a meaning defamatory of the plaintiff. A defamatory meaning injures the reputation of another with reference to moral character, professional or business reputation, or elicits enmity, ridicule or contempt, or tends to lower the plaintiff in the estimation of right-thinking members of society generally. The standard is that of a reasonable person of ordinary intelligence. The defamatory material must refer to the plaintiff either expressly or by implication. In the latter instance the test is whether the words complained of would lead an ordinary reasonable person to believe, on reading the words, that they refer to the plaintiff personally.

#### 2. Defences to defamation

Publication of defamatory material that is *true and for the public benefit* is justified and therefore lawful. Except where fraud, dishonesty or criminal conduct is attributed to the plaintiff, the defamatory material need not be true in every respect, provided that the gist of the defamation is true. Truth alone is not a defence: the publication must also be for the public benefit. The defendant

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<sup>94</sup> *Wagener v. Pharmacare Ltd, Cuttings v. Pharmacare Ltd* 2003 (4) SA 285 (SCA).

must allege and prove truth and public benefit to comply with the constitutional right of freedom of expression.<sup>95</sup>

Publication of defamatory material *in privileged circumstances* is justified and therefore lawful. Absolute privilege exists in respect of debates in Parliament. Qualified privilege exists where material is published while exercising a right, discharging a duty, or furthering a legitimate interest. The duty or right may be legal, moral or social, but the interest must be legitimate. The person to whom the material is published must have a similar right, duty or interest to receive the communication. The existence of a legal right or legal duty is determined by the reasonableness standard. Malice or improper motive will nullify the privileged occasion. Privilege also exists in respect of material published in the course of judicial or quasi-judicial proceedings, or by judicial officers in the exercise of public office. Witnesses and litigants may rebut the presumption of wrongfulness by proving that the material was relevant and germane to an issue in the case. It is then still open to the plaintiff to show malice or that the defendant had no reasonable grounds for believing the truth of the material. The presumption may be rebutted by proof that the material was relevant or germane to the issue.

Publication of defamatory material consisting of *fair comment* on true facts which is shown to be in the public interest is justified and therefore lawful. The statement must amount to comment and must be a genuine expression of opinion, relevant, free from malice and a reasonable inference from the facts. The facts upon which the comment is based must be substantially true and must be expressly stated in the material containing the comment, or clearly indicated or incorporated by reference. The comment must relate to a matter of public interest.

In *National Media Ltd v. Bogoshi*,<sup>96</sup> the Supreme Court of Appeal held that earlier cases establishing strict liability of the media for defamation were wrong, being in conflict with the right of free expression of the media. Even the publication of an untruth could be justified where the publication was reasonable in the circumstances. Reasonableness will depend on factors such as:

- the extent of research or enquiry preceding the publication;
- the opportunity for the plaintiff to respond;
- the seriousness of the defamation;
- the extent of publication, and
- the public interest involved.

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<sup>95</sup> See *Khumalo v. Holomisa* 2002 (5) SA 401 (CC).

<sup>96</sup> 1998 (4) SA 1196 (SCA).

### 3. Intent (*animus iniuriandi*)

Defamation normally requires fault in the form of the intent to injure the reputation of the plaintiff, with knowledge that such conduct is wrongful. A media-defendant or distributor of media-products will be liable where defamatory material was published negligently.

The term ‘malice’ has been inaccurately used to indicate a concept similar to intent or *animus iniuriandi*. However, ‘malice’ in South African law refers to an improper motive, and is relevant when determining whether the defendant has exceeded the limits of the defences referred to above.

The presumption of intent that arises from the publication of a defamatory statement may be rebutted by proof that the statement was published in jest or/ and that the person or persons to whom it was published, understood the statement merely as a jest and not in a defamatory sense. The presumption of intent may also be rebutted by proof of a mistake on the part of the defendant that is incompatible with a consciously wrongful will to cause injury. A mistaken belief in the lawfulness of the publication or in the existence of a valid defence may therefore exclude intent on the part of the defendant.

### 4. Persons who may be defamed

Not only natural persons but also corporate entities have a legally protected reputation and can sue for defamation. This also includes non-trading corporations like a political party and a University that may sue for defamation if the defamatory statement was calculated to cause it financial prejudice. An unincorporated association has no action for defamation, but the management board or the members may sue if the defamatory material refers to them. The State has no action for defamation.

### 5. Burden of proof

Once the publication of a defamatory statement referring to the plaintiff has been established, two rebuttable presumptions arise: that the publication was wrongful, and that it was intentional or *animo iniuriandi*. The onus is then on the defendant to rebut the presumptions by proving one of the defences discussed above. The presumption of wrongfulness saddles the defendant with a full burden of proof that must be rebutted on a balance of probabilities. The presumption of intent to defame places only an evidentiary burden on the defendant.

## B. Infringement of Privacy

The right to privacy is an independent personality right protected by the law of delict and by section 14 of the Constitution. This right can be infringed, for

instance, by the defendant's unauthorised acquaintance with the plaintiff's private affairs, intrusion into the plaintiff's private sphere, or by the defendant's unauthorised disclosure of the plaintiff's private affairs to an outsider. Examples are entry into a private residence, secretly watching a person in a private place, reading private documents, listening to private conversations, taking unauthorised blood tests, disclosing details of a private relationship, and disclosing that a person is HIV positive.

The wrongfulness of an infringement of privacy is determined by the general criterion of reasonableness or *boni mores*. If wrongfulness has been established, a presumption of intent arises, and this presumption can be rebutted by proof of a ground of justification such as a privileged occasion or truth and public benefit.

### C. Wrongful and Malicious Arrest

Wrongful arrest involves the deprivation of physical freedom without justification. A valid warrant, for instance, may justify the arrest. In cases involving wrongful arrest or imprisonment, intent remains an element, but in attenuated form, in the sense that it is no longer necessary for the plaintiff to establish that the wrongdoer was conscious of the wrongful nature of his act.<sup>97</sup>

The Courts conceded that this form of strict liability may conflict with the Roman-Dutch principles of liability for *iniuria*, but noted that its practical consequences are both sensible and just. Public policy demands that more comprehensive protection should be afforded against wrongful arrest that causes a serious encroachment upon the freedom of the individual. The constitutional protection of the right to freedom and security of the person underscores this approach.<sup>98</sup> The plaintiff must prove the fact of imprisonment or arrest and that it was wrongful. It is then for the defendant to show that the imprisonment or arrest was justified.

The manner of detention may render the imprisonment unlawful. The detention of a prisoner in conditions amounting to effective solitary confinement constitutes an infringement of his or her basic rights to bodily integrity and to mental and intellectual well being.

Wrongful arrest or imprisonment must be distinguished from malicious deprivation of liberty, which does require intent. Where the judicial machinery is

<sup>97</sup> *Minister of Justice v. Hofmeyr* 1993 (3) SA 131 (A) at 157.

<sup>98</sup> Constitution of the Republic of South Africa, Act 108 of 1996, s. 12.

improperly used to deprive a person of his or her liberty under the guise of a valid judicial process, the plaintiff must prove that the defendant instigated the deprivation of liberty without reasonable and probable cause. Intent (*animo iniuriandi*), namely consciousness of the wrongful nature of the act, must also be proved.

## VI. STRICT LIABILITY

Despite the dominant application of the principle of no-liability-without-fault, South African law recognises the following instances of strict liability:

- the adapted Roman *actio de pauperie* for damage caused by domestic animals acting *contra naturam sui generis*;
- the *actio de pastu* for damage done by grazing animals;
- the *actio de effusis vel deiectis* and the *actio positi vel suspensi* for the recovery of damage from the occupier of a building from which something was thrown or from which something fell down.

Vicarious liability is a form of transferred liability and fault plays a part. The employer takes on liability for the wrongdoing of an employee, but only to the extent that the employee was at fault. The general rule is that an employer is vicariously (strictly) liable for the delict of its employee committed in the course and scope of employment. The principles of vicarious liability as applied in South African law have been described as ‘perhaps the most comprehensive and far-reaching innovation we have taken from English law’.<sup>99</sup>

Instances of strict liability found in legislation are damage caused by aircraft;<sup>100</sup> fire caused by rail transport;<sup>101</sup> damage caused by nuclear energy,<sup>102</sup> and damage to telecommunication lines.<sup>103</sup>

<sup>99</sup> P.Q.R. Boberg, ‘Oak Tree or Acorn? – Conflicting Approaches to our Law of Delict’ 1966 SALJ 150, 169.

<sup>100</sup> Aviation Act 74 of 1962, s. 11.

<sup>101</sup> Clause 2(1) of Schedule 1 of the Legal Succession to the South African Services Act 9 of 1989.

<sup>102</sup> Nuclear Energy Act 92 of 1982, s. 41(1).

<sup>103</sup> Post Office Act 44 of 1958, s. 108.

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# *Chapter 9*

## **Commercial Law**

***Charl Hugo\** and *Richard Stevens\*\****

### **I. INTRODUCTION**

This chapter deals with the law of negotiable instruments, insurance and insolvency. Together with corporate and labour law, which are dealt with in other chapters, these divisions form the backbone of the subject ‘commercial law’ (*handelsreg* in Afrikaans) as it is presented in South African legal treatises and curricula. They are all highly relevant to the mercantile or business community. Moreover, they are (perhaps somewhat tenuously) bound by the common characteristic of a strong influence of English law on an uncodified civil-law basis. This is especially true of the law of negotiable instruments and insurance.

### **II. NEGOTIABLE INSTRUMENTS**

#### **A. Introduction**

Under South African law, an instrument can acquire the status of negotiability by statute or by common law. ‘Negotiability’ implies that the instrument, and the rights embodied in it, can be transferred (negotiated) from one party to another and that such a negotiation is not subject to equities. In certain circumstances, the new holder can accordingly acquire a better title to the instrument than his or her predecessor. The most important category of negotiable instruments is, without doubt, the bill of exchange, which includes the cheque. The negotiability of these

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instruments, as well as promissory notes, is derived from the Bills of Exchange Act 34 of 1964. This statute is very strongly based on the English Bills of Exchange Act, 1882. Consequently, the South African law of bills of exchange, despite its Roman-Dutch roots (the *wisselrecht*), has aligned itself with the English law in this respect, rather than with the Geneva Uniform Laws for Bills of Exchange and Promissory Notes (1930), and for Cheques (1931), on which many continental systems have based their law. Certain other instruments are also negotiable, but their negotiability stems from the common law.

## **B. Instruments that are Negotiable by Virtue of Statute**

### *1. The Bills of Exchange Act 34 of 1964*

The first South African legislation on negotiable instruments was provincial in origin. These statutes were eventually consolidated in 1964 by the current Act. Although initially closely modelled on the English Bills of Exchange Act, 1882 (both the earlier provincial statutes and the eventual consolidated one), the South African legislation has subsequently seen two major revisions which have introduced significant departures from the English model. The first was in 1943 when the provincial legislation was amended mainly to include a new section introducing conversion liability for certain cheques only. The second amendments, in 2001, were far-reaching. They were designed to eliminate problems relating to:

- the introduction of essentially an English statute to a civil-law background;
- the technological advances in banking;
- the delictual liability of banks for the negligent collection of cheques, and
- the institutionalisation and regulation of non transferable cheques.

Despite these amendments the English model is, however, still clearly discernible today.

### *2. Bearer bills, order bills and non transferable bills*

Bills of exchange (and therefore also cheques), can be payable to bearer or to order, or be non-transferable. A cheque is payable to bearer if it is expressed to be so ('pay to bearer'), or if it is made payable to 'cash', 'cash or bearer' or even, since the 2001 amendments, 'cash or order'. A bill is also payable to bearer if it was initially payable to order and subsequently endorsed in blank, that is, bears the signature of a previous holder without any indication to whom it must be paid. A bill is payable to order if it is expressed to be so ('pay to John Smith or order'), or if it is made payable to a particular person without any words

indicating an intention to render it non-transferable ('pay John Smith'). A bill is non-transferable if it is initially, or by endorsement, rendered payable to a particular person and the bill contains words prohibiting its transfer ('pay to John Smith only', or 'pay John Smith' together with the words 'non-transferable'). Although what is stated here applies to cheques, the 2001 amendments have created a specific non-transferable cheque, described by Malan & Pretorius<sup>1</sup> as the 'institutional' non-transferable cheque. This type of cheque is discussed at II.B.6.f. below.

The implication of a bill being a bearer bill is that it can be negotiated by delivery alone. An order bill, on the other hand, requires the endorsement of the holder for negotiation. A non-transferable bill cannot be negotiated.

The effect of the addition of the words 'not negotiable' to bills of exchange is not entirely clear. Where they appear on a crossed cheque, the position is made clear by the Act. This matter is discussed at II.B.6.b. below. The effect of the words 'not negotiable' on a bill of exchange other than a crossed cheque has not been settled authoritatively in South Africa. It is probably non-transferable.

### 3. *The liability of the parties*

By signing and delivering a bill of exchange or cheque, the drawer engages that it will be honoured by the drawee. By signing and delivering a bill of exchange, cheque or promissory note, the endorser likewise engages that it will be honoured by the drawee (or in the case of a promissory note, by the maker). By accepting the bill, the drawee (now the acceptor) engages to pay it according to the tenor of his or her acceptance. Acceptance entails the signature of the drawee and then either delivery of the instrument or notification to the holder of acceptance. By signing and delivering a promissory note, the maker similarly promises to pay it on the due date. By signing a bill as aval and delivering it, the signer of the aval binds himself as surety. Thus, irrespective of whether the liability in question is that of the drawer of a bill or cheque; the endorser of a bill, cheque or promissory note; the maker of a promissory note; the signer of an aval, or the acceptor of a bill, this liability presupposes that the party in question has signed the instrument and has delivered it. The only exception is that in the case of the acceptor, notification of acceptance can take the place of delivery. The liability of the parties in all these instances is derived from agreement. By signing and delivering the instrument, the party concerned agrees to be liable as explained above.

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<sup>1</sup> F.R. Malan & J.T. Pretorius (assisted by S.F. du Toit), *Malan on Bills of Exchange, Cheques and Promissory Notes* (4th ed., 2002) para. 235.

Agreement, however, cannot explain the liability of the parties in all instances. In this regard the position of a so-called ‘holder in due course’ (*reëlmatige houer*) is very important. A holder in due course is, in essence, a holder who has acquired a bill, note or cheque by negotiation before maturity and has done so in good faith and for value. The liability of a party to a holder in due course is not based on agreement but on the protection of good-faith acquisition. The holder in due course acquires the instrument free from title defects of previous parties and free from any personal defences available to previous parties. This status, the result of centuries of development in the *lex mercatoria*, is today entrenched in section 36 of the Act.

#### 4. *Defences*

The contract of the drawer, endorser, or acceptor of a bill of exchange, or that of the maker of a promissory note, is expressed unconditionally. Nevertheless, it typically rests on an underlying obligation that forms the *causa* for the contract on the instrument itself. A lessee, for example, may deliver his or her cheque to the lessor in payment of rent. Typically the parties do not intend their relationship to be determined solely with reference to the expressed terms on the instrument but also with reference to the underlying obligation. Thus, if no rental is in fact owed in the above example (it has, for instance, already been paid), the landlord will not be able to enforce the drawer-lessee’s cheque obligation. Similarly, if the underlying contract were to be void, or unenforceable, the contract on the bill or note will be affected likewise. A defence derived from the underlying contract (the *causa* of the bill of exchange) is permissible. In this regard it must be noted that in South African law a bill or note can be enforced where the *causa* of the bill or note is a donation. Thus, the English-law doctrine of valuable consideration does not form part of South African law. If the bill or note is delivered subject to a condition it stands to reason that it can only be enforced if the condition has been fulfilled. Thus, any defence originating from the underlying obligation or from the delivery of the bill or note is permissible, provided the holder is not a holder in due course.

Should the holder be a holder in due course, his or her good faith is protected instead of the bill debtor’s rights stemming from the underlying obligation. Thus, defences stemming from the underlying obligation or from the original delivery of the bill or note cannot be raised against the holder in due course. Only the so-called ‘absolute defences’ can be relied on against a holder in due course. The most important of these are the contractual incapacity of the signatory of the instrument and the defence *non est factum* (that is, that the signatory did not intend to sign a negotiable instrument).

### 5. *Formal and material legitimacy*

The key concept of a ‘holder’ is defined in a way which indicates that it is either the payee or endorsee of the bill or note who is in possession of it, or, in the case of a bearer instrument, simply the possessor of the instrument. The holder is accordingly the person who, *ex facie* the instrument, must be paid. He or she is the formally legitimised creditor of the instrument. As is clear from the previous paragraph, a holder is not necessarily truly entitled to payment (materially legitimate). Material legitimacy presupposes a valid contract (that is, delivery of the instrument for a valid *causa*) or holding in due course. Thus, the thief of a bearer bill, although qualifying as holder (the formally legitimate creditor), is not able to enforce the bill against the bill debtor. The holder is not materially legitimate. However, formal legitimacy has important consequences. First, payment in good faith by the debtor to the holder qualifies as ‘payment in due course’ and discharges the debt irrespective of the presence or absence of material legitimacy. Secondly, in enforcing the instrument, the holder can rely on his or her holdership (formal legitimacy). The debtor resisting payment will accordingly have to prove the absence of the material legitimacy of the holder.

In this regard it is significant that in South African law a person who holds the instrument by virtue of a forged endorsement is not a formally legitimate holder. In this respect South African law follows English law and differs from the Geneva Uniform Laws. Thus, subject to certain exceptions pertaining to cheques, payment to a person who ‘holds’ the instrument by virtue of a forged endorsement will not discharge the bill or note.

### 6. *Special provisions pertaining to cheques*

#### a. Introduction

The Act contains a chapter that deals specifically with cheques. Since a cheque is a bill of exchange, the provisions of the Act relating to bills of exchange are equally applicable to cheques. However, the provisions of the chapter on cheques do not affect other instruments.

#### b. Crossing

In the first place, the chapter on cheques provides for the crossing of cheques. Cheques can be crossed generally (by the addition of two parallel transverse lines), or specially by the addition of the name of a bank. The words ‘not negotiable’ (*nie verhandelbaar nie* in Afrikaans) may, or may not, form part of the crossing. A crossing is an instruction to the drawee bank not to pay the cheque over the counter to the holder but to pay it to a bank – any bank in the

case of a general crossing and to the named bank in the case of a special crossing. The failure of the drawee bank to heed this instruction may render it liable to the true owner of the cheque if it were to be stolen. The practical effect of a crossing on the holder is accordingly that he or she must deposit the cheque into a bank account for collection. The holder's bank will then collect payment of the cheque from the drawee bank on behalf of its customer. The words 'not negotiable' do not affect the nature of the crossing. However, they affect the nature of the instrument fundamentally. Such an instrument is no longer a 'negotiable' instrument in the full sense of the word. Although the instrument can still be negotiated by mere delivery if payable to bearer and by endorsement and delivery if payable to order, such negotiation is subject to the *nemo plus iuris* rule. This addition to a crossed cheque therefore destroys one of the essential characteristics of a negotiable instrument, namely the possibility that the transferee acquires a better title than that of the transferor. The benefits of holding in due course are accordingly no longer available to the holders of such cheques.

### c. Liability and statutory protection of drawee bank

The drawee bank acts as mandatary of its customer, the drawer. If the drawee bank accordingly acts in terms of its mandate, that is, pays the cheque as instructed, it is entitled to debit the drawer's account. As a general rule, the converse is also true: if the bank does not pay as instructed by its customer, it is not entitled to debit the drawer's account. This rule, however, is subject to a number of exceptions.

First, if it pays out an order cheque on which an endorsement has been forged, and it does so in good faith and in the ordinary course of business, such payment is deemed to be 'payment in due course' under section 58 of the Act, provided the forged endorsement does not purport to be that of a customer of the branch of the bank on which the cheque has been drawn.

If the cheque is crossed, the drawee bank does not pay it over the counter but pays it to a collecting bank through a highly automated clearing system. It stands to reason that the drawee bank has no way of knowing for whom the cheque is being collected. In practical terms, the responsibility of ensuring that the cheque is paid to the correct person can only lie with the collecting bank. A second statutory protection for the drawee bank stems from this reality: section 79 provides that if the drawee bank pays a crossed cheque in accordance with the crossing to a collecting bank and does so in good faith and without negligence, such payment is deemed to be payment to the true owner of the cheque. The implication is that the drawee bank will be entitled to debit its customer's account for such payment irrespective of whether the person paid was in fact the true owner of the cheque.

If the drawer's signature on the cheque has been forged or if the contents of the cheque have been forged (for example, the amount raised), and the drawee bank pays, it does so without mandate and is not entitled to debit its customer's account. There is no statutory protection in these circumstances. The bank's liability for such payments is not based on negligence but on payment without mandate. Therefore the level of perfection of the forgery is totally irrelevant. However, the Courts have recognised two exceptions to these rules. In the first place, there is an obligation on the customer to inform the bank of lost or stolen cheque forms. If the customer accordingly loses his or her chequebook and knows that he or she has lost it, but does not inform the bank, the bank will be entitled to debit his or her account with the amount of a forged cheque presented for payment. Moreover, under the 2001 amendments of the Act, if the customer is by law required to have his or her financial statements audited (for example a company), there is a duty on such a customer to exercise reasonable care in the custody of cheque forms. This may well mean that the negligent loss of a cheque form by such a customer, in itself, may entitle the drawee bank to debit its payment of such a cheque against its customer's account. As regards the forging of the contents of a cheque, it must also be borne in mind that the customer has the duty to exercise care so that the manner in which he or she draws up the cheque does not facilitate forgery. The South African Courts have recognised that the negligent completion of a cheque by a customer may entitle the bank to debit payment of the forged cheque against its customer's account.

#### d. Delictual liability of collecting banks

In English law a bank collecting a stolen cheque on behalf of a customer can, in principle, be liable to the true owner for conversion. If unchecked, this liability could render the entire collection process unviable. Hence the English statute protects the collecting bank that collects a cheque on behalf of a customer in good faith and without negligence. Thus conversion liability attaches only to banks that cannot bring themselves within this protection. However, South African law does not recognise conversion liability. Until 1991 the implication was that collecting banks could only be held liable for bad faith collection (under the *actio ad exhibendum*). No liability attached to negligent collection of cheques in good faith. However, the recognition and extension of delictual (Aquilian) liability for pure economic loss during the past couple of decades in South African law has led to collecting banks being held liable in delict to the true owner in a number of cases since 1991. The principle is now well entrenched in South African law. Collecting banks will be liable in the following cases:

- where the bank allowed the thief to open an account in a name similar to that of the payee on the cheque and then to deposit the stolen cheque into that account (in other words the bank did not properly verify the identity and ‘cheque-worthiness’ of its customer);
- where the bank collected payment of a cheque clearly made payable to A, for B, and
- where the bank collected payment of a non-transferable cheque for someone other than the payee.

e. Statutory conversion (section 81 of the Bills of Exchange Act)

Amendments introduced to the legislation in 1943 created what may be described as a statutory conversion action. Its scope, however, is restricted to crossed cheques marked ‘not negotiable’. In terms of section 81 of the Act, if such a cheque is stolen and paid by the drawee bank in circumstance which do not render the drawee bank itself liable to the true owner, the true owner can claim his or her damages or the amount of the cheque (whichever is the lesser) from any person who possessed the cheque in own right (irrespective of his or her good or bad faith). From the point of view of any recipient (payee or transferee), the taking of such a cheque accordingly holds the danger that if it was stolen, he or she may be liable to the owner of the cheque. It has been said that the crossing of a cheque marked with the words ‘not negotiable’, is tantamount to a danger signal with the message: ‘take care, this cheque might be stolen’.<sup>2</sup>

f. Non-transferable cheques

A bill, and therefore also a cheque, is non-transferable if it contains words prohibiting transfer, or indicating an intention that it should not be transferable. Such an instrument is valid as between the parties, but not transferable. Thus, a cheque made payable to ‘John Doe only’ is not transferable. However, the 2001 amendments introduced the new section 75A, dealing specifically with non-transferable cheques. It provides for a specific manner of rendering a cheque non-transferable, namely by adding boldly across the face of the cheque the words ‘not transferable’ or ‘non transferable’. A cheque with this addition is then, in terms of the Act, valid between the parties but not transferable and

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<sup>2</sup> D.V. Cowen & L. Gering, *Cowen on the Law of Negotiable Instruments in South Africa* (4th ed., 1966) 435.

deemed to be crossed generally unless it is crossed specially. Moreover, this section provides that:

- 'a bank shall not be negligent by reason only of its failure to concern itself with  
(a) an endorsement intended to prevent transfer of the cheque; or  
(b) words prohibiting transfer, or indicating an intention that it shall not be transferable, other than in the manner provided for in this section'.

This type of non-transferable cheque can be regarded as an attempt at institutionalising the manner in which cheques are rendered non-transferable. If the cheque is made non-transferable in any other manner (for example by making it payable to 'John Doe only' or by a restrictive endorsement similarly worded), it is still non-transferable, but the failure of a bank (drawee or collecting bank) to notice that it is not transferable, will not necessarily be regarded as negligent. Thus, a drawee bank paying such a cheque which bears an endorsement will probably still be entitled to debit its customer's account (in other words, it will not lose its statutory protection due to negligence), and a bank that collects payment of such a cheque for someone other than the payee will probably be able to escape delictual liability.

#### 7. *Typical actions*

Up to and including the last decade, South Africa has seen a relatively high number of actions relating to cheques. Most have fallen into one of the following three classes:

- where a cheque is dishonoured and the holder sues the drawer;
- where a cheque is stolen and the true owner sues the collecting bank for negligent collection of the cheque on behalf of its customer the thief, and
- where a crossed cheque marked 'not negotiable' is stolen and the true owner sues a subsequent possessor for statutory conversion.

### C. Instruments that are Negotiable by Virtue of Common Law

The Act only imparts the quality of negotiability to bills of exchange, cheques and promissory notes. However, this does not mean that other financial instruments or commercial paper cannot be afforded this quality by common law. For example, it has been held that the bank, from which treasury bonds (the South African equivalent of the English exchequer bonds) had been stolen, was incapable of claiming them back by a vindictory action from the bank that had

purchased them in good faith. Modern commentators would further probably agree that travellers' cheques would qualify as negotiable instruments, but this has not yet been tested in the South African Courts.

### III. INSURANCE LAW

#### A. Regulatory Framework

Since 1999, the regulatory framework for insurance business in South Africa is provided by the Long-Term Insurance Act 52 of 1998 and the Short-Term Insurance Act 53 of 1998. Although some of the provisions of these Acts have implications for the relationship between an insurer and the insured (see especially the discussion of misrepresentations and warranties at III.E below), they are primarily concerned with the manner in which the State regulates the insurance business. The legislation provides for a Registrar of long-term and short-term insurance with whom all such insurers must be registered in order to carry on insurance business. The Registrar has wide powers designed to enable him to supervise the insurance industry in the interests of policyholders. Only public companies or companies incorporated without share capital under a law providing specifically for the constitution of a person to carry on insurance business as its main object, can be so registered, and then only if the Registrar is satisfied that the applicant has the financial resources, organisation and management necessary and adequate for the carrying on of the business concerned. The legislation furthermore makes provision for conditional registration and deregistration. It prescribes the minimum assets insurers must have, as well as the kinds of assets and spread thereof. To ensure compliance with the legislation by insurers, the Registrar can require returns from the industry in general or from a particular insurer, calling for the information he sees fit in the form or medium of his choice.

#### B. Common-Law Background

The legal history relating to insurance in South Africa has rendered it rather difficult to determine what the common law relating to insurance is. It is clear that it was Roman-Dutch law initially. During the 19th century, however, Roman-Dutch insurance law was thought to be backward. As a consequence, some provinces introduced legislation between 1879 and 1902 whereby questions pertaining to life, fire and marine insurance were to be decided as if English law

was applicable. This legislation was eventually repealed in 1977 and theoretically, since that date, Roman-Dutch law has been the common law governing insurance issues. It must, however, be borne in mind that by this time the law, in some provinces at least, had been shaped by close to a century of jurisprudence and case law based on English law. The matter was eventually addressed by the Appellate Division in *Mutual and Federal Insurance Co Ltd v. Oudtshoorn Municipality*.<sup>3</sup> The Court held that:

- Roman-Dutch insurance law is the primary source of our common law in this regard;
- although the Roman-Dutch sources are largely confined to marine insurance, the principles of marine insurance could be extended to other forms of insurance;
- general principles of Roman-Dutch law of contract and delict could also infuse insurance law;
- not only Roman-Dutch law proper could be consulted, but also other authorities of the European *ius commune*, and
- English law, where it provided good solutions, could also be consulted and followed.

On a practical level, it would be fair to state that English insurance law remains very important in South Africa and is regularly consulted and cited in the Courts. Thus, ‘South African insurance law is noted for its hybridity – it comprises a delightful, or (depending on one’s perspective) disorderly, blend of doctrines received from English common law and Continental civil law.’<sup>4</sup>

### C. Indemnity and Non-Indemnity Insurance

The distinction between indemnity insurance and non-indemnity insurance is fundamental in South African law. The insurer’s undertaking in the case of indemnity insurance is to indemnify the insured. In the case of non-indemnity insurance, the undertaking is simply to pay a sum of money. Damage does not play a role. To a large degree this distinction is in the two regulating statutes: indemnity insurance is typically short-term insurance and non-indemnity insurance

<sup>3</sup> 1985 (1) SA 419 (A).

<sup>4</sup> J.P. van Niekerk, ‘Subrogation and Cession in Insurance Law: A Basic Distinction Confounded’ 1998 *SA Mercantile Law Journal* 58.

long-term insurance. The distinction is important on the private-law level, since certain insurance doctrines such as subrogation, double insurance and contribution, and under-insurance and average, apply only to indemnity insurance.

## D. Essentials of the Contract of Insurance

### 1. General remarks

Although the normal rules relating to contracts generally apply to insurance contracts, there are notable exceptions:

- certain doctrines affect only insurance contracts (see III.F. below);
- although insurance contracts and wagers have much in common, the former are enforceable and the latter not, and
- only registered insurers can lawfully conclude insurance contracts with the public (see III.A. above).

It is accordingly important to be able to distinguish an insurance contract from other contracts.

The essentials of an insurance contract are:

- an undertaking by the insured to pay the insurer a premium;
- an undertaking by the insurer to pay the insured a sum of money or its equivalent;
- the insurer's undertaking is subject to the happening of a specified uncertain event, and
- the insured must have an insurable interest relating to this uncertain event.

Older textbooks will typically list the further essential that the insurance contract is a contract of utmost good faith – a matter that briefly receives attention at III.E. below. The requirement of insurable interest calls for closer scrutiny.

### 2. Insurable interest

The concept of insurable interest, which forms part of both indemnity and non-indemnity insurance, is inherited from English law. Essentially, insurable interest means that there is a close relationship between the insured and the object of insurance. The concept originated in English law to distinguish insurance contracts from wagers, the point being that in the absence of such an interest the contract is one of wager. If viewed in this light, the insurable interest is an *essentiale* of the insurance contract.

In indemnity insurance it is clear that there is a close relationship between loss or damage and an insurable interest. Thus, if the insured would not suffer a loss should the risk materialise, the insured does not have an insurable interest and vice versa. From the foregoing it is clear that for an interest to be insurable, it must have a financial content. A mere emotional content does not suffice. This means, for example, that a person cannot insure a particular artwork belonging to the local museum on the basis that it means so much to him or her. If it were to be destroyed he or she would suffer no loss. Viewed in this light, an insurable interest can be regarded as a determinant of loss. It follows that the moment when the interest must be present, is the moment the risk, which is insured against, materialises. Thus, owners and co-owners of the risk object, and persons legally entitled to possess it (such as lessees), clearly are examples of persons with insurable interests.

The precise role of insurable interest in South African law is not entirely clear. Is it indeed an *essentiale* of an insurance contract, or is it a mere determinant of loss? The problem has been particularly significant when one spouse seeks to insure the other spouse's separate property. South African Courts, probably driven by notions of equity, have in the past bent over backwards in search of an insurable interest in such cases. This is well illustrated by the case of *Phillips v. General Accident Insurance Co (SA) Ltd*,<sup>5</sup> where the plaintiff insured his wife's jewellery that was subsequently stolen. The Court identified an insurable interest on the two bases that the insured felt morally obliged to replace the jewellery (which implies financial loss) and that due to the mutual obligation of spouses to maintain one another as the jewellery could have been sold by the wife to support her husband in bad times. The clear tenuousness of these arguments, however, led the Court to question the validity of the doctrine of insurable interest in South African law. The question was posed (*obiter*) whether the true basis for distinction between a wager and an insurance contract ought not rather to be sought in the intention of the parties. The intention of the insured in this case clearly was to insure and not to enter into a wager. These critical remarks emanating from the judiciary may herald the demise of insurable interest as an *essentiale* for an insurance contract in South Africa, and restrict its role to that of a determinant of loss.

Although the conventional view in non-indemnity insurance is that an insurable interest cannot be determined with reference to loss, the doctrine nevertheless

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<sup>5</sup> 1983 (4) SA 652 (W).

applies. A person must have an insurable interest in the life he or she wishes to insure. The interest must in this case be present at the time of conclusion of the contract, but need not still be present when the risk materialises (that is, when the insured dies). It is accepted that a person has an insurable interest in his or her own life, and in the life of his or her spouse. The interest is unlimited – in other words, the life involved can be insured for any amount. However, some identifiable financial interest must be present for a person to insure the life of any other person, and the amount for which the life can be insured is in principle limited to the value of the interest. Thus, a person can insure the life of someone legally obliged to maintain him or her. An employer can insure the lives of key personnel. Partners in a business can insure the lives of one another. A creditor can insure the life of his or her debtor.

Finally, it must be noted that in South African law the absence of an insurable interest does not render the contract void but merely unenforceable. It is not unusual for insurers to conclude contracts in the absence of an insurable interest and to honour them when called upon to do so.

## **E. Misrepresentation and Insurance Warranties**

### *1. Introduction*

In deciding whether to extend insurance cover to a prospective insured, insurers rely largely on facts (representations) provided by the insured. It is well established that a prospective insured is under a duty to provide the insurer with the true facts. This means first, that the prospective insured must not make false declarations or positive misrepresentations to the insurer regarding any material facts (see III.E.2. below); and secondly, that the insurer must disclose all material facts of which he has knowledge to the insurer – in other words, he must not make himself guilty of negative misrepresentation (see III.E.3. below). Under English influence, South African law at first regarded this duty of the insured as being derived from the fact that insurance contracts were contracts of the utmost good faith (*uberrimae fidei*). However, in the *Oudtshoorn Municipality* case,<sup>6</sup> the Appellate Division rejected the notion of degrees of good faith in South African contract law and adopted the notion of an *ex lege* duty, which essentially stemmed from the fiduciary nature of the relationship between the insurer and insured.

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<sup>6</sup> 1985 (1) SA 419 (A).

## 2. Positive misrepresentation

An insurance contract is voidable at the choice of the insurer if the insurer was moved to enter into the contract (in the form in which it was concluded) due to a false representation of a material fact by the insured. The implication for a prospective insured is that he should complete the proposal with great care. A false answer to a question posed in the proposal may entitle the insurer to escape liability.

However, due to the fact that most proposal forms contain an affirmative warranty at the end whereby the applicant warrants the truth of all the answers, the avoidance of insurance contracts on the basis of positive misrepresentation is not all that prominent a part of insurance practice. The alternative route of escaping liability on the basis of breach of the affirmative warranty, which amounts to breach of contract, is most often preferred. This matter is dealt with at III.E.4. below.

## 3. Negative misrepresentation (non-disclosure)

A person who applies for insurance is under a legal duty to disclose to the insurer all material facts of which he or she has knowledge. The crucial issues here relate to *materiality* and *knowledge*.

The authoritative exposition of the test for materiality is that of the Appellate Division in the *Oudtshoorn Municipality* case.<sup>7</sup> It was formulated as follows:

'[T]he Court applies the *reasonable man test* by deciding upon a consideration of the relevant facts of the particular case whether or not the undisclosed information or facts are reasonably relative to the risk or the assessment of the premiums. If the answer is in the affirmative, the undisclosed information or facts are material . . . The Court does not in applying this test judge the issue of materiality from the point of view of a reasonable insurer. Nor is it judged from the point of view of a reasonable insured. The Court judges it objectively from the point of view of the average prudent person or reasonable man.'

Examples of facts that have been regarded as material by the Courts include, in the first place, facts relating to the *insurance history* of the applicant. Thus, the

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<sup>7</sup> *Ibid.* at 435.

refusal of similar cover in the past, or the untimely cancellation of a similar policy, or the refusal of renewal of a similar policy in the past, would all constitute material facts. A second category of material facts relates to the risk experience of the applicant, for example for motor vehicle insurance, previous accidents must be disclosed and for fire insurance, previous fires. Another prominent category of material facts relates to the so-called moral hazard. The moral hazard includes aspects of the character of the applicant (or if the applicant is a juristic person, the character of its key personnel) such as dishonesty, criminal record, unstable financial position and incompetent management.

Facts need not be disclosed if the insurer has waived its right to be informed thereof. Such a waiver may be inferred from the formulation of a question in the proposal. The proposal for motor vehicle insurance may, for example, ask whether the applicant has been involved in any motor vehicle accidents during the past five years, and if so, request full information. The implication is that the insurer is not interested in information relating to accidents that occurred earlier. Facts already known by the insurer also do not need to be disclosed by the applicant.

It is of course impossible to disclose what one does not know. Nevertheless, the South African Courts have adopted the notion of constructive knowledge. In accordance with this doctrine, the applicant for insurance is not only under a duty to disclose what he or she knows (actual knowledge) but also that which he or she should have known (constructive knowledge). Constructive knowledge is regarded as knowledge that the applicant would have had, had he or she not been negligent. Moreover, a juristic person such as a company cannot itself have knowledge. It can, however, apply for insurance. In this regard it has been held that the ‘knowledge of a company can only be the knowledge of “directors and managers who represent the directing mind and will of the company, and control what it does”’.<sup>8</sup> The knowledge of a subordinate in the company cannot be regarded as the knowledge of the company, unless it is ‘possessed and acquired by him in the course of his employment under such circumstances and being of such a nature that it was his duty to communicate it to the proper authority in the company’.<sup>9</sup>

<sup>8</sup> *Anderson Shipping (Pty) Ltd v. Guardian National Insurance Co Ltd* 1987 (3) SA 506 (A) at 515, referring to *HL Bolton (Engineering) Co Ltd v. Graham & Sons Ltd* [1957] 1 QB 159 at 172.

<sup>9</sup> *Connock's (SA) Motor Co Ltd v. Sentraal Westelike Ko-operatiewe Maatskappy Bpk* 1964 (2) SA 47 (T) at 53.

#### 4. Insurance warranties

A warranty in an insurance contract ‘is a statement or stipulation upon the *exact truth* of which, or the *exact performance* of which, the validity of the contract depends . . . [I]t must be strictly complied with, whether material to the risk or not’.<sup>10</sup> Thus, if the insured breaches a warranty, the insurer is entitled in common law to cancel the contract and escape liability. This is the case irrespective of the seriousness of the breach. In this respect, insurance contracts differ from other contracts where cancellation is only competent if the breach was material, or if the contract contained a *lex commissoria*.

There are two types of warranties: warranties of truth (affirmative warranties) and warranties of performance (promissory warranties). Affirmative warranties commonly form part of insurance proposal forms where the prospective insured warrants the truthfulness of all his or her answers to the questions on the proposal. Typical promissory warranties are that the insured warrants that he or she will always lock his or her motor vehicle whenever it is unattended (in motor-vehicle insurance), or will not take part in any of a number of listed dangerous activities (in life insurance).

As mentioned above, the breach of either type by the insured allows the insurer in common law to cancel the contract irrespective of the materiality of the breach. The potential of abuse of this legal position came to the fore in the case of *Jordan v. New Zealand Insurance Co Ltd*.<sup>11</sup> The Court, with great reticence, held that the insurer could cancel the contract where the insured, in a proposal for motor-vehicle insurance, gave his age as 22 while in fact it was 23, and warranted the correctness of the information in his answers – despite the fact that the insurer’s risk for drivers aged 23 was smaller than for drivers aged 22. This led to intervention by the legislature. Section 53 of the Short-Term Insurance Act provides that an insurance policy shall not be invalidated, or the obligation of the insurer excluded or limited, or the obligations of the policy-holder increased, on account of

‘any representation made to the insurer which is not true, whether or not the representation has been warranted to be true, unless that representation is such as to be likely to have materially affected the assessment of the risk under the policy concerned at the time of its issue or at the time of any renewal or variation thereof’.

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<sup>10</sup> *Lewis Ltd v. Norwich Union Fire Insurance Society Ltd* 1916 AD 509 at 514-515.

<sup>11</sup> 1968 (2) SA 238 (E).

There is a similar provision in the Long-Term Insurance Act. Thus, a positive misrepresentation warranted to be true by the insured can entitle the insurer to cancel the contract only if the representation was likely to have *materially affected the assessment of the risk* under the policy.

Despite initial indications that the test for materiality in this context would essentially be the same as the reasonable man test for the materiality of non-disclosures formulated in the *Oudtshoorn Municipality* case, the Appellate Division in *Qilingile v. South African Mutual Life Assurance Society*<sup>12</sup> formulated a different test for the materiality required in section 53 by interpreting the specific wording of the Act:

‘It amounts to a simple comparison between two assessments of the risk undertaken by the particular insurer involved. The first is done on the basis of the facts as distorted by the misrepresentation, and the second on the true facts. A significant disparity between the two meets the requirements of materiality for the purposes of the Act. The disparity is significant if the particular insurer, had he known the truth, would probably have declined outright to undertake the particular risk, or only have undertaken it on different terms.’

Thus, the test for materiality in the context of non-disclosures (the reasonable man test) differs from the test for materiality in positive misrepresentations in conjunction with affirmative warranties (the particular insurer test). This state of affairs has drawn stringent criticism both from academic ranks and the judiciary. An amendment to the legislation eventually passed in 2003,<sup>13</sup> put the particular-insurer test of the *Qilingile* case to rest and re-introduced the reasonable man test of the *Oudtshoorn Municipality* case also to positive misrepresentations in conjunction with affirmative warranties.

Finally, it must be noted that section 53 of the Short-Term Insurance Act, and its counterpart in the Long-Term Insurance Act, probably apply only to affirmative warranties and do not affect the common-law rule as regards promissory warranties. Thus, an insignificant (or immaterial) breach of a promissory warranty by the insured will entitle the insurer to cancel the contract.

<sup>12</sup> 1993 (1) SA 69 (A) at 75F-H.

<sup>13</sup> Insurance Amendment Act 17 of 2003.

## F. Important Doctrines

### 1. Subrogation (and cession)

The doctrine of subrogation was adopted from English law in *Ackerman v. Loubser*.<sup>14</sup> In terms of this doctrine, the insurer, once it has settled the claim of the insured, has the right, *ex lege*, to enforce any claim that the insured may have had in this regard against the guilty party, and to do so in the name of the insured. The potential application is wide. One of the most typical applications of the doctrine is in motor-vehicle insurance where the collision was caused by the negligence of the other driver (not the insured). Once the insurer has settled the claim of its insured, it may institute a delictual action against the negligent driver in the name of the insured.

The doctrine does not form part of Roman-Dutch law, which maintains that the insurer can enforce the insured's actions only as cessionary of the insured. Thus, to sue the negligent driver in the example above, the insurer would have to require the insured to cede his or her rights against the negligent driver to the insurer, who will then be able to sue the driver as cessionary of the insured in its own name. This type of cession still forms part of South African law. Against this background it is important for an insurer to determine whether it is suing on the basis of subrogation or cession, as this will determine whether it sues in its own name or in that of the insured. Put differently: if the insurer has required cession it cannot sue on the basis of subrogation as the insured no longer has a right against the third party – the right has been ceded.

Insurance contracts often provide that the insured will lose his or her claim against the insurer if he or she acknowledges guilt against a third party. Such an acknowledgement would imply that the insured accepts that he or she has no claim against the third party. This would jeopardise the insurer's legal position: if the insured has no rights against the third party, the insurer, irrespective of whether it sues in its own name as cessionary of the insured or in the name of the insured on the basis of subrogation, cannot have any rights against the third party either. This type of provision is accordingly designed to protect insurers against such an eventuality.

The doctrine of subrogation is only applicable to indemnity insurance.

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<sup>14</sup> 1918 OPD 31. The doctrine was imported on the basis of it being a matter pertaining to insurance, which implied that the English law had to be applied as discussed above.

## 2. *Under-insurance and average*

The doctrine of average applies to most indemnity policies where the insured has insured the property for less than its true value. In terms of this doctrine, the insured is regarded as his or her own insurer to the extent of the under-insurance. If, for example, the insured property is a house and it is insured for 75% of its true value, the insurer will only pay out 75% of the damage to the house irrespective of the amount of the damage. This doctrine is a *naturale* in the case of marine insurance and an express term in most other indemnity policies.

The doctrine of average applies only to indemnity insurance.

## 3. *Double insurance and contribution*

A person can insure the risk object with more than one insurer. However, the nature of indemnity insurance is such that the insured can never recover more than his or her loss. Thus, if the object is fully insured with two insurers, the insured can either claim a *pro rata* portion from each insurer, or claim the full amount from any one of the two insurers. However, if one insurer settles the claim in full, it will have a right to claim a *pro rata* portion from the other insurer. This principle is known as contribution. The principle applies only to indemnity insurance.

# IV. INSOLVENCY

## A. Introduction

The South African law of insolvency for natural persons is largely regulated by the Insolvency Act 24 of 1936, although the common law plays an important role as well. The Act only deals with the insolvency of natural persons. It does not apply to the liquidation of juristic persons (see Chapter 10.V.), although some of the provisions of the Act are *mutatis mutandis* applicable in the liquidation of juristic persons. Since partnerships (see Chapter 10.II.) and trusts (see Chapter 5.H.) are not juristic persons in the true sense (although often treated as such), they are also covered by the Act.

