Aantekeninge/Notes

The timeous enforcement of trade mark rights

1 Introduction

Ideally, a trade mark proprietor should take steps to enjoin infringing use as soon as possible after a third party commences use of a registered trade mark, such use amounting to infringement. The reality of commerce is, of course, that this does not always happen. Sometimes the proprietor might simply not be aware of the infringement. At other times the third party's use could be perceived not to be prejudicial at first, due to, *inter alia*, geographical considerations, the size of the operation, the nature of the goods produced or services rendered etc. The result could be that court proceedings are only instituted a number of years after use first began (but always on the assumption of course that the third party's use postdates the registration date of the proprietor's mark). By way of example, in *Turbek Trading CC v A & D Spitz Ltd* 2009 (SCA) 158, a claim was considered on the merits despite a delay of six years (par 15). One question that needs answering here is what the legal consequences are when there is a delay before a trade mark right is enforced. Another, in what circumstances the delay can constitute a defence, and the various defences that could feature (waiver and consent are not dealt with here – see Sonnekus *The Law of Estoppel in South Africa* (2012) 161). These issues are discussed below (see also Alberts 'Check who's using your trade mark: The need for the timely enforcement of trade-mark rights' 2007 *Juta's Business Law* 32).

2 Relevant Situations

2 1 Honest Concurrent Use (HCU)

Does a period of undisturbed use benefit the third party trade mark user mentioned above in a registration context? One scenario that can occur is that an application will be refused by the Registrar of Trade Marks, based on a conflict with a prior registered mark (s 10(14) of the Trade Marks Act 194 of 1993). Unless this citation is removed, the application will not proceed to registration. However, the Register may withdraw the citation in the event of HCU having taken place and "register" the mark (s 14(1)). The general factors which should be considered in HCU matters were set out in the British decision of *Pirie's Application* 1933 RPC 147. These include contingencies of confusion, whether the choice of the mark was honestly made, the nature of the trades of the respective parties, actual confusion, and, importantly, the duration of use (159 line

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47-160 & line 12). A period of use of eight years was for instance accepted in *Ex parte Chemisch-Pharmazeutische Aktiengesellschaft* 1934 (TPD) 366. In so far as the British Registrar's previous practice is concerned, reference can be made to his *Working Manual* (Journal No 6171, ch 6, par 11.17.2; own emphasis):

> As a starting point, the mark should have been in use for a reasonable period, usually about five years, prior to the application date. This means the other party, against which the applicant is claiming honest concurrent use, *has a reasonable time in which to become aware of the applicant, and to make any challenge.* It must be stressed however, that this period is only a guideline. Where circumstances dictate otherwise, this period can be *reduced* (or, indeed, increased). It may be possible to reduce this period if e.g. the applicant has spent a massive amount on advertising his product and/or has had a very good turnover, even though his use only predates his application by a couple of years. Conversely, the period of use may need to be substantially more than five years, if the turnover is so small that it diminishes the weight that can be given to the length of use" (information available from: http://www.patent.gov.uk/tm/reference/workman/chapt6/sec11(17).pdf).

Currently, in the United Kingdom, the role of HCU in the examination stage of an application has been reduced, as an order was passed in 2007 which "means that honest concurrent use can no longer be filed in support of an application where there is a requirement to notify the owners of earlier marks thought to be confusable with the applicant's mark" (information available from: 22http://www.ipo.gov.uk/tmmanual-chap3-exam.pdf). The emphasis in the above quotation, is on the opportunity the proprietor must have had to take steps against the potential infringer. Whether knowledge on the part of the proprietor is required in our law is unclear, and the British position might be adopted, although the view in practice is that knowledge is not required. Perhaps one can then say that where the proprietor is unaware, the relevant ground in section 14(1) is not HCU, but "special circumstances" (see in general *Ex parte de Wet Bros (Pty) Ltd* 1940 (CPD) 136; *Origins Natural Resources Inc v Origin Clothing Limited* 1995 (FSR) 280).

Knowledge on the part of the *third party user* might be exclusionary (*Massachusetts Saw Works* 1918 (RPC) 137 148 line 13). It has however been held that knowledge of the registration of the opponent's mark may be an important factor where the honesty of the user of the mark sought to be registered is challenged, but when once the honesty of the user has been established the fact of knowledge loses much of its significance (*Pirie* case 159 lines 21–42). Lastly, it should be pointed out that if there is no confusion, the reason for the selection of a mark is no longer relevant. This approach is embodied in another decision, dealing with trade mark infringement, namely that in *Red Bull GmbH v Rizo Investments (Pty) Ltd* Case number 25741/2001, decision of the then Transvaal Provincial Division, delivered on 28 June 2002. There the court stated the following (p 10):

> However if the charade is acted out successfully and the resemblance is not such as to be likely to deceive or cause confusion among potential purchasers of the products, then the reason why the offending mark was chosen is irrelevant.

2 2 The Absence of Confusion

The issue of confusion is central to most trade mark conflicts. This also applies to the common law remedy of passing off. In order to rely on the latter, it is a requirement that at least the likelihood of confusion must be established (Van Heerden & Neethling *Unlawful Competition* (2008) 181). Evidence of actual confusion is not required. The same applies to statutory trade mark infringement. Section 34(1)(b) of the Trade Marks Act deals with use in relation to similar goods, wherein "use there exists the likelihood of… confusion". Likewise, section 10(12) and 10(14), dealing with oppositions on the basis of common law rights, and a registration, respectively, both require the likelihood of confusion. Proof of actual confusion is not required. However, in decisions such as that in *Arsenal Football Club PLC v Reed* (2001 (RPC) 922) it was said that "absence of evidence of confusion becomes more telling and more demanding of explanation by the claimant the longer, more open and more extensive the defendant's activities are" (par 24).

In *Phones 4U Ltd v Phone 4u. co uk Internet Ltd* 2007 (RPC) 83 it was said that the absence of evidence of confusion "gives rise to a powerful inference that there is no … confusion" (par 42). This principle was described in colourful language, in the latter decision, by a witness who said that the absence of evidence of confusion was a case where "the dog did not bark". The court commented in this regard that the extent of use will determine whether the inference of an absence of confusion can be drawn, and stated that "[y]ou have to show [that] there is a dog who could have barked" (par 43). Other views also exist. In *Ratiopharm Gmbh's Trade Mark Applicatio*n 2007 (RPC) 630 reference was made to case law to the effect that the lack of evidence of actual confusion is "rarely significant", as it may be due to differences extraneous to the registered mark (par 15). Also, the approach that absence of evidence of actual confusion shows that there is not a likelihood of confusion, is no more than a rule of thumb (par 15). Further, in the South African case of *Adidas AG v Pepkor Retail Limited* 2013 (SCA) 3 it was said that there is no significance that attaches to the absence of evidence of confusion (par 27). It would seem though, nevertheless, that the extent and duration of undisturbed side-by-use can be relevant (Webster & Page *South African Law of Trade Marks* (1997) 7-19). It is suggested that the approach of the *Arsenal* case is more in line with practical reasoning. To this extent a considerable period of use will be to the advantage of the user.