A new insolvency regime consisting of one Act covering both natural and juristic persons is envisaged. These plans are contained in Discussion Paper 86 of the South African Law Commission. At this stage, the proposals of the Commission are only in the form of a draft Insolvency Bill and there is

uncertainty whether, and if so, when, this Bill will be approved by the legislature. Until the Bill is assented to and signed into law, the Act of 1936 will still be applicable.

The South African Courts use factual insolvency as test when confronted by an application for the sequestration of the estate of a natural person. In the case of liquidation of a juristic person, the test is generally that of commercial insolvency. In the case of a natural person, the Court will attempt to determine objectively whether the liabilities of the debtor exceed his or her assets. If this is the case, the Court is likely to exercise its discretion in favour of sequestration.

As a general rule, only the High Court has the capacity and jurisdiction to decide on insolvency matters. A specific division of the High Court has jurisdiction to hear an application for a sequestration order of a debtor's estate if the debtor is domiciled, or owns property, or is entitled to property within the Court's jurisdiction on the date upon which the sequestration application is lodged with the Registrar of the Court. The Court will also have jurisdiction if the debtor was usually resident or conducted business within the jurisdiction of the Court during the 12 months prior to the lodging of the sequestration application.

## B. The Sequestration of a Debtor's Estate

The Act provides for two forms of sequestration, namely by means of voluntary surrender or by means of compulsory sequestration.

### 1. Voluntary surrender

Section 3(1) of the Act enables the debtor or his or her authorised agent to apply for the sequestration of his or her estate. The appropriate person to bring the application in the case of a deceased estate is its executor. Should the estate be that of a partnership, the application must be brought by all the partners. Where parties are married in community of property, both have to bring the application.

A Court may grant an order for voluntary surrender if it is satisfied that the estate of the insolvent is indeed insolvent; that the debtor has sufficient assets to cover the sequestration costs; that the sequestration is to the advantage of the creditors, and that certain formalities have been complied with:

- The estate of the debtor must be insolvent. One of the formalities that the debtor has to comply with is to publish a notice of his or her intention to apply for voluntary surrender in various newspapers. The debtor also has to draft a statement of affairs which lists the value of all his or her assets and liabilities. The Court, however, is not bound by the valuations in the statement.

- The Court has to be satisfied that the debtor has sufficient assets in the free residue to cover the sequestration costs. Section 2 of the Act defines the ‘free residue’ as that portion of the estate that is not subject to a right of preference due to a special bond, tacit hypothec, pledge or right of retention. The Court has to refuse the application should the free residue be insufficient to cover the sequestration costs.
- The application will not succeed should the debtor be unable to show that the surrender of his or her estate will be to the advantage of his or her creditors. In general this means that there has to be some pecuniary advantage for the creditors should the application be granted.
- The Court has to be satisfied that certain statutory requirements have been complied with. The debtor must publish a notice of surrender in the Government Gazette and in a newspaper that is distributed in the magisterial district where the debtor resides or if he conducts business, in the district where he mainly conducts business. The notice must be in the prescribed form and must contain the name, address and occupation of the debtor, the date and division of the High Court where the application will be made and where and when the statement of affairs can be inspected. It must be published not more than 30 days prior to the date of the application and not less than 14 days before the date of the application. The debtor, furthermore, must send a copy of the notice to every creditor whose address he knows or can ascertain.

The statement of affairs to be lodged must contain certain information such as:

- a balance sheet;
- a list of immovable property and the value thereof and whether any mortgage bonds have been registered against it;
- a list of movable property and its value;
- the stock in trade and its cost price;
- a list of all debtors with their details;
- a list of all creditors with the details of each claim and whether any security is held for the claim, and
- certain personal details of the debtor, including whether his or her estate has been sequestrated before.

The statement of affairs must be completed in duplicate and lodged with the Master’s office. Should there not be a Master’s office, one copy must be lodged

with the district magistrate. The statement can be inspected for a period of 14 days. Thereafter the Master (or magistrate) will issue a certificate to the effect that the statement was lodged for inspection. This certificate will then be filed with the Registrar of the Court prior to the hearing.

## 2. *Compulsory sequestration*

A creditor may also apply to have the estate of the debtor sequestered. Such an application has to satisfy the Court that the applicant has *locus standi*; that the debtor is insolvent or has committed an act of insolvency; and that there is reason to believe that sequestration will be to the advantage of the creditors.

a. The requirement of *locus standi* means that the applicant must have a liquidated claim of at least R100 against the debtor. Should two or more creditors bring the application they should have a combined liquidated claim of at least R200.

b. Proof of insolvency is often rather difficult. For this reason the legislature introduced section 8 into the Act which identifies eight situations that are known as acts of insolvency. Proof by the creditor that that the debtor has committed any of these acts, gives rise to a rebuttable presumption that the debtor is insolvent. The acts of insolvency are the following:

- In terms of section 8(a), a person commits an act of insolvency if he or she departs from the Republic of South Africa or stays away from the country, or leaves his or her dwelling, or otherwise absents himself or herself with the intention of evading or delaying payment of his or her debts. The mere absence or departure does not suffice since it may have no link with his or her debts.
- In terms of section 8(b), a person commits an act of insolvency if a Court has given judgment against him or her and he or she fails to satisfy the judgment on demand, or fails to indicate sufficient disposable property to satisfy the judgment, or it appears from the sheriff's return that he or she could not find sufficient disposable property to satisfy the judgment. 'Disposable property' means any property that can be attached and sold in execution even if that property is situated in another area. It includes movable and immovable property as well as corporeal and incorporeal property. Immovable property subject to a mortgage bond is not disposable property unless the applicant is the first mortgagee.
- In terms of section 8(c), a person commits an act of insolvency if he or she disposes of property, or attempts to dispose of property, that prejudices his or her creditors or would prejudice them, or that prefers one creditor above

other creditors or would prefer one above the other. The effect of the disposition or attempted disposition is important. ‘Disposition’ means any transfer or abandonment of rights to property. It includes a sale, lease, mortgage, pledge, payment, release, compromise, donation or any contract providing therefor. There is case law to the effect that suretyship also constitutes a disposition for the purposes of the Act.

- In terms of section 8(d), a person commits an act of insolvency if he or she removes property or attempts to remove property with the intention of prejudicing his or her creditors or to prefer one above the other. Here the effect is not important but the intention of the person who removed the property is crucial.
  - In terms of section 8(e), a person commits an act of insolvency if he or she makes, or offers to make, any arrangement with any of his or her creditors for releasing him or her wholly or in part from his or her debts. If a person merely asks for an extension or denies the amount owed it will not be an act of insolvency in terms of this section. There has to be an express or implicit indication that the debtor cannot pay the full amount of the debt.
  - In terms of section 8(f), a person commits an act of insolvency if he or she fails to lodge a statement of affairs with the Master after publication of his or her notice of voluntary surrender that has not lapsed or been withdrawn; or if he or she lodges a statement that is incorrect or incomplete in a material respect; or if he or she fails to apply for voluntary surrender on the date mentioned in the notice.
  - Section 8(g) describes one of the most common acts of insolvency, namely if a person notifies any of his or her creditors in writing that he or she is unable to pay any or all of his or her debts.
  - In terms of section 34 of the Act, if a dealer wishes to dispose of his or her business, goodwill or assets of the business, and such disposition is not in the ordinary course of that business, he or she has to publish a notice of the intended disposal in the Government Gazette. The effect of this is that all debts immediately become due and payable. Should the debtor be unable to pay these debts, it is regarded as an act of insolvency in terms of section 8(h).
- c. Finally, the Court must be satisfied that there is reason to believe that the sequestration will be to the advantage of the creditors. The burden of proof, in this instance, is lighter than with voluntary surrender. A creditor must show that the sequestration of the debtor’s estate will be more advantageous than

maintaining the *status quo*, for example that assets that have been removed could be found, or that certain dispositions could be set aside. This would lead to a situation where a creditor could receive a greater dividend than would otherwise have been the case.

### C. Effect of Sequestration on the State of an Insolvent

In terms of section 20(1)(a), the insolvent loses control over his or her estate once a sequestration order has been granted. The estate vests in the Master and then in the trustee of the insolvent estate.

### D. Property Forming Part of the Insolvent Estate

All the property of the insolvent on the date of the sequestration of his or her estate, as well as any property that he or she receives during the course of his or her insolvency, form part of his or her insolvent estate. According to section 2, property means all movable and immovable property in the Republic of South Africa. It also includes all contingent rights except those of a fideicommissary heir or legatee.

As regards property outside the Republic of South Africa, the common law rule is that only movable property can form part of the insolvent estate, and then only if the insolvent is domiciled within the jurisdiction of the sequestering Court at the date of sequestration. However, to administer such assets, the trustee would in practice need to obtain the recognition of the foreign Court where such assets are situated. The inability of the common law to deal effectively with the problem of foreign assets has accentuated the need for cross-border insolvency regulation and the harmonisation thereof. South Africa's policy on cross-border insolvency is contained in the Cross-Border Insolvency Act 42 of 2000. Although this Act came into effect on 28 November 2003, the relevant Minister has not yet listed those countries whose creditors would receive assistance from South African Courts. The question of reciprocity is therefore still delaying the implementation of this legislation. The South African cross border insolvency legislation was closely modelled on the UNCITRAL Model Law.

Property inherited by the insolvent during his or her formal insolvency will also fall into the insolvent estate. A term in a will that stipulates that the inheritance of an insolvent will not form part of his or her insolvent estate is of no effect. Also, where parties are married in community of property and one spouse inherits property and the will stipulates that the inheritance will form part of the heir's separate estate, that inheritance will nevertheless form part of the

insolvent estate. It is, however, possible for the testator to appoint a substitute, should the heir be insolvent, and for an heir to repudiate the inheritance.

In terms of the Act, certain property is excluded from the insolvent estate, for example clothing, linen, furniture and income, although the trustee can attach surplus income.

#### **E. Effect of Insolvency on the Legal Position of the Insolvent**

As a general rule, insolvency does not affect the insolvent's contractual capacity. However, in order to protect the creditors, the Act contains certain limitations on his or her contractual capacity. In terms of section 23(2), an insolvent may not enter into a contract that purports to dispose of property in the insolvent estate. It is further provided that the insolvent needs the written consent of his or her trustee to enter into a contract that adversely affects or that could adversely affect his or her estate or the contribution to his or her estate. Any such contract is voidable. Should it be set aside, restitution must take place.

#### **F. Effect of Sequestration on the Estate of the (Solvent) Spouse**

Section 21 is one of the anachronisms in the Act. In earlier times when women were generally not substantially economically active, it often happened that men transferred their assets to their wives if they expected the sequestration of their estates. It was extremely difficult for the trustee to prove that the transactions were fraudulent or simulated. Section 21 of the Act was introduced to lighten this burden. The effect of the section is that the estate of the solvent spouse also vests in the trustee of the insolvent spouse. The burden of proof is accordingly borne by the solvent spouse to show that the assets are indeed his or hers. Although the provision has been challenged in the Constitutional Court, it was held to be constitutional and not discriminatory.

#### **G. Prior Incomplete Contracts**

The general principle is that contracts entered into by the insolvent before sequestration are not terminated by the sequestration. All the rights and obligations in terms of the contract are transferred to the trustee. The trustee can choose whether to continue with the contract or to repudiate it but the choice must be exercised within a reasonable time. A recent amendment changed the effect of the insolvency of an employer on the employment contract. Previously, the contract was terminated automatically upon the sequestration or liquidation of the employer. The position now, however, is that the employment contract is

merely suspended. The trustee has to engage in consultations with the employees or their representatives to seek alternatives and may only dismiss the employees after a period of 45 days from the date of sequestration.

Further contracts regulated by the Act are lease agreements (where the lessee is insolvent); contracts of sale of movable property for cash (where the purchaser is insolvent); contracts of sale of immovable property (where the purchaser is insolvent), and instalment sale transactions. Other contracts are regulated by the common law or other statutes. The Alienation of Land Act 68 of 1981, for example, regulates contracts of sale of immovable property where the seller is insolvent.

## H. Pre-Sequestration Dispositions that may be Set Aside

Certain pre-sequestration dispositions can be set aside. They are dealt with below. The effect of the setting aside of the disposition is regulated in section 32. In terms of section 32(3) the trustee may reclaim the asset or the value of the asset at the time of the disposition or at the time of setting aside, whichever is greater. A ‘disposition’ means any transfer or abandonment of rights to property. It includes a sale, lease, mortgage, pledge, delivery, payment, release, compromise, donation or any contract with such effect. The conclusion of a suretyship agreement has also been held to be a disposition.

### 1. *Dispositions without value*

Section 26 authorises the Court to set aside a disposition made without value. The important feature is the fact that there was no obligation on the insolvent to make the disposition. If the disposition was made more than two years before sequestration, it can only be set aside if the trustee proves that the insolvent’s liabilities exceeded his or her assets immediately after the disposition. However, if the disposition was made less than two years before sequestration, the beneficiary will have to prove that the insolvent’s assets exceeded his or her liabilities immediately after the disposition to avoid it from being set aside. Note that this applies only to dispositions made without value. If the beneficiary gave value, section 26 is not available to the trustee. Value is not necessarily monetary value. There will usually be value if the receiver of the disposition gave some form of counter-performance.

Section 27 provides an exception to section 26. If the disposition was made in terms of an antenuptial contract, the beneficiary may retain the disposition. However, the disposition must have amounted to an immediate benefit, and it must have been made in good faith. Moreover, the antenuptial contract must have been registered at least two years before sequestration.

## 2. *Voidable preference*

A debtor may often pay one of his or her creditors shortly before his or her sequestration. The consequence may be that this creditor is preferred above the other creditors. The aim of section 29 is to ensure that all the creditors are treated equally. In terms of section 29, the Court may set aside a disposition made by the insolvent within six months of the sequestration of his or her estate, or of his or her death, if the effect of the disposition was that one creditor was preferred above another, and the liabilities of the debtor exceeded his or her assets immediately after the disposition. The beneficiary may, however, retain the disposition if he or she can prove that it was made in the ordinary course of business and that the insolvent did not thereby intend to prefer him or her above the other creditors.

## 3. *Undue preference*

In terms of section 30, the Court may set aside a disposition made by the insolvent if it was made at a time when the liabilities of the insolvent already exceeded his or her assets and the insolvent thereby intended to prefer that creditor above the other creditors. The estate of the insolvent must have been sequestrated thereafter. The burden of proof is on the trustee.

Undue preference differs from voidable preference in a few respects:

- no time limitation applies for a disposition that is an undue preference;
- the debtor's liabilities must have exceeded his or her assets at the time of the disposition for it to constitute undue preference;
- there is no defence available to the creditor in the case of undue preference, and
- whereas the intention with which the disposition was made is important in the case of undue preferences, the emphasis in the case of voidable preference is on the effect of the disposition.

## 4. *Collusion*

Section 31 provides that a Court may set aside a disposition if the insolvent colluded with another person to dispose of assets, thereby prejudicing the creditors or preferring one above the other. The trustee must prove that both parties were aware of the debtor's insolvency and that the disposition would cause prejudice to the creditors or that one would be preferred above the other. Moreover, section 31(2) provides that the person who colluded with the debtor can be ordered to pay damages for any harm suffered by the estate. He or she can

also be fined and, if he or she is a creditor himself, lose his or her claim against the insolvent estate.

#### 5. *Other dispositions that can be set aside*

A trader who wishes to dispose of his or her business, or of its goodwill or property otherwise than in the ordinary course of business, must comply with certain formalities (for example notice of the sale must be published). In terms of section 34, a failure to do so renders the sale void as against the creditors of the business for a period of six months after the disposition, as well as against the trustee if the estate is sequestrated at any time within that six month period.

Although the *actio Pauliana* is also available under common law to have dispositions *in fraudem creditorum* set aside, litigants do not often use it.

### I. Creditors

There are three categories of creditors, namely secured, preferent and concurrent creditors. Secured creditors have security for their claims, which grants them preference over certain assets in the estate. Preferent creditors in turn have a preference to the free residue. Their position is regulated by sections 96-102 of the Act and they are paid in a specific order. Should there be any money left after the preferent creditors have been paid, concurrent creditors finally share equally in the residue. If there are not sufficient funds in the free residue to satisfy each claim in full, each creditor will receive a pro rata share of his or her claim.

### J. Meetings of Creditors and Proof of Claims

A number of meetings are held after the estate of the debtor has been sequestrated. At these meetings the creditors of the insolvent will prove their claims, elect a trustee and give directions to the trustee in respect of the winding-up of the estate. In principle, there are four types of meetings, namely the first, second, special and general meeting.

### K. The Trustee

The trustee is elected at the first meeting of creditors. The Master may, however, refuse the elected person. Certain people may not act as trustees of insolvent estates and in this regard a distinction is drawn between people who are absolutely prohibited from being trustees (that is, who may never be trustees) and people who are relatively disqualified (that is, who are only disqualified in respect of certain insolvent estates).

## L. Composition

Composition is an agreement between the insolvent and his or her creditors in terms of which the creditors accept partial payment of their claims in full and final settlement. Composition can be in terms of the common law or the Act. Common-law composition is seldom encountered, as it requires acceptance by all the creditors. As far as composition in terms of the Act is concerned, section 119(1) provides that the insolvent may make an offer of composition to his or her trustee at any stage after the first meeting of the creditors. The trustee must consider the offer and if he or she is of the opinion that the creditors will accept, he or she notifies them of the offer and convenes a general meeting for the creditors to vote on the issue. If the trustee refuses to notify the creditors of the offer, the insolvent may approach the Master with the request that the offer be presented to the creditors. The composition must be accepted by a three-quarters majority in number and value of all the creditors who have proved their claims. To be valid, the decision must be taken in good faith.

## M. Rehabilitation

Rehabilitation brings the formal insolvency of a person to an end. The insolvent, however, does not have a right to be rehabilitated and the Court will always have a discretion whether or not to issue a rehabilitation order. In terms of section 127A(1), a person will be rehabilitated automatically after the expiry of ten years from the date of sequestration unless the Court decides that the person should not be rehabilitated automatically. The Act further provides for certain situations in which the insolvent can apply for rehabilitation before the ten-year period has been completed. However, even if the specific requirements are satisfied by the insolvent, the Court still has a discretion to refuse the application. In general, at least four years have to expire before an insolvent may apply for rehabilitation.

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# *Chapter 10*

## **Companies and Other Business Entities**

***Philip Sutherland\****

### **I. INTRODUCTION**

A business entity can be defined as an organisational mould established by law for conducting business activities. The most important examples are sole proprietorships, business trusts, partnerships, close corporations and companies. A sole proprietorship is a business conducted by an individual in his or her own name, and is merely an extension of such a person, while a business trust is a type of trust to which the normal rules of trust law are applicable. Neither of these entities warrants separate analysis here.

### **II. PARTNERSHIPS**

Partnerships are not governed by statute but by common law – the French jurist Pothier's *Traité du Contrat de Société* (1765) having been particularly influential. Partnerships are formed contractually, which means that the ordinary principles of the law of contract govern their conclusion. Any two or more, but generally no more than 20 persons may create a partnership,<sup>1</sup> and they must agree on three essential aspects: every partner must undertake to make a contribution, whether in the form of money, other assets, or labour and skills; its business should be carried on for the joint benefit of the partners and its object must be to make a profit; moreover, every partner must have the intention to create a partnership by means of the contract.<sup>2</sup>

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<sup>1</sup> Companies Act 61 of 1973, s. 30(1).

<sup>2</sup> *Joubert v. Tarry and Company* 1915 TPD 277.

A partnership is not a separate juristic person or entity.<sup>3</sup> A complex web of legal relationships exists between each of the partners and between them and the outside world. The partnership itself cannot hold rights or incur liabilities and would only be treated as an entity for two very limited purposes. An existing partnership may sue or be sued in its own name and execution of a judgment must first be obtained against the partnership assets and then against the assets of the partners while the partnership is in existence.<sup>4</sup> If an insolvent partnership is sequestrated, the estates of the partners will also be sequestrated, but partnership assets will first be used for partnership debts and the assets of partners will be used for personal debts. Only if there is a residue in the estates of partners will it be used to pay partnership debts and vice versa.<sup>5</sup>

The partnership fund consists of the rights held by the partners as co-holders and partners. Each partner has an undivided share in its assets. The nature of the right that a partnership in this sense obtains to particular assets will depend on the intention of the parties. Often the use and not the ownership of an asset will be contributed and it may be difficult to distinguish between these situations. Moreover, co-ownership of assets will only result if proper delivery has been made in accordance with property law. While the partnership is in existence, the partners are co-debtors in respect of liabilities owed to third parties and co-creditors in respect of rights against third parties and thus they may only sue or be sued together. However, after dissolution of a partnership, partners will be jointly and severally liable for its debts, although they will remain joint creditors. Accordingly, any ex-partner may be sued by a creditor for the whole debt owed by the partnership and upon performance will have a right of recourse against other ex-partners. The size of each partner's share in the partnership assets will depend on agreement. In the absence of agreement, shares will be determined by profit share and if this is not agreed, by the value of contributions. If none of these can be determined, each partner will have an equal share. Partnership assets may only be used for partnership purposes unless agreed otherwise.

Internally, partners owe each other fiduciary duties to act with the utmost good faith. In addition, each partner will become delictually liable if he or she does not conduct partnership business with reasonable care and skill. Each partner has a right to share in net profits and all must share in expenses incurred in

<sup>3</sup> *Strydom v. Protea Eiendomsagente* 1979 (2) SA 206 (T).

<sup>4</sup> Supreme Court rule 14 and Magistrates' Court rules 40, 54.

<sup>5</sup> Insolvency Act 24 of 1936, ss 2, 3(2), 13, 49, 92(5), 128.

making such profits. However, they may agree that particular partners will not be liable for net losses. In this regard two special types of partners are accordingly recognised, namely a silent partner and a partner *en commandite*. These partners do not participate actively in the business of the partnership and do not incur liability to creditors of the partnership for outstanding liabilities, but only to the other partners. Moreover, the liability of a partner *en commandite* is limited to a particular amount. If the partners have not specifically agreed on how each will share in profit and loss, the size of each partner's contribution will determine the matter. Again, if the relative size of contributions cannot be determined, they will share equally in profits and losses. Unless otherwise agreed, every partner may be involved in and perform acts of management on behalf of the partnership. A partner will only be entitled to compensation for performing his or her duties if all the partners specifically agreed to it, although a partner may be entitled to a refund of his or her expenses on behalf of the partnership. All partners involved in the management of the partnership are under an obligation to keep proper accounts of all its transactions, unless the parties reached a different agreement on how accounts should be made. However, partners may not be exempted from providing proper financial information regarding their management of the partnership and each will have a right of access to its accounts.

The remaining partners may force a partner to comply with his or her duties as partner.<sup>6</sup> Such a claim will have to be instituted in the name of and against individual partners and not the partnership. A claim may be brought both in the course of and after the dissolution of the partnership. However, claims for amounts owed in respect of its business may only be made after accounts have been settled. Although the Court is loath to force partners to settle accounts outside the designated times, it will do so in exceptional cases. Courts acknowledge that partners enter into an intimate fiduciary relationship and will not foist a partner onto partners who are unwilling to accept him or her.

The lack of juristic personality complicates dealings between the partnership and the outside world. A partner is allowed to bind the partnership (more precisely, the partners acting collectively) contractually if he or she is entitled to act as its representative. The contract must be concluded by the partner as representative of the partnership and the third party must intend to contract with the partnership. The partner must therefore have authority to act on behalf of the partnership or the partners will be estopped from denying that authority has been granted. Authority may be given expressly or tacitly, or granted afterwards by

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<sup>6</sup> *Robson v. Theron* 1978 (1) SA 841 (A).

ratification of the juristic act. It may also be implied in terms of the mutual mandate by which every partner is granted authority to bind the partnership within the scope of its business. The authority of a partner may be restricted by agreement between the partners but the restriction will not operate against a third party acting in good faith. The partnership will not be able to deny, or will be estopped from denying liability under a contract concluded on its behalf if the partners culpably created the impression that the partner acting on behalf of the partnership had authority to conclude the contract and the third party relied on such impression to his or her detriment. A person who is not a partner will be able to conclude contracts on behalf of the partnership in terms of the ordinary principles of agency and the mutual mandate will not apply in favour of a third party dealing with a non-partner. A partnership will only incur delictual liability on the basis of vicarious liability, and only individual partners, and not the partnership, can be found guilty of a crime.<sup>7</sup>

A partnership may be dissolved in various ways. The partners may provide in their partnership agreement how and when the partnership will be dissolved, for example on notice by one of the partners, at the expiry of a term, or when a particular project is completed. Since a partnership is an association of specific persons, any change in partners will also dissolve the partnership. Consequently it will dissolve on the death or retirement of a partner or when a new partner is admitted.<sup>8</sup> A partnership formed for an indefinite period may be dissolved by notice given by one of the partners to the others. If the aim of such notice is to avoid a loss or secure a personal benefit that would otherwise fall to the partnership, he or she will breach his or her fiduciary duty and will continue to be liable for the losses suffered by the partnership and will still have to share his or her profit with the other partners. If a partner dissolves a partnership in contravention of a restriction agreed upon, the partnership will dissolve, but the dissolution will amount to a breach of contract in the form of repudiation. Partners may further dissolve the partnership by agreement or request the Court to order its dissolution

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<sup>7</sup> S. 332(7) of the Criminal Procedure Act 51 of 1977 determines that if a partner commits an offence while carrying on the business of the partnership or furthering the interests of the partners, then the other partners will also be deemed to be guilty of an offence. The onus will then be on the partner to prove that he or she was not involved in the commission of the offence. But this provision is likely to be unconstitutional. See *S v. Coetze* 1997 (3) SA 527 (CC) on the comparable s. 332(5).

<sup>8</sup> *Berco Sameday Express v. McNeil* [1996] 4 All SA 100 (W).

for which the Court has a broad equitable jurisdiction. Finally, a partnership is dissolved if the partnership or the estate of any partner is sequestrated.

After dissolution, the partnership will be liquidated. Its assets will be applied to pay partnership debts and surplus assets will be distributed to partners. The partners nevertheless may make different arrangements: it is often agreed that assets will be taken over by a firm consisting of the remaining partners where a partner resigns or a new partner enters the partnership. If the partnership is liquidated, the partners will establish the liquidation process by agreement. A liquidator may be appointed to administer the process and the Court may be approached to resolve any disputes regarding the appointment of the liquidator or the liquidation process.

If the partnership is dissolved, it continues to exist only for the limited purpose of liquidation and distribution of assets. Fiduciary duties of partners, for instance, will continue, but the power to represent the partnership on the basis of the mutual mandate will terminate. From the moment of dissolution, individual partners may be sued by creditors for partnership debts.<sup>9</sup> The partners may also agree that certain terms may extend beyond termination.

### III. JURISTIC PERSONS AS BUSINESS ENTITIES

A juristic person is not a human being or natural person but is still recognised in law as a separate person. A juristic person has its own rights and incurs its own liabilities. Its members have no direct rights to its property and are not liable to its creditors merely by virtue of their membership (limited liability). The continued existence of a juristic person further does not depend on the continued membership of any person (perpetual succession). The separate recognition of juristic persons has reached the point where they are even granted basic rights in terms of section 8 of the Bill of Rights in the Constitution of the Republic of South Africa, Act 108 of 1996. Indeed, a juristic person may even sue for defamation if a defamatory statement about the way it conducts its affairs is calculated to cause it financial prejudice.<sup>10</sup>

There are good policy reasons for recognising separate juristic personality, but, like most other legal constructions, it is not immutable. Although a Court

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<sup>9</sup> *Lee v. Maraisdrif (Edms) Bpk* 1976 (2) SA 536 (A).

<sup>10</sup> *Argus Printing and Publishing Co Ltd v. Inkatha Freedom Party* 1992 (3) SA 579 (A). See also Chapter 8 V.A.4.

does not have a general discretion to ignore juristic personality, the veil of corporate personality may be pierced both in terms of the common law and legislative provisions. Most fundamentally, the separateness of a juristic person and its members with regard to assets and liabilities will be ignored where fraud, dishonesty or improper conduct is present and policy considerations favour that piercing should take place.<sup>11</sup> Section 65 of the Close Corporations Act 69 of 1984 similarly determines that the corporate veil may be pierced where a gross abuse of the juristic personality of a close corporation has taken place.

A business entity that is a juristic person may be created either at common law or by legislative enactment. At common law only associations which are not formed for the purpose of carrying on business that has as its object the acquisition of gain for the association or its members will obtain juristic personality.<sup>12</sup> Accordingly, only non-profit associations can incorporate at common law.<sup>13</sup>

#### **IV. COMPANIES AND CLOSE CORPORATIONS**

The most important business entities that may be incorporated in terms of legislation are companies in terms of the Companies Act 61 of 1973 and close corporations in terms of the Close Corporations Act 69 of 1984.

##### **A. Sources of Rules**

Much of the English company law was taken over in South Africa. The influential pre-Union Transvaal Companies Act 31 of 1909 was based on the English Companies (Consolidation) Act of 1908. The first post-union Companies Act 46 of 1926 was, in turn, based on the Transvaal legislation. South Africa did not follow every later consolidation of company law in England but only responded with comprehensive amendments to the existing consolidation. In 1963 the Van Wyk de Vries Commission was appointed to review the South African company law legislation comprehensively. The current consolidation of company law legislation, the Companies Act 61 of 1973, stemmed from the report of this

<sup>11</sup> *Cape Pacific Ltd v. Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A).

<sup>12</sup> Companies Act 61 of 1973, s. 31.

<sup>13</sup> *Mitchell's Plain Town Centre Merchants Association v. McLeod* 1996 (4) SA 159 (A).

Commission.<sup>14</sup> Despite some serious flaws, the basic consolidation has survived even after several subsequent amendments.

However, company law in South Africa has not been codified completely and a substantial portion is still regulated by common-law principles. Since company legislation was taken over from England, many of the common-law rules that apply to companies have also entered South African law. Although not strictly binding on South African Courts, English company law cases have exerted great influence and indeed still have a high status in South Africa. In certain cases it may be difficult to determine whether a particular dispute falls within the sphere of general private law, to be resolved in accordance with ordinary Roman-Dutch law, or whether it falls within the sphere of company law, where English law dominates.

A new type of business entity called the close corporation was created by the Close Corporations Act in 1984 to cater for smaller businesses on the basis that the Companies Act did not cater adequately for them. Although some of the aspects of the law that are still dealt with in the common law in the case of companies, have been codified for close corporations, the Close Corporations Act still does not represent a complete codification. English law will again strongly influence the law governing close corporations, which has many features of English origin.

## B. Different Types of Companies

The Companies Act recognises different types of companies. The broadest distinction is between companies without or with a share capital.

Companies without a share capital are limited by guarantee. Members of a company limited by guarantee must undertake in the memorandum of association to make a contribution to the assets of the company at liquidation, if necessary. Companies limited by guarantee will for general purposes be treated like public companies. Virtually all companies limited by guarantee are section 21 companies, that is, companies which have as their main object the promotion of a social, religious, or cultural purpose and which intend to apply profits only for this purpose. All section 21 companies must be limited by guarantee, their names must be followed by the expression 'association incorporated under s. 21' and their memoranda of association must determine that profits will not be distributed to members and that their assets will go to an association or associations with similar objects on its dissolution.

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<sup>14</sup> Main Report (RP 45 of 1970) and see also the supplementary report and draft Bill (RP 31 of 1972).

Most companies, however, will have a share capital. These companies, in turn, are divided into public companies that are intended for large businesses with a clear distinction between the membership and the management of the company, and private companies that are intended for smaller more intimate businesses where the distinction is not so clear. The name of a public company will be followed by the word Limited or the abbreviation Ltd and that of a private company by (Proprietary) Limited or the abbreviation (Pty) Ltd.

Since the rules of certain professions, for instance those of attorneys, auditors and doctors, preclude them from acquiring the benefits of limited liability, section 53(b) of the Companies Act makes provision that a private company may contain a clause in its memorandum of association that the directors will be personally liable for debts contracted by the company during their tenure as directors. These professionals are then allowed to be incorporated as section 53(b) companies.

The Companies Act also applies to some special types of companies such as banks, share block companies and insurance companies. However, in so far as the provisions of the Companies Act are inconsistent with the provisions of the Banks Act 94 of 1990 for banks, the Long-term Insurance Act 52 of 1998 or Short-term Insurance Act 53 of 1998 for insurance companies and the Share Blocks Control Act 59 of 1980 for share block companies, these more specific pieces of legislation will prevail.

Finally, foreign juristic persons created in other countries will also be recognised in South Africa in accordance with the rules of international private law. Moreover, the Companies Act will apply to foreign companies that have a place of business in South Africa and they will have to register in the country as external companies.

Although the Companies Act provides for other types of companies, its template is the large public company. This basic premise is inappropriate for smaller businesses. The main purpose of the Close Corporations Act was to create a simpler and more flexible type of business entity for the conduct of smaller businesses. The name of a close corporation will have to be followed by the words Close Corporation or CC. Many of the complex rules of company law have been simplified for corporations. Whereas contravention of the Companies Act is often visited with a criminal sanction, the preferred mechanism for enforcing the Close Corporations Act is to hold the members of the Close Corporation personally liable for certain debts of the corporation where the Act is contravened.

Companies may be converted into close corporations and vice versa and one type of company may be converted into another in accordance with the provisions of the Companies Act and the Close Corporations Act.

### C. Formation

The procedure for the formation of a company is relatively complex. Application must be made by lodging the originals and copies of the constitutional documents of the company (the memorandum and articles of association) with the Registrar of Companies. If the Registrar is satisfied that all requirements have been complied with, a certificate of incorporation will be issued. From that moment on, the company will have juristic personality and in the absence of fraud, the certificate will be proof thereof. Even so, a company with a share capital will not be able to conduct business unless it has also received a certificate to commence business. Where, as in most cases, no prospectus is issued before the certificate, every director must lodge a declaration with the Registrar that the company has sufficient capital to conduct its business, or if he or she does not hold that opinion, the reasons for it, the sources from which the company will be funded and the extent of funding. South African law does not have an express requirement that companies must have adequate capital at formation. This declaration is a half-hearted attempt to address some of the problems that arise where under-capitalised companies are incorporated. The law seems to attach little significance to the declaration once the certificate is issued.

Close corporations can be incorporated by lodging a founding statement signed by every founding member with the Registrar of Close Corporations. Again the corporation will come into being when a certificate of incorporation is issued by the Registrar. The procedure for the formation of a corporation is simpler and cheaper than that for the formation of a company.

South Africa has taken over the English principle that it is not possible to contract as an agent on behalf of a non-existent principal in the form of a company to be incorporated. However, such a contract can be concluded by the promoter as a stipulator or promisee in terms of a contract for the benefit of a third party.<sup>15</sup> The company may then acquire both rights and duties from this contract if, once incorporated, it accepts the benefit. Moreover, both the Companies Act and the Close Corporations Act provide that pre-incorporation contracts may be concluded on behalf of a company or corporation if certain procedures set out in these Acts are complied with. Again the company or corporation will only become a party to such a contract on acceptance.

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<sup>15</sup> *McCulloch v. Fernwood Estate Ltd* 1920 AD 204.

## D. Constitutional Documents

The memorandum of association is the basic constitutional document of the company. It must give the name, authorised capital, main object and powers of the company, but can also include special conditions. The articles of association determine in greater detail how the company will function. A company may compile its own articles or it may accept the model articles set out in Schedule 1 to the Companies Act subject to any additions, modifications and omissions (section 59). The constitutional documents will bind the members and the company and the members *inter se* like a contract (section 65(2)), although the analogy between a company's constitution and an ordinary contract must not be exaggerated. Many of the ordinary rules of contract law will not apply to the constitution. Most importantly, the constitution may in most cases be amended by special resolution. Agreement is neither required nor sufficient for amendment although the members of a company may depart from the articles for a particular occasion by unanimous assent. The relationship between members is often also regulated by a shareholders' agreement. This agreement is not a constitutional document and ordinarily amounts to no more than a voting agreement between members or a unanimous assent to depart from certain provisions of the articles.

The founding statement of a close corporation must contain the name of the corporation; its principal business; its postal and physical address; the full name and identity number of each member; the size of each membership interest in the corporation, and particulars about contributions made to the corporation in exchange for receiving members' interests.

Furthermore, the members of a corporation may conclude an association agreement and/or an informal agreement to regulate their internal and external relationships. If no association agreement has been concluded, certain default rules will regulate the activities of the corporation. The association agreement need not be lodged with the Registrar, but it must be in writing and signed by every person who is a member at the time of its conclusion. Future members will be bound automatically by the association agreement. The members will also be bound by an informal agreement between them as long as it only affects the corporation and the members, ceases to exist if the membership of any party to it is terminated, and is not inconsistent with the provisions of an association agreement.

## E. Shareholding and Membership

A share consists of a bundle of rights enforceable by a member against a company. Ordinarily a shareholder will have a right to dividends once declared,

a residue at liquidation as well as a right to attend and vote at meetings of members.

A share will come into being when allotted and issued by a company in exchange for a consideration, which will then become the capital of the company. Shares may only be issued at a discount in very limited circumstances.<sup>16</sup> The price of shares must be paid in full before they may be allotted or issued (section 92) and commission may not be paid out of capital to any person in consideration of that person subscribing for shares in the company. Every company must have a register of allotments to enter information such as the consideration for which shares are allotted. The consideration must have a monetary value, which may take the form of money or services. If shares in a public company are offered to the public, a prospectus has to be issued.<sup>17</sup> A private company must determine in its articles of association that it will not offer shares to the public.

In the memorandum, the company must state the number and types of shares that it may allot and issue. It may not issue more shares unless the number has been increased by special resolution. Shares may have a fixed or par value or they may be issued without such a par value. All the ordinary and all the preference shares of a company must be of the same type. The par value of a share is merely a value denominator and it says very little about the actual value of the shares. Shares are mostly issued at a premium that is above the par value. Still, par value shares are generally preferred over non-par value shares. A company may also issue different classes of shares or shares consisting of different rights. The division of shares into classes is normally based on differences as to par value, or the other rights that shareholders may have. The articles of a company will normally determine that class rights may be varied with the consent in writing of the holders of three-fourths of the shares of the class issued or by a resolution taken at a separate meeting of members of the class.<sup>18</sup> However, other procedures for variation of class rights may also be contained in the constitution of the company.<sup>19</sup>

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<sup>16</sup> See Companies Act 61 of 1973, s. 81 for par value shares and s. 82 for no par value shares.

<sup>17</sup> *Ibid.*, ss 20, 142-169.

<sup>18</sup> See Companies Act 61 of 1973, s. 102 read with s. 252.

<sup>19</sup> *Ibid.*, s. 56(5).

There is no limitation on the maximum number of shareholders of a public company, but its members will become personally liable for its debts if it continues to have less than seven members for longer than six months, unless it is a wholly owned subsidiary of another company. By contrast, a private company may have only a single member but its articles of association must determine that the company will not have more than 50 members.

The signatories to the memorandum of association will become the first members of the company. Thereafter, any person who has consented to the memorandum and whose name has been entered into the register of members will become a member. The number of shares held by each member must also be entered on the register for membership is based on shareholding. Even a signatory who automatically becomes a member will have to undertake in the memorandum to take up shares in the company. Nonetheless, in most cases membership will still depend on registration in a register of members although the register is only *prima facie* evidence of matters that is entered into it and an application may be brought to Court for the rectification of the register.

A share certificate will be issued to a person for shares registered in his or her name.<sup>20</sup> The certificate will be *prima facie* evidence of title to the shares.<sup>21</sup> Listed shares may be dematerialised in the sense that they may be held electronically in accounts established in terms of the Act instead of through share certificates. Only uncertificated shares may be dealt with through the JSE Securities Exchange. These electronic registers will be regarded as subregisters of companies for shares registered in them.

Normally, the terms shareholding and membership are used synonymously. However, a person may appoint someone as member to act as a representative on his or her behalf. The representative will then be registered as member, but the principal will remain the actual shareholder. From the company's perspective the representative will be the member and it will neither be allowed nor be entitled to recognise the true beneficiary (section 104). However, the nominee member, as agent, will only be able to deal with the shares in terms of the instructions of the principal or true beneficiary. Such a member will have to vote as determined by the true beneficiary. Dividends will have to be paid over to the true beneficiary. Since shareholders often hide behind nominees for dubious purposes, the

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<sup>20</sup> *Ibid.*, ss 96 and 140 on the issue of share certificates.

<sup>21</sup> *Ibid.*, s. 94, but see on share warrants, s. 101.

Act now obliges nominee members of public companies listed on a stock exchange to disclose the identity of their beneficial owners.<sup>22</sup>

In general, existing shares are transferred, like any other personal rights, by means of cession.<sup>23</sup> Cessions of shares, of course, will not necessarily change membership with regard to the shares so transferred. Membership only changes once the name of the transferor has been removed from the register of members and the name of the transferee has been entered on the register. In the meantime the transferor will hold the shares as nominee for the transferee. Uncertificated shares may only be transferred through the debiting and crediting of electronic accounts.

The shares of a public company may be made freely transferable and offerable to the public. Only the shares of public companies may be listed on the JSE Securities Exchange (the only exchange for such securities in South Africa), and this only if the other listings requirements of the exchange are complied with.<sup>24</sup> The listings requirements provide greater protection for public shareholders than general company law. The articles of association of a private company will have to restrict the transferability of its shares.<sup>25</sup> The Act does not indicate the nature of the restriction and the incorporators or members will have to determine its nature. In general, an existing shareholder who intends to sell to a person who is not a shareholder will first have to offer the shares to other existing members, and/or the directors of the company will be given the power to refuse any transfer of shares.

A close corporation is allowed to have between one and ten members and with few exceptions, only natural persons may be members of corporations.<sup>26</sup> Members in a close corporation do not have shares but membership interests expressed as a percentage. A member must be issued with a certificate signed by all the members that reflects the current percentage of his or her interest. A membership interest consists of a bundle of personal rights and obligations that the member has against the corporation. A membership interest may be obtained

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<sup>22</sup> Companies Act 61 of 1973, s. 140A and see also ss 253-256.

<sup>23</sup> See the exception of share warrants, Companies Act 61 of 1973, s. 101 and see also s. 141 on the offer of such shares to the public.

<sup>24</sup> For securities law, see the Stock Exchange Control Act 1 of 1985, the Financial Markets Control Act 55 of 1985 and the Insider Trading Act 135 of 1998.

<sup>25</sup> Companies Act 61 of 1973, s. 20.

<sup>26</sup> Close Corporations Act 69 of 1984, ss 28-29.

or increased by making a contribution to the corporation. The contributions must be in the form of money, property or services at formation.<sup>27</sup> The percentage interest to which a member will become entitled because of the contribution will be determined by agreement between members. The total percentages of interests must always be 100%. Whether a membership interest may also be held through a nominee, is not yet settled.

A share must be distinguished from a debenture that can be described as a written acknowledgement of debt. The consideration received in exchange for the issue of debentures is long-term loan capital that makes a debenture holder a special type of creditor of the company. A company may issue debentures when authorised by its constitution to do so. The articles of a private company must prohibit the offering of debentures to the public (section 20), but beyond public offerings it may also issue them.<sup>28</sup>

A person may also become a member or increase an existing membership interest by acquiring an interest from an existing member. Such a transfer must take place in accordance with any relevant rules in the association agreement or otherwise it may only take place with the consent of every other member of the corporation. The transferred percentage of membership interest must then be allocated to the transferee. A wholesale change of membership may only take place by means of registration of an amended founding statement. However, membership percentages may be changed informally. This may attract certain penalties if an amended founding statement, reflecting the changed circumstances, is not registered within 28 days of the change.

## **F. Groups of Companies and Close Corporations**

A company or close corporation may be a holding company or a corporation, that is, it may control another company through shareholding, contract or control over directors. A close corporation may have only natural persons as members, but companies may be the subsidiaries of other companies or of a close corporation. Companies or corporations that form part of groups are still separate juristic persons. However, the Companies Act defines subsidiaries and holding companies, and together with the Close Corporations Act, regulates the relationship between such groups.<sup>29</sup> A holding company must prepare group financial statements that

<sup>27</sup> *Ibid.*, ss 24, 33(2), 63(b).

<sup>28</sup> See further on debentures generally, Companies Act 61 of 1973, ss 126-131.

<sup>29</sup> See the definitions in the Companies Act 61 of 1973, ss 1(3), 1(4), 1(55).

simultaneously reflect the financial position of all the companies in the group.<sup>30</sup> Loans by subsidiaries to other companies in groups may lead to personal liability of the directors of the subsidiary and the holding company if it is not made on proper terms (section 37). Many of the provisions of the Companies Act and the Close Corporations Act are extended to apply to companies in a group.

## G. Capital Maintenance and Rules for Protection of Funds for Creditors

Since a company has limited liability, it is important for the protection of creditors that the use of company funds should be restricted. Traditionally, the creditors, and to some extent the members, were protected by the rules of capital maintenance which entailed that the consideration received in exchange for issuing shares could only be distributed in limited circumstances to shareholders in that capacity. Since these rules in reality gave scant protection to creditors, new mechanisms for protecting the funds of the company for creditors have been devised although the law is still in transition.

Some rules of the old system of capital maintenance, however, are still in place:<sup>31</sup>

- the company may not give financial assistance for the purpose of or in connection with the subscription or purchase of its shares or those of its holding company (section 38);
- limitations are placed on the uses that may be made of the premium account and the proceeds received from the issue of non par value shares (sections 76 and 77);
- interest may not be paid on capital,<sup>32</sup>
- the principle of capital maintenance is still respected in the requirements for the redemption of redeemable preference shares (section 98), and
- the articles of most companies still require that dividends may be paid out of profit and not out of capital.

Nonetheless, South African law is also moving away from capital maintenance as a requirement. A company may now make payments to its shareholders from any funds as long as the articles authorise it and the company will thereafter be liquid

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<sup>30</sup> Companies Act 61 of 1973, ss 288-294.