2 3 Acquiescence

In some jurisdictions the issue of acquiescence is regulated by statute. In the United Kingdom, for instance, section 48 of the Trade Marks Act of 1994 states the following:

> (1) Where the proprietor of an earlier trade mark or other earlier right has acquiesced for a continuous period of five years in the use of a registered trade mark in the United Kingdom, *being aware of that use*, there shall cease to be any entitlement on the basis of that earlier trade mark or other right –
>
> (a) to apply for a declaration that the registration of the later trade mark is invalid, or
>
> (b) to oppose the use of the later trade mark in relation to the goods or services in relation to which it has been so used,
>
> unless the registration of the later trade mark was applied for in bad faith.

Importantly, infringement proceedings can thus not be instituted. Notable is the requirement that the proprietor must have been *aware* of the use concerned. The scope of use or any pending negotiations are also relevant factors in terms of case law. The issue of acquiescence (and estoppel), featured in those contexts in Britain in *Boxing Brands Ltd v Sports Direct International plc* (2013 (EWHC) 2200 (Ch)). Here the defendants argued that the claimant permitted them to build up a goodwill in the mark concerned. It was said that it would be unconscionable to prevent them from making use of that goodwill in future. The contention was rejected (par 123):

> First I am far from satisfied that anything was done in the relevant period which built up any goodwill at all. The sales of gloves and other equipment was truly trivial. The usage of the QUEENSBERRY BOXING 1867 logo at fights might have built up some recognition but I am not satisfied about what that recognition would have related to. Second, the major steps relied on were undertaken at a time and in a context in which both sides were working toward coming to a mutual agreement. The fact the agreement was not reached does not make it unconscionable for either party to rely on their underlying legal rights. Third, the position was made clear by the claimant's letter of March 2012. The benefit of any permission or acquiescence by the claimant or its predecessors was terminated by that letter. I reject the defence based on acquiescence or estoppel.

A similar provision to said article 48(1) is found in article 9(1) of the European Council Directive No 89/104/EEC (repealed by EU Directive 2008/95/EC to approximate the laws of the Member States relating to trade marks). This provision featured in the decision of *Budějovický Budvar, národní podnik v Anheuser-Busch Inc,* Case C482/09, judgment of the Court of Justice of the European Union, dated 2011-09-22, where both parties obtained registration on the basis of HCU. An attack on the basis of prior use was however launched. The court remarked, amongst others, that the concept "acquiescence" differs from the word consent, which involves an intention to renounce a right which is unequivocally

demonstrated (par 43). "Acquiescence", in contrast, means that someone remains inactive when faced with a situation in which he would be in a position to oppose (par 44).

With regard to English law, reference can be made to *Daimler Chrysler AG v Javid Alavi (t/a Merc)* 2001 RPC 813 where the defendant had used the trade mark Merc in relation to clothing for 30 years without instances of confusion. The court stated that mere delay does not form a ground of defence, unless it gives rise to a defence in terms of trade mark legislation, or amount to acquiescence. The view that mere delay, without more, can be no bar to the exercise by the owner of a registered trade mark of his statutory right, was accepted as correct (par 112). It was found that (par 113, own emphasis):

> It is an essential component in a defence of acquiescence that the failure of the claimant to act should have induced the defendant to believe that the wrong was being assented to. But in this case there was no such reliance by Mr Alavi: indeed, he only remembered the visit to the stand on being asked by his solicitors, and had attached no importance to it at the time. In any event, DaimlerChrysler (or their predecessors) were not aware of his trading activities until 1997. These facts cannot support a plea of acquiescence. *But the period of trading is very long*. Had I found that Mr Alavi had infringed one or more of the Mercedes marks, but that there was no passing-off, and that there had been no damage, perhaps the question of delay should have to be considered in the context of relief. But the question does not arise. This defence fails.

In South Africa, in *Policansky Brothers v Hermann & Cannard* 1910 (TPD) 1265 it was remarked that it would be inequitable for a person to lay by for a "considerable" time (page 1281). In *William Grant & Sons Ltd v Cape Wine & Distillers Ltd* 1990 3 SA 897 (C) (the *Grant* case), the plaintiff was said to be barred from instituting proceedings in view of the delay that occurred after they became aware of the use of the defendant. The court attached weight to the fact that, initially, the defendant's position in the market did not threaten the plaintiff. It was accepted that, hypothetically, action at a later stage, once the defendant became a leading brand, whilst originally being an insignificant part of the market for some years after its launching, was in order. The test was said to be (923H):

> It was for defendants to show that their invasion of plaintiffs' right had been, for a sufficiently appreciable number of years, substantial enough to justify (and indeed require) the institution of proceedings by plaintiffs, if an end was to be put to defendant's unlawful competition.

It was also said that "the mere lapse of a number of years during which plaintiffs took no action does not in itself justify a finding of acquiescence on their part" (924A). It may be appropriate to state that the nature of the passing off concerned, namely a misrepresentation as to the origin of the goods, may have influenced the court. The approach where there is a (mere) *inter partes* dispute leading to confusion, but not deception, as in this case, could be different. It must be pointed out that it does not

appear equitable, with respect, to allow a plaintiff to adopt a "wait and see" attitude to determine if, in effect, the defendant's business will prosper.

The appropriate status of the acquiescence defence was placed in perspective by Harms DP in *Turbek Trading CC v A & D Spitz Ltd* (*supra* par 15, own emphasis):

> Turbek's first line of defence was a reliance on what counsel referred to as an 'equitable defence' of delay: if a party delays in enforcing its rights the party may in the discretion of the court either forfeit the rights or be precluded from enforcing them. The factual basis of the defence was, briefly put, that Spitz had known since 1 October 2001 of Turbek's trade mark applications and its use of the mark 'KG' on footwear but only took steps to enforce its alleged common-law rights when it instituted the present proceedings during July 2007. This delay, according to the submission, amounted to acquiescence which disentitled Spitz from attacking the registrations or obtaining an interdict. Counsel relied on a statement by Patel J that *our law recognises a defence of acquiescence distinct from estoppel* and that the doctrine can be applied to halt cases where necessary to attain just and equitable results (Botha v White). That Patel J had failed to take account of binding authority that contradicted his bald statement and that he had misread authority on which he sought to rely was pointed out by Thring J in New Media Publishing (Pty) Ltd v Eating Out Web Services CC... During argument it became clear that counsel was unable to contend more than that delay may in a suitable case be evidence of an intention to waive, evidence of a misrepresentation that might found estoppel, or evidence of consent for purposes of the *volenti non fit injuria* principle. In other words, counsel was *unable* to substantiate his submission that acquiescence is a substantive defence in our law. Delay, in the context of trade mark law, may provide evidence of a loss of goodwill or distinctiveness but that was not Turbek's case on the papers.

In other words, acquiescence is not a defence separate from estoppel, practically a case for estoppel must, accordingly, be made out. Delay may be relevant though in other respects (to be dealt with in part 3 below).

2 4 Estoppel

Another ground that may feature is estoppel. Estoppel is defined as follows by Sonnekus (*supra* 2):

> The doctrine of estoppel by representation as applied in the courts of South Africa may generally be said to consist of the following. Where a person (the representor) by his words or conduct makes a representation to another person (the representee) and the latter, believing in the truth of the representation, acts thereon and would suffer prejudice if the representor were permitted to deny the truth of the representation made by him, the representor may be estopped – that is precluded, – from denying the truth of his representation.

The person that has used a trade mark (B) and wishes to rely on estoppel to ward of an infringement action by the proprietor of a registered mark (A), will have to overcome certain obstacles. Amongst

others, there would have to be proof of a (mis)representation. Silence (or inaction by A) can indeed, in certain circumstances, amount to a representation (Sonnekus *supra* 165). Also required, is that A must have had a duty to speak. In other words, A should have foreseen that B would have made the wrong inference from A's "silence" and acted to his prejudice (Sonnekus *supra* 165). This introduces the issue of negligence. Negligence would require an answer to the question whether the reasonable person in the circumstances would have foreseen prejudice to a third party and would have taken steps to prevent detrimental consequences (Sonnekus *supra* 243). In the situation under discussion, this would inevitably involve questions as to the period of inaction. Periods of a few years usually feature. Significantly, in *Oriental Products (Pty) Ltd v Pegma 178 Investments Trading CC* (2011 2 SA 508 (SCA)), it was held that inaction for a mere two months was sufficient to constitute negligence (par 21). Should A have been aware of B's use, before B can rely on estoppel? There is case law to the effect that a person can by his negligence be estopped from contending that he was not aware of the nature and contents of a document signed by him (Sonnekus *supra* 249 n 50). So A could not necessarily rely on the fact that he was not aware of B's use of the trade mark. On the other hand, in favour of A, is the approach, as per *Grobler NO v Boikhutsong Business Undertaking (Pty) Ltd* 1987 2 SA 547 (B) that there cannot be a misrepresentation if ownership (of immovable property) can be established from official records (562A). This view would, naturally, apply to intellectual property and the Register of Trade Marks, in the case of registered marks of course. However, mere knowledge by B of A's registered mark is not always the decisive factor. So, when A informs B that he has no objection to B's use, and A changes his position and object, for instance after obtaining legal advice, B could raise the estoppel defence (Webster & Page *supra* 12-84). In summary, what might be decisive in estoppel cases, is whether a representation was made. In this regard it is worth noting and adapting what was said in the *Grant* case, being that "[t]he mere lapse of a number of years during which plaintiffs took no action does not in itself justify a finding of acquiescence on their part" (924A). In other words, such circumstances do not necessarily constitute a representation in the context of estoppel.

3 Substantive Defence/Procedural Remedy

3 1 Staying of Infringement Proceedings

In the above, consideration was given to the circumstances in which a third party user could have a defence based on the fact that an infringement action was not instituted timeously. One issue discussed was the position of the honest concurrent user (see Alberts 'Substantive and procedural facets of honest concurrent use in South African trade mark law' 2010 *SALJ* 339 341). What approach is followed in infringement proceedings, when the "defence" of concurrent right is raised? In the British case of *Second Sight Ltd v Novel UK Ltd* 1995 (RPC) 423, the court stated that it would be a requirement for a stay of

proceedings for the applicant for registration to have a seriously maintainable claim to registration and he must, furthermore, undertake to proceed with the application with all due diligence (434 line 44). In the South African case of *Robertsons (Pty) Limited v Pfizer SA (Pty) Limited* 1967 3 SA 12 (T), A brought an application for an interdict against B, based on the alleged infringement of A's registered trademarks. B asked the court to defer the matter until an application for concurrent use in terms of the relevant legislation has been disposed of. The court refused, indicating that B would not be prejudiced (15C–E).

Likewise, according to *Abdulhay M Mayet Group (Pty) Ltd v Renasa Insurance Company Ltd* 1999 4 SA 1039 (T), factors such as HCU or special circumstances do not constitute a statutory defence to infringement (1048G–H). It was stated, however, that the court does have a discretion to stay infringement proceedings, but that discretion is to be exercised sparingly and only in exceptional circumstances (1048 H-I). The rationale for this approach was described as follows (1048I–1049A). It was said that the law of infringement will fall into desuetude if every infringer would be allowed to raise the defence that "I know that I am acting unlawfully, but bear with me; there is a possibility that my actions may become lawful". The proper route to follow would be to comply with the law and to desist from infringement until the application based on HCU is finalised. In *Sidewalk Cafes (Pty) Ltd t/a Diggers Grill v Diggers Steakhouse (Pty) Ltd* 1990 1 SA 192 (T), where the respondent had extensive use, it was held, in contrast, that the respondent did not have to await his application proceeding to registration on the basis of HCU, and was entitled to relief without delay (198J–199A). The province where the respondent conducted business in, was excised from the proprietor's registration. The factual bases in these matters might of course differ in relation to the scale of use.

3 2 Interdict

EU Directive 2008/95/EC in recital 12 states that:

> It is important, for reasons of legal certainty and without *inequitably prejudicing the interests of a proprietor* of an earlier trade mark, to provide that the latter may no longer request a declaration of invalidity nor may he oppose the use of a trade mark subsequent to his own of which he has *knowingly* tolerated the use for a substantial length of time, unless the application for the subsequent trade mark was made in bad faith.