<sup>31</sup> See also on the issue of shares at a discount, IV.E. above.

<sup>32</sup> Companies Act 61 of 1973, s. 79, but see the exceptions.

and solvent (section 90). A company may acquire its own shares if the articles authorise it by special resolution and subject to the liquidity and solvency requirements.<sup>33</sup>

Most importantly, the Companies Act provides in section 424 that the Court may declare any person who knowingly allows the company to carry on business in a reckless or fraudulent manner or with the intention to defraud creditors personally liable for any of the debts of the company. This provision has become a powerful tool in the hands of liquidators in cases where businesses have been conducted with reckless disregard for the interests of creditors or where the company has been trading in circumstances of factual and commercial insolvency. But the remedy is not only available during the winding-up process. There need not be a link between the conduct and the debts for which a person is declared to be liable. The expression ‘carrying on business’ is interpreted widely to include even a single isolated transaction. Fraudulent conduct carries its normal legal meaning and the somewhat unusual term recklessness is interpreted to at least include grossly negligent conduct or conduct that departs seriously from the ordinary standard of care of the reasonable person. ‘Knowingly’ means with knowledge of the facts from which the conclusion is drawn that conduct can lead to liability under section 424. Every person who actively took part in performing the act and every person who had a duty to act in the circumstances but omitted to do so, is subject to this provision.<sup>34</sup>

Some attempt is made to ensure that initial membership interests are paid to a close corporation, but these contributions do not really serve as a guarantee fund for creditors. The funds of the corporation are protected for creditors by different means. Membership interests may only be acquired and financial assistance for the acquisition of a membership interest may only be given by the corporation if it will be liquid and solvent.<sup>35</sup> Every payment to a member in the capacity as member may only be made if the corporation will afterwards be liquid and solvent.<sup>36</sup> In addition, section 64 of the Close Corporations Act affords the

<sup>33</sup> *Ibid.*, ss 85-88 and the further requirements set out there, s. 90.

<sup>34</sup> *Philotex (Pty) Ltd v. Snyman* 1998 (2) SA 138 (A). See also Companies Act 61 of 1973, s. 423.

<sup>35</sup> Close Corporations Act 69 of 1984, ss 39, 40 and see s. 63(e) and (f) on the requirement of written consent and further consequences.

<sup>36</sup> *Ibid.*, s. 51 and see s. 63(f) on the payment of amounts to members in the absence of an association agreement.

equivalent protection to creditors of close corporations as section 424 of the Companies Act affords to those of companies.

## H. Governance and Internal Structure of a Company

A company functions internally through organs that are established in terms of the constitution of the company, the Companies Act and the common law. Historically the two most important organs of a company are the meetings of members and the board of directors, but other organs and functionaries may also play an important role in its governance.

### I. Meetings of Members

Theoretically the meeting of members is central to the company since it represents the voice of its shareholders. Many of the powers of the members' meeting will be enumerated in the articles. The Act determines that the meeting of members has certain powers to control the directors (see IV.H.2. below), to amend the articles and memorandum by special resolution (see IV.D above), and to dismiss directors (see IV.H.2. below). In addition, the meeting has certain residual, default and inherent powers at common law. Any particular power not allocated to another organ within the company may be exercised by the members' meeting. If another organ has been allocated a power and it is not allowed or unable to exercise it, the power will also revert to the members' meeting. Finally, by their very nature, certain powers can only be exercised by members.

Two types of meetings of members can be distinguished, namely general meetings and meetings by members of a particular class when changes to their class rights are in issue. The members must have a general meeting at least once every financial year, but may call for other general meetings in terms of sections 181-183 of the Companies Act. The most important business of the annual general meeting is to consider the financial statements of the company and to sanction dividends. The articles will normally provide that the directors will recommend a dividend that may not be exceeded by the dividend declared by the members. The board of directors is also generally given a power to declare interim dividends. Consideration of the financial statements also means that the members may approve or disapprove of them.<sup>37</sup> Special matters that cannot be postponed until the next annual general meeting will be dealt with at other general meetings.

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<sup>37</sup> See *Utopia Vakansie-Oorde Bpk v. Du Plessis* 1974 (3) SA 148 (A) at 170.

Normally the same procedures will be followed in the different types of meetings. Proper notice of meetings must be given (section 186). Members may attend meetings personally, or as frequently happens, appoint proxies to attend on their behalf (section 189). The minimum quorum requirements laid down in the Companies Act in section 190 are very low but a higher quorum may be set in the articles.<sup>38</sup> Resolutions at a meeting are taken by voting. Voting may take place by means of a show of hands or on a poll. On a show of hands, every member will have one vote. On a poll, the voting rights attached to shares must be determined (section 197). Voteless shares may not be issued and each share must at least have some voting right attached to it.<sup>39</sup> The articles of a private company will have to determine the votes attached to each share. A private company may freely load the voting rights attached to shares. In a public company the votes attached to a par value share will depend on the nominal value of the share and every non par value share will have one vote.<sup>40</sup> The right to vote is a proprietary interest and a member is free to exercise it in any manner, as long as it does not constitute a fraud on the minority (see IV.H.3.c. below). Furthermore, the members, or some of them, may conclude voting agreements, which will be binding in law on them.

Two types of resolutions, namely ordinary and special, are recognised. The run of the mill resolutions of the meeting of members are ordinary, but the law often requires special resolutions when it comes to important matters, and these have to comply with certain formalities. Most importantly, they must be accepted by a three-fourths majority of the votes at the meeting, and the resolution must be registered with the Registrar of Companies (sections 199-203).

## *2. Board of Directors*

The management of the company is normally entrusted in the articles to the board of directors which will be sovereign in the sphere of management unless a specific rule of law or a provision of the articles allows the members to act otherwise. Accordingly, the balance of power in a company in practice often lies with the board of directors since it controls the important management function and since the directors are a smaller, more efficient and more coherent group.

<sup>38</sup> Companies Act 61 of 1973, s. 190. The articles normally provide for adjournment where the quorum is not obtained.

<sup>39</sup> Companies Act 61 of 1973, s. 193 but see in the case of preference shares, s. 194(1).

<sup>40</sup> Companies Act 61 of 1973, s. 195 and see s. 195(4) for further rules on voting.

This will be particularly prevalent in big corporations where many of the smaller shareholders are passive investors. In an attempt to restore some of the former balance, the Companies Act contains the following provisions:

- members may always dismiss a director by ordinary resolution (section 221);
- directors may only issue shares if they have been authorised to do so by the members (section 221);
- shares may not be specifically issued to a director or a person in his or her sphere of influence, unless specifically consented to by the members' meeting (section 222);
- unless a director holds a salaried office or employment, and does not receive share options in his or her capacity as employee, a share option may be given to him or her only if it is authorised by special resolution (section 222);
- with certain exceptions,<sup>41</sup> loans may not be made to and security may not be given for the liability of directors of the company, its holding company, subsidiaries of its holding company or juristic persons controlled by any of these directors (section 226(1));
- no payment for loss of office may be made to a director of a company, its holding company or subsidiary unless authorised by special resolution, but a payment by way of damages for breach of contract, pension gratuity or other payment in respect of past services may be made to a director even without such authorisation, and
- the directors may not dispose of the whole or substantially the whole of the undertaking of a company or the whole or greater part of the assets of a company, unless approved by the members' meeting.<sup>42</sup>

The board of directors will also act by means of meetings. The Companies Act (sections 242-246) is not as prescriptive with regard to board meetings as it is with regard to members' meetings. The common law, and very often the articles,

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<sup>41</sup> Under s. 226(2) the most important exceptions to this provision are that a company may make loans or give security to its own director if prior unanimous consent of the members had been obtained or if a special resolution to that effect has been passed; and that a loan may be made and security granted for a director of a subsidiary as long as the director is not a director of the company which grants the loan or the security.

<sup>42</sup> Companies Act 61 of 1973, s. 228. The consent may also be by unanimous assent.

will determine how meetings of directors must be called and held. Normally, a director who has an interest in a particular matter may not be included in the quorum of a meeting dealing with such a matter and such a director may not vote on the matter. The articles normally provide that the board need not meet but that they may make resolutions in writing that must be signed by all directors. Moreover, a decision arrived at unanimously by all directors with full knowledge of what is involved cannot be impugned by any of them. If irregularities occurred that could be cured by going through the same process that will inevitably have the same result, the Court will not intervene.

### 3. *Officers*

The term ‘officer’ is defined in section 1 of the Companies Act as any director, manager, officer or secretary of the company. The company is obliged to keep a register of directors, officers and secretaries of the company that contains certain information about them. Returns that contain some of this information and changes thereto must be lodged with the Registrar.

#### a. Directors

Section 1 of the Companies Act describes a director as ‘any person occupying the position of director or alternate director of a company, by whatever name he is designated’. This is not a true definition because it merely extends the term director as used in the Act to a person who occupies the position of director even if he or she has not been properly appointed. A director can therefore be defined as a person who is a member of the management organ of the company. Accordingly, a single director normally has very limited powers since the board of directors acts collectively. Directors are sometimes referred to as managing partners, agents, trustees or agents of the company. Although there is an element of truth in every one of these analogies, the position of a director is *sui generis*. He occupies a peculiar position as a member of an organ that every company is required to have in accordance with the law. Every private company must have at least one director and every public company at least two.

A director does not necessarily have a contract with the company, although Courts often take for granted that such a contract has been concluded tacitly. It has been suggested that the memorandum and articles constitute a contract for the benefit of a third party and that a director acquires rights and duties from the constitution in this manner. But it is doubtful whether the constitution as an artificial statutory contract can establish rights and duties for directors in this manner.

The law does not require financial knowledge or business acumen from a director. Certain persons are, however, disqualified from acting as directors by

section 218 of the Companies Act, as well as by the articles of association of a particular company. A person who is disqualified as a director under section 218 is not only disqualified from being appointed as a director but also from acting as a manager or being directly or indirectly involved in the management of a company. Moreover, section 219 empowers the Court to disqualify certain persons from being or acting as directors or from being involved in the management of companies for the period specified in the order.

Although the directors fulfil a central role within the company, the Companies Act is not prescriptive with regards to the way in which directors are appointed. Until the first directors are appointed, the subscribers to the memorandum will be the directors of the company and subject to the articles, these subscribers will determine the number of directors and may appoint the first directors. In practice the first directors are often appointed by name in the articles. The members' meeting has the residual power to appoint further directors and normally this power will rest with the members.<sup>43</sup> However, the articles may grant such a power to other persons. If the directors are granted the power, they will have to do so in accordance with their fiduciary duties. Moreover, the power may be given to certain creditors, a trade union, or particular member. A director must consent to appointment in writing. It is an offence to publish that a particular person is a director of a company if he or she has not been properly appointed.<sup>44</sup> Section 214 of the Companies Act provides that an act of a director shall be valid even if it is discovered afterwards that the appointment has been defective.

A director will vacate his or her office on various grounds. He or she will cease to be a director upon death, expiry of the period of appointment, becoming disqualified, if the company is wound up by the Court, and upon retirement or removal. Procedures for removal may be set out in the articles but the members will in any event have the power to dismiss a director by ordinary resolution even though this power often exists on paper only. The director will retain any claim for damages that may flow from the dismissal. The members of a company may still undertake contractually to refrain from voting for the dismissal of a director.

A director has the right against the company to exercise the powers given to him or her, to perform his or her duties, and to inspect the company's accounting records to facilitate this process. Unless the articles determine differently, the

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<sup>43</sup> See the impact of the Companies Act 61 of 1973, s. 210.

<sup>44</sup> Companies Act 61 of 1973, s. 211. See also s. 171 on the publication of directors' names.

members' meeting is empowered to award compensation to directors.<sup>45</sup> A director has no automatic right to remuneration, and will only be entitled to claim remuneration if this has been contractually agreed with the company. A director who is not remunerated is entitled to be indemnified for expenses incurred in the course of performing his or her duties.

A director owes fiduciary duties to the company. For this purpose, the members are often regarded as the embodiment of the company, but formally the duties are still owed to the company and not to the members. This approach does not necessarily accord with modern principles of proper corporate governance. There is very little theorising on the meaning of the concept fiduciary duty in South Africa. The Courts mostly distinguish different manifestations of fiduciary duties. A director:

- may not exceed his or her powers or the powers of the company;
- must exercise every power for a proper purpose, in good faith, in the interest of the company and for the purpose for which the power was given;
- must exercise his or her powers freely and independently, may not be a mere puppet or dummy, and may not contract to exercise a discretion in a particular manner, and
- may not put himself or herself in a position where his or her interests conflict with those of the company.

The latter duty takes on certain well-known forms:

- A director must disclose any interest in a contract concluded by the company to the members' meeting or only to the board of directors if the articles so provide.<sup>46</sup> This common-law duty is bolstered by statutory provisions, which also require disclosure of interests and the setting up of a register of interests.<sup>47</sup>
- A director must account for all profits made due to his or her office, unless the company, after full disclosure to either the members' meeting or the board as above, has consented to him or her taking such profits.

<sup>45</sup> The articles sometimes grant this power to the board of directors.

<sup>46</sup> The articles may even allow the interested director to take part in the decision-making process.

<sup>47</sup> Companies Act 61 of 1973, ss 234-241.

- A director may not take advantage of any corporate opportunity that should or could be acquired on behalf of the company. This duty will arise irrespective of whether the company has the resources to implement the opportunity or whether the creator of the opportunity is prepared to offer it to the company. The duty will remain until the board in good faith decides not to take the opportunity or the members waive the opportunity.
- A director may not compete with the company, although it has been accepted that a non-executive director is not in breach of his or her duties if he or she is the director of a competing company.
- A director is under a duty not to use or disclose for his or her own benefit confidential information entrusted to him or her as director.

If a director breaches any of these duties, he or she will be liable to the company for any losses suffered and will have to account for any profits made on account of such breach. Where the director has taken advantage of a corporate opportunity, the company is allowed to take over the opportunity and any benefits that have flowed from it. Finally, a contract concluded in contravention of the duties to exercise powers properly and to disclose interests in contracts may be rescinded at the instance of the company.

A director also has a duty to act with care and skill in exercising powers on behalf of the company. If the company suffers a loss because a director has acted in breach of this duty, damages can be claimed in delict from the director. The standard by which the director will be measured is partly objective and partly subjective. The standard applied is that of a reasonable person with the knowledge and experience of the particular director.

A director may not be exempted from any liability for the breach of these duties in the articles or an agreement with the director, but the meeting of members may decide not to claim from a director for breach of duty unless the decision itself is a so-called fraud on the minority (see IV.H.3.d. below). The company may also take out indemnity insurance against liability of any director or officer towards the company in respect of any breach of these duties. Finally, a Court may relieve a director from liability due to breach of one of these duties, if he or she acted honestly and reasonably and it would be reasonable to excuse him or her (section 248).

b. Managers and managing directors

Section 1 of the Companies Act defines a manager as ‘a principal executive officer of the company’, while English case law describes a manager as ‘any person who

in the affairs of the company exercises a supervisory control which reflects the general policy of the company for the time being or which is related to the general administration of the company'.<sup>48</sup> A manager must be an employee of the company, has the same fiduciary duties as a director, and is subject to the statutory prohibition regarding the granting of loans and security (see IV.H.2. above).

Company law does not really draw a distinction between executive and non-executive directors, but the distinction is important in practice. In many companies, the board of directors does not perform the day-to-day management of the company – this is left to the executive directors. A director accordingly is not necessarily a manager of the company and vice versa. In fact, the articles of a company will often determine that a director may not be appointed to any other office of profit without the consent of the members.

The managing director is a special type of manager. The articles normally allow a company to appoint such a person and to delegate powers of management to him or her. A director who is also employed as a manager will become a managing director if the board has delegated a substantial part of their powers of control to him or her. Finally, the articles mostly give the power to delegate some of the powers of a managing director to a committee of executive directors. In larger companies such executive committees frequently will do much of the day-to-day management of companies.

### c. Secretary

The definition of 'secretary' in section 1 of the Companies Act is uninformative. A secretary is any person or body corporate that performs the duties normally performed by a secretary. The secretary is the company's chief administrative officer, and the powers and duties of such a person are becoming more extensive in promoting proper corporate governance. The directors of a public company with a share capital are now obliged to appoint a secretary. The secretary must consent to appointment in the same way as a director. With the exception that a secretary may also be a juristic person, a secretary will be disqualified on the same grounds as a director. A statutorily appointed secretary must provide guidance to directors with regard to their duties, responsibilities and powers. He or she must, for example:

- report to the shareholders or directors if the company fails to comply with the laws that apply to it;

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<sup>48</sup> *Re a Company* 1980 1 Ch 138 at 144.

- ensure that proper minutes of company meetings are kept;
- certify in the annual financial statements that the company has lodged all the returns required by law, and
- ensure that a copy of the annual financial statements is sent to every person who is entitled thereto.

The company must inform the Registrar if the secretary resigns or is removed. In such circumstances the secretary must be allowed to set out the circumstances of his or her removal in the annual financial statements.

d. Shareholder actions

Three fundamental principles apply when shareholder actions against and on behalf of the company are considered:

- since company law is premised on majority rule, an ordinary majority will be able to exercise the powers of the members' meeting unless the constitution or some law specifically determines otherwise;
- Courts are loath to interfere with the internal management of the company by designated organs, and
- a company is a separate juristic person with rights clearly distinguishable from those of its members.

In certain circumstances, any member is entitled to use a personal action to force the company to act in accordance with its constitution or the law. Each member has a right to enforce compliance with primary rights contained in the articles of association. Thus the company can be forced to pay a member declared dividends or to allow such a person to attend meetings, or to act in accordance with its constitution and the law if consent by a special majority of the members will be necessary for the company to decide not to insist on compliance with a provision. A member has the right to force the directors to comply with the company's constitution, if the directors, for instance, intend to perform an act for which consent by a special resolution is required, but no such consent has been obtained. A member may force the company to refrain from concluding an illegal transaction where the illegality deprives the company of its capacity to act. The member will have a remedy against a company if the majority commits a 'fraud on the minority' and he or she is injured by it. The phrase 'fraud on the minority' is a technical term. It is committed if the majority act in a manner that unfairly discriminates in their favour at the expense of the minority by unfairly improving their powers or rights within the company to the detriment of the minority.

In certain circumstances a member may bring, despite separate juristic personality, a derivative action on behalf of the company where the rights of the company have been infringed. A derivative action can be based either on the common law or on section 266 of the Companies Act.

The common law derivative action may be instituted to recover assets parted with by the company in terms of an *ultra vires* act (unless the act is validated in terms of section 36), an illegal act, and an act for which the required special majority has not been obtained. This derivative action may be brought against a person (for example a director) who obtains a wrongful benefit at the expense of, or causes harm to, the company and uses his or her position of control to ensure that the company does not assert its rights against him or her. The common law derivative action is also available where the meeting of members is unable to enforce company rights effectively, for example due to a deadlock.

The aim of the statutory derivative action provided in section 266 of the Companies Act is to address perceived defects in the common law action. This action does not replace the common law but merely provides a further procedure for instituting derivative actions. The remedy is available where a company has suffered loss or has been deprived of a benefit as a result of a wrongful act, or a breach of trust or faith committed by an officer or director of a company and no proceedings is brought against the officer or director. The statutory remedy may be instituted irrespective of whether the company has ratified or condoned the conduct. The member must notify the company and request it to institute proceedings. If the company does not react within one month, an application may be brought for the appointment of a *curator ad litem* by means of a two-staged procedure. The *curator* will then conduct proceedings on behalf of the company.

Under section 252 of the Companies Act a member may approach the Court for a remedy if an act of the company is unfairly prejudicial, unjust or inequitable or the business of the company is conducted in a manner which is unfairly prejudicial, unjust or inequitable to his or her interests. If the Court considers it just and equitable, it may then give any remedy which it deems necessary to resolve the matters complained of.

## I. Governance and Internal Structure of a Close Corporation

Since a close corporation is intended for smaller businesses, the separation of management and membership is not always evident. If such a separation is not envisaged in the association agreement, every member who is not disqualified is entitled to participate in the management of the business of the corporation on an

equal basis.<sup>49</sup> The grounds for disqualification are more or less similar to those for directors of companies.<sup>50</sup>

Every member is liable to the corporation if he or she causes the corporation loss by not acting with the necessary care and skill. As in the case of a director of a company, the standard by which the conduct of a member will be measured is partly subjective and partly objective (section 43). Moreover, every member stands in a fiduciary relationship to the close corporation (section 42). The list of breaches of a member's fiduciary duty provided by the Close Corporations Act is not intended to be exhaustive. A member of a corporation breaches a fiduciary duty if he or she does not act honestly and in good faith and does not exercise his or her powers in the interest and benefit of the corporation or exceeds these powers. Moreover, a member must avoid conflicts of interests and may not derive any benefit from membership to which he or she is not entitled in circumstances where the benefit is obtained in conflict with the interests of the corporation. A member must notify all the other members of the extent and nature of any direct or indirect material interest in a contract with the corporation. A member shall not compete with the corporation in its business activities. If a fiduciary duty is breached, any loss suffered and any economic benefit gained therefrom may be claimed from a member. Where a contract in which a member has an interest has been concluded and a member has not disclosed his or her interest, the contract is voidable at the instance of the corporation, unless the Court declares otherwise. All the members may consent in writing to any conduct that would otherwise constitute a breach of duty, except with regard to the duty to act for the benefit and in the interest of the corporation.

Meetings of members serve the role of the meetings of the managers and owners of the corporation. Every member may call a meeting of members by notice to all the other members. The Close Corporations Act determines how the meeting has to be conducted in the absence of differing provisions in the association agreement. Subject to the association agreement, differences between members must be decided by majority vote (section 48) and every member shall have the number of votes that corresponds to the size of his or her membership interest (section 46(d) and (e)).

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<sup>49</sup> Close Corporations Act 69 of 1984, s. 46(a) and (b), and see the proviso for cases where consent of 75% of the membership interest will be necessary. See also the restriction on the making of loans without consent, s. 52.

<sup>50</sup> Close Corporations Act 69 of 1984, ss 47, 63(g), but see the exception for a person over 18.

Since corporations consist of only a few members, it is important that members should be able to co-operate. Several attempts are made to further this end. Section 49 of the Close Corporations Act corresponds to section 252 of the Companies Act, while section 50 enables a member to bring a claim on behalf of a corporation against a member who has not made a membership contribution or has breached duties in terms of sections 42 and 43 of that Act. Ultimately, any member may request the Court to have a particular person's membership terminated where:

- the person has become permanently incapable of performing the functions assigned to him or her;
- the person has harmed the business of the corporation or has made cooperation with him or her intolerable, or
- it is just and equitable to do so (section 36).

## J. The Relationship with the Outside World

A company has a limited capacity. It may perform only the acts that fall within its main object and within its powers as determined in its memorandum of association. A company must state its main object in its memorandum and will have unlimited powers to achieve its main object and objects ancillary thereto unless such ancillary objects and powers are specifically excluded in the memorandum of association.<sup>51</sup> Formerly, a contract outside the capacity or powers of the company was *ultra vires* and void but section 36 of the current Companies Act makes such a contract valid if concluded by the directors of the company and if the only defect in the act is that it is *ultra vires*. The directors who concluded the contract will be liable to the company for losses incurred because of breach of fiduciary duty, as the contract remains *ultra vires*.

Contracts may only be concluded on behalf of a company by persons who have the authority to do so. Some authorities suggest that certain organs can act as the company in certain situations because of their status as organs, but the broadly accepted approach is apparently that every person who contracts on behalf of the company requires authority to do so. First, actual authority may be given either expressly or tacitly. The articles of the company almost always give the board of directors the power to manage the company. Hence, they are given wide powers to represent the company and they usually have authority to perform

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<sup>51</sup> Companies Act 61 of 1973.

almost any act on behalf of the company. Furthermore, the articles normally makes provision for the delegation of wide powers to the managing director. Hence, managing directors usually have similar broad powers to represent the company. Other persons who are designated to perform acts on behalf of the company normally will have more limited powers depending on their designations.

Even where no actual authority exists, the company will be bound on the basis of the principle of estoppel if it misrepresented to a third party that the representative had the necessary authority. The misrepresentation must have been made by means of a positive act or an omission by a person who had the power to make it on behalf of the company; it must have been of such a nature that a reasonable person would have realised that third parties could be expected to rely on it; the third party must have relied on it and the reliance must have been reasonable; and the third party must have acted to his or her detriment.

A third party is deemed to have knowledge of the content of the documents of the company kept at the office of the Registrar of Companies. These are public documents that may be accessed by any member of the public. Thus, even if an actual misrepresentation was made to the third party, such a person will not be able to plead estoppel against the company if he or she would not have been misled if the articles had been read.

The company may lay down internal procedures in its constitution that will have to be complied with before a person may represent a company in particular circumstances but he or she will not without investigation know whether these procedures have been complied with. It may, for instance, determine that money may only be borrowed by the board of directors with the consent of the meeting of members. In such a case the third party will be deemed to know that some internal procedure will have to be complied with before an act will be valid, but he or she will have to investigate whether these procedures have been complied with. Since such investigation would cause unnecessary inconvenience, a third party who deals with a company in good faith may, in the absence of suspicious circumstances that would alert a reasonable person, accept that such internal procedures are complied with. This rule is known as the Turquand rule after the English case of *Royal British Bank v. Turquand*.<sup>52</sup>

A close corporation, unlike a company, has the same unlimited capacity and powers as a natural person (section 2(4)). Every member of the corporation shall, in relation to every person who is not a member of the corporation, have the authority to represent the corporation. The power of a member to represent the

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<sup>52</sup> (1856) 6 E & B 327.

corporation may be restricted in an association agreement between members. But a third party who did not know and ought not reasonably to have known of the restriction on the authority, may hold the corporation to the contract even when the member acts in contravention of such a restriction. A third party is not deemed to have knowledge of the content of the founding statement or an association agreement (sections 17 and 45). In the case of persons other than the members acting on behalf of the corporation, the ordinary principles of the law of agency will apply.

Although neither the Companies Act nor the Close Corporations Act regulates liability of companies or close corporations for delicts or crimes, it is accepted that these juristic persons may incur such liability. Delictual liability of a company or corporation is often vicarious, but the company and probably a corporation as such may commit a delict on the basis of the directing minds doctrine under which an act and state of mind of a person, who has actual control of the operations of a company, would be ascribed to the company. A juristic person may also be held liable of a crime if the act and state of mind ascribed to the company comply with the requirements of the crime. In addition, section 322(1) of the Criminal Procedure Act 51 of 1977 determines that an act performed by a director or servant of a body corporate in furthering or endeavouring to further the interests of the body corporate must be deemed to have been performed by the body corporate with the intention of the person performing the act.

## **K. Accounting Requirements**

Every company or close corporation is obliged to keep accounting records that fairly, accurately and clearly present the financial position of the company or corporation.<sup>53</sup> Companies and corporations must prepare financial statements for every financial year,<sup>54</sup> and a public company must in addition prepare half-yearly interim financial reports and in certain circumstances, provisional annual financial statements. The financial statements must be approved by at least two directors if the company has more than one director and in the case of a close corporation, by members who hold at least 51% of the interests of the corporation. Copies of all company financial statements must be sent to members and a public company

<sup>53</sup> See Companies Act 61 of 1973, s. 284 and the more restricted requirements in the Close Corporations Act 69 of 1984, s. 56.

<sup>54</sup> See Companies Act 61 of 1973, ss 285-309; Close Corporations Act 69 of 1984, ss 57-58.

must in addition lodge its financial statements with the Registrar. If a private company does not comply with the obligatory provisions in its articles required by section 20 (see IV.B-E. above), it will be treated like a public company for disclosure purposes.

Every company must appoint an auditor or firm of auditors at every annual meeting until the next annual general meeting. The auditor will automatically be deemed to be re-appointed at every such meeting, unless he or she has resigned, has become disqualified or is removed at the meeting.<sup>55</sup> An auditor must consent in writing to the initial appointment and information concerning the auditor must be lodged with the Registrar of Companies and entered in the register of directors and officers. The auditor of a company must do an audit or comprehensive examination of the accounting and financial records of the company<sup>56</sup> and he or she must make a report to the members which shall be read out at the annual general meeting unless the members present agree otherwise. An auditor must act with reasonable care and skill and a failure to do so may render him or her liable to the company and other persons who have relied on the audit.<sup>57</sup>

A close corporation must appoint an accounting officer whose name must be entered into the founding statement. Special rules pertain to the removal, resignation and qualifications of an accounting officer. The duties of the accounting officer are more limited than those of an auditor. He or she must prepare an accounting review and report thereon to the corporation. Certain irregularities have to be reported to the Registrar.

## L. Reorganisations and Take-Overs of Companies

In company law, compromises or arrangements between the company and its creditors or members or classes of either, may be accomplished under section 311 of the Companies Act. This section is often utilised in take-overs and in attempts to rescue companies that are not able to pay all their creditors. The Courts generally give a wider interpretation to the ambit of the section.<sup>58</sup> In terms

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<sup>55</sup> See Companies Act 61 of 1973, ss 269-274 (appointment), s. 275 (disqualification), ss 277-279 (removal), s. 280 (resignation).

<sup>56</sup> Companies Act 61 of 1973, s. 300; Public Accountants' and Auditors' Act 80 of 1991, s. 20.

<sup>57</sup> See the limits in the Public Accountants' and Auditors' Act 80 of 1991, ss 20(9)-(10).

<sup>58</sup> *Commissioner for Inland Revenue v. Datakor Engineering (Pty) Ltd* 1998 (4) SA 1050 (SCA).

of section 311, the Court may order a meeting of creditors or members if all the jurisdictional requirements of the section are met. If a majority in number and three-fourths of the creditors or three-fourths of the votes of members are in favour of the compromise or arrangement, the Court may sanction the scheme. If a scheme is sanctioned, all creditors or members involved in the scheme are subjected thereto, even if they voted against it.

The Close Corporations Act provides that any person may make an offer of composition with the creditors of a corporation that is being wound up because it is unable to pay its debts. In such a case the liquidator may put the offer before the creditors. The compromise will become effective if it is accepted by two-thirds in value and number of creditors.

The Companies Act regulates so-called affected transactions in the securities of offeree companies (sections 440A-440N). These are transactions that establish changes of control as defined in the Act. This part of the Act applies to all public companies, statutory corporations and private companies where the shareholder interests and members' loan accounts exceed R5 million, if valued at the offer price (section 440A). It provides a mechanism for the compulsory acquisition of shares in these situations (section 440K). Moreover, a Securities Regulation Panel has been established in terms of section 440B of the Companies Act to regulate take-overs in accordance with the Code on Take-Overs and Mergers. The Code is closely modelled on the English City Code on Take-overs and Mergers.

## V. JUDICIAL MANAGEMENT, WINDING-UP AND DISSOLUTION OF JURISTIC PERSONS

If a company experiences a financial crisis but there is a possibility that it may become a successful concern again, it may be placed under judicial management (section 427). The Court will order that the existing managers be replaced with judicial managers. The company will be given breathing space from its creditors. An application for the cancellation of judicial management may be brought if the purpose of the order has been fulfilled or if for some or other reason, such as the interests of creditors, it is necessary to do so.

A juristic person has perpetual succession and does not die a natural death like a natural person. A company or close corporation may be deregistered if it is found that the company or corporation is not conducting any business. Furthermore, any juristic person may be dissolved after winding-up. Any body corporate except a close corporation is wound up in accordance with the Companies Act

(section 337) and the provisions of that Act are also relevant to the winding up of a corporation (section 66).

A voluntary winding-up is commenced by a special resolution of the members of a company or by the written resolution of all the members of a close corporation. The special resolution may initiate either a voluntary winding-up by the members or by the creditors. Nevertheless, a voluntary winding-up by the members may only be commenced if the company is solvent. A judicial winding-up may be ordered by the Court on the application by a party who is entitled thereto if a ground for winding up can be proved.<sup>59</sup> The most important grounds for winding up a juristic person are if it is unable to pay its debts or is deemed to be unable to do so and if it is just and equitable, for example if the members are in the same position as partners and they are no longer able to co-operate.

Winding up commences when a winding-up order is granted or a special resolution to that effect is registered. Control of the property passes to the Master of the Supreme Court and then to the liquidator on his or her appointment. On winding-up, the consent of the liquidator is necessary for a change of shareholding and the assets of the company are frozen for the purpose of the winding-up process.<sup>60</sup>

In a voluntary winding-up by the members, the creditors play almost no role. The members will nominate a liquidator and will also be able to direct or authorise certain other winding-up activities.<sup>61</sup> In other winding-up processes the interests of creditors have a central place.<sup>62</sup> The Master must summon meetings of members and creditors as soon as possible after final winding-up has commenced, *inter alia* to nominate liquidators.<sup>63</sup> The Master appoints liquidators<sup>64</sup> and is responsible for supervising and controlling liquidators.<sup>65</sup> The liquidators take possession of the company's property and assets. First it must be applied to

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<sup>59</sup> Companies Act 61 of 1973, ss 344-348; Close Corporations Act 69 of 1984, ss 66-68.

<sup>60</sup> Companies Act 61 of 1973, ss 341, 359. See s. 339 on the general application of insolvency law.

<sup>61</sup> Companies Act 61 of 1973, ss 369, 384, 353(2)(b), 386(4).

<sup>62</sup> *Ibid.*, ss 351(2), 369, 353(2)(a), 386(4).

<sup>63</sup> *Ibid.*, s. 364; Close Corporations Act 69 of 1984, s. 78.

<sup>64</sup> Companies Act 61 of 1973, ss 368-369, 370-374, 377-380; Close Corporations Act 69 of 1984, ss 74-76.

<sup>65</sup> Companies Act 61 of 1973, ss 381, 385.

satisfy the cost of winding-up, secondly to pay the claims of creditors and then to distribute the balance to those entitled thereto, normally the members. The liquidator has wide powers and extensive duties in winding-up the company.<sup>66</sup>

Finally, wide powers of examination and interrogation are given to the Master, the presiding officer at a meeting of creditors, and the Court where a company is being wound-up and it is unable to pay its debts.<sup>67</sup> The person interrogated can be forced to answer questions and the evidence may be used against him or her in a civil but not in a criminal Court.<sup>68</sup>

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<sup>66</sup> *Ibid.*, ss 386-411; Close Corporations Act 69 of 1984, ss 70-71, 79-81.

<sup>67</sup> Companies Act 61 of 1973, ss 415, 417-418.

<sup>68</sup> *Bernstein v. Bester* 1996 (2) SA 751 (CC).

# *Chapter 11*

## **Labour Law\***

***Christoph Garbers\*\****

### **I. INTRODUCTION – BASIC DISTINCTIONS**

The relationship between an employer and each individual employee is based on an individual contract of employment. This gives rise to the following three implications:

- the contract of employment by and large is subject to the common-law rules which govern contracts in general;
- as in the case of the contract of sale or the contract of lease, the contract of employment is governed by specific common-law rules, and
- the contractual origins of the contract of employment create the impression that the employer and employee remain free to arrange all aspects of their relationship by agreement between them against the background of the common-law rules applicable to that agreement.

However, at the heart of South African labour law, as is the case with many countries, lies the recognition of the fact that if the employment relationship is simply left to agreement between the employer and employee and regulation by the common law, employees will be exploited unduly. In practice, especially in a country like South Africa where unemployment is high and jobs scarce, employees will agree to the demands of the employer simply to secure employment. Furthermore, the common law provides that a contract of employment may be terminated by giving the agreed notice to an employee, irrespective of the reason

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for such termination. In practice, this would mean that an employer might threaten employees with ‘lawful’ termination of the contract in order to get employees to agree to more ‘exploitative’ terms and conditions of employment. In short, modern South African labour law is built on the recognition of the divide between lawful conduct (in accordance with common-law principles) and fair conduct.

Over the years it has been recognised that lawfulness does not necessarily equal fairness, and this has led to the gradual adoption of legislation that seeks to impose the principle of ‘fairness’ onto the employment relationship. With the adoption of the Constitution of the Republic of South Africa, Act 108 of 1996, and more specifically the Bill of Rights, the requirement of fairness in employment has become a constitutional imperative: section 23, which deals with labour relations, extends a ‘right to fair labour practices’ to ‘everyone’. In line with the recognition of the importance of collective action to ensure fairness, this section also protects workers’ rights of freedom of association, the right to strike as well as their trade union’s right to ‘engage in collective bargaining’. In addition to these labour-specific constitutional rights, which clearly apply to the private sphere, other constitutional rights are also important in the labour sphere. Thus, the right to equality<sup>1</sup> not only outlaws unfair discrimination, but also specifically allows affirmative action. This right is also made applicable at horizontal level between private actors such as employers and employees. Against this background – the residual, though not necessarily fair, role of the common law and the constitutional imperative – the most important labour legislation currently in force are the Labour Relations Act 66 of 1995 (the LRA), the Basic Conditions of Employment Act 75 of 1997 (the BCEA) and the Employment Equity Act 55 of 1998 (the EEA). Together they impose fairness on the employment relationship by:

- mechanisms designed to ensure ‘fairer’ terms and conditions of employment. These mechanisms can be subdivided further into:
  - (i) legislation that lays down minimum terms and conditions of employment from which, as a general rule, parties to the employment contract may only deviate upwards. The BCEA is particularly important in this regard, and
  - (ii) legislation that promotes collective bargaining to ensure a greater measure of equality in the process underlying the establishment of terms and conditions of employment. Collective bargaining is regulated primarily by the LRA;

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<sup>1</sup> Constitution of the Republic of South Africa, Act 108 of 1996, s. 9.

- protection against unfair dismissal;<sup>2</sup>
- protection against other unfair labour practices;<sup>3</sup>
- protection against unfair discrimination and the obligation to implement affirmative action,<sup>4</sup> and
- the creation of specialist tribunals (Bargaining Councils; the Commission for Conciliation, Mediation and Arbitration; the Labour Court and the Labour Appeal Court) to apply the principles of ‘fairness’, as opposed to ordinary Courts whose experience lies in lawfulness. The specialist tribunals are created by the LRA.<sup>5</sup>

Against this background, the residual role of the common law as it relates to the contract of employment will be considered briefly. The main focus, however, will be on how the abovementioned pieces of legislation impact on the employment relationship. In this regard it is useful to note that the discipline of labour law in South Africa encompasses both individual labour law (referred to as employment law in some countries) and collective labour law.

## II. THE RESIDUAL ROLE OF THE COMMON LAW

The contract of employment today could be defined as:

‘an agreement between two parties in terms of which one party (the employee or worker) places his or her labour potential at the disposal and under the control of the other party (the employer), in exchange for some form of remuneration’.<sup>6</sup>

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<sup>2</sup> Regulated by chap. VIII of the LRA.

<sup>3</sup> *Ibid.*

<sup>4</sup> Regulated by the EEA.

<sup>5</sup> At the time of publication, a Superior Court’s Bill is before Parliament, which, if enacted, would abolish the Labour Court and the Labour Appeal Court and transfer their functions to the High Court and the Supreme Court of Appeal respectively. The idea is to create a body of specialist Judges to deal with labour matters in these Courts.

<sup>6</sup> A.C. Basson, *Essential Labour Law*, vol. 1 *Individual Labour Law* (3rd ed., 2002) 25.

From this definition, it is clear that the *essentialia* of this contract are work and remuneration, and that the contract is reciprocal in nature. A distinguishing feature of the employment relationship is the element of subordination and control. The employer generally has the right to control the employee, although in today's highly specialised working environment, control is not always evident.

Subject to the limitations imposed by legislation discussed at III-VIII below, the parties to the employment relationship remain free to agree on the nature of their relationship and the duration of that relationship. Employees may be appointed on an indefinite (permanent) basis or for a specific period (fixed-term) or to perform a specific task. Once the contract of employment comes into existence, certain duties for the respective parties flow from it.

The main duties of the employer are to receive the employee into service (although there is no general duty actually to provide the employee with work) and the payment of remuneration. There are no provisions in South African law that prescribe the level of remuneration and as such it remains a matter for agreement between the parties to the contract. This general statement should, however, be qualified by mentioning that collective agreements often prescribe minimum wages associated with certain types of employment, while the Minister of Labour has the power, conferred on him by the BCEA, to prescribe minimum wages as part of sectoral determinations made in terms of that Act, typically with regard to unorganised sectors of the economy. The employer is furthermore under a duty in common law to provide safe working conditions (now regulated extensively by the Occupational Health and Safety Act 85 of 1993 and the regulations issued under that Act and, as far as the mining industry is concerned, by the Mine Health and Safety Act 29 of 1996). In case of injury or ill health arising from the workplace, the Compensation for Occupational Injuries and Diseases Act 130 of 1993 provides for indemnity of the employer in case of such injuries or ill health and no-fault compensation of employees through the office of the Compensation Commissioner. One of the common-law consequences of a contract of employment is that the employer becomes vicariously liable for the unlawful conduct performed by its employees during the course and scope of their duties that causes loss to third parties.

The main common-law duties of an employee are to place his or her labour potential at the disposal of the employer; to perform work diligently and competently and without negligence; to obey all reasonable and lawful commands of the employer; to show respect towards the employer, and to act in good faith towards the employer. The last-mentioned duty includes the duty to act honestly;

not to divulge or use confidential information without authorisation; to promote the business of the employer and not to compete with the employer. These common-law duties form the basis of an employer's right fairly to dismiss an employee for misconduct or incapacity.

A contract of employment may be terminated in a number of ways, such as:

- the automatic termination of a fixed-term contract in due course;
- by agreement between the parties;
- on notice given to the other party (irrespective of the reason), and
- a summary termination in case of a fundamental breach of contract by the other party.

Most of these ways of termination of the employment contract, although lawful, now have to meet the requirements for a fair termination, laid down by legislation. Despite this, South African law clearly holds that the parties to an employment contract, in case of termination (or other disputes relating to a contract of employment), remain free to exercise their common-law contractual remedies of cancellation or specific performance coupled with a claim for damages, or their legislative remedies based on fairness. Thus, if an employee refuses to work, an employer, instead of fairly dismissing the employee for misconduct, may elect to enforce the contract through an order for specific performance, as happened recently when a high-profile soccer coach wanted to join another club before expiry of his fixed-term employment contract.<sup>7</sup> Or, viewed from the side of the employee, where an employer for example terminates a fixed-term contract before its expiry, that employee may, at his or her choice, refer the dispute as an unfair dismissal in terms of the LRA, or decide to exercise the contractual remedies of cancellation coupled with a claim for damages.

### III. THE SCOPE OF APPLICATION OF LABOUR LEGISLATION

Certain categories of employees, for example members of the National Defence Force, the National Intelligence Agency and the South African Secret Service, are specifically excluded from the protection of labour legislation. They are, however, protected by the Constitution and other legislation that apply specifically to them. In the absence of such specific exclusions, labour legislation applies to

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<sup>7</sup> *Santos Professional Football Club (Pty) Ltd v. Igesund* (2002) 23 ILJ 2001 (C).

an ‘employee’, which is defined in the LRA (the BCEA and the EEA use a similar definition) as follows:

- ‘(a) any person, excluding an independent contractor, who works for another person or for the State, and who receives, or is entitled to receive remuneration; and
- (b) any other person who in any manner assists in carrying on or conducting the business of an employer’.

Labour legislation thus specifically excludes an independent contractor from the definition of employee (and therefore the protection of labour legislation), but does not tell us how to distinguish between them. A contract with an independent contractor today could be characterised as a contract whereby one person hires another to do a specific job or a specific piece of work. The object of a contract with an independent contractor is the performance of the specified work or the production of a specified result. It is the product or the result of the labour which is the object of the contract, rather than the labour itself, as is the case with a contract of employment. The element of control is very different in the independent contractor relationship. In response to the difficulty of identifying the contract of employment in borderline cases, the South African Courts today apply the common-law ‘multiple’ or ‘dominant impression’ test. In terms of this approach, the Courts will consider the employment relationship as a whole, rather than a single factor, such as control.

Some of the important factors which Courts have found relevant in determining whether or not a worker is an employee or an independent contractor are:

- the existence of control or direction over the manner in which a person works and his or her working hours;
- the number of hours worked;
- the degree of dependency of the person who performs the work on the person contracted with;
- whether the worker remains free to perform work for other persons as well;
- whether the worker is provided with tools, equipment and office space; and generally,
- to what extent the worker is part of the other person’s organisation.

The Court weighs up all these and other factors to decide whether or not the dominant impression is that the person in question is an employee. In this regard,

it can be mentioned that recent amendments to both the BCEA<sup>8</sup> and the LRA,<sup>9</sup> have created a presumption that a person is an employee if any one of the factors mentioned above – such as control or the fact that the employer provides the tools of the trade – is present. In practical terms, this means that an employee, who can show the existence of any one of these factors, will be regarded as an employee and eligible for the accompanying protection of labour legislation, unless the employer can convince the tribunal or Court otherwise. It is also important to note that all employees – whether they are permanent, temporary (that is, employed in terms of a fixed-term contract), part-time, probationary or senior managers – generally enjoy the same rights extended by labour legislation. Exceptional cases where this will not be the case are the following:

- as far as protection against unfair dismissal is concerned, probationers and senior managers are protected to a slightly lesser extent than other employees in case of a dismissal for poor work performance;
- the provisions of the BCEA do not apply uniformly to all employees. Thus, chapter 2 of the Act, which relates to working hours (that is, normal working hours, overtime, meal and weekly intervals, night work and the like), does not apply to senior managerial employees; sales staff who travel to the premises of customers and who regulate their own hours of work; employees who work less than 24 hours a month for an employer, and employees who earn more than a certain threshold determined from time to time by the Minister of Labour (currently R115 572 per annum). By contrast, only employees who work less than 24 hours per month for an employer are excluded from the leave provisions of the BCEA;
- the right to freedom of association, that is, to belong to a trade union and to participate in the lawful activities of that trade union, as well as the right to strike, extends to all employees – even senior managers. However, this is subject to the manager's common-law duty to act in good faith to the employer;
- the right not to be unfairly discriminated against not only extends to all employees, but also to applicants for employment. Protection against unfair discrimination and of freedom of association is the only protection granted to applicants for employment in terms of labour legislation.