It was noted earlier that reliance on HCU in the United Kingdom required knowledge of the existence of the third party's activities by the proprietor. The position regarding acquiescence there, and in the European Union, is the same (the latter has no specific time period stipulated though), there must be awareness of the "infringer's" activities (s 48(1) of the British Trade Marks Act; *Budějovický* case (par 45)). Similarly in South Africa, in cases of estoppel, proof of knowledge on the part of the proprietor would assist the third party relying on estoppel. What is the situation though where there is no knowledge on the part of

the proprietor? The third party might, to force the point, have been using the mark for ten years, but cannot, for argument's sake, make out a case for estoppel. Can the proprietor prevent the third party's continued use after all those years? Van Heerden and Neethling (*supra* 180) say that there is protection against a passing off action in comparable situations, if the mark has become distinctive of the goods of the third party. In the *British Daimler* case it was stated that (par 67; own emphasis):

> I should just add that there must come a time after which the court would not interfere with a continued course of trading which might have involved passing off at its inception but no longer did so: logically, this point would come six years after it could safely be said that there was no deception and *independent goodwill* had been established in the market by the protagonist.

Also of interest, is the view of Wadlow (*Law of Passing Off* (2011) 856) who states that "[t]he distinctiveness of marks is frequently destroyed by conduct which would have been actionable, even fraudulent, had the plaintiff acted in time. *A fortiori*, a concurrent right to use the mark, or more properly an immunity, can thus be obtained by use which was less than honest in its inception".

What is the position though in a statutory milieu? In the *Jalavi* decision, it was remarked that the period of use was "very long", and it was added that "[h]ad I found that Mr Alavi had infringed one or more of the Mercedes marks, but that there was no passing-off, and that there had been no damage, perhaps the question of delay should have to be considered in the context of relief" (par 113). Similarly, in the *Turbek* ruling, Harms DP stated, after the quotation set out above, that his earlier explanation "does not mean that delay may not have procedural consequences; for instance, it may be a factor to take into account in exercising a court's discretion to refuse to issue … an interim interdict or, maybe, even a final interdict, leaving the claimant to pursue other remedies such as damages" (par 15). One may infer from this that whilst delay is not a substantive defence, the eventual refusal of an interdict may, through a procedural mechanism, ensure a fair outcome.

The view of Harms DP will then also be in line with the British position. It has been stated there that delay might cause a court to refuse injunctive relief even if the conduct does not amount to acquiescence (*Blackstone's Civil Practice* 2013: The Commentary 614). Much would depend on the facts. So a two year delay might be excused, whilst a 20 days delay might cause relief to be refused (Blackstone's *supra* 615). In *Blinkx UK Ltd v Blinkbox Entertainment* Ltd 2010 (EWHC) 1624 (Ch), a trade mark infringement and passing off matter, the plaintiff had operated a website providing an internet video service that gave access to film, television and video content. The respondent also had a website which offered its customers, amongst other things, the ability to choose, customise and share video and television clips. The court specifically rejected the argument that the plaintiff was entitled to wait for instances of confusion to occur in the marketplace (par 21). The court stated that "[h]ad the claimant acted promptly while the defendant's business was still in its

trial phase, the balance of convenience might have favoured an injunction. But two years later it seems to me that the position has reversed" (par 28). The delay was held to be "fatal" (par 28).

What is the position where the proprietor is not aware of the use? It is submitted that the focus should not be exclusively on "punishing" the proprietor for not taking timeous action, whilst being aware of the third party's activities. In appropriate circumstances a court should thus refuse to grant an interdict of there has been an extensive period of open use.

4 Conclusion

In conclusion, where appropriate, relief can be provided to a third party user if there was an undue delay, albeit not by way of a substantive law principle. Principles of equity should also apply to cases where the proprietor was not aware of the third party's use.

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Note on the use of the public nuisance doctrine in 21st century South African law

1 Introduction

Since the reception of the common law remedy of public nuisance into South African law during the late 19th century, it has been applied in what can be categorised as three series of cases: the first series dating from the late 19th century to 1943 (*Queenstown Municipality v Wiehan* 1943 (EDL) 134); the second series consisting of only one case in 1975 (*Von Moltke v Costa Aroesa (Pty) Ltd* 1975 (1) SA 255 (C) (the Von Moltke case)); and a third series between 1989 and 2001 (in *East London Western Districts Farmers' Association v Minister of Education and Development Aid* 1989 (2) SA 63 (A) (*East London* case) the application for an interdict to abate a public nuisance as a result of an informal settlement was granted; *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (1) SA 577 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1993 (3) SA 49 (T); *Diepsloot Residents and Landowners Association and Another v Administrator Transvaal* 1994 (3) SA 336 (A)). In the Diepsloot trilogy, an application for an interdict preventing the establishment of the formal settlement was denied after the court considered policy considerations; in *Rademeyer and Others v Western Districts Councils and Others* 1998 (3) SA 1011 (SE), the application for an interdict to prevent the establishment of an informal settlement was denied because the

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occupiers of the informal settlement were protected as "occupiers" under the Extension of Security of Tenure Act 62 of 1997. In *Three Rivers Ratepayers Association and Others v Northern Metropolitan* 2000 (4) SA 377 (W) (*Three Rivers* case), an application for an interdict was granted after the local authority could not prove that it had taken reasonable steps to prevent a possible public nuisance caused by an informal settlement being established in the vicinity of the properties owned by the members of the Three Rivers Ratepayers Association. In *Minister of Public Works and Others v Kyalami Ridge Environmental Association and Another (Mukhwevho intervening)* 2001 (3) SA 1151 (CC), the court denied an application for an interdict to prevent a temporary transit camp from being established in the vicinity of farms and residential areas. Amongst the arguments presented by the applicants, was that of a public nuisance being constituted, but no evidence could be given to support that argument and it failed in the Constitutional Court.