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<sup>8</sup> A new s. 83A.

<sup>9</sup> A new s. 200A.

## IV. FAIR TERMS AND CONDITIONS OF EMPLOYMENT

### A. The Basic Conditions of Employment Act, 1997

In terms of the common law, the employee's hours of work, overtime, leave, as well as other aspects of the employment relationship are matters of express or implied contractual agreement between the parties. If there is no agreement, account may be taken of what is reasonable or customary in the circumstances. The BCEA, as indicated earlier, now lays down the minimum acceptable levels of certain terms and conditions of employment. As such it is the first mechanism through which fairness, specifically with regard to terms and conditions of employment, has been imposed on the employment relationship. The floor of rights contained in the BCEA is, for the most part (and subject to the remarks above), extended to every single employee. By agreement, the prescriptions of the BCEA may be deviated from as long as the provisions of the agreement are more favourable to the employee than those prescribed by the BCEA. In only very limited circumstances is provision made for a deviation downwards – that is, where an agreement validly prescribes less favourable terms and conditions of employment than those contained in the BCEA. In this regard a further distinction has to be made between the source of terms and conditions of employment. In descending order of importance, the Act provides<sup>10</sup> for deviation downwards in bargaining council (sectoral) collective agreements (in which case most of the provisions of the BCEA may be deviated from), other collective agreements and the individual contract of employment (where the possibility of deviation downwards is very limited). The most important provisions of the BCEA are as follows:

#### *1. Working time – chapter two*

Under this heading, the BCEA regulates a number of important issues (note that these rules do not apply, for example, to senior managers or people who earn more than a certain amount – currently R115 572 per annum).

##### a. Ordinary hours of work<sup>11</sup>

In terms of the BCEA, an employee may generally not work more than 45 hours per week or nine hours per day (if an employee works five days or less per

<sup>10</sup> S. 49.

<sup>11</sup> S. 9.

week). Employees who work more than five days per week cannot be expected to work more than eight hours per day. These hours may be extended by agreement by a maximum of 15 minutes per day or 60 minutes per week. The ultimate aim of the BCEA is to reduce the number of hours worked to 40 hours per week.

b. Overtime<sup>12</sup>

The general rule regulating overtime work is that an employee may only be expected to perform overtime work in accordance with an agreement; that no employee may work more than 12 hours per day (including overtime); that overtime is limited to ten hours per week and that an employee has to be paid a minimum of one and a half times his or her normal remuneration (or be granted the equivalent in time off). The BCEA does, however, allow the averaging of the number of hours worked overtime over a period of four months.

c. Meal intervals and rest periods<sup>13</sup>

If an employee works continuously for at least five hours, an employer must give him or her a meal break of at least one hour. Furthermore, employees are entitled to a daily rest period of 12 hours (between ending and commencing work) and a weekly rest period of 36 hours which, as a general rule, has to include Sunday.

d. Work on Sundays and public holidays<sup>14</sup>

An employer may expect an employee to work on Sundays, but then has to pay him or her double the normal rate of remuneration. If the employee normally works on Sundays, the employer has to pay him or her one and a half times the normal rate of remuneration. Employees must agree to work on public holidays. If the employee works on a public holiday, the employer has to pay him or her double the normal remuneration. If the employee does not work on a public holiday, but that holiday falls on a normal working day, the employee is entitled to normal pay.

e. Night work<sup>15</sup>

An employee may only be expected to perform night work (between 18:00 and 06:00) in accordance with an agreement. For this night work, the employee must

<sup>12</sup> S. 10.

<sup>13</sup> Ss 14-15.

<sup>14</sup> Ss 16, 18.

<sup>15</sup> S. 17.

be paid an allowance or compensated by the employer with a reduction in working hours. The employer has to provide transportation to the employee to and from work, and, where the employee regularly works between 23:00 and 06:00, has to inform the employee of safety risks involved and the right to undergo a medical examination. The employer also has to pay for such examination if requested and has to transfer the employee if the medical examination shows a connection between a health condition and the night work.

## 2. *Leave – chapter three*

In terms of the common-law rule of ‘no work, no pay’, the employer is not obliged to give an employee paid leave unless there is a contractual agreement in this regard. However, the BCEA does provide for a basic minimum of 21 consecutive days’ paid *vacation leave* per annum for most employees (these appear to be calendar days and exclude public holidays).<sup>16</sup> In addition, employees are entitled to paid *sick leave* equal to the number of days worked in a six week period in respect of every period of 36 months of employment,<sup>17</sup> and to four consecutive months of *maternity leave* which, as a general rule, may commence at any time after four weeks prior to the expected date of birth.<sup>18</sup> There is no provision for paid maternity leave, but collective or individual agreements may provide for this and the employee remains entitled to claim unemployment insurance in terms of the Unemployment Insurance Act 63 of 2001. The BCEA also provides for a minimum of three days’ paid *family responsibility leave* for every 12 months worked.<sup>19</sup> Only employees who have worked longer than four months for an employer and who work at least four days a week are entitled to family responsibility leave, which may be taken if an employee’s child is born or ill, or if a close relative dies.

## 3. *Particulars of employment – chapter four*

Upon commencement of employment, an employer has to provide an employee with all written particulars relevant to their employment relationship as prescribed in the BCEA. The Act also requires record keeping on the part of the

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<sup>16</sup> S. 20.

<sup>17</sup> S. 22.

<sup>18</sup> S. 25.

<sup>19</sup> S. 27.

employer about the particulars of employees. The BCEA does not prescribe how much an employee is to be paid, but it does contain important provisions about how an employee is to be paid; how pay should be calculated; when employees should be paid, and what deductions an employer may make from an employee's pay. In general, deductions from an employee's pay may only be made in terms of an agreement, the law or a Court order.

#### *4. Termination of employment – chapter five*

In general, an employee has to be given one week's notice if the employee has been employed for six months or less, two weeks' notice if the employee has been employed between six months and a year, and four weeks' notice if the employee has been employed for more than a year. The BCEA allows an employer to pay an employee instead of requiring the employee to work out the notice period. The BCEA also requires of an employer to provide an employee with a certificate of service upon termination of employment. As far as severance pay in case of a dismissal for operational requirements (discussed at V.B.2.c. below) is concerned, the BCEA provides, as a general rule, for a minimum of one week's pay for every year of continuous work. Even if an employer terminates the contract of employment and gives the required notice, such conduct may still constitute an unfair dismissal.

#### *5. Prohibition of employment of children and forced labour – chapter six*

Although the Constitution views a child as someone under the age of 18,<sup>20</sup> the BCEA absolutely prohibits the employment of someone under the age of 15. As far as older children are concerned (those between 15 and 18), the BCEA allows such employment, provided it is appropriate and does not unduly place the child's well-being, education, health or development at risk, and subject to regulation of such employment by the Minister of Labour.

Labour inspectors, employed by the Department of Labour, enforce these provisions administratively. First, they will try to secure an undertaking of compliance by the offending employer but, failing such an undertaking, have the power to issue compliance orders. Ultimately the enforcement of compliance with the Act falls under the jurisdiction of the Labour Court, which, as part of its functions, may impose prescribed fines for non-compliance.

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<sup>20</sup> S. 8(3).

## B. Collective Bargaining

The second mechanism used to better employees' terms and conditions of service is the promotion of collective bargaining, that is, bargaining between employers (or employers' organisations) and trade unions. In South Africa, collective bargaining takes place at any one or more of three levels – sectoral, enterprise and/or plant level. Sectoral collective bargaining typically takes place at bargaining councils<sup>21</sup> which, at least as far as the private sector is concerned, are collective bargaining institutions created by agreement between employers' organisations and trade unions, and registered as such by the Department of Labour to exercise jurisdiction in respect of a certain sector of the economy and a certain area of the country. However, bargaining council agreements, which may be extended to apply to non-members of the council, typically are general in nature and only regulate minimum terms and conditions of employment with regard to that area and sector. This means that even in the presence of bargaining council agreements, or in those areas and sectors where no bargaining councils exist, collective bargaining will still take place between employers and employees at enterprise or plant level about real terms and conditions of employment.

It seems to be accepted, barring one minor exception and despite the provisions of section 23 of the Constitution, that there is no duty on an employer to bargain with employees. The law merely seeks to promote collective bargaining and to lay down certain rules for the collective bargaining process. The LRA does this by creating a number of rights and establishing a number of principles which merit brief consideration.

### *1. The preconditions for collective bargaining*

In the first instance, and against the backdrop of the Constitution, the LRA protects what is commonly referred to as the freedom of association of employees by extending these rights to employees and by declaring that an employer may not prejudice or victimise employees in any way for their trade union membership or activities.<sup>22</sup> At the same time, however, as envisaged by section 23(6) of the Constitution and provided certain requirements are met, the LRA specifically allows (post-entry) agency shop and closed shop agreements in the workplace.<sup>23</sup> Secondly, apparently in order to assist trade unions to establish a

<sup>21</sup> Bargaining Councils are regulated by ss 27-38 of the LRA.

<sup>22</sup> See ss 4-5 of the LRA.

<sup>23</sup> Ss 25-26.

presence in the workplace, the LRA extends certain organisational rights to trade unions that are registered with the Department of Labour and that have attained a certain level of representation in the workplace.<sup>24</sup> The five rights provided for in the LRA are:

- trade union access to the workplace;
- the right to have union subscriptions deducted by the employer and paid over to the trade union;
- the right to elect trade union representatives ('shop stewards') and to have these representatives perform certain functions in the workplace;
- the right to leave for activities of trade union officials, and
- the right to disclosure of information.

Of these rights, the right to elect shop stewards and the right to disclosure of information, depend on majority representation by the registered trade union in the workplace, while the other three depend on 'sufficient' representation (generally taken to be around 30% representation). The LRA also provides for a procedure through which registered trade unions may obtain these organisational rights, irrespective of refusal by the employer, through either arbitration or industrial action.<sup>25</sup> However, an employer remains free to reach an agreement with the trade union as to which rights it will extend to the union and on what conditions it will do so.

## *2. Further rights aimed at making collective bargaining effective*

The right to freedom of association and organisational rights are aimed to ensure that collective bargaining is realised. But this does not mean that collective bargaining will be effective. In this regard, the LRA, again, against the backdrop of the Constitution, extends and protects the right of workers to strike and to picket in support of their demands. However, these are not unlimited rights. The LRA uses the concepts of a 'protected' strike and picket as opposed to an 'unprotected' strike or picket. In order to be protected, a strike must be a 'strike' as defined in the LRA; it must not be prohibited by the LRA, and it must meet the procedural requirements laid down by the LRA. Before it can be defined as such, a strike has to meet three requirements:

<sup>24</sup> See ss 12-16 of the LRA.

<sup>25</sup> See s. 21 of the LRA.

- it must entail certain types of action by employees, which include a complete or partial refusal to work or a retardation or obstruction of work (work includes overtime work);
- the action must be collective (that is, one employee cannot strike on his or her own), and
- it must have a specific common purpose – it must be to remedy a grievance or be about a matter of mutual interest between employer and employees.

Once the action constitutes a ‘strike’ as defined, the question arises whether the strike is prohibited by the LRA. The list of prohibitions are contained in section 65 of the LRA and includes a prohibition on striking if:

- a binding collective agreement exists which prohibits a strike about the issue in dispute;
- a binding agreement requires the dispute to be settled by arbitration;
- the dispute is one that may be referred to arbitration in terms of the LRA (this includes unfair dismissal disputes);
- the employees are engaged in an essential service. An ‘essential’ service is defined to mean ‘a service the interruption of which endangers the life, personal safety or health of the whole or any part of the population; the Parliamentary service [and] the South African Police Service’. The LRA also provides in sections 70-74 for the establishment of an Essential Services Committee whose job it is to designate services as essential and to resolve disputes about such designation;
- the employees are engaged in a maintenance service. A ‘maintenance service’ (regulated in section 75 of the LRA) is a service, the interruption of which has the effect of a material physical destruction of any work area, plant or machinery, or
- the issue in dispute is regulated by a collective agreement, arbitration award or sectoral determination. This is, however, subject to a collective agreement.

If the strike is not prohibited, it will only acquire protected status if certain further procedural requirements are met. In general, these requirements are:

- that the dispute between the employer and employees must be referred to conciliation (that is, a formal attempt to settle the dispute);
- that conciliation must have been unsuccessful, and
- that 48 hours written notice (seven days where the State is the employer) of the commencement of the strike must have been given to the employer.

If the strike is protected, that is, not prohibited and meets the requirements as discussed in the previous paragraph, the employees participating in the strike may not be dismissed for such participation, although they may still be dismissed for misconduct or operational requirements as discussed below. The employees further do not breach their contracts of employment by refusing to work; neither the employees nor the trade union may be sued for damages caused by the strike, and the strike cannot be interdicted, that is, the employer cannot approach the Court and get a Court order prohibiting the strike. However, if a strike is unprotected, mere participation in the strike by employees constitute misconduct and they may be dismissed, provided this is done fairly. The protection against a claim for damages further falls away and the strike may be interdicted. Note that, irrespective of whether a strike is protected or unprotected, an employer is not obliged to pay employees who are on strike, unless the employer provides payment in kind relating to accommodation, food and other basic amenities and the employees request this to continue during a strike. Replacement labour may be used.

A picket will only be protected if it is called by a registered trade union, if it is peaceful and if it is in support of a protected strike or in opposition to any lockout. If protected, the same consequences flow from it as in the case of a protected strike.

Against the background of the Constitutional Court viewing a lockout by an employer as a legitimate tactic falling under the constitutional right ‘to engage in collective bargaining’, the LRA regulates lockouts in the same way as it regulates strikes. The LRA furthermore provides that an employer, when it institutes a defensive lockout (that is, a lockout in response to a strike), can hire replacement workers to do the work of strikers. If a lockout is offensive (that is, the employer seizes the initiative and locks employees out before they can embark on a strike), the employer is not allowed to take in replacement labour.

Lastly, it is worth mentioning that the LRA specifically provides for sympathy or secondary strikes as well as a fairly unique type of strike called ‘protest action’. Secondary strikes<sup>26</sup> will be protected if the primary strike is protected, seven days’ written notice has been given to the secondary employer and if the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect on the primary employer. Protest action,<sup>27</sup> which one can perhaps describe as a large-scale political strike, will be protected if it is for the

<sup>26</sup> Regulated by s. 66 of the LRA.

<sup>27</sup> Regulated by s. 77 of the LRA.

purpose of promoting or defending the socio-economic interests of workers (which purpose may not be the same as the defined purpose of a strike); if it is called by a registered trade union or federation of trade unions; if notice of the proposed protest action has been served on NEDLAC (that is, the National Education, Development and Labour Council, a tripartite body instituted by legislation); and if it has been considered by NEDLAC and 14 days' notice has been given to NEDLAC that the protest action will proceed. Examples include protest actions called by COSATU, South Africa's biggest federation of trade unions, against proposed amendments to the BCEA and about educational issues.

### *3. The impact of collective bargaining*

The LRA specifically states who is bound by a collective agreement<sup>28</sup> and states that a collective agreement, that is, an agreement between an employer and a registered trade union about terms and conditions of employment, where applicable, varies the individual contract of employment.<sup>29</sup> It further states that no individual contract of employment may provide for terms and conditions of employment that are worse than an applicable collective agreement.<sup>30</sup> As a source of terms and conditions of employment, collective agreements therefore override the individual contract of employment. As such, the LRA gives effect to the underlying rationale for collective bargaining, namely that the result of collective bargaining will, in all probability, be a fairer result than that reached by agreement between an individual employee and an employer.

## V. PROTECTION AGAINST UNFAIR DISMISSAL

The common-law right of the employer lawfully to terminate the contract of employment with notice or by means of a summary dismissal for breach of contract, has been curtailed by the law of unfair dismissal as codified in the LRA. The protection provided in the LRA ensures that it is not sufficient that a dismissal is lawful, but that it must also be fair.

Chapter VIII of the LRA states that 'every employee has the right not to be unfairly dismissed'. Implicit in this fundamental right are three questions, namely:

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<sup>28</sup> S. 23.

<sup>29</sup> S. 23(3).

<sup>30</sup> S. 199.

- who qualifies as an employee?
- what constitutes a dismissal? and
- when will such a dismissal be unfair?

The question of who is an ‘employee’ for purposes of labour legislation has already been discussed earlier. The other important principles of the law of unfair dismissal will be addressed when answering the remaining two questions.

### A. The Meaning of ‘Dismissal’<sup>31</sup>

The LRA has clearly defined the circumstances in which a termination of employment will be a dismissal, that is, when such a termination will open the door to a fairness scrutiny.

#### *1. Termination by the employer with or without notice*

The BCEA prescribes basic minimum periods of notice and the parties can also agree contractually to a specific notice period, provided the period is more favourable than the minimum periods laid down in the BCEA. Where the employee has committed a serious breach of contract, it may be possible in terms of the common law for the employer to terminate the contract summarily (without notice). The LRA now makes it clear that both these ways of termination of the employment contract (even though lawful) will constitute a ‘dismissal’. This, in turn, means that the fairness of that termination may be investigated.

#### *2. Failure to renew a fixed-term contract of employment*

The LRA includes, under the definition of ‘dismissal’, the failure or refusal by an employer either to renew a fixed-term contract or to offer such a renewal on the same or similar terms. However, a prerequisite is that the employee must be able to show that a reasonable expectation existed that the fixed-term contract would be renewed on the same or similar terms. Conduct such as a previous renewal or assurances of renewal may create such an impression. Currently, our labour Courts remain divided about the question whether temporary employees may use this section in the LRA to obtain permanent employment.

#### *3. Termination due to pregnancy*

In terms of the BCEA, a female employee is entitled to four consecutive months’ maternity leave. In defining a dismissal, the LRA includes the refusal to allow an

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<sup>31</sup> S. 186 of the LRA.

employee to resume work after she has either taken maternity leave in terms of any law, collective agreement or contract, or even where she was merely absent from work during the permitted period of maternity leave. Such a refusal will constitute a ‘dismissal’ and, as will be seen below at V.B.I., it may very well be automatically unfair.

#### *4. Selective re-employment*

Selective re-employment usually happens during retrenchments where the employer agrees to re-employ some but not all retrenched workers if economic circumstances improve. Those who have been refused re-employment in these circumstances (where they were all initially dismissed for the same or a similar reason) can allege dismissal.<sup>32</sup>

#### *5. Constructive dismissal*

A constructive dismissal takes place where termination of the employment relationship is done with or without notice by the employee, but only because the employer made continued employment ‘intolerable’. The enquiry into ‘intolerability’ in this context is an objective one; is not limited to instances where the employer repudiates the contract, and generally, the resignation of the employee must be a measure of last resort after exhaustion of other reasonable options for the resignation to constitute constructive dismissal.

#### *6. Constructive dismissal in case of a transfer of a business as a going concern*

Sections 197 and 197A of the LRA regulate the rights of employees in case of a transfer of a business as a going concern, either where this takes place in the normal course of business or where the business taken over is insolvent. One of the general consequences of such a transfer is that the contracts of employees are automatically transferred to the ‘new’ employer, who is obliged to provide them with substantially the same terms and conditions of employment. Against this background, section 186 now states that where an employee resigns in circumstances where the employer, after a section 197 transfer, does not provide the employee with substantially the same terms and conditions of employment, such a resignation will constitute a dismissal. As will be seen below at V.B.I., such a dismissal may very well be automatically unfair.

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<sup>32</sup> In terms of s. 186 of the LRA.

## B. The Fairness of Dismissals

The employee bears the onus of proving that there has been a dismissal. If the termination of employment constitutes a ‘dismissal’ as discussed above, the next stage is to enquire whether the dismissal is ‘automatically unfair’ or if the dismissal is unfair based upon either the conduct or capacity of the employee or the operational requirements of the employer. The onus of establishing the fairness of a dismissal rests upon the employer.

### *1. Automatically unfair dismissals*

The LRA has defined the following nine cases which would result in a dismissal being automatically unfair:

- if the employer acts in contravention of freedom of association in dismissing an employee;
- if the employee is dismissed for participating in a protected strike or protest action;
- if the employee is dismissed for refusing to provide replacement labour where other employees are on a protected strike;
- if the employee is dismissed to compel him or her to accept a demand about a matter of mutual interest made by the employer;
- if the employee is dismissed for exercising his or her rights granted by the LRA against the employer;
- if a female employee is dismissed for any reason related to her pregnancy;
- if the dismissal constitutes unfair discrimination against an employee;
- if the employee is dismissed as a result of, or for any reason related to, a section 197 transfer of a business as a going concern, or
- if the employee is dismissed because the employee made a protected disclosure as defined in the Protected Disclosures Act 26 of 2000.

The main issue regarding automatic unfair dismissal law has proved to be causality. In most instances where an employee alleges that a dismissal is automatically unfair, the employer will invariably argue that the dismissal was actually based on one of the possibly fair reasons for dismissal, namely misconduct, incapacity or operational requirements (as discussed at V.B.2. below). The approach of the Courts has been to apply a combination of factual causation (where the outlawed reason was a *sine qua non* for the dismissal) and legal causation (where the outlawed reason was the proximate, dominant or most likely cause of the dismissal).

The only category of automatically unfair dismissal, where, in the absence of a break in causation, the LRA allows employers to justify their behaviour, is where the dismissal constitutes unfair discrimination against an employee. In such cases the dismissal may be fair ‘if the reason for the discrimination is based on the inherent requirements of the particular job’ or, in those cases where age discrimination is alleged, ‘if the employee has reached the normal or agreed to retirement age for persons employed in that capacity’. As mentioned below, a strong argument exists that in the absence of an employer being able to justify a discriminatory dismissal on one of these above-mentioned grounds, he may do so based on the general notion of fairness (because only *unfair discrimination* – and not discrimination as such – is outlawed).

## *2. Possibly fair dismissals*

According to section 188 of the LRA:

‘A dismissal that is not automatically unfair, is unfair if the employer fails to prove –

- (a) that the reason for the dismissal is a fair reason –
  - (i) related to the employee’s conduct or capacity; or
  - (ii) based on the employer’s operational requirements; and
- (b) that the dismissal was effected in accordance with a fair procedure.’

Only those dismissals, which are based on the employee’s conduct or capacity or the employer’s operational requirements, may, therefore, be fair in certain circumstances. The one exception to this general rule is that a closed shop dismissal may also be fair. The onus is on the employer to prove that there was a substantively valid and fair reason for the dismissal and that a fair procedure was followed.

### a. Dismissal for misconduct

The alleged misconduct of an employee is one of the most common grounds for justifying a dismissal. Most of the different types of misconduct encountered in the workplace, although typically included in an employer’s disciplinary code, find their origin in the employee’s implicit common law duties to render services; to render those services with reasonable skill and diligence; to obey lawful and reasonable instructions; to show respect towards the employer; to act in good faith towards the employer, and to promote the business of the employer.

The fairness of discipline in the workplace is regulated, not in the body of the LRA, but in Schedule 8 thereto, named the Code of Good Practice: Dismissal.

These guidelines have been accepted and applied by the Courts. Briefly, they entail that for a dismissal or any other disciplinary sanction for misconduct to be substantively fair, six requirements must be met simultaneously:

- a rule regulating conduct in, or of relevance to, the workplace must have existed;
- the rule must have been contravened by the employee;
- the rule must have been valid and reasonable;
- the employee must have been aware, or could reasonably be expected to have been aware of the rule;
- the rule must have been applied consistently by the employer, and
- the sanction (in this case dismissal) was appropriate.

As far as procedural fairness of a dismissal for misconduct is concerned, it is clear from the Code of Good Practice that the essence of a fair procedure is that the employee has a right to defend himself or herself. This means that the employer must conduct an investigation into the misconduct and that the employee must be given an opportunity to state a case in response to the allegation. The employee must be told of the allegation in a language he or she understands, allowed sufficient time to prepare the response, and be given assistance if desired. If the employee is to be dismissed, he or she should be given a reason for the dismissal and reminded of any rights he or she may have, or of any dispute resolution procedure, in terms of the LRA.

#### b. Dismissal for incapacity

As is the case with misconduct, the Code of Good Practice: Dismissal<sup>33</sup> offers guidelines for determining whether a dismissal for incapacity is both substantively and procedurally fair. As point of departure, incapacity is divided into two broadly defined categories, namely poor work performance and ill health or injury.

##### i. *Poor work performance: substantive and procedural fairness*

The requirements that have to be met before a dismissal due to the poor work performance of the employee will be fair, are as follows:

- the employee must have failed to meet a required performance standard;
- the employee must have been aware, or could reasonably be expected to have been aware of the required standard;

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<sup>33</sup> Schedule 8 to the LRA.

- the employee was given a fair opportunity to meet the required standard, and
- dismissal was an appropriate sanction for not meeting the required performance standard.

Procedurally, the employee must be given an opportunity to improve (the employer has to provide evaluation, guidance, instruction, training and counselling) and, if necessary, alternatives, such as a transfer to a less physically, intellectually or emotionally demanding job, must be considered. The Code of Good Practice: Dismissal, also distinguishes between probationary employees and permanent employees and at least creates the impression that it is relatively easier to dismiss probationers in case of poor work performance.

*ii. Ill health or injury: substantive and procedural fairness*

If the incapacity of the employee is due to ill health or injury (whether permanent or temporary, work-related or not), the Code of Good Practice: Dismissal, once again sets out guidelines that will determine the fairness or otherwise of the dismissal:

- is the employee capable of performing the work?
- if the employee is not capable of performing the work, to what extent is he able to perform the work; to what extent might his work circumstances be adapted to accommodate the incapacity, or, where this is not possible, to what extent might his duties be adapted; and, is there any other suitable work available?

If alternatives to dismissal are considered, relevant factors which should be taken into account are the nature of the job, the period of absence, the seriousness of the illness or injury, the possibility of finding a temporary replacement, and the feasibility of adapting duties or work circumstances. If the illness or injury is the result of the work performed by the employee, there is an added duty on an employer to accommodate an employee. Ultimately, however, there is no duty on an employer to create jobs in order to accommodate incapacitated employees.

One interesting issue concerns the overlap between incapacity (as a ground of dismissal) and disability (as an outlawed ground of discrimination). If one looks at the definition of 'people with disabilities' in section 1 of the EEA – namely 'people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment', it should be clear that many cases of incapacity will also constitute a disability. However, the spectre of possible discrimination does not preclude

dismissal in these circumstances. As mentioned above in the discussion of automatically unfair dismissals, it depends on what the real reason for the dismissal is (causality) and on whether the employer can justify the discriminatory dismissal. In any event, as will be discussed below, the South African law of unfair discrimination only requires reasonable (not absolute) accommodation of disabled employees.

### c. Dismissal for operational requirements

The point of departure in any discussion of the right of an employer to dismiss employees for ‘operational requirements’, is the definition of the term in section 213 of the LRA as ‘requirements based on the economic, technological, structural or similar needs of the employer’. As such, the term refers to the standard idea of retrenchment due to adverse economic conditions, the introduction of technology or restructuring of businesses. Under the phrase ‘or similar needs’, Courts have included instances where the special operational needs of a business require changes and employees refuse those changes; where the presence of an employee affects a business negatively, and where an employee’s conduct, in the absence of proof of misconduct, has led to a breakdown in the trust relationship between employer and employee. Since August 2002, when the first major overhaul of the LRA came into operation, dismissals for operational reasons are regulated in a curious way by sections 189 and 189A of the LRA. The point of departure is its distinction between large-scale dismissals by big employers (that is, those with more than 50 employees), small-scale dismissal by big employers, and dismissals by small employers. The scale of the dismissal is determined by means of a formula based on the relationship between the number of employees dismissed and the number of employees. In the case of large scale dismissal by a big employer, employees, as far as the substantive fairness of the dismissals are concerned, are entitled either to strike about a dispute with the employer, or to have the dispute adjudicated by the Labour Court. The choice is mutually exclusive. With regard to large-scale dismissal by big employers (and, possibly, also in other cases where a retrenchment takes place), substantive fairness furthermore is described as requiring that the dismissal must be to give effect to a requirement based on the employer’s economic, technological, structural or similar needs; that the dismissal must be operationally justifiable on rational grounds; that there must be a proper consideration of alternatives, and that the selection criteria must be fair and objective.<sup>34</sup>

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<sup>34</sup> S. 189A(19).

In general, the approach of the Courts has been not to second-guess an employer's business decisions. As long as a genuine operational reason exists; the decision is not made in bad faith and is rational (although maybe not the best); dismissal is the last resort; and selection criteria are fair and objective, the Court will not interfere with the employer's ultimate decision to dismiss.

Given the deference shown to the business decisions of employers, added emphasis is placed on the procedural fairness of operational requirement dismissals. These requirements, which apply in all cases of operational requirement dismissals, are set out in section 189 of the LRA and include:

- a written notice inviting employees who are likely to be affected by a contemplated retrenchment or their representatives to prior consultation;
- a meaningful joint consensus-seeking process about appropriate measures to avoid retrenchment; to minimise the number of dismissals; to change the timing of dismissals; to mitigate the adverse effects of the dismissals; to decide on selection criteria, and to decide on severance pay;
- written disclosure of all relevant information which will allow for effective consultation over the proposed dismissal. Section 16 of the LRA, which applies to retrenchments, obliges an employer to disclose to a trade union representative all information that will allow the effective performance of the representative's duties. If the employer and trade union representative are engaged in negotiations or in consultation, the employer must also disclose to the union all relevant information to allow the trade union to consult or bargain effectively. Exceptions to this duty relate to information that is legally privileged; where such disclosure would result in a contravention of any law or Court order; where the information is of a confidential nature and, if disclosed, might cause substantial harm to an employee or to the employer, or where such information is private personal information relating to an employee;
- allowing employees an opportunity to make representations during the consultation process;
- consideration of the representations;
- selection of employees according to fair and objective selection criteria, and
- payment of severance pay. It should be noted that in terms of the BCEA, every employee is, as of right, entitled to at least one week's severance pay for every completed year of continuous service with that employer, unless the employer has been exempted from such obligation or unless the employee unreasonably refuses an offer of alternative employment as an alternative to dismissal.

## VI. UNFAIR LABOUR PRACTICES

As mentioned in the introduction, the Constitution specifically protects the right to fair labour practices. In contrast to the position prior to adoption of the LRA, when the concept of ‘unfair labour practices’ was extremely wide, the approach of the LRA has been to regulate certain identified unfair labour practices such as unfair dismissal or the protection of employees in case of a transfer of a business in detail, and simply to identify other possible unfair labour practices. In this regard, section 186(2) of the LRA provides an exhaustive list of other, sometimes called ‘residual’, unfair labour practices. These are:

- unfair conduct by an employer relating to the training of an employee;
- unfair conduct by an employer relating to the promotion or demotion of an employee;
- unfair conduct (excluding dismissal) by an employer relating to probation;
- unfair conduct by an employer relating to the provision of benefits to an employee;
- unfair suspension of an employee;
- unfair disciplinary action short of dismissal (such as, for example, warnings);
- the failure or refusal to re-instate or re-employ an employee in terms of any agreement, and
- subjecting an employee to any occupational detriment (other than dismissal) because the employee made a protected disclosure in terms of the Protected Disclosures Act 26 of 2000.

A number of important observations should be made in this context. First, as mentioned, the list is exhaustive. This means that if the employee cannot fit the conduct of the employer under one of the provisions, the employee cannot complain of an unfair labour practice and will have to seek his or her remedy elsewhere (for example, under discrimination). Experience so far has been that the Courts interpreted the meaning of the various unfair labour practices restrictively, thus often precluding jurisdiction to hear a dispute. Furthermore, the provisions clearly are aimed at the conduct of the employer and not at the conduct of employees or their representatives, or at the relationship between employees and their trade union.

## VII. UNFAIR DISCRIMINATION

The last legislative mechanism aimed at promoting fairness in employment is protection against unfair discrimination. The most important piece of legislation in this regard is the Employment Equity Act (EEA), although, as we have seen, the LRA regulates discriminatory dismissals. Building on the equality clause of the Constitution,<sup>35</sup> which clearly embraces a notion of substantive equality, that is, equality of outcome, the EEA both outlaws unfair discrimination and imposes an obligation to implement affirmative action. As far as protection against unfair discrimination is concerned,<sup>36</sup> section 6 of the EEA prohibits unfair discrimination

‘directly, or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibility, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language and birth’.

It is important to note that the protection of the EEA extends to both employees as well as applicants for employment. Based on the interpretation the South African Constitutional Court has given the equality clause in the Constitution, determination of the existence of unfair discrimination requires a three-step approach. First, there must be differentiation between employees or applicants for employment. Secondly, only if the employee is successful in showing a link between such differentiation and one of either the grounds listed, or an unacceptable ‘unlisted’ ground, that is, a ground for discrimination not specifically mentioned but which shows the same characteristics as those listed, does the differentiation become discrimination. Thirdly, if the discrimination is on a listed ground, the discrimination is presumed to be unfair and the onus shifts to the employer to justify the discrimination. If the discrimination is on an unlisted ground, the onus remains on the employee to show that the discrimination was unfair. As far as possible grounds for justification are concerned, it has already been indicated at V.B.1. that, in the context of dismissal, the ‘inherent requirements of the job’ and the ‘normal or agreed to retirement age’ are mentioned in the LRA. The Labour Court has held that affirmative action cannot justify the discriminatory dismissal of an employee. However, as far as policies or practices

<sup>35</sup> S. 9.

<sup>36</sup> This is regulated in ss 6-11 of the EEA.

other than dismissal are concerned, the EEA mentions two specific grounds on which an employer may justify discrimination, namely the ‘inherent requirements of a job’ to which is added ‘affirmative action consistent with the purpose of the EEA’. It is further of interest that the EEA further protects against unfair discrimination by providing that harassment constitutes discrimination, and that medical and HIV-testing as well as psychological testing of employees are outlawed unless certain requirements are met.

The provision that affirmative action may justify discrimination should not only be viewed against the background that section 9 of the Constitution allows for affirmative action, but also that a large portion of the EEA<sup>37</sup> is devoted to placing an obligation on designated employers (for the most part, those with 50 or more employees) to implement affirmative action measures. In terms of the EEA, the goal of affirmative action is the equitable representation of members of the designated groups in all occupational categories and levels in the workplace. The beneficiaries of affirmative action are ‘suitably qualified people’ from the ‘designated groups’. ‘Suitably qualified’ is defined broadly to include not only people with formal qualifications, prior learning, or relevant experience, but also with the ‘capacity to acquire the ability, within a reasonable time, to do the job’ in question.<sup>38</sup> The designated groups are ‘black people’ (defined to include Africans, Coloureds and Indians), women and the disabled. Affirmative action measures<sup>39</sup> include preferential appointment and promotion, measures to retain members of the designated groups and numerical goals, but the EEA specifically excludes quotas or situations where an absolute barrier is created for members of the non-designated groups. It is also important to note that the weight of authority currently suggests that members of the designated groups cannot rely on the affirmative action provisions of the EEA to force an employer to be, for example, appointed or promoted. As has been said by the Courts, ‘affirmative action is a shield, not a sword’. This means affirmative action is an obligation on employers and, at the same time, a defence against allegations of unfair discrimination made by prejudiced members of the non-designated groups.

Prior to the enactment of the EEA, and against the background of the Constitution, it became clear that many employers, in their efforts to implement affirmative action, fell short of perhaps the most important constitutional requirement for lawful and fair affirmative action, namely rationality. Courts struck

<sup>37</sup> Ss 12-27.

<sup>38</sup> S. 20(3).

<sup>39</sup> These are described in s. 15 of the EEA.

down affirmative action efforts simply because no plan existed or because such plans were haphazard. In constitutional parlance, the plans were not properly designed to achieve a realistic goal. The EEA does not only place an obligation to implement affirmative action on designated employers, but also tries to ensure that this is done according to properly designed and realistic plans. To further this end the EEA requires an employer to consult with its workforce; to appoint an employment equity manager; to conduct an audit of existing employment policies and practices; to formulate an employment equity plan which has to be submitted to the Department of Labour, and to report annually to this Department about its progress toward employment equity. Failure to do so may result in hefty fines and the cancellation of State contracts. At the same time, section 42 of the EEA tries to impart an element of realism into the pace at which affirmative action takes place. This section provides that in assessing whether an employer has complied with its affirmative action obligations, factors such as demographics, the pool of qualified available employees, the pace of labour turnover at its workplace, and the financial position of the employer, should be taken into account.

### VIII. DISPUTE RESOLUTION

The approach to the resolution of labour disputes in South Africa rests on two basic points of departure, of which neither is unique. First, it distinguishes between disputes of interest (that is, disputes about the creation of new rights) and disputes of right (that is, disputes about the interpretation or application of existing rights), and recognises that disputes of interest are best left to the process of collective bargaining as described above (unless the parties agree to private arbitration), while disputes of right are best subjected to some process of adjudication by a third party. Secondly, it recognises that, for a variety of good reasons, disputes of right should be catered for by a specialised set of institutions and not by the ordinary Courts. In this regard the LRA provides for two types of procedures, namely conciliation and, if conciliation is unsuccessful, arbitration or adjudication, and for four different dispute resolution bodies to determine disputes of right. These bodies are bargaining councils (that is, bodies registered for a specific industry in a specific area); the Commission for Conciliation, Mediation, and Arbitration (the CCMA); the Labour Court, and the Labour Appeal Court.<sup>40</sup> There are only three exceptions to this general approach to the

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<sup>40</sup> See n. 5 above.

resolution of labour disputes. First, in case of the refusal by an employer to extend organisational rights to a registered trade union, that trade union may try and obtain those rights either by way of arbitration<sup>41</sup> or by means of a strike.<sup>42</sup> Secondly, in case of a dispute about the substantive fairness of a large-scale dismissal by a big employer based on operational requirements, the employees are given the choice of either referring the dispute for adjudication to the Labour Court, or to strike about the dispute. Thirdly, in case of interest disputes in essential or maintenance services, provision is made for compulsory arbitration of such interest disputes.

According to labour legislation all disputes – whether it be a dispute of interest or a dispute of right – first have to be referred to a process of conciliation. This referral must be to a bargaining council, if there is one for the industry and area in which the dispute arose, or, if not, to the CCMA. Note that disputes about unfair discrimination may only be referred to the CCMA for conciliation. The purpose of conciliation is to try and convince the parties to the dispute to settle it by agreement. Experience has also shown that the success rate of CCMA conciliations is high and that most disputes are settled at this stage. If conciliation is unsuccessful, a dispute of interest may lead to economic power-play, subject to the rules regulating strikes, pickets and lockouts. A dispute of right, after unsuccessful conciliation, is either referred to a bargaining council for arbitration or to the CCMA for arbitration, or to the Labour Court for adjudication, depending on the nature of the dispute. However, parties remain free to contract out of the dispute resolution mechanisms created by legislation and to agree to private arbitration of their dispute.

In practice, the most prevalent types of disputes are those related to unfair dismissal and unfair labour practices. Disputes about dismissals for misconduct and incapacity, as well as disputes about unfair labour practices, must be referred (after unsuccessful conciliation) to a bargaining council for arbitration or, if there is no bargaining council, to the CCMA. Disputes about automatically unfair dismissals, dismissals for operational reasons (where more than one person is dismissed) or unfair discrimination have to be referred to the Labour Court after unsuccessful conciliation unless the parties to the dispute agree to have their dispute determined by arbitration. In dismissal cases, the dispute must be referred to conciliation within 30 days of the date of the dismissal and must be referred to arbitration within 90 days after unsuccessful conciliation. In case

<sup>41</sup> In terms of s. 21 of the LRA.

<sup>42</sup> In terms of s. 65(2) of the LRA.

of unfair labour practices and unfair discrimination, the time limit for the referral to conciliation is, respectively, 90 days and six months. The EEA also requires in case of a dispute about unfair discrimination that the referring party must satisfy the CCMA that a reasonable attempt was made to resolve the dispute prior to referral.

If it is established that an employer acted unfairly, the remedies that may be afforded an employee differ, depending on the nature of the dispute. In case of unfair dismissal, the LRA provides for three possible remedies, namely:

- reinstatement (that is, placing the employee back in his old position on the same terms and conditions of employment);
- re-employment (that is, ordering the employer to take the employee back, but not necessarily on the same terms and conditions of employment), or
- compensation.

The Court or arbitrator is required to order the employer to reinstate or re-employ an unfairly dismissed employee unless the employee does not wish to be reinstated or re-employed; the circumstances are such that this is not reasonably practicable; the continued employment relationship would be intolerable, or if the dismissal was only procedurally unfair (but substantively fair). The LRA has limited the amount of compensation that may be paid to an employee to a maximum of 24 months' remuneration in case of automatically unfair dismissals and to a maximum of 12 months' remuneration if the dismissal is otherwise substantively or procedurally unfair.

In case of unfair labour practices, the arbitrator is given a wide discretion to determine the dispute on 'terms deemed reasonable', which may include reinstatement or re-employment (for example, in case of an unfair suspension) or compensation. In case of unfair discrimination, the Labour Court is also given a wide discretion to determine the dispute, including the granting of compensation and issuing an interdict to prohibit the employer from continuing its discriminating actions. It should be borne in mind that if there is a dispute about the contract of employment or the application of the BCEA, the Labour Court has concurrent jurisdiction with the ordinary civil Courts to determine the matter.

One of the most litigated issues concerning the dispute resolution machinery created by labour legislation relates to the finality of arbitration awards made by bargaining councils and especially the CCMA. Here the LRA only provides the party aggrieved by such an award with a right of review on seemingly limited grounds, and not a right of appeal to the Labour Court. Against the backdrop of the Constitution, however, the Labour Appeal Court has now infused the

grounds for review of an arbitration award with the constitutional requirement of ‘rationality’ or ‘justifiability’, which means that the award must be justifiable in relation to the reasons given. In practice, this means that the right of review does to some extent include the right to reconsider the merits of an award as opposed to the procedure underlying it, which is the typical focus of a review application. Should the Labour Court be the Court of first instance, an appeal lies to the Labour Appeal Court.

## IX. CONCLUSION

Since the adoption of the final Constitution, South Africa has seen a major overhaul of its labour legislation, which, in contrast to the common law regulating the contract of employment, remains the most important source of modern South African labour law. This contribution tried to do no more than give an overview of the structure and most important provisions of labour legislation. As a result, very little attention was paid to the sometimes-vexing questions faced by South African labour tribunals and Courts in interpreting and applying such legislation. The sources mentioned below, however, should provide the reader with a more in depth analysis and further references.

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# *Chapter 12*

## **Law of Civil Procedure**

**H.J. Erasmus\***

### **I. INTRODUCTION**

The historical development of the South African law of civil procedure can be divided into four periods. The first of these is the rule of the Dutch East India Company (1652-1795), during which Roman-Dutch law applied at the Cape. No rules of procedure were promulgated specifically for the Cape and the civil procedure applied by the *Raad van Justitie* was based on the Ordinance on civil procedure of 1580. The works on civil procedure of the Roman-Dutch jurists were in regular use, and the recorded cases contain references to the works of Andreas Gail, Joost van Damhouder, Paulus Merula, Simon van Leeuwen and Gerard van Wassenaar. The form of procedure displays the features characteristic of proceedings based upon the medieval romano-canonical procedure. The Court played an active role while that of the parties and their legal representatives was subservient and passive. The collegial Court did not itself hear the evidence, but a commissioner was appointed to gather the evidence. The Court evaluated the evidence on the basis of his written report. The process was characterised by judicial control and the mediate presentation of written evidence.

The second period is that of British colonial rule from 1795-1910. The British found the state of the administration of justice at the Cape wanting. A commission, appointed in 1823, recommended that the existing judicial machinery and procedural institutions be reshaped along English lines. In 1827 the First Charter of Justice replaced the *Raad van Justitie* by a superior Court of professional Judges known as the Supreme Court of the Colony of the Cape of Good Hope. A Second Charter superseded the First Charter in 1832. Section 31 of the Second Charter provided that the Supreme Court of the Colony of the Cape of Good Hope was to exercise its jurisdiction ‘according to the laws now in force within

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(the Cape)', that is, the Roman-Dutch law. Once the decision was taken to retain the Roman-Dutch law as the law of the Cape, there could be no separate administration of 'law' and 'equity' as in English law. The Charter of Justice accordingly provided for the creation of a unitary 'Supreme Court of the Colony of the Cape of Good Hope' and under the system introduced at the Cape there was no room for a Court of equity along the lines of the Court of Chancery in England.

The newly established Supreme Court of the Colony of the Cape of Good Hope was given extensive powers to make rules for the practice and pleading in civil matters. Under section 46 of the Charter of Justice, all rules and forms of practice made by the Supreme Court had to be framed 'so far as the circumstances of the said Colony may permit . . . with reference to the corresponding rules and forms in use in Our courts of record at Westminster'. The first rules, which were promulgated during January and March 1828, made provision for two forms of proceedings before the Supreme Court, namely proceedings by way of motion and proceedings by way of summons. Proceedings by way of motion were reminiscent of the practice in the Court of Chancery in so far as they were mainly on paper. Proceedings by way of summons introduced a system of pre-trial pleading whereby the issues in dispute are defined for determination at a trial at which *viva voce* evidence is heard. To this day these forms of proceedings have retained their essential character in the rules of practice of the South African Courts.

Despite the replacement of the Roman-Dutch mode of civil practice by a common-law model, several Roman-Dutch remedies were retained. These include provisional sentence (*namptissement*) which originated in Italy in the Middle Ages and found its way during the 16th century via French law to the Roman-Dutch law. Other remedies include the *mandament van spolie*, attachment and arrest *ad fundandam iurisdictionem* and arrest *suspectus de fuga*. The procedures to obtain these remedies, elaborate and cumbersome in Roman-Dutch law, have been adapted to fit into the common-law procedural model.