In the first series of cases, public nuisance was applied in line with its original aims, namely to protect the health and safety of the public in general (according to Spencer ("Public nuisance – a critical examination" 1989 48 *Cambridge Law Review* 55-84 56), public nuisance can be defined as "an act or omission that endangers the life, health, property, morals, or comfort of the public, or to obstruct the public in the exercise or enjoyment of rights common to all Her Majesty's subjects"). In an attempt to protect the wellbeing of the community at large, the remedy served as a means against infringements such as noise (in *Champion v Inspector of Police, Durban* 1926 47 NPD 133 the appellant was convicted when he lawfully used a building for public entertainment purposes when prohibited from doing so by section 76 of the General By-Laws. Section 76 stated that "[n]o person being in any private premises within the borough shall make any noise or disturbances so as to be a public nuisance in the neighbourhood of such private premises"), keeping a brothel (in *R v Paulse* (1892) 9 SC 423 the accused was convicted on the ground that his brothel was kept in such a manner that it constituted a public nuisance); and obstruction of a highway (in *Putt v Rex* 1908 EDC 25, the appellant erected gates across a main road. The court a quo found that the gates constituted a public nuisance). In essence, the important factors were that all these nuisances affected a public right relating to the protection of public health or safety and, importantly, that the nuisance originated on public rather than private land.

However, the second and third series of public nuisance cases were applied contrary to its original aims. Some of the courts in both the second and third series of public nuisance cases used the terms "private nuisance" and "public nuisance" interchangeably and failed to distinguish between the different requirements for the two distinct species of nuisance (for example in *Three Rivers* 380F Snyders J stated that the concept of public nuisance is similar to that of private nuisance, except for the public extent of the nuisance). Therefore, although the nuisance originated on private instead of public land, courts based their decisions on public instead of private nuisance. Furthermore, the public

nuisance doctrine was applied as a mechanism to evict occupiers of informal settlements and in so doing circumvented eviction legislation such as the Extension of Security of Tenure Act 62 of 1997 (ESTA) and the Prevention of Illegal Eviction from Unlawful Occupation of Land Act 19 of 1998 (PIE) (before the enactment of the anti-eviction measures of ESTA and PIE, applicants could rely directly on section 26(3) of the Constitution. However, there is no case law - in which the public nuisance doctrine was applied – wherein section 26(3) was directly applied) as well as sections 26 (1), (2) and (3) of the Constitution of 1996.

Statutory nuisance systematically replaced the common law notion of public nuisance in South African law, as it did in English law. Because of the implementation of statutory measures that regulate unreasonable interferences affecting the public at large, there was less need for the application of the common law. The implementation of statutory nuisance employed to curb and regulate public nuisance with great success ultimately resulted in a decline in the use of the common law notion of public nuisance in disputes.

For the reasons set out above there is a great deal of doubt regarding the legitimacy of applying public nuisance principles in South African law. However, from 2009 to 2011 three cases were decided with reference to public nuisance, namely *Intercape Ferreira Mainliner (Pty) Ltd and Others v Minister of Home Affairs and Others* 2010 5 SA 367 (WCC) (*Intercape* case); *410 Voortrekker Road Property Holdings CC v Minister of Home Affairs and Others* 2010 (8) BCLR 785 (*Voortrekker* case); and *Growthpoint Properties Ltd v SA Commercial Catering and Allied Workers Union* 2011 (1) BCLR 81 (KZD) (*Growthpoint Properties* case), which suggests the presence of genuine public nuisance disputes. By genuine public nuisance disputes, I refer to nuisance that affected the public at large and emanated on public land such as, for instance, a street. The aim of the case note is to analyse these three cases and determine whether the notion of public nuisance has a legitimate purpose in 21st century South African law (the *Intercape* and *Voortrekker* cases will hereafter be referred to as the fourth series of cases).

2 *Intercape, Vootrekker* and *Growthpoint* Properties

2 1 *Intercape*

To establish the existence of a public nuisance in the cases *Intercape*, *Voortrekker* and *Growthpoint Properties*, the logical point of departure would be to analyse the facts. Paramount to this investigation are two requirements inherently connected with the presence of a public nuisance. These characteristics normally associated with public nuisance are: a) the health or wellbeing of the general public would be affected; and, importantly, b) the nuisance must have originated on public as opposed to private land or space (see the definition of a public nuisance in Church J & Church J 'Nuisance' in Joubert WA, Faris JA & Harms LTC (eds) *LAWSA* 19 (2006) 115-145 par 163). The *Voortrekker* case is a direct

consequence of the judgment in *Intercape* and the facts of these two cases are therefore similar. However, *Growthpoint Properties* is a peculiar nuisance dispute. The facts of the case will be discussed below.

In the *Intercape* case, the first applicant (Intercape) owns or occupies various premises in the vicinity of Montreal Drive, Airport Industria, Western Cape. The first respondent is the Minister of Home Affairs. The Department of Home Affairs (DoHA) occupies a premise (Erf 115973) in Montreal Drive. Although the premises are used by the DoHA, the Department of Public Works leases the property from Cila, which is the third respondent. Therefore the Minister of Public Works was joined as a respondent to the proceedings. Intercape, together with the other applicants (who also either owned or rented premises in the same vicinity), sought an interdict prohibiting the DoHA from using their premises as a refugee office (*Intercape* case par 1). The applicants argued that the refugee office contravened the City's zoning scheme. Furthermore, the applicants argued that the refugee office constituted a common law nuisance, a point which is especially relevant for the purposes of this article (*Intercape* case par 2). The respondents and Cila opposed the application.

Before dealing with the two questions – namely, whether the refugee office contravened the City's zoning scheme and whether a common law nuisance was constituted – the appalling conditions complained of, which were a direct consequence of the refugee office, have to be analysed.

According to the first applicant, Mr Ferreira, the DoHA's activities seriously interfered with the applicant's business. On a working day, it was likely that four to five hundred asylum seekers would visit the refugee office. The DoHA's officials only allowed a certain number of visitors into the premises per day and, as a result, many asylum seekers congregated on the streets. Furthermore, some of them slept outside the refugee office to be in the front for the next day's queue. The applicants complained that asylum seekers on the street were responsible for litter, left-over food, make-shift materials (for instance; corrugated iron) and, in the absence of toilet facilities, human waste (par 35). The applicants also complained that the general litter and, especially, the absence of toilet facilities are a major health concern for all those in the vicinity.

Furthermore, the presence of the asylum seekers in turn attracted illegal street vendors, which added to the litter generated by the crowds. Criminal elements were also attracted and asylum seekers were robbed from time to time (par 36). Criminal elements precipitated violence between themselves and the crowd. Traffic flow within Montreal Drive increased, seeing that asylum seekers were transported to the refugee office by taxis and cars. As a result, vehicles parked as they pleased and thus violated traffic laws (par 38).