Territorial expansion led to the establishment of superior and inferior Courts in other parts of South Africa. In all these Courts, the English mode of procedure on the Cape model was adopted. There was no suggestion that the Roman-Dutch version of the romano-canonical procedure should be re-introduced. Thus, in the Orange Free State and in the South African Republic (Transvaal), rules of procedure based on the Cape rules were adopted. In the countries of Southern Africa beyond the boundaries of the Republic of South Africa where the Roman-Dutch law has been received, namely Botswana, Lesotho, Namibia, Swaziland and Zimbabwe, a similar overlay of English judicial and procedural techniques has occurred.

The forms of procedure devised under the Charters of Justice display the fundamental features characteristic of proceedings at common law, namely the

adversary character of the system; the predominant role of the parties in the conduct of the litigation; the passive and neutral role of the Court, and the orality, immediacy and publicity of its proceedings.

The third period runs from the establishment of the Union of South Africa in 1910 to the coming into operation of the interim Constitution of the Republic of South Africa in 1994. The most important development during this period was the establishment of a Supreme Court of South Africa consisting of an Appellate Division and various provincial divisions. The system of lower Courts at district level was retained and properly regulated on a countrywide basis by the Magistrates' Courts Act 32 of 1917, later superseded by the Magistrates' Courts Act 32 of 1944. A further important development during this period was the adoption of a set of uniform rules for the various divisions of the Supreme Court of South Africa to replace the different sets of rules operative in the various provincial divisions. The Uniform Rules came into effect on 15 January 1965. Though they have been extensively amended through the years, the Uniform Rules still govern proceedings in the superior Courts.

The final period was heralded by the coming into operation of the interim Constitution of the Republic of South Africa, Act 200 of 1993 on 27 April 1994. This Act was subsequently superseded by the final Constitution of the Republic of South Africa, Act 108 of 1996, which came into operation on 1 July 1997. In so far as it brings a constitutional dimension to the civil process, the Constitution represents a drastic breach with the past. As far as the procedure itself is concerned, the traditional model remains largely unaffected. From the strictly procedural point of view, the most important innovation was the modification and extension of the function of the *amicus curiae*. The *amicus curiae* was a familiar figure in South African Courts, exercising different functions within the context of civil and criminal litigation. The rules of the Constitutional Court extended the role and functions of the *amicus curiae* along the lines of the rules of the United States Supreme Court, which deal with the '*amicus* brief'. The rules of the Constitutional Court make provision for an *amicus curiae*, who is not a party to the proceedings, to submit argument in an endeavour to influence the outcome of a case.

## II. SOURCES

The sources of the law of civil procedure are mainly statutory. Acts of Parliament establish Courts, define their jurisdiction and to some extent provide for the procedures to bring and defend disputes before the Courts. The principal sources

of the detailed rules of civil procedure are the Rules of Court made by virtue of powers conferred by statute. Important subsidiary sources are the common law and judgments of the Courts.

### A. Legislation

The Constitution of the Republic of South Africa, Act 108 of 1996 does not deal with any procedural matters except for providing in section 171 that rules and procedures must be provided for in terms of national legislation. The Constitutional Court Complimentary Act 13 of 1995 provides for a number of procedural matters pertaining to the Constitutional Court. These include the seal of the Court; the scope and execution of the process of the Court; the issue of process against a member of the Court; the referral of an order of constitutional invalidity made by the Supreme Court of Appeal or a High Court in terms of section 172(2) of the Constitution; the manner of securing the attendance of witnesses and the production of documents, and the refusal by a witness to give evidence or to produce documents.

The Supreme Court Act 59 of 1959 deals with the seals of the High Courts (as the superior Courts are now designated under the Constitution); the removal of proceedings from one division to another; the issue of process against a Judge; the time allowed for appearance; the manner of procuring the attendance of witnesses and the production of documents; interrogatories and commissions *rogatoire*, and execution.

The Magistrates' Courts Act 32 of 1944 deals with procedural matters such as the manner of procuring the attendance of witnesses; interrogatories and commissions *de bene esse*, and the pre-trial procedure for formulating issues. Chapter IX of the Act deals extensively with the execution of judgments, including such matters as the manner of execution; property executable; inquiry into a debtor's financial position; orders for the payment of judgment debts in instalments; emoluments attachment orders and administration orders.

### B. Rules of Court

The detailed rules of procedure are to be found in the Rules of Court. In the common-law procedural model, superior Courts have always made their own rules to regulate their own process. In keeping with this tradition, the Supreme Court of the Colony of the Cape of Good Hope was given extensive powers to make rules for the practice and pleading in civil matters by the Charters of Justice of 1828 and 1832. These powers were confirmed in section 43(1) and

43(2)(a) of the Supreme Court Act 59 of 1959. The Judges of the superior Courts were at one time also given the power to make rules for the lower Courts. The idea of a statutory ‘Rules Board’ for lower Courts originated in Natal. Section 80 of the Magistrates’ Courts Act 82 of 1896 (Natal) provided for the establishment of a Rules Board consisting of the Crown Solicitor, a magistrate appointed by the Governor and a person appointed by the committee of the Natal Law Society. The Magistrates’ Courts Act 32 of 1917 followed the Natal example and vested the power to make rules for the lower Courts in a Rules Board. The Rules Board was retained as the rule-making body for lower Courts in section 25 of the Magistrates’ Courts Act 32 of 1944.

By the Rules Board for Courts of Law Act 107 of 1985, which came into operation on 20 February 1987, the rule-making powers for superior and inferior Courts passed to a statutory Rules Board for Courts of Law. The only rule-making power retained by the judiciary is the power conferred on a Judge President of a High Court under section 43(2)(b) of the Supreme Court Act 59 of 1959 to make ‘local’ rules for regulating the proceedings of his Court or of any local division within the area of jurisdiction of that Court. There are a number of specialist Courts with their own rules which differ from those of the regular Courts and which are not made by the Rules Board. These include the rules of the Small Claims Courts; the rules of the Income Tax Appeal Court; the rules for the conduct of proceedings in the Labour Court and the Labour Appeal Court; the rules of the Land Claims Court, and the rules of the Constitutional Court.

The Rules of Court constitute the procedural framework within which civil disputes are to be resolved. In *Khunou v. M. Führer & Son (Pty) Ltd*,<sup>1</sup> Slomovitz AJ described the nature and purpose of the rules as follows:

‘The proper function of a Court is to try disputes between litigants who have real grievances and so see to it that justice is done. The rules of civil procedure exist in order to enable Courts to perform this duty with which, in turn, the orderly functioning, and indeed the very existence, of society is inextricably interwoven. The Rules of Court are in a sense merely a refinement of the general rules of civil procedure. They are designed not only to allow litigants to come to grips as expeditiously and as inexpensively as possible with the real issues between them, but also to ensure that the Courts dispense justice uniformly and fairly, and that the true issues which I have mentioned are clarified and tried in a just manner.’

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<sup>1</sup> 1982 (3) SA 353 (W) at 355G-H.

The rules are not an end in themselves to be observed for their own sake: they are provided to secure the inexpensive and expeditious completion of litigation before the Courts. For this reason the Courts do not encourage formalism in the application of the rules. This does not, however, mean that the provisions of the rules can be disregarded or that slackness on the part of practitioners will be tolerated.

Though they regulate the different phases of the civil process, the rules are not exhaustive of practice and are sometimes not appropriate to specific cases. Accordingly, the superior Courts retain an inherent power exercisable within certain limits to regulate their own procedure and adapt it and the Rules of Court according to the circumstances. A superior Court has the power to grant relief when the Rules of Court make no provision for it, and to relax the provisions of a rule, even where peremptory in form, when necessary in the interests of justice. A Magistrate's Court has no inherent jurisdiction and in regard to matters that are specifically provided for, a magistrate is obliged to keep within the terms of the Act and the rules. It is not clear whether a Magistrate's Court has the power to prevent the abuse of its own process, and it may be necessary in a proper case to approach a High Court, even though its order will relate to a matter pending in the Magistrate's Court.

### C. Practice Directions

Apart from local rules made under section 43(2)(b) of the Supreme Court Act 59 of 1059, the Judge Presidents of various High Courts have issued what is variously termed 'Court Notices', 'Practice Notes', 'Practice Directions' and 'Practice Directives'. These deal with a wide variety of matters, such as the preparation and filing of documents; urgent applications; pre-trial conferences and minutes, and heads of argument. Each High Court deals with these matters in its own way, resulting sometimes in wide divergences in the practice of different High Courts. Practice Directives pertaining to practice in the Constitutional Court and the Supreme Court of Appeal have also been issued.

### D. Common Law

As has been pointed out, several remedies of Roman-Dutch origin have survived in South African law. These include provisional sentence (*namptissement*); the *mandament van spolie*; attachment and arrest *ad fundandam iurisdictionem*, and arrest *suspectus de fuga*. It should be stressed that the procedures to obtain these remedies are today prescribed by the Rules of Court. The common law, however, remains an important source for the substantive aspects of the remedies. The

limited scope for the application of the rules of procedure of the Roman-Dutch law is apparent from the following statement in *Prudential Assurance Co Ltd v. Crombie*:<sup>2</sup>

‘While writers on Roman-Dutch law who lived many years ago and had their being in different conditions might be of some aid on certain aspects, for example, what constitutes a cause of action, they cannot – if it be remembered that our procedure is largely provided for by the Rules of Court – be of any real help in determining the present problem.’

In *Vitorakis v. Wolf*,<sup>3</sup> where counsel relied on the authority of Voet in regard to joinder and intervention, it was said:

‘One should be careful not to look almost exclusively to the common law as counsel has done, for guidance in this problem. On the contrary, our modern Rules of Court are so explicit on this point that there is now – since the promulgation of the Uniform Rules – hardly anything left of the basic common law approach to joinder and intervention.’

On the other hand, where the Rules of Court leave room for the application of common-law principles, the common law may be consulted as a source of procedure. Thus it was held in *De Wet v. Western Bank Ltd*<sup>4</sup> that under the common law, the Courts of Holland had a discretionary power to rescind judgments obtained on default of appearance, on sufficient cause shown. This discretion extended beyond, and was not limited to, the grounds provided in Uniform Rules 31 and 42(1).

## E. Precedent

The English doctrine of precedent asserted itself at the Cape even before the First Charter of Justice. In due course *stare decisis* became an established feature of South African practice. This means that judgments that interpret rules of procedure and lay down procedural guidelines are an important source of procedural law.

<sup>2</sup> 1957 (4) SA 699 (C) at 702B.

<sup>3</sup> 1973 (3) SA 928 (W) at 930H.

<sup>4</sup> 1979 (2) SA 1031 (A).

### III. FORM OF PROCEEDINGS

The rules cover every facet of the civil process, from the initiation of proceedings in one of the prescribed ways, through to judgment, appeal and execution of the judgment. The detail need not, indeed cannot, be canvassed here. No more will be done here than to sketch in broad outline some of the principal features of the system.

The principle of *audi alteram partem* is fundamental to the civil process. Thus the rules require that all those who may be affected by the order sought by a plaintiff or applicant be joined in the proceedings. The rules further make detailed provision for the manner of service upon interested parties of proceedings that have been initiated. Proceedings in the Magistrates' Courts and the High Courts may take two forms: proceedings by way of action (by way of summons) and proceedings by way of application (by way of notice of motion). The fundamental difference between the two forms of proceedings lies in the manner in which evidence is presented to the Court. In action proceedings the evidence is given orally by witnesses present in Court; in application proceedings the evidence is put before the Court in writing by way of affidavit (sworn statement). In view of the fact that an application is less costly and more expeditious than an action, there is, in the High Courts, 'an ever-growing practice of launching proceedings by way of motion which had previously only been initiated by way of action'.<sup>5</sup> Application proceedings are, however, not always appropriate and a wrong choice of procedure may induce a Court to refuse to hear the matter or elicit an adverse order as to costs.

#### A. Applications

An application begins with the service of a notice of motion to which is annexed an affidavit in which the facts relied upon by the applicant are fully set out. This is followed by an answering affidavit by the respondent in which he or she gives his or her version of the facts and, if necessary, by a replying affidavit by the applicant. The matter is then set down for hearing and it is argued on the basis of the facts set out in the affidavits. Oral evidence is normally not heard in application proceedings.

There are certain matters in which application proceedings are prescribed by statute or Rule of Court. There are other matters in which application

<sup>5</sup> *Minister of Native Affairs v. Sekukuni* 1958 (4) SA 99 (T) at 101G.

proceedings are not permissible at all, for example matrimonial matters and illiquid claims for damages. Between these extremes there is an area in which a litigant has a choice between action and motion proceedings according to whether or not there is on any material question of fact a dispute between the parties which cannot be resolved on affidavit. The choice does not depend upon any difference of character between various kinds of claims. It is rather a question of the proper method of determination in each case of the facts upon which any claim depends.

Whether or not a real and genuine dispute of fact exists between the parties, is a question of fact for the Court to decide. The Court must examine the alleged dispute of fact and see whether there is a real issue of fact that cannot be satisfactorily determined without the aid of oral evidence. The most obvious way in which a dispute of fact arises is when the respondent denies the material allegations made by deponents on the applicant's behalf and produces positive evidence to the contrary. A dispute of fact also arises when the respondent admits the applicant's affidavit evidence but alleges other facts that the applicant disputes. A dispute of fact further arises when the respondent concedes that he has no knowledge of the main facts stated by the applicant, but denies them, putting the applicant to the proof and he gives evidence to show that the applicant and his deponents are biased and untruthful or otherwise unreliable and that certain facts upon which the applicant relies to prove the main facts are untrue.

When a dispute of fact arises, the Court has a discretion as to the further course of the proceedings. The courses open to a Court once a factual dispute has been found to exist, set out in Uniform Rule 6(5)(g), are:

- to dismiss the application – the Court will dismiss an application when an applicant should have realised when launching his application that a dispute of fact, incapable of resolution on the papers, was bound to develop;
- to hear oral evidence on specified issues – the Court will adopt this course where the factual dispute is within narrow compass and can be expeditiously disposed of, or
- to order the parties to trial – the Court will order a matter to trial if the dispute of fact is incapable of resolution on the papers and too wide-ranging for referral to the hearing of oral evidence on specified issues. The Court will adopt this course where the applicant when launching his application could not reasonably have foreseen that a dispute of fact, incapable of resolution on the papers, was bound to develop. The effect of the order is that the application is converted into an action that culminates in a trial at which oral evidence is heard.

In the normal course, notice of an application must in accordance with the *audi alteram partem* rule be given to the respondent. In certain circumstances, an application may be brought *ex parte*, that is, without notice to a respondent. An application may be brought *ex parte*:

- when the applicant is the only person who is interested in the relief which is being claimed;
- where the relief sought is a preliminary step in the proceedings, for example, an application for leave to sue by way of edictal citation;
- where the nature of the relief sought is such that the giving of notice may defeat the purpose of the application, for example, an arrest *suspectus de fuga* under the common law or under an Anton Piller-type order, or
- where immediate relief is essential because harm is imminent. If granting relief will affect the interests of another person, the Court will not grant a final order without giving such other party an opportunity to be heard. The Court will issue a rule *nisi* calling upon the other party (now the respondent) to give reasons on or before a particular date (the return day) why a final order should not be granted. The rule *nisi* is nothing but an application of the *audi alteram partem* rule in terms of which all interested parties must be afforded an opportunity to state their case before a Court will make a final order.

Applicants must observe the utmost good faith in *ex parte* applications. This means that in an *ex parte* application, all material facts that *might* influence the Court in coming to a decision, including facts adverse to the applicant's case, must be disclosed. If any material facts are not disclosed, whether they be suppressed wilfully or omitted negligently, the Court may on that ground alone dismiss an *ex parte* application. The rules also make provision for urgent applications. 'Urgency' involves the abridgement of times prescribed by the rules and the departure from established filing and sitting times of the Court. The degree of relaxation of the rules and of the ordinary practice of the Court will depend in each case upon the degree of urgency of the matter. In some cases the urgency may be so great that no time is available to prepare any documents, in which case *viva voce* evidence may be heard. An applicant who approaches the Court by way of urgent application must explicitly set forth in his or her founding affidavit the circumstances which render the matter urgent and the reasons why he or she cannot be afforded relief at a hearing in due course. A person against whom an order was made in his or her absence in an urgent application may by notice set the matter down for reconsideration of the order.

## B. Actions

The issue and service of a summons initiate action proceedings. In the practice of the High Courts there are several kinds of summons that may be used depending upon the nature of the claim. They are:

- the summons for a claim in respect of a debt or liquidated demand;
- the combined summons for an illiquid claim, and
- the summons for provisional sentence (*namptissement*).

In the Magistrates' Courts there is one form of ordinary summons; a special form where an automatic rent interdict is included, and a special form for provisional sentence.

Proceedings by way of action can be divided into two distinct phases: the pre-trial phase and the trial. The pre-trial phase can in turn be subdivided into the pleading-phase, which is characterised by the exchange of pleadings in which the nature and scope of the dispute between the parties is defined, and steps in preparation for the trial after the close of pleadings. In this phase of the process, the rules make provision for matters such as requests for particulars for trial; discovery, inspection and production of relevant documents; inspection of things; medical examination of plaintiffs in personal injury cases; exchange of summaries of expert evidence to be adduced at the trial, and pre-trial conferences with a view to narrowing the issues and expediting the trial. The culmination of the whole process is the trial at which oral evidence is heard on the issues in dispute between the parties.

The parties control the two stages of the pre-trial phase. It is up to them to determine the nature and scope of the issues in dispute, to collect the evidential material for presentation at the trial and to take all steps necessary for the preparation of the trial. Except in so far as it may be requested by a party to grant some form of interim or interlocutory relief, the Court is not directly involved in the pre-trial phase of the process. The proceedings at this stage are characterised by the exchange of pleadings and other documents, in other words, everything is done in writing.

The process culminates in the trial, the 'day in Court', a continuous process during which the parties present all the evidence on which they rely. The principle of orality prevails at this stage of the proceedings: the witnesses are present in Court and give their evidence *viva voce* in open Court. The presentation of documentary and real evidence is also usually done orally in that witnesses are called to identify the documents or objects in question. This phase of the proceedings is

also controlled by the parties to the extent that each party decides on the evidence to be adduced on its behalf and on the sequence in which the evidence is to be presented to the Court. It is the function of the presiding Judge or magistrate to see to it that the proceedings are conducted in accordance with the applicable rules of law and procedure. After the presentation of all the evidence, the parties are afforded the opportunity to address the Court. The Court then gives its judgment.

#### IV. COSTS

At the end of the trial of an action, or the hearing of an application, the Court will make an order of costs in favour of one of the parties. The basic rule is that costs are in the discretion of the Court who will exercise its discretion in the light of all the circumstances of a particular case which may have a bearing upon the question of costs as would be fair and just between the parties.

The most important general rule is that costs follow the result. In *Texas Co (SA) Ltd v. Cape Town Municipality*<sup>6</sup> the principle is succinctly stated as follows:

‘Costs are awarded to a successful party in order to indemnify him for the expense to which he has been put through having been unjustly compelled either to initiate or defend litigation as the case may be.’

In the exercise of its discretion, the Court may, depending upon the circumstances of a particular case, make no order as to costs, which in effect amounts to an order that each party pays its own costs, or make a punitive order of costs against a party who has, for example, abused the process of the Court or caused his or her opponent to incur unnecessary expense.

South African common law in general frowned upon the champertous agreement (*pactum de quota litis*), though some forms of such agreements were acceptable.<sup>7</sup> Thus it was held that where a plaintiff has an original and valid cause of action and pursues that cause of action as the real plaintiff and for his own benefit, the Court will not refuse to entertain the action merely because the plaintiff has made a champertous agreement in regard to a portion of the proceeds of the action.<sup>8</sup> The common-law position has been changed by the

<sup>6</sup> 1926 AD 467 at 488.

<sup>7</sup> *Headleigh Private Hospital (Pty) Ltd v. Soller & Manning* [1998] 4 All SA 334 (W).

<sup>8</sup> *Lekeur v. SANTAM Insurance Co Ltd* 1969 (3) SA 1 (C).

Contingency Fees Act 66 of 1997 which allows ‘contingency fees agreements’ in certain proceedings under prescribed conditions.

## V. APPEAL AND REVIEW

A litigant who is dissatisfied with the judgment of a Court of first instance may appeal against that judgment to a higher Court. An appeal against the decision of Magistrates’ Courts and other inferior Courts lies to the provincial division of the High Court having jurisdiction. Two Judges of the High Court will hear the appeal. An appeal against the judgment of a single Judge of the High Court sitting as a Court of first instance will lie either to a full Court (‘a full Bench’) of the provincial division of the High Court having jurisdiction, or to the Supreme Court of Appeal. In a matter which involves a ‘constitutional issue’, an appeal will lie to the Constitutional Court.

In civil proceedings, the right to appeal is not absolute. No appeal lies against certain interlocutory and other orders that do not have the effect of a final judgment. In matters where an appeal lies, there is an appeal as of right from a judgment of a Magistrate’s Court. Within the context of High Court proceedings, leave to appeal has to be obtained from the Court against whose judgment or order the appeal is to be made, both in the case where a single Judge of the High Court sits as a Court of first instance in proceedings and in the case where the appeal is to be made against a judgment or order given by a High Court on appeal to it. Where such leave has been refused, the Supreme Court of Appeal may grant leave to appeal. In the case of a judgment given by a full Court of a provincial division of the High Court, the special leave of the Supreme Court of Appeal has to be obtained. A litigant who desires to appeal to the Constitutional Court on a constitutional matter must bring a substantive application for leave to appeal.

A division of the High Court has the power to review the proceedings of all inferior Courts within its area of jurisdiction. Section 24(1) of the Supreme Court Act 59 of 1959 sets out the following grounds upon which the proceedings can be brought under review:

- absence of jurisdiction on the part of the Court;
- interest in the cause, bias, malice or corruption on the part of the presiding judicial officer;
- gross irregularity in the proceedings, and
- admission of inadmissible or incompetent evidence or the rejection of admissible or competent evidence.

From the foregoing it is apparent that judicial review of the proceedings of an inferior Court is not concerned with the decision of the Court, but with the decision-making process. In other words, where the complaint is that the Court has come to a wrong conclusion on the facts and the law, the appropriate way to attack the decision of the Court is by way of appeal. Where the grievance is about the manner of conduct of the proceedings, the appropriate way to proceed is to bring the matter on review in the High Court.

The procedure on appeal and review differ materially. A notice of appeal setting out the grounds upon which the merits of the decision of the Court are attacked initiates an appeal. At the hearing of the appeal, the Court of Appeal is confined to the record of the proceedings in the Court *a quo*: no further evidence is received on appeal. Review proceedings are brought by way of application with the grounds of complaint being set out in the founding affidavits and the respondent stating his or her case in his answering affidavit. Though a review will in most cases turn on the record of the proceedings in the Court *a quo*, the Court of review is not confined to the record. In some cases, the ground for review may not be apparent from the record. Remarks made by a judicial officer outside the Court may, for example, be indicative of bias on his or her part.

## VI. REVIEW OF ADMINISTRATIVE ACTION

Review proceedings are not confined to the review of the proceedings of lower Courts. As is the case in English law and administrative-law systems based on it, South African law maintains that administrative bodies are subject to supervision by the ordinary Courts. Prior to 1994 this was an inherent power of the Supreme Court governed by the common law. The constitutional dispensation has had a decisive effect on the control of administrative action by the Courts. The review of administrative action is today regulated indirectly by section 33 of the 1996 Constitution and directly by the Promotion of Administrative Justice Act 3 of 2000. Judicial review of administrative action is the citizen's principal bulwark against maladministration. The focus of this kind of review is also on the decision-making process and not on the merits of the administrative decision. Indeed, for a Judge to pronounce on the merits of administrative decisions would amount to usurpation by the judiciary of the functions entrusted by the Constitution to the executive branch of Government. The procedure has not undergone any change. Review of administrative proceedings are brought by way of application, the grounds of complaint being set out in the founding affidavits, the respondent stating his or her case in his or her answering affidavit.

## VII. CONCLUSION

Though the common-law procedural model as applied in South African practice in general works reasonably well, it has not escaped the ills which beset procedure in common law jurisdictions, namely delay, expense and (at times) excessive adversarial zeal. Through the years these problems have been addressed by several commissions and, in recent years, by the Rules Board. More aggressive action is, however, called for in order to bring South African civil procedure into line with developments in other common law jurisdictions. In particular, greater use should be made of information technology and of case-management techniques to regulate the civil process from inception through to execution of the final judgment.

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# *Chapter 13*

## **Criminal Law**

***Jonathan Burchell\****

### **I. THE SCENE**

The Roman-Dutch and English roots of the South African criminal law produced a hybrid or mixed system. These roots were firmly planted in South African soil by the Dutch settlers who arrived at the Cape of Good Hope in 1652 and by the British in the late 18th and early 19th centuries.

The reception of English criminal law was greatly facilitated by the Transkeian Penal Code of 1886. The English accusatorial model of criminal procedure prevailed from an early stage and trial by jury remained until 1969. While the Courts resisted the subtle English distinctions between felonies and misdemeanours, assault and battery, and burglary and housebreaking, the English law nevertheless exerted its influence on the definition and detail in the criminal law. The basic system of criminal law remained Roman-Dutch, but the English influence was significant, at least initially, in both form and substance. This amalgam of Roman-Dutch and English law gradually spread to the other provinces in South Africa.

Under the influence of 18th and 19th century European criminal theory and writing, South Africa adopted the fundamental principle of legality, which in essence required that the criminal law should be reasonably certain in its definition, that it should not be retrospective in its operation and that the Courts, as opposed to the legislature, should not be empowered to create new crimes. The essential aspects of the principle of legality are also entrenched in the Constitution of the Republic of South Africa, adopted in 1996.

During the course of the 20th century, South African criminal law, particularly in its statutory form, was perverted by successive Governments to further policies of racial segregation and oppression under the notorious scourge

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of ‘apartheid’. A skewed crime control model reached its zenith amidst ominous dark clouds of institutionally entrenched racial polarisation. Draconian security laws re-enforced by emergency regulations, race-related penal provisions and the alarming use of the death penalty, provided the inevitable backdrop for widespread political resistance. Substantial resistance from within as well as outside South Africa ultimately led, in the last years of the 20th century, to the termination of the state of emergency, the unbanning of the African National Congress, the introduction of a democratic Government, the removal of racial crimes from the statute book and the adoption of a Constitution with a Bill of Rights.

Legal research in criminal law has over the years been influenced by both English and continental sources (especially Dutch and, more recently, German). Theories from Germany and England have, through being interpreted by South African writers, helped to shape the South African criminal law, while Courts have also, at times, developed peculiarly South African solutions to problems. The English and German theories that have influenced the shape of the general principles of the South African criminal law will be documented in the text of this chapter.

The present system of criminal law in South Africa is a truly mixed system blending Roman-Dutch, English, German and uniquely South African elements, which all require to be tested against the norms and values of a justiciable Bill of Rights. The indisputable fact that all criminal prosecutions inevitably involve State action will ensure that the quintessential private law dispute regarding the extent of the horizontal application of the Bill of Rights in South Africa will not be reflected in the criminal law. Principles of criminal law, whether derived from the common law or statute, will have to pass the litmus test of constitutionality. The post-Constitutional ethos will not only provide the catalyst for re-evaluation of even hallowed principles of the statutory or common law on crime but will also undoubtedly facilitate the continuing influence of customary law, non-State systems of justice and restorative justice in identifying fundamental principles of fairness.

The current challenge to the fledgling democracy’s system of criminal justice in South Africa lies not so much in the field of the taxonomic development of legal principle nor even in the crime-control, legislative blunderbuss response to the ravages of transnational crime and corruption threatening both society and internal security. The fundamental challenge to the future of the criminal justice system in South Africa lies in drastically improving criminal detection rates and developing a widespread respect for the principles of the law and due process.

## II. THE GENERAL PRINCIPLES OF CRIMINAL LIABILITY

For criminal liability to result, the prosecution (the State) must prove, beyond reasonable doubt:

- that the accused has committed *voluntary conduct* which is *unlawful* (sometimes referred to as *actus reus*), and that this conduct was accompanied by
- *criminal capacity* and
- *fault* (sometimes referred to as *mens rea*).

The overriding principle of the South African criminal law is enshrined in the maxim *actus non facit reum nisi mens sit rea* – an act is not unlawful unless there is a guilty mind. Although a handful of regulatory and other statutory offences are based on strict (or no-fault) liability, the general rule is that fault is required for criminal liability and the fault element may take the form of either intention or, in some cases, negligence. O'Regan J in the Constitutional Court emphasised the centrality of fault-based liability<sup>1</sup> and the Supreme Court of Appeal has endorsed a firm preference for at least a negligence basis for statutory offences.<sup>2</sup>

### A. Unlawful Conduct

#### I. General

In essence, the criminal law punishes the conduct of human beings. However, a person may be liable for using an animal to inflict harm on another and, in certain statutorily defined instances, an artificial person such as a company may incur criminal liability.

Criminal conduct must be voluntary in the sense that it is controlled by the accused's conscious will. Involuntary conduct during sleep, concussion, heavy intoxication, provocation or severe emotional stress, for instance, is not considered by the Courts to be conduct for the purposes of criminal liability. However, even if an accused person acts in a state of automatism he or she may nevertheless be criminally liable for such conduct if there was *prior* voluntary conduct, combined with *antecedent* fault, which is causally linked to the unlawful consequence

<sup>1</sup> *S v. Coetze* 1997 (3) SA 527 (CC) at paras 162-177.

<sup>2</sup> See the majority judgment of the Appeal Court in *Amalgamated Beverage Industries Natal (Pty) Ltd v. Durban City Council* 1994 (3) SA 170 (A).

committed in a state of automatism. This form of liability, which has an echo in the German jurisprudence, derives from the *actio libera in causa* principle.

### 2. *Insane and sane automatism*

A distinction is drawn between sane and insane automatism. A condition of insane automatism results from a pathological mental condition, which requires the accused under both the common and statute law to prove this pathological condition on a balance of probabilities. Proof of insanity usually results in committal to a mental institution.

Placing the burden of proof on the accused is a questionable infringement of the presumption of innocence, and possibly other constitutional rights, but is based on the countervailing English-based presumption of sanity.

The same rules of onus and committal that apply to insanity cases do not apply to other forms of automatism or incapacity. An accused, raising the defence of *non-pathological automatism or incapacity*, does not bear a burden of proving the basis of this defence but, at most, bears a mere *evidential burden* of laying a foundation for the defence. Success of this defence is founded upon the identification of a reasonable doubt regarding the element of voluntariness or capacity and is accompanied by a complete acquittal rather than committal to an institution.

Courts in South Africa have warned that evidence of automatism must be carefully scrutinised and that there is a presumption that, in normal circumstances, persons act voluntarily. Recent case authority on the scope of the defence of non-pathological automatism (see II.B.5.b. below), questions the distinction between non-pathological *automatism* and non-pathological *incapacity*.

### 3. *Omissions*

As a general rule, conduct must consist in doing something (a positive act) or not doing something (an omission). There is no general duty on individuals to act, but, depending on the legal convictions of the community, there may be criminal liability for a failure to act. The legal convictions of the community have crystallised into the judicial recognition that exceptional legal duties may arise in the following circumstances:

- where there is prior conduct on the part of the accused creating a legal duty to act (the so-called *omissio per commissionem* rule);
- where the accused is in control of a potentially dangerous thing or animal, which imposes on him or her a legal duty to act to prevent that thing or animal causing harm to others;

- where the accused is in a protective relationship with the person harmed so as to be under a legal duty to prevent that person from suffering harm;
- where the accused occupies a public or quasi-public office *vis-à-vis* the victim, and
- where either statute or contract requires a legal duty to act.

The Courts have affirmed that these categories do not constitute a closed list and are not watertight. Further categories or factors can be added provided these new circumstances do not overturn the fundamental rule of no liability and remain within the constraints of the principle of legality. The Constitutional Court has emphasised that the approach of the common-law Courts to the development of circumstances giving rise to a legal duty to act must be informed by and developed in accordance with constitutional norms and values.<sup>3</sup>

In recent judgments of the Supreme Court of Appeal on the civil law,<sup>4</sup> the general rule of no liability for an omission is qualified in the context of the liability of the State. In terms of these judgments, a duty leading to liability for damages would appear to be placed on the State to act to protect citizens from violent crimes and from having their human rights infringed. This duty on the State to act would *logically* also extend to criminal law. However, a policy decision might be involved in determining whether the civil remedy for damages is more appropriate than the criminal sanction as a means of ensuring the accountability of the State for its omissions to protect its citizens from having their fundamental rights infringed.

In certain circumstances, the criminal law punishes a ‘state of affairs’, such as being found in possession of prohibited matter or drunk in a public place.

#### 4. Causation

In crimes that involve an unlawful *consequence*, as opposed to an unlawful circumstance, there must be a causal link between the initial act or omission and the ultimate unlawful consequence. Liability requires both *factual* and *legal* causation. The *sine qua non* test for determining factual causation is favoured by the South African Courts and a theoretical distinction is drawn between

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<sup>3</sup> *Carmichele v. Minister of Safety and Security* (2001) 10 BCLR 995 (CC), 2001 (4) SA 938 (CC); *Minister of Safety and Security v. Van Duivenboden* 2002 (6) SA 431 (SCA); *Van Eeden v. Minister of Safety and Security (Women's Legal Centre Trust, as Amicus Curiae)* 2003 (1) SA 389 (SCA).

<sup>4</sup> See n. 3 above.

causation by a positive act (involving a notional elimination of the positive act from the sequence of events) and causation by an omission (involving a notional addition to the sequence of events of the act legally required of the accused). In either inquiry, if the consequence of the act or omission in question disappears after engaging in the notional inquiry, then the conduct is a cause in fact of the particular consequence. To put the inquiry in its more traditional way: if the consequence would not have resulted but for the conduct of the accused, the conduct of the accused is a factual cause of the consequence.

A smorgasbord approach to legal causation allows the Courts to weigh in the balance a variety of policy factors in order to limit the scope of liability for factual causes. In particular, the following inquiries are used by the Courts to limit liability on the grounds of legal policy: was the consequence in question a direct consequence of the conduct of the accused or did an abnormal act or event (*novus actus* (or *causa*) *interveniens*) break the causal sequence; and, in the light of human experience, would this type of conduct normally lead to this type of consequence (the adequate theory of causation)? The unifying feature of these inquiries is the examination of what is normal or abnormal in the light of human experience.

### *5. Unlawfulness*

The accused's conduct must be unlawful in order to lead to criminal liability. Usually this means that there must be no defence excluding unlawfulness available to the accused. The general defences excluding the unlawfulness of conduct available to an accused are: private (or self) defence, necessity, impossibility, obedience to superior orders, consent, public authority, disciplinary chastisement, *de minimis non curat lex* and *negotiorum gestio*.

Whether entrapment is a defence has not been authoritatively decided in the South African criminal law but a fairly recent High Court decision<sup>5</sup> has rejected the defence of entrapment in South African law. However, the Courts can regulate potential abuses of State power by declaring evidence obtained as a result of an abuse of State power inadmissible in Court or by requiring that the State come to the Court 'with clean hands'.

No burden of proof rests on the accused to establish the defences excluding unlawfulness as the prosecution bears the overall onus of proving the unlawfulness of conduct beyond reasonable doubt.

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<sup>5</sup> *S v. Hassen* 1997 (1) SACR 247 (T).

### a. Private defence

The term ‘private defence’ is used in preference to ‘self-defence’ since the former term is wide enough to include legitimate defence of a third party and the term also stresses the essence of the distinction between ‘private’ defence and a publicly sanctioned use of force, such as the use of force used by persons effecting an arrest or apprehending a fleeing suspect.

Private defence will be a defence where it becomes necessary for a person faced with an imminent or commenced, unlawful attack on his or her or a third party’s legal interests to take the law into his or her own hands by using reasonable force to repel the unlawful attack. There is authority to the effect that, in special circumstances, a person may kill in defence of property but this authority, dating back to the 1960’s, could be challenged on the basis that it unjustifiably undermines the pre-eminence given to the right to life (as opposed to property) in the Constitution.

### b. Necessity or compulsion

Necessity will be a defence where a person, faced with human threats (compulsion) or overwhelming force of surrounding circumstances, contravenes the norms of the criminal law by inflicting harm on an innocent third party or his property. For many years, legal systems have had to grapple with the difficult ethico-legal question whether necessity or compulsion can justify or excuse the intentional killing of another human being or beings. The South African solution to this dilemma is to acknowledge that the criminal law requires reasonable conduct from the ordinary person rather than stipulate a ‘blueprint for saintliness’, as does the English law. Under the South African criminal law, necessity or compulsion may, in principle, be a defence to all crimes, including murder, provided a reasonable person would not have been able to resist the threats implicit in the necessity or compulsion situation. An exception to the rule that, in principle, necessity or compulsion can be a complete defence even to a charge of murder, is that a person who voluntarily and deliberately joins a criminal gang knowing, or at least foreseeing, that the violent code of vengeance of the gang might lead to such compulsion, cannot successfully raise the defence of compulsion if such threats are exerted by the gang. This exception is also recognised in English law.

South African criminal law does not yet draw a distinction between necessity (or compulsion) as a ground of ‘justification’ and an ‘excuse’ in the jurisprudential sense acknowledged by the German Criminal Code.

c. Impossibility

If it is physically impossible for the accused to comply with a positive obligation imposed by law he or she may escape liability for failing to comply with this obligation. For instance, it may be physically impossible for me to submit an income tax return as required by law if I have been declared insane and committed to a mental institution for treatment.

d. Superior orders

This defence usually arises in the context of military or police commands. Obedience to certain orders may be a defence under the South African criminal law. This defence will, however, not be available where the order was manifestly unlawful. For instance, a command issued by a military superior to a subordinate to kill and rape innocent civilians will be regarded as manifestly unlawful. The defence of superior orders has not been recognised beyond the scope of commands issued by legally acknowledged military or police authorities.

e. Consent

The principle *volenti non fit injuria* (an injury is not done to one who consents) applies to a limited extent in the criminal law. Strictly speaking, a person cannot validly consent to be killed, because the State has an interest in the preservation of life. However, support is emerging in the High Court for a limited concession to this rule in the context of voluntary euthanasia where the subject is in a persistent vegetative state, lacking a basic quality of life and with no reasonable prospect of recovery (see III.A.1. below). The Courts in South Africa have not yet pronounced on the validity of what is colloquially called the ‘living will’, although the South African Law Commission has urged legal recognition of such document.

Consent may be a valid defence to what would otherwise constitute an assault in the context of, for example, therapeutic medical treatment or lawful sporting activities.

The current South African definition of rape includes, as one of its elements, the lack of a woman’s consent to sexual intercourse. This emphasis on the consent or lack of consent of a woman in rape prosecutions has been disputed by legal reformers as it often leads to secondary victimisation of women. The South African Law Commission<sup>6</sup> has redrafted a definition of rape that shifts the focus

<sup>6</sup> See Draft Sexual Offences Bill, Project 107, *Sexual Offences Report* (December 2002), Annexure A.

of the offence away from its preoccupation with lack of consent towards an emphasis on ‘coercive circumstances’. This revised definition of rape, which is currently before Parliament, also casts the crime of rape in gender neutral terms and clearly labels as ‘rape’ the conduct of the person who procures another to commit sexual penetration with a third party.

#### f. Public authority

The State is, for instance, authorised by statute (section 49 of the Criminal Procedure Act 51 of 1977) to use force, including deadly force, on a person who flees or resists arrest. The Courts<sup>7</sup> and legislature<sup>8</sup> recently redefined the scope of legitimate deadly force that can be used by police officers and others in preventing a suspect from fleeing arrest. The Courts have specifically required a balancing of the nature of the crime suspected of having been committed by the fugitive to be weighed against the threat or potential threat of physical harm to the arrestor and others.

It is clear that under the current law, an arrestor who has attempted to arrest an unarmed youth for stealing an apple is not entitled to shoot to kill the fleeing youth, even if the obligatory warning shot has been fired. Contrary to perceptions that fuelled police resistance to this enactment coming into force, the power of arrestors to protect themselves and others against violent criminals is not curtailed by the recent Court decisions or the legislative reform of section 49. In essence, the public authority granted to certain persons to use force against fleeing suspects is, notwithstanding some subtle differences, based on the normal constraints on the use of force in private defence.

The issue of onus of proof in section 49 situations remains disputed. The case law prior to the recent redefinition of the scope of deadly force that can legitimately be used by arrestors in apprehending fleeing suspects, placed the onus on the arrestor to prove that he or she fell within the framework of section 49. This judicially sanctioned shifting of the onus onto the accused (arrestor) to prove the existence of a defence excluding unlawfulness was clearly an infringement of the

<sup>7</sup> *Govender v. The Minister of Safety and Security* 2001 (4) SA 273 (SCA); *Ex parte Minister of Safety and Security: In re S v. Walters* 2002 (2) SACR 105 (CC).

<sup>8</sup> An amendment of the scope of s. 49 of the Criminal Procedure Act 51 of 1977 effected by s. 7 of the Judicial Matters Second Amendment Act 122 of 1998. Apparently, the police are operating according to the Constitutional Court’s guidelines on the use of deadly force on fleeing suspects despite the fact that the amended s. 49 has not yet come into operation.

presumption of innocence, which required the prosecution to prove guilt (including the unlawfulness of the accused's conduct) beyond reasonable doubt. This infringement of the fundamental rule of criminal law was justified on the policy grounds of confining a statutory provision that was couched in overly broad terms. The revised version of section 49, unlike its predecessor, is not so widely defined or open to abuse, and thus, it is submitted, the Courts should interpret this new provision in such a way that it does not infringe the fundamental rule that the prosecution must prove all the elements of criminal liability (including the unlawfulness of conduct) beyond reasonable doubt.

#### g. Disciplinary chastisement

*The past:* Parents and guardians of children were, by common law dating back to the early 20th century, authorised to inflict moderate corporal chastisement upon young persons in their charge for educational purposes. 20th century legislation provided for teachers and prefects, acting *in loco parentis*, to inflict similar moderate corporal chastisement on male pupils in their charge. The Criminal Procedure Act 51 of 1977 made statutory provision for Courts to use corporal punishment as a sentencing option.

*The present:* In 1995 the Constitutional Court in *S v. Williams*<sup>9</sup> held that the judicial imposition of corporal punishment in South Africa was unconstitutional – juvenile whipping as a sentencing option violated human dignity and the right not to be subjected to cruel, inhuman and degrading punishment. The infringements of these rights could not be justified in terms of the limitations clause of the Constitution.<sup>10</sup>

Section 10 of the South African Schools Act 84 of 1996 outlawed the administration of corporal punishment in a school to a learner and the Constitutional Court<sup>11</sup> has held that this provision extends to both public (State) and private schools alike. The Court did not specifically deal with the last vestige of disciplinary chastisement – chastisement of children by parents and guardians in the privacy of the family home.

*The future:* Logically, the same reasoning regarding the degrading nature of corporal punishment in schools should also apply to corporal punishment in the

<sup>9</sup> 1995 (3) SA 632 (CC).

<sup>10</sup> Then s. 33 of the interim Constitution, Act 200 of 1993 and now s. 36 of the final Constitution, Act 108 of 1996.

<sup>11</sup> *Christian Education South Africa v. Minister of Education* 2000 (10) BCLR 1051 (CC), 2000 (4) SA 757 (CC).

domestic context, although the practical problem of monitoring abusive parents' conduct in the privacy of the home is one that cannot be ignored. It is possible that the South African Courts might in future take the approach that all forms of corporal punishment, except those that could be classified as *de minimis* or where the discretion to prosecute is declined, could fall foul of the Constitution.<sup>12</sup>

#### *h. De minimis non curat lex*

The crime may be so insignificant in nature that the law may disregard it as too trivial to warrant criminal liability.

#### *i. Negotiorum gestio* (or unauthorised administration)

Where a person performs an otherwise unlawful act in the interest of another with the intention of benefiting that other, but without the latter's knowledge or consent, we refer to the situation as one of *negotiorum gestio*. The conduct of the *negotiorum gestor* (the unauthorised administrator) can be regarded as lawful in certain circumstances.

## B. Capacity

### *1. The concept of capacity*

In 1967 a Commission of Inquiry into the Responsibility of Mentally Deranged Persons and Related Matters (under the chairmanship of Mr Justice Rumpff) recommended that the question of criminal responsibility of the insane accused be tested, like that of the responsibility of young children and insane persons in Roman law, in terms of criminal capacity. This test of capacity, which has an analogue in the German law but not specifically in the Anglo-American system of criminal law, later became accepted by the Courts as a general criterion for judging criminal responsibility in *all instances*, even where no mental illness or youthfulness was involved.

The accused must have the requisite criminal capacity (or capacity for fault) before he or she can be convicted. Capacity means the capacity to appreciate the wrongfulness of conduct (cognitive functions of the mind) and the capacity to act

<sup>12</sup> The Israeli Supreme Court in *Plonit v. Attorney General* (1998) 54 (1) PD 145 has indicated that even the last vestige of corporal punishment in the privacy of the family home may not be immune from criminal prosecution and the direction of this and other foreign precedent could triumph within the South African society where child abuse has already reached alarming proportions.

in accordance with that appreciation (conative functions of the mind). The prosecution must prove criminal capacity beyond reasonable doubt.

Criminal capacity must be present in the prosecution of both crimes based on intention and those for which negligence is sufficient. Capacity is tested subjectively, rather than objectively, and so *any* subjectively assessed factor resulting in lack of cognitive or conative functions could, in principle, lead to a finding of incapacity and consequent acquittal. Criminal capacity has been held by the Courts to be lacking as a result of youthfulness, insanity, heavy intoxication, provocation or emotional stress. If such capacity is not established beyond reasonable doubt by the prosecution, then the accused is entitled to a complete acquittal.

## 2. *Youthfulness*

In South Africa, children under the age of 7 are not liable criminally or civilly.<sup>13</sup> There is an irrebuttable presumption that a child under 7 years of age is not criminally responsible (that is, lacks criminal capacity) for his or her actions.