The large crowds, hooting of taxis and loud music from car stereos significantly increased the noise levels outside the refugee office. In the

case of violent outbursts, there is also an increased level of noise. Megaphones used by officials to organise crowds also contributed to the high noise levels (par 40).

Finally, the applicants argued that the safety and security of their employees was endangered. Some employees travelling to and from work on foot had been victims of robberies, muggings and intimidation, with some even resigning from their respective places of employment. Moreover, these conditions deterred clients from visiting the applicants' premises (par 45).

After having received substantial evidence and having conducted an analysis of the founding, answering and replying affidavits, the court finally adjudicated on the issue of whether the refugee office contravened the City's zoning scheme. On this issue, the court found that the refugee office did indeed contravene the City's scheme. In essence, the court concluded that Montreal Drive is subject to the Land Use and Planning Ordinance 15 of 1985 (LUPO) and that the scheme was zoned for "industrial general" purposes (par 91). The court found that it was common cause that the activities of the refugee office did not fall within the 'predominant uses for this site as required by LUPO (par 91).

The most interesting and relevant part of the judgment, for the purposes of this note, is the issue of whether a nuisance was constituted. While the court was ready to grant relief on the basis that the zoning scheme had been contravened, it still addressed the cause of action based on nuisance (par 141). Without identifying which of the two categories of nuisance would be applicable, the court accepted that the alleged nuisance was of a private nature when it stated:

> In the context of the present case, the term nuisance connotes a species of delict arising from wrongful violation of the duty which our common law imposes on a person towards his neighbours, the said duty being the correlative of the right which his neighbours have to enjoy the use and occupation of their properties without unreasonable interference (par 142).

Subsequent to the statement above, the court formulated the question of whether the DoHA was using Erf 115973 in a way which resulted in an unreasonable interference in the right of neighbouring owners and occupants to use their premises (par 147).

The court accepted the material evidence provided by the applicants. The evidence was not convincingly disputed by the respondents and as a consequence, the court found in favour of the applicants. Illegal parking, blocking of roads, noise, violence, crowd numbers in the street, litter (including human waste) and endangering the safety and security of the general public were all given as material evidence. Video and sound recordings provided further compelling evidence such as the outburst of violence, noise, large crowds congesting the streets, illegal parking, appalling litter and the state of mobile toilets (par 151).

On the basis of this compelling evidence, the court further accepted that due to the presence of a large crowd on a daily basis, there was a continued nuisance in the form of noise, litter, etc. The respondents argued that they cannot be held liable for the large crowds, because the onus rests upon the law enforcement officials to deal with illegal activities in the street. However, the court concluded that the origin of the congested streets was the operation of the refugee office. The court further held that, even if it was the law enforcement officials' responsibility, it would be impossible for them to deal with circumstances in Montreal Drive on a daily basis (par 154). Even if the law enforcement officials had endless resources, their presence would by no means eliminate the unsatisfactory conditions under which the applicants are currently operating (par 154).

The court then shifted its focus to the facts of the *East London* case to compare it with those in the *Intercape* case. In the *East London* case, the facts clearly indicated that nuisance-causing actions originated on the respondent's property, which caused infringements on the applicant's private land; this cannot be said about the facts in the *Intercape* case. In the *Intercape* case, the nuisance was a result of the operation of a refugee office on private land, but caused a nuisance or infringement on public as opposed to private land. The judge recognised this distinction, but said, in his own words, "as a matter of principle I do not think this distinction matters" (par 156). This is a rather dubious statement, seeing that the court's misjudgement had some negative implications on the decision. There is a distinct difference between a private and a public nuisance. There are many similarities, but at the same time important differences. This issue will be dealt with in more detail in the concluding section of this note.

The court recognised that the central element, namely "reasonableness," is the same in both South African and English common law (par 157 and 163). The court concluded that an individual's actions may give rise to an actionable nuisance, even though the nuisance is caused by other persons who are attracted to the premises and congregate in the streets (par 167-168).

In conclusion, the court found that the actions emanating from the operation of the refugee office constituted a nuisance. The court granted an interdict as an order to cease the operation of the office. The court, however, suspended the interdict and allowed the DoHA to find alternative premises (par 171-186).

2 2 *Voortrekker*

The second case, namely the *Voortrekker* case, is a direct consequence of the *Intercape* decision. After *Intercape*, the DoHA relocated to premises in Maitland. After moving from their premises in the Airport Industria, the DoHA occupied alternative refugee offices in Maitland. Once again the

applicants argued that the refugee office contravened the City of Cape Town's zoning regulations and created a nuisance.

Similar to *Intercape*, the court found that the operation of the refugee office contravened the zoning scheme and thus constituted a nuisance (par 78-81). Once again, the court failed to distinguish between a private and a public nuisance.

Again, the court granted an interdict to cease the operation of the refugee office, but this time the court gave the DoHA time to address illegalities and thereby regulate the operation of the office at its current location as opposed to finding alternative accommodation. The court was of the opinion that it would be impractical to close the refugee office immediately.

2 3 *Growthpoint*

In the latest case, namely the *Growthpoint Properties* case, it appears that the court might have missed yet another opportunity to clearly indicate the distinction between a private and a public nuisance. In this case, the applicant (Growthpoint) alleged that a group of Dis-Chem employees, participating in a strike organised by the South African Commercial Catering and Allied Workers Union (SACCAWU), constituted a public nuisance (par 1). According to Growthpoint, the strikers would sing, shout, ululate and make use of instruments which in effect constituted an intolerable noise. Growthpoint sought an interdict prohibiting the strikers from doing so (par 5).

The main issue in this judgment was to confirm a rule *nisi* granted on 3 June 2010. The court *a quo* granted an interim order prohibiting the strikers to sing, shout, ululate and use instruments to make a noise. For the purposes of this note, the focus is on the issue of whether a public nuisance was constituted. Growthpoint contended that by committing a nuisance the union SACCAWU and its members subjected themselves to criminal sanctions in terms of the by-laws of the city. Growthpoint further contended that they (and the other tenets of the shopping centre) had the right not be arbitrarily deprived of their use of the property. They based their premise on the right that landowners and land occupiers have the right to reasonable enjoyment of their land (the applicant relied on the *East London* case to substantiate the argument that a public nuisance was constituted (see *Growthpoint Properties* case (par 31))). Growthpoint alleged that an interference with such a right creates a public nuisance. On the issue of whether the municipal by-laws were contravened, the court found that the applicants could not provide compelling evidence to substantiate this argument. More importantly, on the issue of whether a public nuisance was constituted, the court did not make any findings.

However, to solve the question of whether a nuisance was constituted, the court decided to balance the constitutional rights of owners and occupiers to their property, the environment and trade, on the one hand, and the right of strikers to freedom of expression, to bargain collectively,

to picket, protest and demonstrate peacefully, on the other. This method of balancing the right of the owner and that of the strikers – as a means to establish whether a nuisance was present – circumvented the basic investigation into the nature of the nuisance: For instance, whether the nuisance took place on private or public land or space; were the individuals affected by nuisance of a private or public nature? These questions could only have been answered if the court distinguished between a private and a public nuisance, thereby establishing which form of nuisance was at hand. The distinction between private and public nuisance will be elaborated on in the conclusion.

Consequently, the court found that SACCAWU and its members had to exercise their rights reasonably without interfering with Growthpoint, its tenants and the public (par 60). Therefore, the effect of the remedy was to ensure that SACCAWU and its members lower their noise levels (par 61).

One could argue that a public nuisance was constituted, but due to a lack of evidence and arguments on the side of the applicants and the court's failure to investigate the nature of the nuisance, the matter was never addressed in detail.

3 Comments

3 1 Distinction between Private and Public Nuisance

Although in both the *Intercape* and *Voortrekker* cases, the courts were correct to conclude that a nuisance was constituted, they erred when they automatically assumed, without relying on the facts to establish the character of the nuisance, that the unreasonable activities constituted a private nuisance. Similarly, in *Growthpoint Properties*, the applicant alleged the infringement of its reasonable use and enjoyment of land as a landowner. This allegation relates to a neighbour law dispute and therefore a private as opposed to a public nuisance. But Growthpoint alleged that an interference with such a right creates a public nuisance. The court never considered determining which of the two species of nuisance was constituted; instead it allowed the interchangeable use of private and public nuisance. Therefore, the courts failed to distinguish between a private and a public nuisance.

A more logical approach would be to establish the nature of the nuisance at hand. The courts would then distinguish between a private and public nuisance, and not simply use these two distinct species of nuisance interchangeably. A private nuisance affects the reasonable enjoyment of the land of an individual (typically a neighbour) who resides in the vicinity of the neighbour (Mostert, Pope, Badenhorst, Freedman Pienaar & Van Wyk *The principles of the law of property in South Africa* 132-134). A private nuisance "denotes an infringement of a neighbour's entitlement of use and enjoyment so that it affects her quality of life, *i.e.* ordinary health, comfort and convenience, by an on-going wrong"

(Mostert, Pope, Badenhorst, Freedman Pienaar & Van Wyk *The principles of the law of property in South Africa* 134). In the case of private nuisance, the reasonableness test is applied, namely "whether a normal person, finding him or herself in the position of the plaintiff, would have tolerated the interference concerned" (Badenhorst, Pienaar, Mostert, Silberberg & Schoeman *The law of property* 112). A successful applicant is entitled to an interdict (according to Church & Church "Nuisance" in Joubert, Faris & Harms (eds) *LAWSA* 19 (2006) 115-145 par 198, an interdict "can serve to restrain an offender from establishing a threatened nuisance or from continuing an existing nuisance") or an abatement order (An abatement order occurs when "a local authority or public officers are authorised under national or regional legislation to order owners or occupiers of land or premises to abate nuisances upon their property"). See Church & Church "Nuisance" (*supra* par 197), self-help (according to Church & Church "Nuisance" (*supra* par 196), self-help occurs only in exceptional circumstances, where an affected landowner is eligible to take the "law into his or her own hands; however, it is only available in the most urgent cases of necessity and in ordinary cases resort to self-help is not justifiable". Examples of urgent cases include imminent risk to health or circumstances so pressing as to admit of no delay in abating the nuisance), or claim for damages (see Church & Church "Nuisance" (*supra* par 202). On the other hand, a public nuisance can be defined as "an act or omission or state of affairs that impedes, offends, endangers or inconveniences the public at large" (Church & Church "Nuisance" (*supra* par 163). The doctrine was originally used for the abatement of ordinary public nuisances (protecting the general public health and safety) such as smoke (*Redelinghuys and Others v Silberbauer* 1874 4 B 95); noise (*London & South African Exploration Co v Kimberly Divisional Council* (1887) 4 HCG 287); and smells (*R v Le Rot* (1889-1890) 7 SC 7). These kinds of nuisances can be private nuisance too, but are categorised as a public nuisance when they originate from a public space or on public land. No reasonableness test is applied to determine whether a public nuisance was constituted. The perpetrator's action is unlawful if he or she is found guilty of causing injury, damage or inconvenience to the health and safety of the general public. Currently, the perpetrator's action is unlawful if it is found to be in conflict with certain statutory regulations. An interdict or abatement order is used to suppress or stop a public nuisance.

Therefore, it was essential that the courts distinguish between these two species of nuisance to avoid the interchangeable use thereof and in so doing circumvent any confusion between the nature of a private and a public nuisance.

3 2 Existence of a Genuine Public Nuisance

It was clear from the evidence in *Intercape* and *Voortrekker* that it was not only the applicants but anyone – for example, clients, employees and visitors – who set foot in the vicinity of the refugee office would be negatively affected by having to endure noise, face the possibility of

being mugged and robbed, be exposed to a health risk and be prevented from using the road as a result of illegal parking or road blockage. Similarly in *Growthpoint Properties*, it can also be argued that alleged public nuisance existed. According to van der Walt (van der Walt *The Law of Neighbours* (2010) 51–52; see n 87 in van der Walt JQR *Constitutional Property Law* 2011 (1) at 2.4):

> [T]he nuisance would probably have been the threat that the noise posed to the health and safety of the owners, occupiers and customers of the shopping mall. Although the shopping mall is of course private property it may well be assumed, partly on the basis of public accommodations doctrine, that the open spaces such as the entrances, parking areas and corridors of a shopping complex are sufficiently open to and used by the public that a threat or danger for public health and safety caused there could be adjudicated on the basis of public nuisance.

Abrams and Washington view a public right as (Abrams & Washington "The misunderstood law of public nuisance: A comparison with private nuisance twenty years after *Boomer*" (1990) 54 *Albany Law Review* 359-399 364):

> [a] public nuisance does not necessarily involve an interference with the private enjoyment of property; rather the interference is with a public right, usually relating to public health and safety or substantial inconvenience or annoyance to the public.