As far as children between the ages of 7 and 14 years are concerned, there is a presumption that they are not criminally responsible for their conduct but this presumption is rebuttable and the presumption's effect weakens as the child approaches the age of 14 years.

Above the age of 14, criminal responsibility is assessed in the same way as an adult.

## 3. *Insanity*

The only common-law exception to the rule placing the onus on the State to prove the elements of criminal liability (including capacity) beyond reasonable doubt is in the context of the defence of insanity. When the defence of insanity is raised, the accused (under the influence of English law) has to prove on a balance of probabilities<sup>14</sup> that he or she was suffering from a legally-recognised, pathological

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<sup>13</sup> S. 6 of the Juvenile Justice Bill of 2000 (South African Law Commission, Project 106, *Juvenile Justice Report* (July 2000), [B 49-2002] recommends raising the age to 10.

<sup>14</sup> This rule regarding the onus of proof is derived from the English law presumption of sanity. The presumption of sanity and the shifting of the onus onto the accused to prove insanity, where he or she raises the issue, is now entrenched in South African criminal law by s. 5 of the Criminal Matters Amendment Act 19 of 1998, which amends s. 78 of Act 51 of 1977. This amendment came into force on 28 February 2002.

condition (mental illness or mental defect) at the time he or she committed the prohibited conduct and that this condition impaired criminal capacity.

Placing a burden of proof, on a balance of probabilities, on the accused to prove insanity, is arguably an unjustifiable and unreasonable infringement of the constitutionally-entrenched presumption of innocence that requires the prosecution to prove the elements of criminal liability (including criminal capacity) beyond reasonable doubt. The rule that shifts the burden of proof to the accused is not only contrary to the general principles of criminal liability but also arguably one that perpetuates the unequal treatment of mentally-ill accused persons who are particularly vulnerable. Furthermore, placing on the accused a *full onus* of proving *pathological* illness or defect, which if successfully discharged will lead to *committal to an institution*,<sup>15</sup> while requiring an accused who raises the defence of *non-pathological* incapacity to simply *adduce enough evidence to create a reasonable doubt* regarding capacity in order to obtain a complete acquittal, merely aggravates an already indefensible distinction.

#### 4. Intoxication

The leading judgment of the Appellate Division (now Supreme Court of Appeal) in *S v. Chretien*,<sup>16</sup> rejected the application of the English specific intent rule relating to intoxication in South Africa and affirmed that self-induced intoxication, depending on its degree, could be a *complete* defence excluding the voluntariness of the accused's conduct, criminal capacity or intention. Although this judgment in 1981 opened up the opportunity for lack of capacity succeeding under the common law as a defence in a case of self-induced intoxication, the legislature subsequently intervened (albeit unsuccessfully) to try and fill the gap created by the *Chretien* case. By enacting section 1(1) of the Criminal Law Amendment Act 1 of 1998 in a vain attempt to reflect public sentiment on intoxication, the legislature simply compounded the problems.

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<sup>15</sup> A successful defence of insanity results in the accused becoming a State patient and, in the normal course of events, being sent to a mental institution: see s. 5(d) of the Criminal Matters Amendment Act, amending s. 78 of the Criminal Procedure Act 51 of 1977. The amendments to s. 78 of the Criminal Procedure Act (and s. 29 of the Mental Health Act 18 of 1973) replace the old inflexible rule that a Judge had no discretion but to send the insane accused to an institution for treatment which could last for an extremely long time, with a limited discretion to release him or her.

<sup>16</sup> 1981 (1) SA 1097 (A).

In essence, section 1(1) of the Criminal Law Amendment Act, modelled on section 330(a)(1) of the German Penal Code, created a special *statutory* offence of committing a prohibited act while in a state of criminal *incapacity* induced by the voluntary consumption of alcohol. The section requires the prosecution to prove beyond reasonable doubt that the accused is not liable for a common-law offence because of lack of capacity resulting from self-induced intoxication, so requiring the prosecution to engage in an unfamiliar *volte-face*. If the intoxication, leading to an acquittal of the common-law offence, is only sufficient to impair *intention* (as on the facts of the *Chretien* case), rather than sufficient to impair capacity, then no liability can result under section 1(1), as lack of capacity resulting from intoxication has to be proved for a conviction under section 1(1). The section is in dire need of reform or replacement with a more appropriately worded section.

##### 5. *Provocation or emotional stress*

###### a. A period of vacillation

The Roman and Roman-Dutch law did not regard anger, jealousy or other emotions as an excuse for any criminal conduct but only as a factor which might mitigate sentence if the anger was justified by provocation.

Although the Rumpff Commission of Inquiry into Responsibility of Mentally Deranged Persons and Related Matters in 1967 recommended that an examination of the cognitive and conative functions of the mind be accommodated within the legal test of criminal capacity, it did not consider that the affective functions of the mind, which regulate emotions such as hatred, love and jealousy, should be relevant to criminal liability, as opposed to punishment.

The approach of the Roman-Dutch law and the advice of the Rumpff Commission were, however, not heeded by the Courts, which initially inclined towards the policy-based partial excuse rule for provoked killing (leading to a middle verdict of culpable homicide). South African law might well have followed the Roman and Roman-Dutch law had it not been for the introduction of the mandatory death penalty for murder in 1917. Instead, the South African Courts initially, under the influence of section 141 of the Transkeian Penal Code of 1886, adopted a position that provocation could never be a complete defence to killing – at most it could be a partial defence: homicide that would otherwise be murder could be reduced to culpable homicide if the person who caused death did so in the heat of passion occasioned by sudden provocation. The decision to reduce murder to culpable homicide depended on an application of the criterion of the ordinary person's power of self-control.

Prior to the development of the subjective capacity concept a Court might have convicted of culpable homicide *on general principles* if death, although not foreseen, was reasonably foreseeable to a person of reasonable fortitude and the accused had failed to take reasonable steps to guard against this consequence.

However, the partial excuse rule was ultimately rejected in favour of a new approach developed in the last three decades of the 20th century, when the South African Courts acknowledged that evidence of provocation was relevant not only to the existence of intention but also to a finding of criminal capacity. Under the influence of the development of the overarching subjective concept of capacity, the Courts acknowledged that any factor, whether intoxication, provocation or emotional stress, could serve to impair this criminal capacity, assessed essentially subjectively. The Courts broadened the concept of provocation to include emotional stress and began to distinguish between the concept of ‘non-pathological incapacity’ and that of insanity or ‘pathological incapacity’.

In three High Court decisions<sup>17</sup> and one Supreme Court of Appeal decision, the accused charged with murder, who raised the defence of non-pathological incapacity, were completely acquitted. The basis of the decisions was that the evidence adduced on the provocation/emotional stress experienced by the accused at the time of, or before the killing, led to a conclusion that criminal capacity had not been proved beyond reasonable doubt. The Courts did not even consider whether a conviction of culpable homicide, based on a deviation from the standard of the reasonable person, would be appropriate because a preliminary finding of capacity was required for such a conviction as well.

This approach had no obvious parallel in Anglo-American jurisprudence and the Courts were not unanimously happy with the new direction taken. Some cautioned that if the accused’s version of events was unreliable then the psychiatric or psychological evidence adduced in favour of the defence of non-pathological incapacity, which was inevitably based on the accused’s version of events, would also fall to the ground.<sup>18</sup>

#### b. Clarity begins to emerge?

The most recent pronouncement of the Supreme Court of Appeal on the matter is *S v. Eadie*,<sup>19</sup> where Navsa JA comprehensively reviewed the jurisprudence on

<sup>17</sup> *S v. Arnold* 1985 (3) SA 256 (C); *S v. Nursingh* 1995 (2) SACR 331 (D); *S v. Moses* 1996 (1) SAC 701 (C).

<sup>18</sup> *S v. Potgieter* 1994 (1) SACR 61 (A).

<sup>19</sup> 2002 (1) SACR 663 (SCA).

provocation and emotional stress, and clearly indicated that, although the test of capacity appears to remain in principle subjective, the *application* of this test must be approached with caution. Courts must not too readily accept the *ipse dixit* of the accused regarding provocation or emotional stress. A Court is entitled to draw a legitimate *inference* from what ‘hundreds of thousands’ of other people would have done under the same circumstances (that is, looking at objective circumstances). Drawing such an inference could result in the Court disbelieving the accused, who simply says, without adducing any further evidence, that he or she lacked capacity or acted involuntarily under provocation or emotional stress. Thus, in the *Eadie* case, the Supreme Court affirmed the decision of the High Court that the accused could not successfully raise the defence of non-pathological incapacity on the facts where he had battered another to death in alleged road rage. In the *Eadie* case, both the High Court and the Supreme Court of Appeal drew a pragmatic distinction between loss of control and loss of temper.<sup>20</sup>

The *Eadie* judgment signals a warning that in future, the defence of non-pathological incapacity will be scrutinised most carefully. Persons who may in the past have been acquitted in circumstances where they had killed someone who had insulted them will find that Courts will scrupulously evaluate their *ipse dixit* in the context of objective standards of acceptable behaviour. In terms of this interpretation of the *Eadie* case, capacity remains, in principle, subjectively tested but the practical implementation of the test must accommodate the reality that the policy of the law, in regard to provoked killings, must be one of reasonable restraint. It may be difficult for the Courts in future not to blur the thin line between, on the one hand, drawing legitimate inferences of individual subjective capacity from objective, general patterns of behaviour, and, on the other hand, judicially converting the current subjective criterion for judging capacity into an objective one.

It might be possible to place a more radical interpretation on the judgment of Navsa J in *S v. Eadie* – not just emphasising the Court’s ability to draw legitimate inferences as to capacity from objective circumstances but, in fact, going further

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<sup>20</sup> A difficult aspect of the judgment is Navsa JA’s comments on the interrelationship between the defence of automatism and the lack of capacity. At times the Judge of Appeal seems to regard the second part of the capacity inquiry (that is, the conative inquiry) to be equivalent to the inquiry into voluntariness but ultimately he appears to take the approach that the conative inquiry still has an independent reason for existence. This conclusion is supported as the conative inquiry in essence is that of the capacity to act voluntarily or rationally and the voluntariness inquiry is one focused on whether the accused *actually did* control his or her conscious will.

and explicitly changing the essence of the test from a subjective to an objective inquiry. However, this radical interpretation could not have been intended by the Court. The Court would neither simply have overturned, by implication, a considerable body of judicial precedent on the subjective approach to capacity nor would it have reached a sweeping conclusion that could possibly alter other aspects of the law where the test of capacity is in issue, without full argument on these issues. Rather than suggesting that the Court replaced the subjective inquiry into capacity with an objective evaluation it is possible to suggest an interpretation of the *Eadie* case that involves a middle course: capacity could be *both* subjectively and objectively assessed.

### C. Fault

#### 1. General

It is a general principle of the South African criminal law that conduct is not unlawful unless it is committed with a guilty mind (*mens rea* or fault). Under common law, fault is required for criminal liability. All common-law crimes are based on intention, except for culpable homicide and contempt of court by the editor of a newspaper, for which negligence is sufficient for liability. Even in the context of statutory criminal provisions, the presumption is that fault is required for liability and the Constitutional Court has affirmed the pre-eminence of fault as requirement for criminal liability.

Fault may take two broad forms, namely intention (*dolus*) or negligence (*culpa*). Although there is some debate about whether negligence is a form of fault or an assessment of conduct, it seems accepted that failure to measure up to notional standards of reasonableness can be seen as a type of fault.

#### 2. Intention

##### a. Forms of intention

Intention is divided into four varieties – *dolus directus*, *dolus indirectus*, *dolus eventualis* and *dolus indeterminatus*. All forms of intention are assessed subjectively and *dolus eventualis* is a sufficient form of intention for all crimes based on intention. Motive is not equivalent to intention.

- *Dolus directus* is intention in its ordinary grammatical sense and refers to where the accused's aim and object was to perpetrate the unlawful conduct or cause the unlawful consequence.
- *Dolus indirectus* is present where the accused foresaw the unlawful conduct or consequence as certain or substantially certain to occur.

- *Dolus eventualis* exists where the accused foresaw the possibility that the prohibited consequence might occur, in substantially the same manner as that in which it actually does occur, or the prohibited circumstance might exist and he or she accepts this possibility into the bargain. There has been much debate on whether the foresight of even a remote possibility may be sufficient for this type of intention. While there is a strong argument for restricting the scope of criminality to foresight of a real/substantial possibility and regarding foresight of any possibility short of a real/substantial one as, at the most, satisfying the first part of a test for conscious negligence,<sup>21</sup> the Appellate Division in *S v. Ngubane*<sup>22</sup> in 1985 preferred a different approach. In principle, *dolus eventualis* could extend to foresight of even a remote possibility that the likelihood of the possibility eventuating would have a bearing on whether the accused accepts the possibility into the bargain (the so-called ‘volitional’ element of *dolus eventualis*).
- *Dolus directus, indirectus* and *eventualis* may be general (*indeterminatus*) where the accused does not have a particular object or person in mind, for instance where he throws a bomb into a crowd of people or derails a train.

#### b. Knowledge of unlawfulness

If the accused genuinely does not know, or does not foresee the possibility, of the unlawfulness of his conduct then he or she cannot be held to have the required guilty mind in the form of intention. Thus in the South African criminal law, genuine ignorance of the law may be an excuse. This differs from German law where only unavoidable lack of knowledge of unlawfulness is excusable. In South African law genuine lack of knowledge of unlawfulness, even if avoidable or unreasonable, is excusable and thus excludes a criminal intention. The current South African approach to knowledge of unlawfulness was established in 1977 when the highest Court in South Africa rejected the English presumption that everyone is presumed to know the law and that ignorance of the law is not an excuse, holding that this maxim was out of keeping with the concept of intention in South Africa.

#### c. Mistake regarding the causal sequence

Intention, at least in the form of foresight, must extend to every element of the crime, including unlawfulness, and also, where a consequence crime is involved,

<sup>21</sup> See J. Burchell & J. Milton, *Principles of Criminal Law* 310-312 and chap. 31.

<sup>22</sup> 1985 (3) SA 677 (A).

to the general manner in which the unlawful consequence occurs. For instance, on a murder charge, if a marked difference existed between the actual way in which death occurred and the foreseen way in which death might occur, then the accused would be entitled to an acquittal on grounds of mistake regarding the causal sequence.

Where, however, the accused's aim and object was to bring about an unlawful consequence (*dolus directus* was present), his or her mistake or ignorance of the causal sequence would generally not be a defence.

#### d. Defences and putative defences excluding intention

Any of the factors serving to exclude a finding of criminal capacity (youthfulness, insanity, intoxication or provocation/emotional stress), can also exclude intention.

Furthermore, where there is evidence that the accused genuinely believed that a defence excluding unlawfulness was available to him or her, whereas in fact such a defence was not available, he or she could successfully raise a defence excluding intention in the form of a *putative* defence. Thus, an accused who genuinely believes he or she is acting in self defence, whereas in fact and in law he or she is exceeding the bounds of this defence, will be able to raise *putative* self defence (not actual self defence) as a defence excluding *fault* in the form of intention. A putative or supposed defence could arise where lack of knowledge of unlawfulness relates to the existence of any defence excluding unlawfulness: in other words, putative necessity, putative obedience to orders, putative disciplinary chastisement, putative public authority and putative consent.

Where the blow intended by X for Y goes astray (the so-called *aberratio ictus* situation) and kills Z, X's genuine ignorance or mistake as to the presence of the ultimate victim might be a defence excluding intention.

### 3. Negligence

Negligence is sufficient for the fault element of culpable homicide, contempt of court by the editor of a newspaper and also for numerous statutory offences. A person will be held negligent where his or her conduct falls short of the standard of the reasonable person. In a multi-cultural society such as South Africa, much academic and some judicial discussion has focused on the definition of the standard of this 'reasonable person'. For instance, can the law take account of the fact that the accused genuinely believes in superstition in determining whether that accused satisfied the standard of reasonable conduct? In *S v. Ngema*,<sup>23</sup> Hugo

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<sup>23</sup> 1992 (2) SACR 651 (D).

J took the view that belief in superstition could be taken into account in the essentially objective test of negligence, so departing from the out-dated eurocentric approach to the unreasonableness of belief in the supernatural laid down in *R v. Mbombela*<sup>24</sup> in 1933.

The subjective inquiry into criminal capacity (discussed at II.B.1. above), which is a preliminary investigation preceding the examination into negligence, can assist in alleviating certain potential injustices in a multicultural society by accommodating subjective factors such as youthfulness, lack of education and belief in the supernatural.

The standard of the reasonable person is raised to accommodate an accused who has special knowledge above the norm or who is a person who possesses or professes skill in the area in which potential liability arises.

The operation of the test of negligence can best be seen in culpable homicide cases where the prosecution must prove beyond reasonable doubt that a reasonable person, in the same circumstances as the accused, would have foreseen the *death* of the victim as a consequence of his or her conduct and that a reasonable person would have taken steps to guard against this consequence. If the accused did not take such reasonable steps to guard against the foreseeable death of the victim, then the accused has been negligent in regard to the victim's death.

In negligence-based crimes, if the accused does not know or foresee the possibility of the unlawfulness of his conduct, such ignorance or mistake must be *reasonable* in order to excuse. If the accused works in a particular sphere of activity then he or she ought to know the law relating to that sphere of activity and will be adjudged negligent if he or she does not know the appropriate legal provisions.

Normally, negligence will consist of 'inadvertent' conduct, but the South African Courts<sup>25</sup> have accepted that the existence of subjectively assessed intention does not necessarily preclude a finding of advertent negligence.

## D. Participation in Crime

### 1. *Participation before the completion of the crime*

A distinction is drawn in the South African criminal law between co-perpetrators and accomplices. The perpetrator (or co-perpetrator) is someone who satisfies the

<sup>24</sup> 1933 AD 269.

<sup>25</sup> See *S v. Ngubane* 1985 (3) SA 677 (A) at 685A-B.

definitional elements of a particular crime. An accomplice is someone who knowingly associates himself or herself with the commission of the crime by the perpetrator and furthers the commission of the crime.

There is a controversial rule in the South African criminal law concerning common-purpose cases whereby the conduct of the perpetrator may, in certain circumstances, be attributed or imputed to the other participants in the common purpose. By means of this process of imputation all those who actively associate in the common purpose with the requisite guilty mind will be co-perpetrators. The Courts have drawn a distinction between common-purpose cases arising out of, on the one hand, a mandate or prior agreement to commit a crime or series of crimes and, on the other hand, a common purpose arising out of active association in the common purpose where no mandate or prior agreement exists. Where common-purpose liability is based on the unlawful conduct of ‘active association’ alone there are special additional requirements (such as presence at the scene of the crime) for liability to be imposed on the participants in the common purpose.

The common-purpose rule relieves the prosecution of the burden of proving, on the part of remote parties in a common purpose, the essential element of causation in consequence crimes. However, the Constitutional Court has affirmed that the common-purpose rule, as formulated and applied by the South African Courts, is constitutional.<sup>26</sup>

The common-purpose rule, unlike the felony-murder rule in other countries, does not obviate the need for the prosecution to prove the fault element of each individual participant in the common purpose. The general principles governing fault liability apply and thus certain participants may be guilty of murder by virtue of the common-purpose principle while others are merely guilty of culpable homicide, depending on their respective degrees of fault.

Even though the prosecution is relieved of proving the causal element of each participant in the common purpose, it does have to prove beyond reasonable doubt that at least one of the participants in the joint venture caused, in fact and in law, the unlawful consequence. Furthermore, the remote parties to a common purpose to whom the causal conduct of the actual perpetrator is attributed, can nevertheless avail themselves, in appropriate circumstances, of the rule that a mistake as regards the causal sequence may be relevant to their liability.

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<sup>26</sup> See the unanimous judgment of the Constitutional Court delivered by Mosenke J in *S v. Thebus* 2003 (10) BCLR 1100 (CC), affirming (at par. 50) the rule set out in *S v. Mgedezi* 1989 (1) SA 687 (A) at 705-706.

The South African Appellate Division, in the majority judgment in *S v. Nkwenja*,<sup>27</sup> has held that the correct moment for assessing the fault element of parties to a common purpose is when the common purpose is formulated. The minority in this case was of the view that the correct moment for assessing the fault element is when the unlawful conduct forming the essence of the common purpose is perpetrated. The minority opinion would appear to be preferable because it allows for subsequent changes in mind after the common purpose is formulated.

The joint enterprise rule in England that formed the foundation for the development of the South African common-purpose rule is different in its effect from its South African counterpart. The English rule regards participants in the joint enterprise as *accomplices*, not co-perpetrators.

The existing common-purpose rule in South Africa regards participants in a common purpose as co-perpetrators by a process of imputing or attributing the causal conduct of the actual perpetrator to the others in the common purpose. This form of liability has been found in homicide, treason, public violence, assault, rape, and housebreaking cases. The prosecution in common-purpose cases can also rely on a range of alternative charges, namely accomplice liability, conspiracy, incitement, attempt and public violence.

## *2. Participation after the completion of the crime*

A person who intentionally assists the perpetrator *after* the completion of the crime is not an accomplice because he or she does not further the commission of the crime. Such a person may, however, be liable as an accessory after the fact (or for defeating or attempting to defeat the administration of justice).

## **E. Attempt, Incitement and Conspiracy**

The South African criminal law not only punishes completed crimes but also incomplete crimes, namely attempts, incitement and conspiracy.

In these incomplete crimes, the degree of harm to the community is obviously less than in completed crimes. But the disruption of the social order and the apprehension of potential harm to the community is considered sufficient justification for the punishment of someone who unsuccessfully tries to commit a crime (attempt), or makes a communication to another with the intention of influencing him or her to commit a crime (incitement), or agrees with another to commit a crime (conspiracy).

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<sup>27</sup> 1985 (2) SA 560 (A).

Since the mere unilateral decision to commit a crime is insufficient to incur criminal liability, the universal problem in punishing attempts to commit crimes is to determine where acts of preparation end and attempt begins.

In South African criminal law a person is even liable, in certain circumstances, for an attempt to commit the impossible.

### III. THE MOST IMPORTANT CRIMES AGAINST PERSON AND PROPERTY

#### A. Homicide

##### 1. *Murder*

The South African criminal law draws a basic distinction between intentional killing (murder) and negligent killing (culpable homicide). Murder is defined as the unlawful, intentional killing of another.

By adopting this essentially Roman-Dutch dichotomy between intentional and negligent killing, the South African law has shunned both the English categorisation of killing into premeditated murder on the one hand and voluntary and involuntary manslaughter on the other hand, and the American terminology of first and second degree murder and voluntary manslaughter.

Adherence to the basic distinction between intentional and negligent killing has an attractive simplicity but it also means that the South African law regards ‘murder’ as including both a killing where death was merely foreseen as a possibility as well as the archetypical case of murder where the killing was premeditated. Furthermore, without a specific label for the ‘voluntary manslaughter’ predicament, the South African Courts have been driven towards a more rigid approach to killing in extreme, but excusable, mental and emotional states. The dilemma, for instance, of the accurate labelling of provoked killings, where the choice at present apparently is between a complete acquittal or a conviction for murder, no lesser conviction being permissible because of the absence of proof of subjective capacity, has already been alluded to (see II.B.5. above).

It is possible that the rather simplistic dichotomy of murder and culpable homicide may require refinement in future to accommodate a more sophisticated range of conviction labels rather than just reflecting the degree of severity of the conduct in the sentence.<sup>28</sup>

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<sup>28</sup> J. Burchell ‘Criminal Justice at the Crossroads’ 2002 SALJ 579, 597.

Capital punishment for murder was mandatory from 1917 to 1935 in South Africa. Thereafter a Judge was given a discretion to impose a lesser sentence if the killing was accompanied by ‘extenuating circumstances’ and in 1990 this discretion became an unfettered one. After a brief moratorium on executions had been imposed, the Constitutional Court in 1995 in *S v. Makwanyane*<sup>29</sup> decided conclusively that capital punishment, as a sentence for any crime,<sup>30</sup> was unconstitutional as it was a ‘cruel, inhuman and degrading punishment’. The existence of capital punishment has had a significant, but not altogether salutary, effect on the development of the principles and the practical implementation of the criminal law in South Africa.

The right to life is now enshrined in section 11 of the Constitution of the Republic of South Africa, Act 108 of 1996. This right, along with the right to dignity, has been regarded by the Constitutional Court in *S v. Makwanyane* as the most important of all the rights.<sup>31</sup> Killing in circumstances of legitimate private defence or within the limited constraints of obedience to superior orders is recognised in South African law as a legitimate qualification on the right to life. The appropriate legal response to more contentious killings is controversial. Examples are killings in defence of property where a fleeing suspect is killed by an arrestor, and hastening the death of a person in a persistent vegetative state who may or may not have given advance consent to be allowed to die with dignity. The first and second of these debateable issues have already been canvassed (II.A.5.a. and f.) but the issue of euthanasia and assistance to another to commit suicide requires some discussion.

South African Courts have consistently emphasised the sanctity of human life and the State’s interest in the preservation of life, but recent dilemmas in the field of euthanasia have encouraged the Courts to recognise a limited exception to these hallowed principles.

In 1970, the Appellate Division in *Ex parte Die Minister van Justisie: In re S v Grotjohn*<sup>32</sup> held that, although suicide was not a crime in South African law, knowingly providing the assistance to another to commit suicide nevertheless constituted the factual and legal cause of death, despite the fact that ‘the last act is committed by the non-criminal hand’ of the person committing suicide.

<sup>29</sup> 1995 (3) SA 391 (CC).

<sup>30</sup> With the only possible exception of treason in a state of war (see at 452F-G).

<sup>31</sup> Per Chaskalson P at 451C-D.

<sup>32</sup> 1970 (2) SA 355 (A).

The essence of this case deals with the issue of causation, but the Court did state that assisting another to commit suicide could, in principle, be murder if the assistance was unlawful and intentional, or culpable homicide, if the killing was merely negligent. The Court did, however, use the term ‘accessory’ to describe the role of the assister in another’s suicide and, by emphasising that the conduct must be both intentional and *unlawful*, it has left the door open for future Courts to take account of changing attitudes to death and dying. In 1975, the Cape Provincial Division of the High Court in *S v. Hartmann*<sup>33</sup> emphasised that a medical practitioner hastening the death of his father, who was suffering from cancer and already close to death, by injecting Pentothal into his drip, was nevertheless guilty of murder, despite his compassionate motive.

These decisions underscored the State’s interest in the preservation of life and the rule that it is murder to hasten a person’s death, even when the person is terminally ill. This broad principle needs to be qualified, however. It appears to be both ethically and legally acceptable for a medical practitioner to administer drugs or other medicines intended to *alleviate pain* to a terminally ill person, even if the death of the patient is hastened in the process. The medical conduct is considered ethically and legally permissible in these circumstances.

In the light of the decision of the Natal Provincial Division of the High Court in *Clarke v. Hurst NO*,<sup>34</sup> it is also considered ethically and legally permissible for artificial naso-gastric feeding to be withheld from a patient whose brain had ‘permanently lost the capacity to induce a physical and mental existence at a level which qualifies as human life’.<sup>35</sup> According to the Court, the legal convictions of the community did not require that the patient should be kept alive in these circumstances. The factual circumstances in both the *Grotjohn* and *Hartmann* cases involved *positive* conduct (in the first case, handing a shotgun to a person threatening to commit suicide and in the second case, injecting a substance into the person’s drip). These forms of positive conduct and, in the case of *Grotjohn*, non-medical conduct, can be distinguished from the *Clarke* case, which involved the withholding of treatment (*omission*) in a controlled medical environment.

An important aspect of murder, not yet considered, is defining the moment of death.<sup>36</sup> The traditional legal approach to the moment of death is to determine

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<sup>33</sup> 1975 (3) SA 532 (C).

<sup>34</sup> 1992 (2) SACR 676 (D).

<sup>35</sup> At 702d-f.

<sup>36</sup> *S v. Williams* 1986 (4) SA 1188 (A) at 1194E-F.

whether breathing or heartbeat is absent. Medical science, more accurately, places the focus on irreversible damage to the brain stem and the Courts may well opt for a criterion of death that is linked to ‘irreversible brain stem injury’.

## 2. *Culpable homicide*

Culpable homicide is the unlawful, negligent killing of another.

Unlike under Anglo-American systems of law, the negligence does not have to be ‘gross’ in nature in order to constitute sufficient negligence for a conviction of culpable homicide in South Africa.

Negligence is assessed objectively according to the standard of the reasonable person, but the debate surrounding the extent of limited, subjectively-assessed personal characteristics of an individual accused that can legitimately be taken into account in determining whether he or she has been negligent, has not yet been fully resolved (see II.C.3. above).

For a conviction for culpable homicide, death (and not merely bodily injury) must have been reasonably foreseeable; a reasonable person would have taken steps to guard against this consequence, and the accused must have failed to take such steps.

A jurisprudential debate has raged around the true nature of negligence – is it a form of fault or is it a type of conduct? Although the debate has not yet been fully resolved, there seems to be some recognition that negligence is a form of fault, especially in the context of statutory offences where the Court reaches the conclusion that the fault element for a contravention of the statute is negligence.

It has been emphasised by the Appellate Division that proof of intention does not necessarily exclude a finding of negligence. Although intention postulates foreseeing, negligence does not necessarily postulate not foreseeing.<sup>37</sup> In terms of this judicial acknowledgement a person may *foresee* the possibility of, say death, but can be found negligent if a reasonable person in his position would have taken steps to guard against this consequence and the accused did not take the required steps. This is what is called ‘conscious’ or ‘adventent’ negligence.

## B. Abortion

After many years of rigorous anti-abortion laws, the South African legislature enacted the Choice on Termination of Pregnancy Act 92 of 1996, which places

<sup>37</sup> *S v. Ngubane* 1985 (3) SA 677 (A) at 685.

the decision to terminate a pregnancy firmly in the hands of the pregnant woman herself and the medical practitioner. The general philosophy behind the Act is the American one that the earlier the pregnancy the greater the freedom of choice, and the later the stage of the pregnancy the greater the regulation.

The legislation provides for lawful abortions in three situations:

- on request up to 12 weeks gestational age, performed by a medical practitioner or registered midwife;
- after 12 weeks and up to 20 weeks gestational age, performed by a medical practitioner who is of the opinion that there would be a risk of injury to the woman's physical or mental health or a substantial risk that the child would suffer from physical or mental abnormality if the pregnancy were to continue. The medical practitioner could also lawfully perform an abortion on the advice of another medical practitioner or midwife who certified that there would be a risk to the woman's mental health, where a social worker was of the opinion that the woman had been raped, where the pregnancy resulted from incest or sexual abuse, or where the economic or social conditions of the woman would be adversely affected by the pregnancy, and
- after 20 weeks gestational age, where the medical practitioner is of the opinion that the woman's life would be in danger by the continued pregnancy or that there would be malformation of the foetus.

In *Christian Lawyers Association of South Africa v. Minister of Health*,<sup>38</sup> the Choice on Termination of Pregnancy Act of 1996 was challenged in the High Court on the basis that it permitted the termination of human life. The High Court rejected the challenge on the basis that the word 'everyone' used in section 11 of the Constitution to describe the bearers of the right to life does not include a foetus.<sup>39</sup>

### C. Assault

The South African criminal law punishes various forms of assault, namely common assault, assault with intent to cause grievous bodily harm, and indecent assault.

<sup>38</sup> 1998 (4) SA 1113 (T).

<sup>39</sup> The judgment has limited impact, as the constitutionality of permissive abortion legislation cannot be reduced to the question of whether a foetus is a person or not.

### *1. Common assault*

Common assault consists in unlawfully and intentionally:

- applying force to the person of another, or
- inspiring a belief in another that force is immediately to be applied to him or her.

Both forms of conduct are labelled as ‘assault’ and no distinction is drawn between ‘assault’ and ‘battery’.

The general defences excluding unlawfulness apply to assault and the force may be applied directly or indirectly (for instance, by derailing a train in which the victim is travelling or setting one’s vicious dog on the victim). Even the internal application of force (for instance, by administering poison) may be unlawful.

A belief that force is immediately to be applied can arise from aggressive conduct (such as drawing a gun or raising a fist) or even by words ('your money or your life!'). An assault by threats is thus any act or gesture (or words) that induces in the mind of another an apprehension that he or she is about to have force applied to him or her. The test is whether the threatened party believes that the conduct of the accused will immediately cause some sort of contact with his or her body.

The mere fact that the threat is conditional ('I will wring your neck unless you get out of here!') does not prevent it from being an assault.

Intention to assault may take the form of *dolus eventualis* but not negligence. Intention must include knowledge of unlawfulness.

### *2. Assault with intention to do grievous bodily harm*

It is not necessary that the accused actually causes grievous bodily harm for this offence to be committed. It is enough that he or she *intends* to cause it. Intent to cause grievous bodily harm is defined by the Courts as ‘intent to do more than inflict the casual and comparatively insignificant and superficial injuries which ordinarily follow upon an assault. There must be proof of an intent to injure and to injure in a serious respect’.<sup>40</sup>

## **D. Rape**

### *1. Legal position*

Rape, according to the current South African law, is the unlawful, intentional sexual intercourse with a woman without her consent. Where the crime of rape is

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<sup>40</sup> *S v. Mbela* 1966 (1) PH H176 107 (N).

not yet complete but the accused is ‘commencing the consummation of the crime’ with the requisite guilty mind he may be guilty of attempted rape.

If the complainant is under 12 years of age, she cannot legally consent to sexual intercourse (therefore sexual intercourse in these circumstances is always rape) and if she is under 16, section 14(1) of the Sexual Offences Act 23 of 1957 will apply. The crime of rape (unlawful, intentional sexual intercourse with a woman without her consent) overlaps with indecent assault and, in cases where the girl is under 16 years of age, with what is sometimes called ‘statutory rape’, the offence created in terms of section 14(1) of the Sexual Offences Act. Section 14(1) of the Act punishes, *inter alia*, any male who has or attempts to have carnal intercourse with a girl under 16. Various defences are provided in the Act, for example that the woman is a prostitute,<sup>41</sup> that the man is under 21, or that the woman has deceived the man regarding her age.

The focus of the common-law definition of rape is the lack of a woman’s consent. This definition of rape has been subjected to a number of serious criticisms. It has been argued that focusing on the woman’s lack of consent often leads to the ‘secondary victimisation’ in Court of the complainant who is questioned on her behaviour before and after the traumatic event. The prosecution is also saddled with the burden of proving a negative proposition, that is, that the complainant has not consented. Furthermore, it is argued that the definition is not gender neutral, applying only to sexual penetration of a female, and that the definition does not cover forced oral or anal sex or the insertion of objects into the genitals or mouth.

Certain general rules relating to consent have particular application to the current definition of rape. In order for consent to be valid it must be recognised by law as a possible defence; it must be real (that is, voluntary), and it must be given by a person capable in law of consenting. Consent is the opposite of objection. Mere submission is not enough – active consent is required.

Consent can be withdrawn at any time.<sup>42</sup> A woman is entitled to withdraw consent at any stage and perseverance with sexual intercourse by the accused

<sup>41</sup> On prostitution in general, see *S v. Jordan (Sex Workers Education and Advocacy Task Force as Amici Curiae)* 2002 (2) SACR 499 (CC) where the majority of the Constitutional Court affirmed the criminality of prostitution (sex for reward), while the minority, regarding s. 20(1)(aA) of the Sexual Offences Act 23 of 1957 as constituting indirect and unfair discrimination on the ground of gender, were of the view that the crime of prostitution (which is aimed essentially at the prostitute rather than the customer) was unconstitutional.

<sup>42</sup> See *R v. Kaitamaki* [1980] 1 NZLR 59 per Richmond P and Richardson J.

after that time constitutes rape. Intoxication may affect the capacity to give consent and the degree of intoxication is important.

In terms of section 5 of the Prevention of Family Violence Act 133 of 1993 (which is not repealed by the provisions of the Domestic Violence Act 116 of 1998), a husband may be convicted of raping his wife. The ordinary principles of rape thus apply to this situation.

If the accused genuinely but erroneously believed that the complainant has consented or is consenting to sexual intercourse he may lack knowledge of unlawfulness and so not be guilty of rape. His belief does not have to be reasonable.<sup>43</sup>

According to the law, fraud, in order to nullify consent, must lead to *error in negotio* (error as to the nature of the act) or *error in persona* (error as to the identity of the person participating in the conduct). A difficult question is where there is consent to the nature of the conduct and to the person engaging in the conduct but the person allegedly giving consent is misled or ignorant of the serious or material risks involved in the conduct consented to. In terms of an old English case, *R v. Clarence*,<sup>44</sup> a man is not guilty of rape if he knows that he is suffering from venereal disease and does not tell his sexual partner who consents to having sexual intercourse with him, as the misrepresentation does not induce *error in negotio* or *error in persona*. But, can a woman truly be said to consent to sexual intercourse when she is oblivious of the serious consequences of having unprotected sex with a man who can transmit HIV to her?

The South African Law Commission<sup>45</sup> has recently recommended that a person who intentionally fails to disclose his or her HIV-positive status before having sex could be guilty of rape. In the Criminal Law Amendment Act 105 of 1997, life imprisonment is provided for someone who rapes another ‘knowing that he has the acquired immune deficiency syndrome or the human immuno deficiency virus’.

<sup>43</sup> See the English House of Lords decision in *DPP v. Morgan* [1976] AC 182 (HL), which is in keeping with the general principles of South African law on *mens rea*. The South African Law Commission has also not recommended a change in the law on mistake regarding consent.

<sup>44</sup> (1888) 22 QBD 23.

<sup>45</sup> See Draft Sexual Offences Bill, Project 107, *Sexual Offences Report* (December 2002), Annexure A.

## 2. Reform of the law of rape

Namibia (in the Combatting of Rape Act 8 of 2000) has already redefined the crime of rape in gender-neutral terms, focusing the definition of the crime of rape on ‘coercive circumstances’ and on sexual acts rather than penetration. The Namibian Combatting of Rape Act defines rape as an unlawful, intentional sexual act, and even non-penetrative sex is punishable as rape.

The South African law of rape, and in fact of sexual offences in general, is in the process of reform. The South African Law Commission<sup>46</sup> has recommended the legislative re-definition of the South African common law of rape to address these valid criticisms. The proposed legislation currently before Parliament shifts the focus away from the consent of the complainant to what is defined in the draft Bill as ‘coercive circumstances’. Lack of consent on the part of the complainant would be only one of the factors affecting the unlawfulness of the accused’s conduct.

The South African Law Commission has recommended a gender-neutral definition of rape that focuses on ‘penetration’.

## E. Indecent Assault

The purpose of punishing indecent assault is primarily to protect the sexual autonomy, bodily integrity and dignity of a person.

A touching may suffice and, like the crime of common assault, includes the apprehension that an application of force (including a mere touching) is immediately anticipated. For instance, a hand en route to another’s private parts is pushed away. The general defences to assault (for instance, consent) apply.

The central problem in defining the ambit of the crime of indecent assault is determining whether it is the *act itself* that must be indecent or whether the indecency of the assault lies in the *intention to commit an indecent act*? Although there is some old authority favouring the view that ‘some indecent handling of the complainant’ is required,<sup>47</sup> more recent (and convincing) authority<sup>48</sup> is to the effect that indecent assault can be committed provided that the accused intended to commit an indecent act even where the assault is not aimed at the complainant’s private parts.

<sup>46</sup> *Ibid.*

<sup>47</sup> *R v. Abrahams* 1918 CPD 50.

<sup>48</sup> *S v. F* 1982 (2) SA 580 (T).

## F. Criminal (or *Crimen*) *Iniuria* and Defamation

Both the law of delict (civil law) and the criminal law seek to protect the personality interests of dignity and reputation. Dignity is protected by the crime of criminal *iniuria* and reputation by the crime of defamation.

The crime of defamation is confined to serious infringements of reputation. The use of the criminal (as opposed to the civil) law to protect individual reputation is a most severe encroachment of free expression and is, fortunately, seldom resorted to.

The prosecution for criminal *iniuria* (the unlawful, intentional impairment of a person's dignity) is sometimes used to protect individuals from serious impairments of dignity or invasions of privacy. Although there have not been many prosecutions of this nature, those that have taken place have usually involved some element of sexual impropriety (for instance, watching a stranger undressing).

'Dignity' includes a person's self-respect, self-esteem, personal autonomy and privacy and is assessed both subjectively and objectively: the complainant's self-esteem for example, must have been actually impaired (subjective inquiry) and a person of ordinary sensibilities would have regarded the conduct as offensive (objective inquiry). The impairment of dignity must have been 'serious' in order to be considered criminal.

## G. Kidnapping

Kidnapping consists in unlawfully and intentionally depriving a person of liberty of movement and/or his custodians of control.

Kidnapping is often confused with abduction. Abduction consists of unlawfully taking a *minor* out of the control of his or her custodian with the *intention of enabling someone to marry or have sexual intercourse with that minor*. The crime of kidnapping is much broader than abduction and can perform the same function as abduction. In fact, the continued existence of a crime of abduction separate from kidnapping is debateable.

The right protected by the crime of kidnapping is the highly prized right to freedom of movement. Although the deprivation of liberty often takes place with physical force, physical force is not an essential of the crime. Technically, the deprivation of liberty does not have to endure for any length of time although recent decisions of the Courts have indicated that there must be a substantial interference with freedom of movement.<sup>49</sup>

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<sup>49</sup> *S v. Mellors* 1990 (1) SACR 347 (W) (in this case a two-hour deprivation of liberty was considered sufficient).

## H. Theft

Theft is defined as the unlawful *contrectatio* with intent to steal of property capable of being stolen.

### 1. Unlawfulness

The consent of the owner is the most important defence excluding the unlawfulness of the taking. This consent of the owner may not be ‘real’ if it is induced by fear, force or fraud. Thus the hijacker, who threatens the wealthy traveller with the words ‘your money or your life!’ is truly a robber (and hence guilty of theft) if the taking of the money is induced by the threat.<sup>50</sup>

### 2. *Contrectatio*

The Roman law concept of *contrectatio* has been defined as an ‘assumption of control’ of a thing. This assumption of control requires that the accused must deal in some way with the property but that an actual removal of the property is not required. The true nature of the *contrectatio* element of theft helps to delineate the completed crime of theft from an attempt and the central issue becomes whether the accused must deprive the owner of control.

The problem is highlighted by the classic case of removing an object from the shelf in a self-service store and, with intent to steal, concealing the object on one’s person before reaching the checkout point. Although there are some decisions that hold the person who acts in this way guilty of only attempted theft, there are other more recent cases<sup>51</sup> where the conviction of theft has been entered on these facts. These cases indicate that, even if the owner retains some control over the object in his store until the shopper passes through the checkout point, the shopper nevertheless unlawfully appropriates sufficient control by surreptitiously hiding the object before approaching the checkout.

Modern writers on theft, therefore, favour a concept of ‘appropriation’ rather than ‘*contrectatio*’. Appropriation is regarded as assuming the rights of the owner and excluding the owner from his or her property. This approach to the ‘taking element’ of theft is one that can accommodate the dishonest transfer of money, electronically or otherwise. This concept of ‘appropriation’ also coincides with the intention element of theft, that is, the intention to deprive the owner permanently of the benefits of ownership.

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<sup>50</sup> *Ex parte Minister of Justice: In re R v. Gesa, R v. De Jongh* 1959 (1) SA 234 (A).

<sup>51</sup> *S v. M* 1982 (1) SA 309 (O); *S v. Dlamini* 1984 (3) SA 196 (N).

### *3. Property capable of being stolen*

Some property is absolutely incapable of being stolen: this includes immovable property, incorporeals, such as an idea or design, and things that are common to all (*res communes*) such as air, water of the sea and public streams. Other property is relatively incapable of being stolen: this includes things unowned but capable of ownership (*res derelicta*), one's own property (*res sua*), and wild animals (*fera natura*) that have not been sufficiently enclosed.<sup>52</sup>

There are special rules relating to the theft of trust money, that is, money handed over by A to B to be used by B for the benefit of A. It is no defence in the case of theft of trust money that the accused intended to return an equivalent amount but the fact that the accused held an equivalent liquid fund available to cover the liability may be an important factor in determining whether the accused had knowledge of the unlawfulness of his or her conduct or not.<sup>53</sup>

### *4. Intention to steal*

The intent to steal exists where the accused:

- intentionally effects an assumption of control;
- intends to deprive the owner permanently of the benefits of ownership;
- knows that the property is capable of being stolen, and
- knows that he is acting unlawfully in taking it.

Intent to steal does not require intent to benefit from the property stolen.

The definition of intent to steal was established in *R v. Sibiya*.<sup>54</sup> In this case the accused and M, employees at a garage, took the complainant's car, which had been parked in the garage, on a joy ride. They were convicted of theft in the trial Court even though they always intended to return the car to the garage. Schreiner ACJ, delivering the majority judgment in upholding the appeal against conviction and sentence, held:

'I have come to the conclusion that the law requires for the crime of theft, not only that the thing should have been taken without belief that the owner . . . had consented or would have consented to the taking, but also that the taker should have intended to terminate the owner's enjoyment of

<sup>52</sup> In terms of the Game Theft Act 105 of 1991.

<sup>53</sup> *S v. Visagie* 1991 (1) SA 177 (A).

<sup>54</sup> 1955 (4) SA 247 (A).

his rights or, in other words, to deprive him of the whole benefit of his ownership'.<sup>55</sup>

This intention may be inferred, say, for instance, in circumstances showing recklessness as to what becomes of it.

*Furtum usus* (or unauthorised borrowing) was, therefore, confirmed by *R v. Sibiya* not to be criminal at common law. Shortly after the *Sibiya* case, the legislature stepped in and enacted section 1(1) of the General Law Amendment Act 50 of 1956 which sought, according to the long title of the Act, to declare the unlawful appropriation of the use of another's property an offence. The legislature did not succeed in its aim. The unlawful use of property by someone who already happens to be in possession of it is apparently not punishable. The emphasis, in terms of the wording of the statute, is not on use but on removal from control in order to use. However, the Supreme Court of Appeal in *S v. Rheeder*<sup>56</sup> has now re-interpreted the word 'control' of the owner to cover not just physical control but complete control over the use of the property, so including extra-contractual user within the purview of section 1(1).

In certain instances, the unauthorised borrower will not only contravene section 1(1) but will also be guilty of common-law theft, for instance where he abandons the thing with reckless disregard of whether it will be found, or where he borrows what is called a fungible (something which is consumed by use, such as petrol) and uses it, even though he intends to return an equivalent amount of petrol to that used.

Van den Heever JA in *R v. Sibiya* suggested that a motorcar, like a candle, is consumed by use. If this is accepted, it is a matter of degree whether the value of traditional non-fungibles like a car has been consumed by the use thereof by the accused.

The motive of the accused (for instance, to annoy the complainant) must be distinguished from intention to steal. Neither a motive of gain nor a motive to prejudice the complainant is required.

The accused must *know or foresee the possibility* that the property is capable of being stolen. In South African law an accused does not have intent to steal

<sup>55</sup> At 257B-C.

<sup>56</sup> 2000 (2) SACR 558 (SCA). On whether extra-contractual user falls within this section, see C.R. Snyman 'The Broadening of the Scope of Statutory *Furtum Usus*' 2001 SACJ 217-224 and J. Burchell 'Legislative Lapses and the Reach of the Criminal Law: Another Perspective on *S v. Rheeder*' 2001 SACJ 225-232.

unless the State proves that he knew (or foresaw the possibility) that he was not lawfully entitled to take the property. For instance, the accused might escape liability for theft if he genuinely believed that the property was abandoned or that the owner consented or would have consented to the taking. It is even a defence, in terms of *S v. De Blom*,<sup>57</sup> that he genuinely, but erroneously, thought he was entitled in law to take the property. In other words, knowledge of unlawfulness is a part of intention. The mistake or ignorance does not have to be reasonable as well as *bona fide* to exclude knowledge of unlawfulness, although the unreasonableness of the belief might lead to an inference of such knowledge.

Theft is a ‘continuing crime’. This means that theft continues as long as the stolen property is in the possession of the thief or of someone who was a party to the theft or of some person acting on behalf of or even, possibly, in the interests of the original thief or party to the theft.

This rule has implications for jurisdiction and parties in theft cases. Even though the original assumption of control (*contrectatio*) took place outside the Court’s jurisdiction, the thief may be tried at the place where he is found with the property. Furthermore, the person who assists the thief while the theft continues is not merely an accessory after the fact but guilty of theft itself.

A crime of theft by false pretences has been recognised by our Courts in the past but this crime straddles theft and fraud and its continued existence can be questioned.

## I. Receiving Stolen Property

The common-law crime of receiving stolen property consists in unlawfully receiving possession of stolen property knowing it to be stolen.

Receiving is regarded as punishable because it facilitates theft. There would be few thieves if there were no ‘fences’ or receivers to pass the stolen goods to.

One of the major difficulties encountered by the State in securing a conviction for this common-law offence is in proving that the alleged receiver knew or foresaw that the goods were stolen. This difficulty prompted the legislature to provide that in certain circumstances it is possible to achieve a conviction for receiving even though the *mens rea* (intention) for common-law receiving has not been established.<sup>58</sup> This legislative form of receiving also contained a reverse onus, which the majority of the Constitutional Court has struck down as contrary

<sup>57</sup> 1977 (3) SA 513 (A).

<sup>58</sup> General Law Amendment Act 62 of 1955, s. 37.

to constitutional norms in *S v. Manamela*.<sup>59</sup> The majority of the Constitutional Court read into the section an *evidential* onus, while the minority delivered a compelling dissent upholding the reverse onus.

### J. Unexplained Possession of Goods Suspected of having been Stolen

The South African legislature has also made it a crime if the accused is unable to explain the possession of goods reasonably suspected of having been stolen.<sup>60</sup> This legislative provision will become even more important now that the Constitutional Court has taken the sting out of the statutory provision on the receipt of stolen goods by declaring the reverse onus in the section invalid (see above III.I). The essence of the section is the emphasis on the inability of the accused to give a satisfactory account of his or her possession. It would seem that this section does not involve a significant departure from the right to remain silent and, if it does, there is a strong case for arguing that this departure is a reasonable and justifiable one.

### K. Fraud and Forgery

Fraud in South Africa is punishable as a general common-law offence. The offence consists of unlawfully making, with intent to defraud, a misrepresentation that causes actual prejudice or which is potentially prejudicial to another.

In the early 20th century, the South African Courts extended the ambit of this crime to cover both potential and non-proprietary prejudice. Potential prejudice would arise where there was a risk of prejudice that was not too remote or fanciful. Non-proprietary prejudice might arise where, for instance, the accused laid a false charge with the police and so caused them unnecessary investigation. The extension of the crime to potential prejudice serves to blur the line between fraud and attempted fraud.

The ultimate broad definition of fraud that emerged in the South African law has been challenged on the grounds of alleged vagueness, but in *S v. Friedman* (1),<sup>61</sup> the current definition of fraud managed to survive the challenge.

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<sup>59</sup> 2000 (1) SACR 414 (CC).

<sup>60</sup> General Law Amendment Act 62 of 1955, s. 36. Cf. the unexplained possession of stock or produce suspected of having been stolen: Stock Theft Act 57 of 1959, s. 2.

<sup>61</sup> 1996 (1) SACR 181 (W).

The intent to defraud element of the offence has been interpreted to require not just an intention to deceive but also an intention to defraud in the sense that the intention is to induce the victim of the fraud to alter or abstain from altering his or her position.

Forgery is a special form of fraud punishing a person who unlawfully makes, with intent to defraud, a false document that causes actual prejudice or which is potentially prejudicial to another. If the document is communicated (or ‘put off’), the crime becomes forgery and uttering.

## **L. Malicious Damage to Property and Arson**

The South African criminal law punishes malicious damage to property and arson, a specific species of malicious damage to property. Arson consists of unlawfully setting an immovable structure on fire with intent to injure another.

The overarching crime of malicious damage to property is not ideally suited to damage to intangible property and so the legislature had to intervene to proscribe unauthorised access to computer systems and altering computer data.<sup>62</sup>

## **M. Robbery**

Robbery is the theft of property by intentionally using violence or threats of violence to induce another to submit to the taking of his or her property. Robbery is therefore theft accompanied by an assault, or theft by means of violence. It is a common mistake often made by the general public to say that Y has been ‘robbed’ of his property where no violence or threat of violence has been used. If there is no assault, the crime can only be theft.

The essential elements of robbery are:

- theft;
- violence;
- submission, and
- intention.

### *1. Theft*

The completed crime of theft is an essential for a conviction of robbery. If any of the elements of theft is lacking, there is no robbery, although a conviction for assault may result.

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<sup>62</sup> See chap. XIII of the Electronic Communications and Transactions Act 25 of 2002.

At one time it was said that the *contrectatio* (or assumption of control) must be from the *person of another* or *in his presence*. This rule emerged in English law but the Courts soon realised that if the taking had to be from the person of another then the hijacker who took the victim's parked car by threats rather than his watch had not committed robbery regarding the taking of the car. The English Courts, therefore, extended the rule to cover property taken in the victim's immediate presence. There were also flaws in this approach since X, who threatened Y to hand over his keys so that X could ransack Y's house some kilometres away,<sup>63</sup> would not be guilty of robbery. Similarly, if X used violence to kill Y and then took property from Y's dead person, the property, strictly speaking, could not be said to have been taken in his presence, except in a rather macabre sense.

In *Ex parte Minister van Justisie: In re S v. Seekoei*,<sup>64</sup> the Appellate Division confirmed the rule that the property need not be taken in the presence of the victim. In this case X attacked Y and forced her to hand over the keys of her shop that was two kilometres way. X then tied Y to a pole, using barbed wire, and drove her car to the shop, where he stole money and other property. The Appellate Division held that X should have been convicted of robbery: the fact that he did not take the property in Y's presence afforded him no defence.

## 2. Violence

The theft and the assault must form part of one continuous transaction and the assault must have been the means by which the unlawful possession was obtained. The purpose of the violence must have been to induce the victim to submit to the taking.

Violence that is sufficient for the crime of assault is also sufficient for robbery. In most cases of robbery, actual violence is used, but a threat of violence, overpowering the victim with a drug, or rolling over an already unconscious victim to remove his wallet, will be enough. It was established in *Ex parte Minister of Justice: In re R v. Gesa, R v. De Jongh*<sup>65</sup> that if Y chooses to hand over the property rather than suffer the threatened harm (for example in a hijack or 'your money or your life' situation), the taking is clearly not by consent because any consent is overborne by the threat.

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<sup>63</sup> As in *Ex parte Minister van Justisie: In re S v. Seekoei* 1984 (4) SA 690 (A).

<sup>64</sup> N. 63 above.

<sup>65</sup> 1959 (1) SA 234 (A).

The violence must be directed against the victim and not the property to be stolen. For some years there was dispute as to whether ‘bag-snatching’ constituted robbery. The pickpocket who stealthily removes a wallet from Y’s pocket obviously does not use violence and so robbery is not committed. It is also theft and not robbery where X cuts the strap of a bag and so stealthily releases it without the owner being aware of it. The liability of the bag snatcher, who overcomes the resistance of the owner not by stealth but by grabbing the bag, is considered at III.M.3. below.

There must be a causal link between the violence and the taking. The property must have been obtained by X as a result of the violence or threat of violence. The premise is that the violence must precede the taking and that robbery is not committed if the violence is used to retain a thing already stolen or to facilitate escape (here there may be theft and assault but no robbery). If X assaults Y and then, perchance, finds that Y has dropped some property, X does not commit robbery if he then takes that property, which he did not intend to take in the first place.

The Courts soon found that the rule that the violence must precede the taking had to be qualified. The Appellate Division in *S v. Yolelo*<sup>66</sup> acknowledged that robbery may be committed even though the violence follows the completion of the theft. This will be the case if, having regard to the time and place of X’s act, there is such a close link between the theft and the violence that they may be regarded as connecting components of one and the same action. Thus in the *Yolelo* case, X was found in possession of Y’s property before he could leave the house. X’s ensuing assault on Y was regarded as so closely connected with the process of taking the property that X was convicted of robbery. The Court did not rely on the continuing nature of the crime of theft to reach this conclusion.

### 3. Submission and intention

X must have the intention of taking the property by means of violence or threats of violence and in this way overcoming Y’s resistance.

The violence must not be incidental to the taking as in *S v. Matjeke*<sup>67</sup> where X, intending to assault Y, brandished a knife and Y, in order to divert the attack, flung his jacket at X’s face. X desisted from the attack but refused to return Y’s jacket. It was held that X had committed only assault and theft.

Previously, the Courts held that if X snatches Y’s handbag out of her hands in a sudden and unexpected movement (with no resistance from Y), X is not guilty

<sup>66</sup> 1981 (1) SA 1002 (A).

<sup>67</sup> 1980 (4) SA 267 (BSC).

of robbery but merely of theft. It was said that the violence is incidental to the taking. However, Rumpff CJ in *S. v Mogala*<sup>68</sup> in an *obiter dictum* questioned this approach: he pointed out that in this type of case X knows very well that he can gain possession of the bag only if he snatches it from the woman in a quick and unexpected movement. In *S v. Sithole*,<sup>69</sup> the Natal Court agreed with the then Chief Justice and held X guilty of robbery where he approached Y from behind, snatched her bag and ran away. In the *Sithole* case, the Court held that in order to constitute robbery, it is not necessary that Y should actually have offered resistance. Despite criticism of the case, other divisions of the High Court have followed it.<sup>70</sup>

## N. Housebreaking

Housebreaking (burglary) is punishable under the South African criminal law and a number of fine distinctions and terms of art characterise the interpretation of this offence.

To ‘break’ does not literally mean causing physical damage, but rather means to displace some obstruction (for instance, pushing open a partially closed door or window). The accused must not only break into but also enter premises.

A house, in the literal sense of the word, does not have to be broken into. The concept of ‘premises’ has a special meaning. This meaning has been defined in terms of three factors:

‘First, whether what has been broken and entered is a structure (or part of a structure) in the nature of a house or store-room. Secondly, whether the structure is, or might ordinarily be, used for human habitation or storage of property. Thirdly, whether there is some degree of permanency about the purpose to which the thing is devoted.’<sup>71</sup>

The Courts in South Africa have held that the following constitute premises for the purpose of the crime of housebreaking: a store-room, a garage, a shop, a tent, an office, a cabin on a ship, and a caravan (or trailer). Not only must the accused intend to commit an unlawful breaking and entering of premises but he or she

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<sup>68</sup> 1978 (2) SA 412 (A) at 415-416.

<sup>69</sup> 1981 (1) SA 1186 (N).

<sup>70</sup> *S v. Mofokeng* 1982 (4) SA 147 (T) and *S v. Witbooi* 1984 (1) SA 242 (C).

<sup>71</sup> J.M. Burchell & J.R.L. Milton, *Principles of Criminal Law* 604-605.

must intend to commit a further crime (apart from the trespass or malicious injury to property inherent in the housebreaking) by his or her conduct. In other words, the common-law crime is ‘housebreaking *with intent*’.

## O. Extortion (or Blackmail)

Extortion consists in obtaining from another some advantage by unlawfully and intentionally subjecting him or her to pressure that induces him or her to submit to the taking. The elements are the following:

- unlawful subjection to pressure;
- pressure;
- some advantage;
- inducement, and
- intention.

### 1. *Unlawful subjection to pressure*

It must be unlawful to use the pressure *for the purpose for which X uses it*. The threat to inflict physical harm on the person or property of the victim is clearly unlawful unless there is a general defence excluding the unlawfulness of the conduct available.

Threats to reveal embarrassing information are classic instances of extortion. However, the fact that the information revealed is embarrassing to the complainant is not on its own enough to make the disclosure unlawful. It is when the threat is to exact some advantage that is not due to the extorter, that the threat becomes unlawful. The crime of extortion prohibits the ‘bargaining’ over the disclosure of embarrassing information. If X for example, threatens Y that he (X) will reveal that Y has committed a crime if Y does not pay him (X) R100 000, then X commits extortion by ‘bargaining’ with Y in this way. X should simply report the crime committed by Y to the police.

Threats to institute legal proceedings are not unlawful. Even a threat to institute legal proceedings unless some advantage is obtained is not extortion. The threat, however, becomes unlawful if it is intended to obtain an advantage that is not due. Thus if X threatens to sue Y unless Y has sexual intercourse with him, the threat would be unlawful. If a threat is based on an accusation, the accusation need not be false – it could be true.

A classic instance of extortion (and also corruption) is where a police officer (who is entitled to arrest Y) threatens Y that if he does not pay him a sum of money, he will be arrested.

One must look at the threat *and* the purpose for which it is used. In most instances of extortion the advantage sought is not due to the extorter (or extortionist). In some cases, however, extortion may be committed even where the advantage is due, for example, where X threatens to assault Y unless Y pays X the money due to him (X).

### 2. Pressure

There must be something in the nature of a threat, in other words, something that is intended to inspire fear and which does inspire fear. If there is no pressure, the crime may be corruption or fraud but not extortion. The threat need not be of bodily harm – it could be of damage to property, arrest, or dismissal. The threat may be express or implied. A threat to a third party suffices.

### 3. Some advantage

There was some authority in the old South African cases that could be interpreted to imply a wide approach to ‘advantage’, that is, not merely pecuniary, but any other form of advantage, including non-pecuniary advantage. However, the Appellate Division in *Ex parte Minister van Justisie: In re S v. J & S v. Von Molendorff*,<sup>72</sup> following an examination of the old authorities, held that ‘according to the *communis opinio* . . . which runs through our common law like a golden thread, the benefit in extortion should either be money or a patrimonial benefit’.

The legislature realised that there was a social need to extend the scope of the crime of extortion and enacted section 1 of the General Law Amendment Act 139 of 1992:

‘At criminal proceedings at which an accused is charged with extortion it shall with respect to the object of the extortion be sufficient to prove that any advantage was extorted, whether or not such advantage was of a patrimonial nature.’

Thus advantages such as advancement of legal proceedings without financial reward, avoiding prosecution or even sexual gratification (as in *S v. J*), would be enough for a contravention of this statute.

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<sup>72</sup> 1989 (4) SA 1028 (A) at 1041.

#### *4. Inducement*

The pressure used by X must have induced Y to hand over or submit to the advantage. The test for inducement is the test of factual causation: but for the pressure would Y not have submitted? Where Y is caught red-handed by a policeman (X) and X threatens Y with arrest unless he is paid money, although Y already fears arrest, prosecution and punishment, X commits extortion.

#### *5. Intention*

Intention has three aspects: X must intend his words or conduct to operate as a threat or pressure; X must intend his pressure to induce Y to submit, and X must know that his use of pressure is unlawful.

### **P. Organised Crime**

Organised crimes may be committed by an individual or by a group of persons, but are frequently perpetrated by groups of persons over a substantial period of time. A feature of almost every modern society is the emergence of organised criminal enterprises that transcend national boundaries and whose conduct involves some element of continuity.

While certain manifestations of organised crime are adequately punished within the parameters of existing common-law and statutorily-defined crimes, the legislature in South Africa, to some extent impelled by international pressure, has enacted the Prevention of Organised Crime Act 121 of 1998, which came into operation on 21 January 1999. This piece of legislation specifically criminalises racketeering, money laundering and certain gang activities. It introduces a dual system of recovery of criminal assets based on both post-conviction confiscation and civil forfeiture without requiring conviction. The effective implementation of the Prevention of Organised Crime Act is re-enforced by the recent introduction of the Financial Intelligence Centre Act 38 of 2001, parts of which have already come into operation on 1 February 2002, 1 March 2002 and 3 February 2003. The constitutional implications of a number of the provisions of the Prevention of Organised Crime Act have yet to be decided by the Courts.<sup>73</sup>

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<sup>73</sup> Already the Constitutional Court has pronounced on the scope of s. 38 of the Prevention of Organised Crime Act dealing with preservation orders: see *National Director of Public Prosecutions v. Mohamed* (1) 2002 (4) SA 843 (CC); *National Director of Public Prosecutions v. Mohamed* (2) 2003 (4) SA 1 (CC).

## Q. International Crimes

South Africa ratified the Rome Statute that created the International Criminal Court that came into operation on 1 July 2002 after the lodging of the 60th ratification. The South African legislature has also passed the International Criminal Court Act 27 of 2002 that ensures that South Africa complies with its obligations as a State party to the Rome Statute. By this piece of legislation, South Africa has incorporated the international definitions of genocide, crimes against humanity and war crimes into domestic law.

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# *Chapter 14*

## **Law of Evidence**

***David Zeffertt\****

### **I. INTRODUCTION AND SOURCES**

The South African law of evidence is the product of a peculiar history. It reflects the imposition of English common law as the result of imperial expansion and conquest, followed by a republican period in which some colonial shackles were slightly loosened and, since 1994, the advent of a constitutional regime in which various fundamental rights that impact both on domestic statutes and common-law rules are enshrined. There are two further characteristics of significance to the evidentiary system:

- juries survived in criminal trials in the Supreme Court until they were abolished in 1969<sup>1</sup> and findings of fact are made by a magistrate or a Judge or, in some criminal proceedings, by a Judge and assessors, and
- criminal proceedings are accusatory and adversarial and civil proceedings are adversarial.

To this there is an important qualification – a judicial officer in a criminal trial has the power to call witnesses and, indeed, is obliged to do so if it is essential to the just decision of the case.<sup>2</sup>

When the Union of South Africa came into existence in 1910, the four former colonies had statutory provisions that, although not identical, had a similar effect on the law of evidence. Three of the provinces, namely the Cape, the Transvaal and the Orange Free State<sup>3</sup> (the last two being conquered territory after 1902),

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<sup>1</sup> By the Abolition of Juries Act 34 of 1969.

<sup>2</sup> Criminal Procedure Act 51 of 1977, s. 186; *R v. Hepworth* 1928 AD 265.

<sup>3</sup> See Ordinance 72 of 1830 and Proclamation 16 and 11 of 1902 respectively.

followed a pattern of drafting that imposed the law, as it was applied by the English Courts, to particular topics and, in addition, codified aspects of the English law. The Transvaal proclamation included a provision, also, that in any case not expressly provided for, the law in force in the Supreme Court of Judicature in England had to be followed. It reflected the Criminal Evidence Act, 1898 by making the accused a competent witness for his defence, but while the Transvaal legislation referred to the law applied by the Supreme Court of Judicature, the same effect was reached in the Free State by referring to the law of the Cape – the fact that the Cape applied the law as at 1830 was conveniently disregarded by the Courts. Natal used a different technique<sup>4</sup> by simply applying ‘the known rules and the exception to such rules recognized by the English law of evidence under the common law or by statute [then] in force in England’. A litany of topics then followed.

Prior to Union, local legislation reflected law reform in England. Thus, two Cape ordinances, in 1846 and 1861, accommodated English developments relating to the competence of witnesses. The Administration of Justice Act 1886 anticipated the Criminal Evidence Act, 1898 by making the accused a competent witness. The Union ceased to exist at the end of May 1961. At that time the law of evidence in civil matters was governed by the colonial legislation, mentioned above, to the extent to which it had not been repealed or amended. The Criminal Procedure and Evidence Act 31 of 1917 (section 1), which had, in turn, been superseded by the Criminal Procedure Act 55 of 1956, had consolidated criminal proceedings for the whole country. The legislation governing criminal proceedings followed a familiar pattern. Some topics were codified – a notable instance that departed substantially from the common law related to confessions. Others applied the English law to specific matters and a residuary provision did so for matters not expressly provided for in the statute. Because the English law in relation to civil proceedings had been incorporated at different times in the different provinces, the extent to which English statutes had been incorporated varied from province to province. Consequently, civil proceedings had to wait for consolidation until the advent of the Republic.

The Courts of the Union of South Africa had to deal with the question whether English decisions were binding. It was held that they were – even when a local Court thought that they were wrongly decided. Although some local variations crept in to accommodate differences in the procedural system, South African Courts were bound by English decisions. Moreover, some Courts adopted the

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<sup>4</sup> Law 17 of 1859, s. 1.

fiction of an immutable common law and that the Courts merely declared what its unchangeable content had always been. That, obviously, did not apply to statutes. It was held that when a local statute incorporated English law, it had the effect of incorporating all English statutes that were in force at the time of incorporation. But subsequent statutes were not incorporated merely by their enactment.

The advent of the Republic did not have the effect of breaking the shackles of the English law, but domestic case law loosened it to some extent. In civil proceedings, a consolidating statute, the Civil Proceedings Evidence Act 25 of 1965, repealed the old colonial statutes, but resurrected them by means of a formula that was substituted for erstwhile specific statutory incorporation of the English law. The formula applied the law as it had been on 30 May 1961 – a day immediately preceding the establishment of the Republic. On that date the relevant law had its source in the colonial statutes to the extent to which they had not been repealed or amended before 30 May 1961. It followed that the purported repeal in 1965 had no significance. The incorporation of the law as applied by the Supreme Court of Judicature in England in the Criminal Procedure Act 56 of 1955, was replaced in 1963 by the 30 May 1961 formula – a formula retained by the present Criminal Procedure Act 51 of 1977 in respect of a number of specified topics and for matters not specifically dealt with in the Act.

As regards criminal proceedings, the Appellate Division decided that the formula applied the English law as it was on 30 May 1960 and as implemented in South Africa. The position in civil proceedings was determined in a case in the Free State involving a rule that applied the law of the Cape that in turn applied the law as applied by the English Courts. The Appellate Division, by means of rather dubious reasoning, cast off some of the shackles that bound it by holding<sup>5</sup> that a decision of the Privy Council on evidence made before the abolition of appeals from South Africa to it on 12 May 1950<sup>6</sup> – even if the appeal came from another jurisdiction – was binding just as if it were a decision of the Appellate Division (now the Supreme Court of Appeal) itself. In other words, it binds it unless it was made *per incuriam* or unless it was clearly wrong. The Court followed a decision of the Privy Council rather than a conflicting decision of the House of Lords, which, of course, bound the Supreme Court of Judicature although the Judicial Committee of the House of Lords was not part of it.

<sup>5</sup> *Van der Linde v. Calitz* 1967 (2) SA 239 (A).

<sup>6</sup> In terms of the Privy Council Appeals Act 16 of 1950 which commenced on that date.

Although the Appellate Division did not say so explicitly, the ineluctable inference is that the Supreme Court of Appeal (the successor to the Appellate Division) will not be obliged to follow an English decision that, in the opinion of the Supreme Court of Appeal, wrongly reflects the English common law. English decisions after 30 May 1961 are merely persuasive, as are those of the Privy Council made after 12 May 1950.

The 30 May 1961 formula does not apply to rules of practice but only to evidentiary rules in the strict sense. Thus, while a South African Court must apply English rules when dealing with the privilege against self-incrimination, it has been held that a local practice about warning witnesses not to answer incriminating questions had to be followed despite the absence of an equivalent English practice. Nor does it import the English substantive law. By ‘substantive law’ is meant, in this context and according to local authority, law that lays down what has to be proved in any given issue and by whom. The rules of evidence have been held to mean those rules that relate to the manner of proof. Thus the onus of proof, despite being something usually dealt with in books relating to the law of evidence, has been held to be a matter of substantive law and that English law is inapplicable to it.

The Law of Evidence Amendment Act 45 of 1988 effected important changes to the law of hearsay, the proof of indigenous custom and foreign law, and the competence of spouses.

The interim Constitution of the Republic of South Africa, Act 200 of 1993, which included a Bill of Rights, entrenched a number of fundamental human rights. It included, for instance, the right not to be subjected to bodily and proprietary searches or to the violation of private communications; the right to privacy and human dignity; the right of access to information held by the State or the organs of State; the right not to make an admission or confession and to remain silent during criminal proceedings and not to be a compellable witness against oneself. A law of general application could justify a breach of these rights if it was reasonable and in line with what was acceptable in an open and democratic society based on freedom and equality.

These rights, in the main, were not new. However, their entrenchment meant that they could not be violated by statute – and the English law of evidence had been applied by virtue of a South African statute – unless the violation were to be justified. The implications for the law of evidence were obvious.

Explicit provision for the effect of a breach on the admissibility of evidence had to await the advent of the final Constitution of the Republic of South Africa, Act 108 of 1996, which lays down in section 35(5) that evidence that has been obtained in a manner that violates any right in the Bill of Rights must be

excluded if its admission would render the trial unfair or would otherwise be detrimental to the administration of justice.

As was the case with the interim Constitution, fundamental rights entrenched in the 1996 Bill of Rights<sup>7</sup> may be limited by laws of general application if the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom. The rules of the English common law, which have been incorporated by statute, are laws of general application. There is a threshold of rights to which the limitation provision does not apply and when it is applicable, all relevant factors such as, for instance, the nature of the right, the nature, purpose and importance of the limitation, and whether there is a less restrictive way of achieving it, have to be taken into account.

The Bill of Rights applies vertically between private persons and the State or an organ of State. A discussion of whether the Constitution operates horizontally in matters between private persons is beyond the scope of this chapter, but it can safely be said that it does apply horizontally to evidentiary rules reflecting the right to privacy and dignity.<sup>8</sup>

The Constitution requires a Court to develop the common law when it is out of kilter with constitutional values. But South Africa does not have a common law of evidence and when it applies the English common law it does so because a statute enjoins it to do so. It is submitted, however, that it would be against the tenor of the Constitution to take a narrow view of what constitutes common law in this context and that the English common law should be regarded as South African despite its having been applied by statute. This view signifies that the Constitution, when it lays down in section 8(3) that a Court must develop the common law, should be read as referring to the rules of the English law of evidence that have been applied by statute. It is submitted that an English statute that has been incorporated into South African law and which forms part of it by that incorporation should be regarded as a South African statute. A South African statute that unjustifiably conflicts with the Bill can either be read down so as to conform to it, or, if it cannot, should be struck down.

In conclusion, the South African rules of evidence, whether arising from the English common law or specific local codification, must now be regarded in a constitutional perspective, and matters that were once purely procedural may

<sup>7</sup> Some of those relevant to the law of evidence will be discussed below when appropriate topics are dealt with.

<sup>8</sup> See *Khumalo v. Holomisa* 2002 (5) SA 401 (CC) for a discussion of horizontality.

have become principles of substantive law as well as procedural adjuncts to those principles.

A number of important instances in which the South African law has diverged from the English law of evidence will be discussed below.

## II. HEARSAY

Hearsay no longer bears the meaning that it had at common law. It has been given a statutory definition for the purposes of both criminal and civil proceedings by the Law of Evidence Amendment Act 45 of 1988 (section 3(4)), namely, as evidence, whether oral or in writing, the probative value of which depends on the credibility of any person other than the person giving such evidence. The meaning of ‘depends on’, which ought to have been considered crucial to the proper construction of the definition, has not attracted the attention of the Courts, but it has been suggested by writers that it signifies either a substantial dependence on the credibility of someone other than the witness giving the evidence or that evidence is hearsay if its probative value depends upon the credibility of someone other than the witness giving the evidence, to a degree that, in the opinion of the Court, could cause prejudice if it were received. Since the definition does not require that evidence, if it is to be hearsay, must have the purpose of asserting the truth of its content, evidence that has been regarded as not being hearsay for that reason, would constitute statutory hearsay if its probative value were to depend on the credibility of someone other than the witness. The definition, also, calls for a new approach to the admissibility of the implied assertions of verbal and physical conduct but this aspect has not, as yet, had to be considered by the Courts.

Subject to the provisions of any other law, hearsay is inadmissible unless it can be received under three exceptions set out in section 3:

- it can be admitted if the party against whom the evidence is to be adduced agrees to it;
- if the person upon whose credibility the probative value depends testifies in the trial, and
- if the Court, having regard to a number of factors set out in the provision, is of the opinion that the admission of the hearsay should be admitted in the interests of justice.<sup>9</sup>

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<sup>9</sup> S. 3(1)(a),(b) and (c) respectively.

These factors are the nature of the proceedings; the nature of the evidence; the purpose for which the evidence is tendered; the probative value of the evidence; the reason why the evidence is not given by the person upon whose credibility its probative value depends; any prejudice to a party which the admission might entail, and any other factor which in the opinion of the Court should be taken into account.

It has been held that a decision on whether hearsay should be admitted does not constitute the exercise of discretion but is a decision of law that can be overruled on appeal.<sup>10</sup>

Hearsay may be provisionally admitted if the Court is informed that the person upon whose credibility the evidence depends will testify in the proceedings – if he does not, it will not be taken into account unless it is received under another exception.<sup>11</sup> Similarly, it will be disregarded if he or she testifies and disavows the statement.<sup>12</sup>

There has been a greater reluctance in criminal cases than in civil cases to admit hearsay on the ground of its being in the interests of justice. It has been authoritatively said that a Court should hesitate long before admitting or relying on hearsay that plays a decisive, or even a significant, part in convicting an accused unless there be a compelling justification for doing so.<sup>13</sup> The exception requires the Court to bring its mind to bear on the dangers generally inherent in hearsay and on the disadvantages of receiving the particular evidence that has to be considered. The Courts have, accordingly, taken the following into account (the list is not exhaustive):

- the circumstances in which a declaration was made;
- whether there has been cross-examination;
- whether the original declarant had a motive to lie or an interest in making the statement;
- whether it is tendered for a dubious or illegitimate purpose;
- the time when the reported statement was made;
- the relationship between the declarant and the person against whom it is adduced;

<sup>10</sup> *McDonald's Corporation v. Joburgers Drive-In Restaurant (Pty) Ltd* 1997 (1) SA 1 (A).

<sup>11</sup> S. 3(3).

<sup>12</sup> *S v. Ndhlovu* 2002 (6) SA 305 (SCA).

<sup>13</sup> *S v. Ramavhale* 1996 (1) SACR 639 (A).

- whether it has been made on oath;
- the reputation and standing of the declarant, and
- the fact that the more hearsay is piled on hearsay, the more unreliable it becomes.

Since the exceptions have been made subject to the provisions of any other law, the statutory exceptions created by other legislation, whether made before or after the Law of Evidence Amendment Act 45 of 1988, are unaffected. Some writers believe that the same cannot be said of hearsay exceptions at common law. This view is submitted to be correct because, among other reasons, they had been incorporated into South African law by provisions that were repealed by the Act.

### III. CONFESSIONS

The law relating to confessions has been codified by section 217 of the Criminal Procedure Act 51 of 1997, read with the provisions of the Constitution. A presumption contained in it has, however, been struck down as unconstitutional. Admissions are governed in the main by the common law; and some regard it undesirable to treat confessions and admissions differently, particularly because the grounds for excluding confessions are wider than those of admissions and, despite the fact that an admission can, at times, be as deadly in effect as that of a confession, the distinction between the two in South Africa is casuistic and unsound in policy.

For a confession to be admissible, the prosecution must prove beyond a reasonable doubt that it was freely and voluntarily made by a person in his sound and sober senses without his having been unduly influenced, and, if it was made to a peace officer other than a magistrate or justice, it will be inadmissible unless confirmed and reduced to writing in the presence of a magistrate or justice. A peace officer is defined as including a police official, and a justice as a justice of the peace. A commissioned police officer is a justice of the peace,<sup>14</sup> so it follows that a confession made to him does not have to be confirmed and made in writing, as must a confession to a policeman who is below commissioned rank and is, therefore, not a justice of the peace.

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<sup>14</sup> Justices of the Peace and Commissioners of Oaths Act 16 of 1963, s. 4 and the first Schedule to the Act.

A very restrictive interpretation has been given to the meaning of a confession. To be a confession it has to be an unequivocal admission of guilt, the equivalent of a plea of guilty before a Court of law.<sup>15</sup> Thus, for instance, it would not be a confession to murder if one were merely to say that one had shot the deceased, but it is recognised that regard may be had to the surrounding circumstances in order to remove equivocation.<sup>16</sup> The test is objective. What signifies is not whether a person intended to confess but whether he intended to admit facts that made him guilty, whether he or she realised it or not.<sup>17</sup>

A ‘voluntary’ statement bears its common-law meaning,<sup>18</sup> that is, it must not have been induced by a threat or promise proceeding from a person in authority. But this restrictive sense is of little importance because the concept of ‘undue influence’ is elastic and may operate to enlarge the area of exclusion: it can emanate from anyone and the notion of what may induce it goes beyond violence and extends, for instance, to unduly lengthy interrogation, subjection to fatigue, the exploitation of weaknesses such as poor education or youthfulness. In a nutshell, a practice is an undue one if it is repugnant to the principles upon which the criminal law is based.<sup>19</sup> A test that had formerly been applied in South Africa, namely whether the inducement has created a risk of a false confession, is no longer compatible with the view accepted by the Courts in South Africa about why some confessions have to be excluded. The consideration that an unduly induced confession may be unreliable is no longer paramount. Statements are also excluded if their admission would be unfair or otherwise abhorrent to civilized values.<sup>20</sup> Moreover, section 35(5) of the Constitution requires a Court to exclude evidence that has been obtained in a manner that violates the Bill of Rights, not only if its admission would render the ensuing trial unfair, but if it ‘would otherwise be detrimental to the administration of justice’. It would be wrong, therefore, to admit a confession that has been obtained by violating rights enshrined in the Bill of Rights if its reception either rendered the trial unfair or brought the administration of justice into disrepute. To bring the administration of justice into disrepute would, surely, be detrimental to it. It has also been

<sup>15</sup> *R v. Becker* 1929 AD 167.

<sup>16</sup> *S v. Yende* 1987 (3) SA 367 (A).

<sup>17</sup> *S v. Yende* 1987 (3) SA 367 (A); *R v. Kant* 1933 WLD 128.

<sup>18</sup> *S v. Yolelo* 1981 (1) SA 1002 (A).

<sup>19</sup> *S v. Pietersen* 1987 (4) SA 98 (C); *S v. Williams* 1991 (1) SACR 1 (C).

<sup>20</sup> *S v. De Vries* 1989 (1) SA 228 (A).

recognised that a trial may be unfair because of practices that occurred before its commencement.<sup>21</sup>

Once a practice has been found to be an undue one, a confession must be excluded if the Court finds that, but for that practice, the accused would not have made it.<sup>22</sup> The test is subjective.<sup>23</sup>

For the purposes of section 217, a person will not be in his sound and sober senses unless he or she is unable to know what he or she was saying.<sup>24</sup>

The Department of Justice has laid down administrative procedures to be followed by magistrates when taking confessions and the Courts have given illustrations<sup>25</sup> of what they regard as salutary practice. A failure to follow such administrative procedures will not in itself necessarily be fatal, for ultimately, the Court will have to decide whether there has been due compliance with section 217. But, such a failure will be relevant to that decision and, moreover, could be material to the question whether evidence would have to be excluded under section 35(5) of the Constitution.

A magistrate should investigate the events and circumstances that led to a person's appearing before him or her in order to confess; the results of that inquiry should be recorded; the police should not be present; if the person says that he or she has been assaulted by the police but that he or she does not wish to report it to the police, the magistrate should not simply accept an averment that he or she wishes to make a voluntary statement. Caution has to be exercised; the exact words of the confession should be recorded; if he or she says that he or she has been assaulted by the police, the statement should not be handed over to the very policemen alleged to have done so, and if he or she is sent for medical examination, the police should not be present. Before the Constitution, there was no duty on a magistrate to inform an accused person who has been brought before him or her in order to make a statement, of the right to legal representation. Since the Constitution, some Judges have said that a failure to inform an accused of his or her rights whenever there is a risk of self-incrimination is

<sup>21</sup> *S v. Mpetha* (2) 1983 (1) SA 576 (C).

<sup>22</sup> *S v. Khan* 1997 (2) SACR 611 (SCA).

<sup>23</sup> *S v. Mpetha* 1983 (1) SA 576 (C). It is submitted that this reflects the weight of authority, but see *S v. Kuzwayo* 1949 (3) SA 761 (A) at 768.

<sup>24</sup> *R v. Blyth* 1940 AD 355.

<sup>25</sup> The cases, according to *S v. Abbot* 1999 (1) SACR 489 (SCA), provide illustrations of what is good practice.

undesirable but does not necessarily lead to inadmissibility while others have held that an accused person's constitutional rights must be explained at every important new pre-trial procedure that relies on his or her co-operation. The Supreme Court of Appeal, however, has held a confession to be admissible despite the fact that the investigating officer and the magistrate unfairly failed to tell the accused that he had a right to legal representation.<sup>26</sup>

The Courts ruled that section 217(3) allowed the reception of a confession in order to prove an accused person's guilt if it was elicited by a question put by him or her to a witness whose reply to it constitutes a direct and fair answer. A Court should not receive the confession, however, where an accused is either not legally represented or where he or she is incompetently defended, unless it is satisfied that the accused or counsel was fully aware of the risks that were involved in putting it.<sup>27</sup>

#### IV. THE ACCUSED AS WITNESS

Section 197 of the Criminal Procedure Act 51 of 1977<sup>28</sup> enacts, with some verbal differences, the provisions of the English Criminal Evidence Act, 1898. The South African provision does not incorporate the English law and English decisions on the meaning of section 1(f) of the 1898 Act are not binding on South African Courts. The slight differences in wording have led to different results and, in one crucial instance, a completely different meaning has been given to the same words.

A literal interpretation of section 197 would neither allow the prosecution to put a question to an accused that tends to show that the accused has been charged with an offence nor that he or she is of bad character even if it is relevant to an issue. *In Jones v. DPP*,<sup>29</sup> the majority of the House of Lords, guided by the maxim *expressio unius, exclusio alterius* (expression of one excludes the other), rejected a suggestion that any qualification could be added to the provision that would allow such a question. It gave, in other words, a literal interpretation. In

<sup>26</sup> *S v. Khan* 1997 (2) SACR 611 (SCA).

<sup>27</sup> *S v. Mvambo* 1995 (1) SACR 180 (W).

<sup>28</sup> The law in this regard was consolidated for all the provinces by s. 295 of the Criminal Procedure and Evidence Act 31 of 1917.

<sup>29</sup> [1962] AC 635.

*S v. Mokoena*,<sup>30</sup> the Appellate Division declined to follow *Jones v. DPP* and followed its own earlier decisions that permitted questions of that kind. It is clear law in South Africa that an accused can be asked a question tending to show that he or she is of bad character, or that he or she has committed another offence, if that issue is relevant to an issue,<sup>31</sup> that is, if it would not offend the similar-fact rule if it were to be led in examination in chief.

A different approach has been taken in South Africa to that of the House of Lords in *Selvey v. DPP*<sup>32</sup> as to when the ‘nature or conduct’ of the defence has the effect of exposing an accused person to cross-examination about his bad character. The expression has been regarded as amenable to the interpretation that the accused did not incur the procedural penalty of being exposed to a character attack if the imputations made by him against the character of the complainant (the prosecutor), or any other witness for the prosecution, are an essential portion of the proof – or even if they are merely relevant<sup>33</sup> or have ‘some relevance’<sup>34</sup> to that proof – that the conduct of the accused is not criminal.<sup>35</sup> In other words, a distinction is drawn between an imputation that is relevant to an issue and one that is solely relevant to credibility. In the first instance, the accused will lose his or her shield only if the conduct of the defence warrants it; in the second, the accused loses his or her immunity because, by impugning the character of the witness for the prosecution, the accused wishes to cast doubt on it to have his or her own believed and, accordingly, the Court should be informed (at any rate so far as cross-examination of the accused will serve to inform it) about his or her character as well.<sup>36</sup>

## V. THE COMPLAINANT’S CHARACTER

Section 227(2) of the Criminal Procedure Act 51 of 1977 is substantially similar to section 2(1) of the English Sexual Offences (Amendment) Act 1976. It has

<sup>30</sup> 1967 (1) SA 440 (A). The Appellate Division has followed this decision consistently.

<sup>31</sup> *S v. Mavuso* 1987 (3) SA 499 (A).

<sup>32</sup> [1970] AC 304.

<sup>33</sup> *Spencer v. R* 1946 NPD 696 at 700.

<sup>34</sup> *R v. Hendrickz* 1933 TPD 451.

<sup>35</sup> *S v. V* 1962 (3) SA 365 (E).

<sup>36</sup> *R v. Hendrickz* 1933 TPD 451.

been interpreted<sup>37</sup> as laying down that, generally speaking, questions will not be allowed if their purpose is to suggest that the complainant should not be believed because she has had sexual experience with other men with whom she is not married. Questions of this sort will seldom be allowed, but questions relevant to an issue are likely to be allowed unless their degree of relevance is so slight that the Court would be far from satisfied that the exclusion of the evidence would be unfair to the accused. But questions will be allowed if the evidence of her promiscuity is so strong, or close in time to when the offence is alleged to have happened, as to have come near the border between a mere relevance to credibility and a relevance to an issue. It would be proper for a Court, when deciding whether or not to allow the evidence, to consider the following:

- the interests of justice, including an accused person's right to make a full answer and defence;
- society's interest in encouraging the reporting of sexual offences;
- whether there is a reasonable prospect that the evidence will assist in arriving at a just determination of the case;
- the need to remove any discriminatory belief or bias;
- the risk that the evidence might unduly arouse prejudice, sympathy or hostility;
- the potential prejudice to the complainant's dignity and privacy, her right to personal security and the full protection and benefit of the law, and
- any other relevant factor.

## VI. THE REVERSE ONUS

Section 35(3) of the Constitution provides that every accused person has the right to a fair trial and the Constitutional Court has regarded the presumption of innocence as a corollary of this right. There is, of course, nothing new about that; nor is there anything new about the presumption of innocence which meant at common law that the prosecution has to prove all the elements of an alleged common-law crime beyond a reasonable doubt – with the exception of the defence of insanity where the accused bears an onus that has to be discharged on a balance of probabilities.

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<sup>37</sup> *S v. M* 2003 (1) SA 341 (SCA).

Prior to the advent of the Constitution, a statute could validly include a provision that, in certain circumstances, an accused is presumed to have done something and thereby imposing an onus (in the true sense) on an accused, which he or she could rebut on a balance of probabilities (a reverse onus). Or, it could say that if X were to be proved, it would constitute *prima facie* proof (or evidence) against an accused that he or she had done Y, thus casting an evidentiary burden on him or her (an evidentiary presumption).

Now that the Constitution has made the presumption of innocence a constitutional imperative, the Constitutional Court has had to consider the validity of such provisions in the light of the accused person's constitutionally enshrined right to have a fair trial with the corollary, in the South African system, that the prosecution has to prove, beyond a reasonable doubt, all the elements of a crime that he or she is alleged to have committed.

After making a study of various jurisdictions in which Canadian law was found to be both apt and helpful, the Constitutional Court held that a presumption that imposes a reverse onus on an accused is unconstitutional if it could result in his or her being convicted despite the existence of a reasonable doubt about his or her guilt – unless it was justified under section 36(1) of the Constitution. In a majority judgment, the Constitutional Court has remarked that despite the fact that rights enshrined in the Bill were not absolute, it had yet to find an impugned reverse-onus provision that passed constitutional muster. It nevertheless expressly left open the possibility that a reverse onus could be justified.<sup>38</sup> Factors that the Courts will look to in order to determine whether a reverse onus is justified, would include considering:

- whether the legislation was aimed at a great or a trivial social evil;
- whether the offence is truly criminal and not merely regulatory;
- the severity of the punishment contemplated for offenders;
- the consequences for the accused of a conviction, and
- whether means less damaging to constitutional rights such as the imposition of an evidentiary burden could not have achieved the desired end.

In considering the effect of a statutory provision that imposes an evidentiary burden upon an accused, Courts in South Africa have failed to draw a clear distinction between provisions that merely impose a tactical choice upon an accused (what have been called permissive inferences and not mandatory

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<sup>38</sup> *S v. Manamela (Director-General of Justice Intervening)* 2000 (3) SA 1 (CC) at par. 28.

conclusions) and those whose which, despite not affecting the incidence of the onus, will have the effect of establishing proof beyond a reasonable doubt if the accused does not rebut them (mandatory conclusions). Consequently, their pronouncements on the subject are not adequately nuanced. In *Scagell v. Attorney-General, Western Cape*,<sup>39</sup> the Constitutional Court was concerned with a provision that when any one of a large number of gambling devices is found at any place, or on the person of any person found at any place, it was ‘prima facie proof’ that the person in charge of that place permitted gambling and that anyone found there intended to gamble there. This extraordinarily sweeping provision was held to be unconstitutional since it could have had the effect of convicting an innocent person despite the absence of any evidence suggestive of his or her guilt. Presumably the Court regarded the presumption as creating a mandatory conclusion rather than a permissible inference that imposed a tactical choice on an accused. The Constitutional Court, in invalidating a presumption that imposed a reverse onus in the full sense, has also remarked that it would have been better for the legislature to have employed means less damaging to constitutional rights such as the imposition of an evidentiary burden, presumably a permissible inference and, depending on the circumstances, even mandatory conclusions.<sup>40</sup>

## VII. ACCESS TO INFORMATION

Section 32(1) of the Constitution provides that everyone has the right of access to information held by the State as well as to information that is held by another person that is required for the exercise of any rights. This was accompanied by an injunction in section 32(2) that national legislation had to be enacted to give effect to this right. The Promotion of Access to Information Act 2 of 2000 was accordingly enacted. It does not, in terms of section 12 apply to:

- a record of the cabinet and its committees;
- the judicial functions of a Court or a special tribunal, or
- an individual member of Parliament or of a provincial legislature in that capacity.

Nor does it, in terms of section 7(1), apply in any criminal or civil proceedings to any record, that is to say, to any recorded information, regardless of form or

<sup>39</sup> 1997 (2) SA 368 (CC).

<sup>40</sup> *S v. Mbatha, S v. Prinsloo* 1996 (2) SA 464 (CC).

medium, in the possession or under the control of a private or public body whether or not it was created by such a body, if it is requested after the commencement of proceedings, and the production of the record, or access to it, is provided for in any other law. If the record is obtained in contravention of section 7(1), it will be inadmissible unless the Court is of the opinion that it would be detrimental to the interests of justice to exclude it.

Section 7 envisages that Court proceedings, whether criminal or civil, have begun. There are other provisions<sup>41</sup> that lay down procedures for requesting information from an ‘information officer’ of a public body. An information officer may refuse a request if disclosure could reasonably be expected to cause prejudice to the defence or security of the Republic or, unless the record is more than 20 years old, to its international relations. In this context, a record includes one relating to military tactics or strategy whether pertaining to hostilities or subversive activities, weaponry and other equipment used to control hostile or subversive activities, and information about other military matters. An information officer may also not allow disclosure of diplomatic correspondence or a record held for intelligence purposes relating to the defence of the Republic, subversive or hostile activities, and various matters pertaining to international relations. Similarly he or she may refuse disclosure of the methods and equipment used to garner such intelligence. If an information officer is entitled to refuse disclosure on these grounds, he or she may also refuse to confirm or deny the existence or non-existence of a record.

In section 42 provision is made for economic matters. An information officer of a public body may refuse a request for access to a record of the body if its disclosure would be likely to jeopardise materially the economic interests or financial welfare of the Republic or the ability of the Government to manage the economy of the country in its best interests. He or she may also deny access to records relating to the operations of the public body (section 44), but must deny access in order to protect the research information of a third party if disclosure would be likely to expose the third party, or a person carrying on research on his or her behalf, or the subject matter of the research, to serious disadvantage (section 43).

The provisions allowing the information officer discretion to allow access are overridden by section 46 that lays down that he or she must allow it if disclosure would reveal evidence of a substantial contravention of, or a failure to comply with the law, or an imminent and serious risk to public safety or the environment, and the public interest in disclosure clearly outweighs the harm of allowing it.

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<sup>41</sup> Contained in s. 41.

Once litigation has started, the Court would have to give effect to the constitutional right to access in circumstances where an information officer has refused it, or where no request has been made to him or her. While it has been accepted that the approach to State privilege would in future be less deferential to State officials, there has been no clear indication until now whether, and to what extent, the Court would go beyond the common law. It is suggested that the Court will have to weigh up competing values and reach a conclusion based on proportionality. By doing so, it may bring the common law in line with recent developments in some other jurisdictions.

### VIII. DOCKET PRIVILEGE

The coming into force of the Constitution has had a profound effect on an accused person's right of access to the information contained in the police docket relating to the charge against him. The Constitutional Court discarded the blanket privilege formerly enjoyed by the prosecution against disclosure of such information.<sup>42</sup> It held that there are overwhelming reasons in favour of giving an accused person a right of access when there is no reasonable risk that disclosure might reveal the identity of an informer, or State secrets, or lead to intimidation or to the obstruction of the ends of justice. Where there is such a risk, the Court will have to balance the accused person's right to a fair trial against the legitimate interests of the State in furthering the ends of justice. However, this does not signify that there is a blanket right of access in all circumstances. The right to a fair trial, it concluded, allows access not in the abstract but only in the particular circumstances of each case. The factors to be regarded in allowing access to the docket include:

- the complexity or simplicity of the case;
- the degree of particularity in the indictment or the summary of facts furnished by the prosecution, and
- the accused person's need to have access in order to defend himself or herself properly.

That need for access could arise for many reasons, for instance, to prepare his or her case; to identify witnesses who could contradict assertions made by the prosecution witnesses and to exercise his or her right to adduce and challenge

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<sup>42</sup> In *Shabalala v. Attorney-General*, Transvaal 1996 (1) SA 725 (CC).

evidence. Ordinarily he or she should be entitled to have access to the statements of prosecution witnesses unless the prosecution could justify non-disclosure in the circumstances of the case.

## IX. ILLEGALLY OR UNFAIRLY OBTAINED EVIDENCE

In pre-constitutional days, evidence of this kind was admissible in criminal proceedings if it was relevant, but it was recognised that, in general terms, a Judge had a discretion to exclude it if its reception would be unfair or against public policy. As regards civil proceedings, the existence of such discretion had been doubted but, in a number of later decisions, this doubt was dismissed.

As regards criminal proceedings, section 35(5) of the Constitution now lays down that evidence that has been obtained in a manner that violates any right in the Bill of Rights, must be excluded if its admission would render the trial unfair or if it would otherwise be detrimental to the administration of justice. It is difficult to imagine evidence that could be obtained illegally or unfairly without violating a right contained in the Bill. For this reason, it has been held that there is no longer a place for the pre-constitutional discretion, but it is submitted that if there were to be an instance that was not covered by the Bill, a discretion to exclude evidence, as recognised in the past, should still exist.

In civil proceedings it has been held that there is now a new reason to justify the existence of the discretion which (at least in some pre-constitutional decisions) entitled a Judge to exclude unfair or illegally obtained evidence – it satisfies the constitutional injunction to the Courts to give effect to the spirit, purport and objectives of the Bill of Rights.

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# *Chapter 15*

## **Law of Criminal Procedure**

***Andrew Skeen\****

### **I. INTRODUCTION**

The South African law of criminal procedure is basically of English origin. Procedural law, based on that of England, was introduced by legislation into each of the colonies or territories that from 1910 formed the Union of South Africa. Uniform legislation, covering the whole of the Union of South Africa, was framed in 1917 and the current law relating to criminal procedure is to be found in the Criminal Procedure Act 51 of 1977. This Act contains most of the provisions relating to criminal procedure although statutory offences and penalties can be found in other statutes. South African Criminal procedure can be described in broad terms as being adversarial in nature with certain overlays of inquisitorial procedures, particularly in plea procedures.

Since 1994, criminal procedure has been radically affected by the Bill of Rights contained in the Constitution of the Republic of South Africa, Act 108 of 1996, which entrenches certain procedural rights in favour of arrested, detained and accused persons. Section 35 embodies the following rights:

- ‘(1) Everyone who is arrested for allegedly committing an offence has the right –
  - (a) to remain silent;
  - (b) to be informed promptly –
    - (i) of the right to remain silent; and
    - (ii) of the consequences of not remaining silent;
  - (c) not to be compelled to make any confession or admission that could be used in evidence against that person;

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- (d) to be brought before a court as soon as reasonably possible, but not later than –
    - (i) 48 hours after the arrest; or
    - (ii) the end of the first court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary court hours or on a day which is not an ordinary court day;
  - (e) at the first court appearance after being arrested, to be charged or to be informed of the reason for the detention to continue, or to be released; and
  - (f) to be released from detention if the interests of justice permit, subject to reasonable conditions.
- (2) Everyone who is detained, including every sentenced prisoner, has the right –
- (a) to be informed promptly of the reason for being detained;
  - (b) to choose, and to consult with, a legal practitioner, and to be informed of this right promptly;
  - (c) to have a legal practitioner assigned to the detained person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (d) to challenge the lawfulness of the detention in person before a court and, if the detention is unlawful, to be released;
  - (e) to conditions of detention that are consistent with human dignity, including at least exercise and the provision, at state expense, of adequate accommodation, nutrition, reading material and medical treatment; and
  - (f) to communicate with, and be visited by, that person's –
    - (i) spouse or partner;
    - (ii) next of kin;
    - (iii) chosen religious counsellor; and
    - (iv) chosen medical practitioner.
- (3) Every accused person has a right to a fair trial, which includes the right –
- (a) to be informed of the charge with sufficient detail to answer it;
  - (b) to have adequate time and facilities to prepare a defence;
  - (c) to a public trial before an ordinary court;
  - (d) to have their trial begin and conclude without unreasonable delay;
  - (e) to be present when being tried;
  - (f) to choose, and be represented by, a legal practitioner, and to be informed of this right promptly;

- (g) to have a legal practitioner assigned to the accused person by the state and at state expense, if substantial injustice would otherwise result, and to be informed of this right promptly;
  - (h) to be presumed innocent, to remain silent, and not to testify during the proceedings;
  - (i) to adduce and challenge evidence;
  - (j) not to be compelled to give self-incriminating evidence;
  - (k) to be tried in a language that the accused person understands or, if that is not practicable, to have the proceedings interpreted in that language;
  - (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted;
  - (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted;
  - (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing; and
  - (o) of appeal to, or review by, a higher court.
- (4) Whenever this section requires information to be given to a person, that information must be given in a language that the person understands.
- (5) Evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of that evidence would render the trial unfair or otherwise be detrimental to the administration of justice.'

These rights may be limited only in terms of laws of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relationship between the limitation and its purpose and less restrictive means to achieve the purpose.<sup>1</sup>

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<sup>1</sup> Constitution of the Republic of South Africa, Act 108 of 1996, s. 36(2).

## II. COURTS

The Courts that apply the Criminal Procedure Act are the High Court, the Regional Magistrate's Court and the District Magistrate's Court. The Supreme Court of Appeal hears appeals but does not try cases. The provincial and local divisions of the High Court have original jurisdiction in respect of all offences, whereas the Regional Court may try all offences except treason. District Courts have jurisdiction to hear all cases other than treason, murder and rape. The High Court may impose penalties up to and including life imprisonment whilst the Regional Court may impose up to 15 years imprisonment per count and a maximum fine of R300 000. The District Court may impose up to three years imprisonment and a fine not exceeding R60 000. Jury trials no longer exist but up to two assessors may sit in the High Court and in the Magistrate's Court.

## III. PROSECUTING AUTHORITY

The authority to institute and to conduct a prosecution vests in the State. Public prosecutions are instituted in the name of the State (namely *State versus X*). Private prosecutions occur in rare instances after a director of public prosecutions has declined to prosecute and after the issue of a certificate of *nolle prosequi* (do not prosecute). Such prosecutions may only be brought by a private prosecutor who is able to prove a substantial and peculiar interest in the case arising out of an injury that he or she has suffered as a result of the offence. A director of public prosecutions may intervene in any private prosecution at any stage before judgment.

Until 1998, public prosecutions were overseen by an Attorney-General appointed for a particular High Court provincial or local division. There was no overall national system of public prosecution. In 1998, in terms of section 179 of the Constitution and the National Prosecuting Authority Act 32 of 1998, a single national prosecuting authority was created, which is headed by a National Director of Public Prosecutions. Directors of public prosecutions were appointed to areas of the provincial and local divisions of the High Court (replacing the Attorneys-General). The director of public prosecutions is the head of the office concerned and controls it. Under the director, deputy directors and prosecutors function.

Subject to the control and direction of the National Director of Public Prosecutions, a director of public prosecutions exercises the power to institute and conduct criminal proceedings on behalf of the State, carry out incidental functions necessary thereto and discontinue criminal proceedings. The National Director of

Public Prosecutions with the concurrence of the Minister of Justice after consulting the directors of public prosecutions must determine prosecution policy and issue policy directions that are to be observed.

Once a prosecutor is satisfied that there is sufficient evidence to establish a *prima facie* case, a prosecution will normally ensue unless public interest demands otherwise. The following factors are considered in determining whether a prosecution would be in the public interest:

- the nature and seriousness of the offence;
- the interests of the victim and the broader community, and
- the circumstances of the offender.

The prosecutor's primary function is to assist the Court in arriving at a fair verdict and he or she must act impartially and in good faith.

In terms of the Criminal Procedure Act 51 of 1977, the right to institute a prosecution shall, unless some other period is expressly provided for by law, lapse after 20 years from the date when the offence was committed. The following offences, namely murder, treason committed when the Republic is in a state of war, robbery with aggravating circumstances, kidnapping, child stealing and rape do not, however, prescribe.

The prosecutor may withdraw a charge before plea but the accused is then not entitled to a verdict. Should the charge be withdrawn after plea, the accused is entitled to a verdict. A prosecutor may not stop a prosecution after plea without the consent of the director of public prosecutions or authorised delegate.

As long as a director of public prosecutions acts within his statutory powers, the High Court, in the absence of *mala fides*, is unlikely to interfere with the manner in which he or she exercises his or her discretion. An application for an interdict restraining the director from prosecuting a particular person will only be successful where a clear case of unfounded prosecution is made out.

A stay of prosecution may be granted if there is an unavoidable delay in a trial causing substantial prejudice. A constitutional right exists for an accused to have a trial begin and conclude without reasonable delay. The Constitutional Court has held that the three most important factors to consider are the nature of the prejudice suffered by the accused, the nature of the case and the systemic delay.

Investigation of cases is the responsibility of the South African Police Services, which is a national police service. The police are required to preserve internal security, to maintain law and order, to investigate crime and to prevent crime. Unless the police have themselves exercised a discretion not to prosecute, completed investigations are submitted to the prosecuting authority to decide upon prosecution.

## IV. ARREST

### A. General

The methods of securing the attendance of an accused in Court are arrest, summons, written notice and indictment.

Arrests may be made with or without a warrant and unless the person to be arrested submits to custody, an arrest is effected by actually touching his or her body or if the circumstances require it, by forcefully confining his or her body. The arrested person must be informed of the reason for the arrest, or if it is as a result of a warrant, a copy of the warrant must be handed to him or her on demand. The effect of an arrest is that the arrestee is in lawful custody. As arrest involves an invasion of liberty and privacy, it should be exercised sparingly and where the matter is not urgent and the person to be arrested has a known address, it is preferable to issue a summons. There is, however, no rule that obliges such a course.

### B. With Warrant

A magistrate or justice of the peace may issue a warrant for the arrest of a person upon the written application of a director of public prosecutions, a public prosecutor or a commissioned officer of police. The application must set out the offence alleged to have been committed and must allege that the offence was committed in the area of jurisdiction of the magistrate or that the person suspected is within the area of jurisdiction. The application must state that from information taken on oath there is a reasonable suspicion that the person in respect of whom the warrant is applied for has committed the alleged offence. A warrant may be issued on any day and remains in force until it is cancelled or executed. A warrant is valid throughout the country. The warrant is executed by a peace officer, which means a magistrate, justice of the peace, police official, a member of the correctional services and certain persons gazetted as peace officers.

### C. Without Warrant

A peace officer may without warrant arrest a person who commits or attempts to commit an offence in his or her presence and any person whom he or she suspects of committing a Schedule 1 offence (that is, a serious offence), other than escaping from lawful custody. In South Africa there is no distinction between felonies and misdemeanours. All criminal activity, however serious or otherwise, is described as an offence. Various other statutory powers give the

police, in terms of the Criminal Procedure Act and other statutes, the power to arrest without warrant. Reasonable suspicion is determined objectively.

#### **D. General Matters Relating to Arrest**

A peace officer may demand the name and address of a person whom he or she is entitled to arrest, as well as of a person who in his or her opinion will be able to give evidence in regard to the commission of an offence.

A private person may arrest a person without warrant in the following circumstances:

- where the person commits or attempts to commit, or where the arrestor reasonably suspects the person of having committed, a Schedule 1 offence;
- where the arrestor reasonably believes the person to have committed any offence is escaping from and freshly pursued by a person having authority to arrest him or her;
- where the arrestor is by any law authorised to arrest without warrant, or
- where the offender has engaged in an affray.

Every male inhabitant of the Republic between the ages of 16 and 60 is under a duty when called upon by any police official to assist in arresting and detaining a person. Any person who may lawfully arrest another may break open premises after he or she has first audibly demanded entry and failed to gain entry.

The use of force for the purposes of effecting an arrest has long been a controversial issue and in 2002 the Constitutional Court ruled that the statutory provision dealing with the matter was unconstitutional.<sup>2</sup> The law following this decision may be summarised as follows:

- the purpose of arrest is to bring persons suspected of having committed offences to trial before a Court;
- arrest may never be used to punish a suspect;
- where force is necessary, only the least degree of force reasonably necessary to carry out the arrest may be used;
- in deciding what degree of force is both reasonable and necessary, all the circumstances must be taken into account in deciding the threat of violence the suspect poses to the arrestor or others and the nature and

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<sup>2</sup> *Ex parte Minister of Safety and Security: In re S v. Walters* 2002 (4) SA 613 (CC).

circumstances of the offence the suspect is suspected of having committed, the force being proportional to all the circumstances;

- shooting a suspect solely in order to carry out an arrest is permitted in very limited circumstances only;
- ordinarily such shooting is not permitted unless the suspect poses a threat of violence to the arrestor or others, or is suspected on reasonable grounds of having committed a crime involving the infliction or threat of infliction of serious bodily harm and there are no other reasonable means of carrying out the arrest, whether at that time or later;
- these limitations in no way detract from the rights of an arrestor attempting to carry out an arrest to kill a suspect in self-defence or in the defence of any other person.

Both in terms of the Constitution and the Criminal Procedure Act 51 of 1977, every person is entitled, after being arrested, to be brought before a Court as soon as reasonably possible but not later than 48 hours after the arrest or the end of the first Court day after the expiry of the 48 hours, if the 48 hours expire outside ordinary Court hours or on a day which is not an ordinary Court day. An arrested person is not entitled to be brought to Court outside ordinary Court hours, namely before 9.00 am and after 16.00 pm.

## V. SEARCH AND SEIZURE

A large number of statutes contain provisions relating to entry and seizure and general provisions exist in the Criminal Procedure Act. Section 14 of the Constitution dealing with privacy includes the right of every person not to have their person, home or property searched or their possessions seized. These rights may, however, be limited under section 36 that allows for reasonable and justifiable limitations. The Criminal Procedure Act 51 of 1977 applies to the entering of premises, the search of a person or of premises or containers and seizure, forfeiture and disposal of goods seized in connection with an offence. Generally an article may be seized only in terms of a search warrant issued by a magistrate or justice of the peace. Such a warrant is issued when it appears to the magistrate or justice that there are reasonable grounds for believing that the relevant article is being kept within the jurisdiction. A judicial officer may issue a warrant during the course of a trial. The warrant authorises a policeman to enter and search and require the seizure of the article. A search warrant must be executed by day,

unless otherwise authorised. A warrant is strictly interpreted in favour of the individual and warrants addressed to ‘all police officers’ are not valid. The warrant must be addressed to known and named police officials.

A police official may search and seize without a warrant where:

- the person in charge of premises or goods consents, or
- where a police official believes on reasonable grounds, objectively determined, that he would have obtained a warrant in any event and the delay in obtaining one would defeat the object of the search.

When a person is arrested, the peace officer that makes the arrest may search him or her and may seize goods under his or her control. If the arrestor is not a peace officer, he or she must forthwith deliver to a police official any articles so seized. An arrestor may place in custody an object found on the person arrested that may be used to cause bodily harm to himself or herself or to others.

In terms of the South African Police Service Act, police officials have the power to search and seize for the purposes of border control, in a cordoned off area, and at a road block or checkpoint.

The Criminal Procedure Act lays down that the search of any person or premises shall be conducted with strict regard to decency and order and that a woman may only be searched by a woman. Section 35(5) of the Constitution provides that evidence obtained in a manner that violates any right in the Bill of Rights must be excluded if the admission of the evidence excluded would render the trial unfair or if it would otherwise be detrimental to the administration of justice. This provision militates against the introduction of evidence obtained as a result of an illegal search.

## VI. BAIL

Section 35(1)(f) of the Constitution provides that every arrested person has the right to be released from detention if the interests of justice permit, subject to reasonable conditions. Bail is non-penal in nature. When bail is granted, an accused who is in custody must be released from custody on payment of or the furnishing of a guarantee to pay the sum of money determined. The accused must then appear on the date and at the place set for his or her trial. A failure to appear or to abide by any conditions set, may result in the cancellation of bail and forfeiture of the bail money to the State. Failure to appear or to comply with the conditions set, is also a criminal offence.

The guiding principle in deciding whether or not to grant bail is whether the interests of justice would be prejudiced if the accused were granted bail. Various factors are considered such as:

- the likelihood that the accused, if released on bail, would endanger the safety of the public or of any particular person or would commit a Schedule 1 offence;
- whether the accused will abscond;
- the likelihood that the accused will influence or intimidate witnesses or conceal or destroy evidence;
- the likelihood that the accused may commit further offences if released on bail, and
- in exceptional circumstances, the likelihood that the release of the accused will disturb the public order or undermine the public peace or security.

Bail may be granted by the police in certain circumstances prior to the first appearance in a Magistrate's Court and bail may also be set by a director of public prosecutions or by a prosecutor authorised by the director. In both instances the bail only persists until the first hearing in Court. The Court may of course extend the bail on the same conditions. Certain inquisitorial features are evident in the bail procedures. If a Court is of the opinion that it does not have reliable or sufficient information or evidence at its disposal or that it lacks certain important information to reach a decision on the bail application, the presiding officer must order that such information or evidence be placed before the Court. The strict rules of evidence are loosened for the purpose of bail applications. Hearsay evidence may in certain circumstances be permitted.

Generally the onus of proof, in this case on a balance of probabilities, rests on the State to show that it is not in the interests of justice that the accused be released on bail. However, the Criminal Procedure Act provides that where the accused is charged with a Schedule 6 offence (certain serious offences committed with what may be described as aggravating circumstances), the accused shall remain in custody unless he or she satisfies the Court that exceptional circumstances exist which in the interests of justice permit his or her release. The same applies to Schedule 5 offences (certain serious offences). In such cases the onus, on a balance of probabilities, rests on the accused.

An appeal by both the State and the defence exists in respect of bail procedure decisions.

## VII. LEGAL REPRESENTATION

Both the Constitution and the Criminal Procedure Act provide that a person is entitled to the assistance of a legal representative from the time of arrest and is further entitled to be represented by a legal representative at criminal proceedings. A juvenile under the age of 18 may be assisted by a parent or guardian. The prohibition by legislation of legal representation in traditional or regional authorities Courts has been declared to be unconstitutional. A detained person and an accused person has the right to have a legal practitioner assigned to him or her at State expense if substantial injustice would otherwise result, and such person has the right to be informed promptly of this right. In such circumstances the accused does not have the right to choose a particular legal representative. If the accused can afford a legal representative it is of course a free choice. In appropriate circumstances an adjournment will be supplied to the accused to obtain legal representation. The Legal Aid Board has the duty to provide legal representation in certain circumstances depending on the means of an accused. Public defenders are available in Johannesburg and various University Law Clinics provide assistance subject to the means tests and the type of offence alleged. Courts are obliged to advise an accused as to his or her right to be legally represented.

## VIII. INDICTMENTS, CHARGES AND WRITTEN NOTICES

Once it has been decided to charge an accused with an offence, the prosecutor must decide whether to charge him or her in the High Court, in a Regional Court or in a Magistrate's Court. If the accused is to be tried in the High Court, he or she will be indicted and the charge will be contained in a document called an indictment. In the Regional Court and in the Magistrate's Court the document is referred to as the charge sheet or it may be contained in a summons or a written notice to appear in Court if the accused does not pay a pre-determined admission of guilt fine.

The charge is the formulation of the offence alleged against the accused and must state the time when, the place where, and where appropriate, the person against whom, and the goods in regard to which the offence is alleged to have been committed. The particulars must be sufficient to inform the accused of the case against him or her. Any number of charges may be joined in the same proceedings before any evidence has been led. The Court may order the separation of trials in respect of separate offences.

Where it is doubtful what offence has been committed, the accused may be charged with all or any of the offences or the accused may be charged in the alternative. A rule has developed in respect of the duplication of charges (sometimes referred to as the splitting of charges) to prevent a multiplicity of convictions for what in essence is one set of facts. It also prevents additional punishment being imposed. Two tests are usually used to determine whether there has been a duplication of charges. Under the so-called 'single evidence' test, duplication is said to occur when the evidence establishing one offence establishes the other. Another guide is whether there was a single intent and if so, one offence was committed. Neither of the guides gives a satisfactory answer in all cases.

An accused may, before pleading to a charge, object to it on the ground that it lacks an essential element of the offence. An accused may, at any stage before evidence has been led, in writing request the prosecutor to furnish further particulars of any matters alleged in the charge. The accused is entitled to ask the State what it proposes to prove but not how it will be proved. The State is bound by the particulars provided. Where a magistrate refuses to order the furnishing of particulars, the High Court may order the magistrate to order the furnishing of particulars.

An exception, exemption, proviso, excuse or qualification that would exclude an accused from the effect of a general prohibition need not be negated by the State in advance. It is for the accused to prove that he or she is covered by the exemption. Generally, incriminating factors must be proved by the State and exculpatory factors by the accused.

Where a charge is defective for want of an averment that is an essential element of the offence, the defect may be cured at the trial that proves the matter which should have been averred.

## IX. MENTAL CAPACITY OF ACCUSED

It is a presumption of South African law that every person is of sound mind unless the contrary is proved. If an accused is by reason of mental illness or mental defect not capable of understanding the proceedings so as to note a proper defence, he or she cannot be tried and the Court, after hearing evidence or considering unanimous medical reports, may order that the accused be detained. Should he or she recover, a trial may take place. The assassin of Dr. H.F. Verwoerd, a former Prime Minister of South Africa, was thus detained for over 30 years until his death in detention.

A second situation occurs when an accused is fit to stand trial but is found not to be criminally responsible for an act or omission which constitutes an offence

if at the time of the commission or omission he or she suffered from a mental illness or defect which made him or her incapable of appreciating the wrongfulness of his or her act or of acting in accordance with an appreciation of the wrongfulness. Such a person is not criminally responsible. After the hearing of evidence, and where the Court finds that the accused was not criminally responsible, the accused will be found not guilty by reason of mental illness or defect and may be detained, treated as an outpatient or released. If a finding of diminished responsibility is made, this may be taken into account when assessing sentence.

## X. PREPARATORY EXAMINATIONS

A preparatory examination is a proceeding before a magistrate, initiated by a director of public prosecutions. It is not a trial and is rarely used. The State leads evidence and the accused may cross-examine but usually does not, so as not to reveal his or her defence. At the end of the State case, after all the evidence has been led, a charge is put to the accused. The accused may then give evidence or make a statement and call witnesses. After this, the magistrate may either discharge the accused, or, if a *prima facie* case has been made out, adjourn the case pending the decision of the director of public prosecutions. The director may direct that the accused be arraigned for trial or sentence before a Court determined by him or her, or decline to prosecute the accused.

The more common procedure is for the State to bring the accused to Court so that he or she can plead to a charge on which he or she will be tried in a Regional or High Court. The procedures for pleas of guilty and not guilty, discussed in XIII and XIV below, must be followed.

## XI. PLEAS

The charge must be put to the accused by the prosecutor before the trial and the accused will be required to plead forthwith. The following pleas are recognised:

- guilty to the offence charged, or any offence which would be a competent verdict;
- not guilty;
- *autrefois convict*, that is, that the accused was previously convicted of the offence charged;

- *autrefois acquit*, that is, that the accused was previously acquitted of the offence charged;
- that the accused has received a free pardon from the President for the offence charged;
- that the Court has no jurisdiction to try the offence;
- that a discharge has been given from the prosecution in the case where the accused has given evidence for the State as an accomplice and the Court has found that he or she has given evidence frankly and honestly;
- that the prosecutor has no title to prosecute, or
- that the prosecution may not be resumed or instituted because of a Court order following unreasonable delays in the trial.

Two or more pleas may be pleaded together except that a plea of guilty may not be pleaded with any other plea to the same charge.

## XII. PLEA BARGAINING

Prior to 2001, formal plea and sentence agreements were not provided for by legislation although in general, agreements were entered into by the State and accused persons or their legal representatives. In 2001 the Criminal Procedure Act was amended to provide for plea and sentence agreements.

A prosecutor authorised by the National Director of Public Prosecutions and an accused who is legally represented may, before the accused pleads, negotiate, and in respect of a plea of guilty by the accused to the offence charged or to an offence of which he or she may be convicted on the charge, and if the accused is convicted of such offence, enter into an agreement to:

- a just sentence to be imposed by the Court; or
- the postponement of sentence in terms of certain provisions; or
- a just sentence to be imposed by the Court of which the operation of the whole or any part is to be suspended in terms of certain provisions, and
- if applicable, an amount of compensation.

The prosecutor may enter into such an agreement only after consultation with the investigating officer. In most cases he or she will allow the complainant to make representations. The agreement must:

- be in writing;
- contain a statement that the accused has been informed that he or she has the right to be presumed innocent until proven guilty beyond a reasonable doubt;
- contain the statement that the accused may remain silent and need not testify during the proceedings;
- contain the statement that the accused may not be compelled to give self-incriminating evidence;
- fully state the terms of the agreement and set out the substantial facts of the matter and other facts relevant to sentence, and
- be signed by all the parties.

Note that the Court plays no part in the negotiations. The agreement is only disclosed to the Court after the accused has pleaded. In certain circumstances, for example when the Court is not satisfied that the accused is guilty or that the accused does not admit an allegation if the Court enters a plea of guilty, the trial will commence *de novo* before another presiding officer. If the plea of guilty stands, the Court will then consider the sentencing agreement and if the Court is satisfied that the sentence is just, it will convict the accused and sentence him or her in accordance with the agreement. If the Court considers the sentence unjust, it will indicate a sentence that it considers just and the accused and the prosecutor may then either abide by it and allow the Court to impose sentence, or withdraw from the agreement.

In the normal course of events where there is no plea and sentence agreement, the plea is taken from the accused at the commencement of the trial.

### XIII. A PLEA OF GUILTY

If the accused pleads guilty to the charge, two different courses may be followed:

- Where the prosecutor accepts the plea, and the presiding officer is of the opinion that the offence does not merit punishment of imprisonment or other form of detention without the option of a fine exceeding R1 500,<sup>3</sup> he or she *may* convict the accused on his or her plea and impose a sentence other than imprisonment or a fine exceeding R1 500. It is not necessary to hear any evidence.

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<sup>3</sup> This figure may be altered by the Minister of Justice.

- Where the presiding officer is of the opinion that the offence deserves imprisonment or a fine exceeding R1 500 or where the prosecutor requests the presiding officer to act (because the accused may have previous convictions), the Court *must* question the accused with reference to the alleged facts of the case in order to ascertain whether he or she admits the allegations in the charge to which he has pleaded guilty. If satisfied that the accused is guilty, the presiding officer may convict and sentence the accused without the hearing of evidence.

Prior to 1977 it was necessary in a lower Court to lead evidence *aliunde* to prove the commission of the offence. If the accused is legally represented, or wishes to be, a written statement setting out the facts which are admitted and on which he pleads guilty may be handed in. In lieu of questioning the accused, the Court may convict the accused on the strength of this document.

If the Court at any stage of the proceedings and before sentence is passed is in doubt whether the accused is guilty in law of the offence to which he has pleaded guilty; or is satisfied that the accused does not admit an allegation in the charge; or that the accused has a valid defence, the Court must record a plea of not guilty. The common law position that the accused will be allowed to alter his or her plea if a reasonable explanation is given, still pertains.

#### XIV. A PLEA OF NOT GUILTY

Where an accused pleads not guilty, the judicial officer may ask him or her whether he or she wishes to make a statement setting out the basis of his or her defence. Where the accused does not do so or makes a statement which does not make it clear to what extent he or she denies or admits the issues raised, the Court may question the accused to ascertain which allegations are in dispute. The Court is under a duty to establish from the accused whether an allegation in the charge that is not placed in issue may be recorded as an admission. If the accused agrees, such an admission will be recorded and deemed to be a formal admission. The accused should be advised that he or she may remain silent and that he or she is not obliged to answer any questions. Failure to give such advice amounts to an irregularity, the effect of which will depend on the circumstances. Where the legal representative of the accused replies on behalf of the accused, whether orally or in writing, the accused is required to declare whether he or she confirms such reply or not.

## XV. PROCEDURE AFTER A PLEA OF NOT GUILTY

Before leading evidence, the prosecutor may outline the case to the Court and inform it of the evidence to be led, but without comment. The State will then call its witnesses. If the Court is of the opinion after the closing of the State case that there is no evidence that the accused committed the offence, it may discharge the accused and return a verdict of not guilty. The question to be asked is whether there is evidence on which a reasonable man might convict. If there is no evidence, the accused must be discharged.

Should the accused be placed on his defence (namely when a *prima facie* case has been established), the accused or his representative may outline the evidence to be tendered. The accused may give evidence or remain silent. If the accused wishes to give evidence he or she must do so before the witnesses he or she proposes to call. If the accused wishes to remain silent, his or her silence does not lead to an adverse inference, but when faced with direct and credible evidence and then to remain silent, might lead to a *prima facie* case that speaks for itself.

After the defence has closed its case, the parties are given an opportunity to address the Court. Judgment will then be given and thereafter, if the accused is found guilty, a sentence will be imposed. The State must prove its case beyond a reasonable doubt. If the accused gives an explanation, even if it is improbable, and there is a reasonable possibility that the explanation could be true, the accused is entitled to be found not guilty.

## XVI. OPEN COURT

Generally, criminal proceedings in any Court will take place in open Court and may take place on any day. In certain circumstances proceedings may be held *in camera*. If it appears to a Court that it would be in the interests of the safety of the State, of good order, of public morals or of the administration of justice that the proceedings be held behind closed doors, it may direct that the public or any class of it must not be present. If the Court considers there to be a likelihood that harm may result to any person other than the accused if he or she testifies in public, an order may be made for the case to be held *in camera*. The Court may also be cleared when the complainant in a sexual case is giving evidence. The same applies to witnesses under 18 where the Court will hear the evidence *in camera*.

## XVII. CRIMINAL PROCEEDINGS TO TAKE PLACE IN THE PRESENCE OF THE ACCUSED

All criminal proceedings must take place in the presence of the accused. In certain circumstances evidence may, however, be heard by closed circuit television if it would prevent unreasonable delay; save costs; be convenient; be in the interests of the security of the State or public safety, justice or the public; or prevent the likelihood of prejudice or harm to any person if he or she testifies. Evidence may also be given through intermediaries if giving evidence in the normal way would expose any witness under the age of 18 to undue mental stress or suffering. The intermediary will convey the general purport of questions to the witness. The proceedings will be relayed by electronic means as the witness and intermediary will normally be in a separate room.

If an accused conducts himself or herself in a manner which makes the continuance of the proceedings impracticable, the Court may direct that the accused be removed and that the proceedings continue in his or her absence.

## XVIII. JOINDER AND SEPARATION OF TRIALS

An accused may be joined with any other accused in the same criminal proceedings at any time before any evidence has been led. Where two or more persons are charged jointly, the Court may at any time during the trial on the application of the prosecutor or an accused, order a separation of trials. The question is whether the applicant will suffer prejudice if a joint trial takes place. A bare possibility of prejudice is not sufficient and it must be shown that prejudice is likely. An accused cannot complain of prejudice when an avenue of escape has been lawfully stopped by a joint trial. When there are different pleas by different accused, there will generally be a separation of trials.

Any number of participants in the same offence may be tried together and any number of accessories after the fact may be tried together. South African law knows no distinction between principles in the first and second degree. It calls a person who aids, abets, counsels or assists in a crime a *socius criminis* or an accomplice. The doctrine of common purpose provides that if two or more persons decide to embark on a joint unlawful activity, the acts of one are imputed to the other which fall within their common purpose. In cases of murder it is not necessary to prove a causal connection between the acts of each participant and the death of the victim. Disassociation from common purpose may take place.

## XIX. VERDICT

If the evidence on a charge does not prove the commission of the offence charged but proves the commission of an offence, which by reason of the essential elements of that offence is included in the offence charged, the accused may be found guilty of the offence proved.

The Criminal Procedure Act 51 of 1977 expressly sets out competent verdicts on certain charges. For example, if the charge is murder or attempted murder, the accused can also be found guilty of culpable homicide; assault with intent to do grievous bodily harm; robbery; common assault; public violence; exposing an infant; disposing of the body of a child; or pointing a fire arm, air-gun or air-pistol. Where an accused is charged with a substantive offence and only an attempt is proved, he or she may be found guilty of an attempt. If the evidence does not prove the offence charged but proves that the accused was an accessory after the fact, he or she may be found guilty of being an accessory after the fact.

Where by mistake a wrong judgment or sentence is delivered or passed, the Court may, immediately after it is recorded, amend the judgment or sentence.

## XX. SENTENCE

Previous convictions are only relevant in respect of sentence. Previous convictions for similar offences will usually have an impact on the current sentence. The prosecution may after conviction produce to the Court a record of previous convictions and the Court must ask the accused whether he or she admits or denies the previous convictions. Should the accused deny them, the prosecutor must prove them – usually by means of fingerprints, which constitute *prima facie* proof. Another way of proving previous convictions is by producing the previous record or a certified copy thereof.

Where a Court has convicted a person of any offence for which the punishment may be a period of imprisonment exceeding six months without the option of a fine *and* the Court has postponed the passing of sentence or discharged the person without the option of a fine; or has discharged the accused with a reprimand or caution; or has convicted the accused for any offence other than one for which the punishment may be a period of imprisonment without the option of a fine, that conviction falls away after a period of ten years.

The traditional rationales for punishment, namely reformative, retributive, preventative and deterrent, are used in South Africa. Judicial pronouncements have indicated that deterrence is the most important objective of punishment.

Rehabilitation is also an important aim. However, it is often stressed that sentences should not be totally disproportionate to the gravity of the offence.

A wide discretion is allowed to a trial Court in the assessment of punishment, except in the case of an offence for which a minimum sentence has been fixed by statute. The imposition of punishment has often been considered to be pre-eminently a matter for the discretion of the trial Court. The discretion is wide but must be exercised in a judicial manner. The guidance of past decisions by higher Courts leads to some degree of consistency. In the exercise of this discretion the triad consisting of the crime, the offender and the interests of society have to be considered.

A sentence should only be altered on appeal if the discretion has not been exercised judicially. The test is whether the sentence is vitiated by irregularity, misdirection or is disturbingly inappropriate. In 2000, the South African Law Commission recommended a new Sentencing Council that would provide sentencing guidelines and guideline judgments delivered by the Supreme Court of Appeal. Legislation, however, has not eventuated at the date of writing (March 2003).

The following sentences are permitted by law:

- imprisonment, including life imprisonment or imprisonment for an indefinite period;
- periodical imprisonment;
- declaration as an habitual criminal;
- imprisonment in default of payment of a fine;
- a fine;
- recognisance to keep the peace;
- commitment to a treatment centre;
- a community service order;
- conditional postponement or suspension of sentence;
- caution or reprimand;
- committal to a reform school, and
- correctional supervision and imprisonment from which a person may be placed under correctional suspension.

In 1995 the death penalty and corporal punishment were found to be unconstitutional and were abolished. Imprisonment for an indefinite period is a sentence that may now be passed on a dangerous criminal.

If a Court finds that an offender was at the time of the commission of the offence criminally responsible for his or her actions but that his or her capacity to appreciate the wrongfulness of the act or to act in accordance with the appreciation was diminished by reason of mental illness or defect, it may take the fact of diminished responsibility into account when sentencing the accused.

A Court which convicts an offender under the age of 18 may, instead of imposing punishment, order that he or she be placed under the supervision of a probation officer, or in the custody of a suitable person, or that he or she be sent to a reform school. It is usual practice to call for a probation officer's report, at least in a serious case, where a juvenile is convicted.

Compensation may be awarded where the accused is convicted of an offence that has caused damage or loss of property or money to another. The Court may award compensation on the application of the injured person, or of the prosecutor acting on the instructions of such person. Such an order has the effect of a civil judgment and may be executed as if it were a judgment of a Magistrate's Court.

## XXI. REVIEW

### A. General

Various types of review exist. The distinction between a review and an appeal procedure is the following:

- should the accused be dissatisfied as to the outcome of the trial or the sentence either on the facts or the law, then appeal is the correct procedure;
- where the complaint is against the procedure at the trial or an irregularity, review is the proper procedure.

### B. Review under the Supreme Court Act 59 of 1959

The Act provides for review in four concurrent areas:

- absence of jurisdiction;
- interest in the cause, bias, malice or corruption on the part of the judicial officer;
- gross irregularities in the proceedings, and
- the admission of inadmissible evidence or the rejection of admissible or competent evidence.

### C. Review under the Criminal Procedure Act 51 of 1977

The Act provides for four types of review procedures:

- automatic review;
- extraordinary review;
- review of proceedings before sentence, and
- set down of a case for argument.

#### *1. Automatic review*

Automatic review is of South African origin and it provides that certain cases with a sentence above a specified limit must be forwarded for review to the High Court within seven days. This only applies to sentences imposed in the Magistrate's Court. Regional Court sentences are not automatically reviewed. This provision provides some protection to the large number of accused persons who are not represented at their trial. If the accused is legally represented the provisions for automatic review do not apply.

The following sentences are subject to automatic review:

- a sentence of more than three months imprisonment (or detention in a reformatory or a fine exceeding R2 500) passed by a magistrate who has held the substantive rank of magistrate for less than seven years, and
- a sentence of more than six months (or detention in a reformatory or a fine exceeding R5 000) passed by a magistrate who has held the substantive rank of magistrate for more than seven years.

A written statement or argument from the convicted person should be attached to the record. The reviewing Judge will confirm the proceedings if it appears that the proceedings were in accordance with justice. If the Judge has any doubts, he or she may ask the magistrate for written reasons and sometimes the view of the director of public prosecutions is canvassed. Thereafter the Judge may confirm the proceeding or alter or quash the conviction or reduce, alter or set aside the sentence. The reviewing Judge may also remit the case to the magistrate to deal with any matter specified.

#### *2. Extraordinary review*

If a Magistrate's Court has imposed a non-reviewable sentence, or in a case where a Regional Court has imposed a sentence and it is brought to the notice of a Judge that the proceedings were not in accordance with justice, the Judge may call for the record and review the case.

*3. Review of proceedings before sentence*

Where a magistrate or a regional magistrate after conviction but before sentence is of the opinion that the conviction is not in accordance with justice, he or she may send the matter for review with a statement of reasons. The Judge may then review the matter.

*4. Accused may set case down for argument*

An accused may have a case set down for argument or review where the matter is subject to automatic review.

## XXII. APPEAL

All convicted persons have an unlimited right to appeal against the decision of a lower Court. No leave to appeal is required. In the case of appeals from the High Court, leave to appeal is required. The test as to whether leave to appeal should be granted, is whether the applicant would have a reasonable chance of success on appeal.

Direct access to the Constitutional Court is allowed in exceptional circumstances only and must be in the interests of justice. An appellant may prosecute an appeal in person. The State and private prosecutors can only appeal on points of law. The director of public prosecutions can appeal against a sentence imposed by a lower Court.

Where there has been an appeal to the High Court from a lower Court and the High Court gives a decision in favour of the person convicted on a point of law, the prosecutor may appeal to the Supreme Court of Appeal which may vary or set aside the decision. The Supreme Court of Appeal may reinstate the conviction and sentence.

Appeals in a criminal case heard by a High Court will be heard either by a full Bench of the High Court or directly by the Supreme Court of Appeal.

If a question of law arises at a trial in the High Court, the Court may on its own motion or at the request either of the prosecutor or the accused, reserve the question for consideration by the Supreme Court of Appeal. This must be done as soon as possible after judgment but may not be done during the trial. In the case of an appeal against a conviction or on any question of law, the Supreme Court of Appeal may allow the appeal, give judgment as ought to have been given or impose punishment as ought to have been imposed at the trial. In respect of an appeal against sentence, the Supreme Court of Appeal may confirm, delete or amend the sentence.

### XXIII. GENERAL

The President of the Republic of South Africa has the power to extend mercy to any person or to issue a free pardon.

A corporate body may be prosecuted, convicted and sentenced either for a common-law offence or a statutory offence, although there are certain statutory offences that may only be committed by a natural person. Prosecutions may take place in respect of any act or omission performed with or without a particular intent, by or on the instructions or with permission, express or implied, given by a director or employee of the corporate body in the exercise of his or her powers, or in the performance of his or her duties as such, or in furthering or endeavouring to further the interests of the corporation. Such acts shall then be deemed to have been performed (or to be an omission) by the corporate body.

The corporate body will be represented by a director or servant and if such person pleads guilty, the plea will not be valid unless the corporate body authorised him or her to plead guilty. If the person representing the corporation is convicted, only a fine may be imposed without the alternative of imprisonment.

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