Based on this view, one can ascertain that the nuisance affected a public right and not necessarily a private right. Furthermore, the nuisance occurred in a public space, namely the street. A street is a place where the community at large can be in contact with the alleged unreasonable interferences. In fact, the first series of South African public nuisance cases covered the majority of unreasonable interferences complained of in both the *Voortrekker* and *Intercape* cases, namely pollution (see *R v CP Reynolds* 1901 22 NLR), noise (*London & South African Exploration Co v Kimberly Divisional Council* 1887 4 (HCG) 287) and the obstruction of roads occurred in a public space or public land (see *Putt v R* 1908 (EDC) 23; *Coetzee v R* 1911 (EDL) 339). Similarly in *Growthpoint Properties*, parking areas, entrances and open spaces associated with the public accommodations doctrine affected a public as opposed to a private right. Therefore the nuisance complained of was a public nuisance and not a private nuisance.

These series of cases – in the period between the inception of the public nuisance doctrine into South African law and 1943 (categorised as the first series of cases) – rightfully categorised these interferences as a public nuisance after having analysed the facts in the particular context. One can therefore reach the conclusion that the court erred in assuming that a private instead of a public nuisance had been constituted. The nuisance originated in a public space, namely the street, or in the case of *Growthpoint Properties*, parking areas, entrances and open spaces.

As already indicated, the judgments can be criticised for failing to distinguish between the categories of nuisance but, more importantly, that they missed the opportunity to apply the public nuisance doctrine for its original purposes, especially after its indirect application in the third series of public nuisance case law, briefly referred to above. As indicated above, these original purposes were applied in the first series of South African public nuisance case law. On the other hand, these cases illustrate that public nuisance could still, depending on the situation, have a purpose to fulfil in South African law.

3 3 Nuisances Regulated by Statute

In both the *Intercape* and *Voortrekker* cases, the unreasonable interferences complained contravened the provisions of LUPO. As a result, the courts granted an interdict that obliged the DoHA to cease the unlawful operation of the refugee office. However, in *Voortrekker* – in contradiction to the *Intercape* decision – the court gave the DoHA an option to address illegalities and thereby regulate the operation of the office at its current location, as opposed to finding alternative accommodation. The court was of the opinion that it would be impracticable to close the refugee office immediately. In essence, LUPO (in this specific scenario) replaced the use of the public nuisance doctrine.

Similarly, in the *Growthpoint Properties* case, if the court applied the Labour Relations Act 66 of 1995, the doctrine of public nuisance would not have been applied seeing that certain provisions in the Act would have prohibited the continuance of the alleged nuisance. This raises the question of whether the application of public nuisance was necessary or relevant at all. Therefore, it could be argued that although genuine public nuisance is constituted, the doctrine is only applicable in the absence of statutory or any other legislation such as LUPO, which covers existing or future public nuisance offences.

4 Conclusion

In all three cases it appears that a genuine public nuisance was constituted. In essence, the courts were correct in finding the existence of a nuisance. However, the courts erred in automatically assuming that there is no need to distinguish between a private and public nuisance. Based on the facts of each case, this distinction is paramount in order to classify a nuisance as either private or public. In these cases it was clear that a public instead of a private nuisance had been constituted.

In these cases, the courts assumed a position without investigating the nature of the nuisance. It therefore failed to correctly classify the nuisance at hand. There was no need for a rigorous investigation; a mere enquiry into the two distinct classifications of nuisance, their definitions and an analysis of case law would have sufficed to determine the category of nuisance.

Based on the facts in the *Intercape* and *Voortrekker* cases, any individual (for example, client, employee, a motorist driving along Montreal Drive, pedestrian) who set foot in the vicinity of the refugee office was affected by the noise, violence, litter and street blockages. Thus the general public at large could be a victim of these unlawful actions such as violence, litter, health risks, noise and a blocked street in Montreal Drive, which could affect their health and safety. In the *Growthpoint Properties* case, although the shopping centre is privately owned, it is a public attraction. Therefore, not only those who own or rent a space in the centre are affected by noise, but anyone who comes into contact with this public space, namely the general public. Moreover, based on the public accommodations doctrine referred to by van der Walt, there is a much stronger argument that a public nuisance was constituted.

More compelling evidence of the existence of a public nuisance, as opposed to a private nuisance, is that the first series of public nuisance case law compared with the last three cases (categorised as the fourth series of cases) is similar, because the infringements complained of – namely pollution, noise, blocked roads – are present in both series of cases. More importantly, all the nuisances in the first and fourth series of cases occurred in a public as opposed to a private land or space.

As stated above, this would have been an appropriate occasion to set the record straight pertaining to the application of nuisance, especially in the light of the indirect use of public nuisance in the second and third series of public nuisance cases.

In all three cases there were legislative measures to regulate interferences - which amounted to a public nuisance - at hand. This surely raises the question whether the application of public nuisance was necessary or relevant at all. It could be argued that although genuine public nuisance is constituted, the doctrine is only applicable in the absence of statutory or any other legislation such as LUPO, which covers existing or future public nuisance offences.

In essence, courts ought to distinguish between the two distinct species of private and public nuisance when determining the nature of the nuisance in a particular situation. The nature of the nuisance has to be determined in order to establish which nuisance is present and; finally, the doctrine can only be applied in the absence of any legislation regulating such interferences.

Furthermore, I am of the opinion that the notion of public nuisance can still serve a legitimate purpose in South African law. But it should be applied only in the absence of legislation covering nuisance offences.

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Onderhoudstoekenning vir gades of vennote *pendente lite* en by egskeiding: Het ons `n nuwe benadering?

1 Inleiding

Hierdie aantekening beoog om vas te stel of die beleid met betrekking tot onderhoudstoekenning vir vennote in 'n burgerlike vennootskap en gades in 'n huwelik by egskeiding verander het. Die aantekening gaan op twee gevalle konsentreer.

Die een geval wat ondersoek word, fokus op onderhoudstoekenning ingevolge Reël 43(1) van die Eenvormige Hofreëls en die ander omstandigheid bespreek onderhoudsvoorsiening ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979.

Alvorens daar met die bespreking verder gegaan word, gaan die algemene beginsels vir onderhoudstoekenning kortliks bespreek word.

2 Algemene beginsels vir onderhoudstoekenning

Gades (en telkens wanneer na gades verwys word, sluit dit ook vennote ingevolge 'n burgerlike vennootskap in terme van die *Civil Union Act* 17 van 2006 in) is *ex lege* verplig om mekaar te onderhou. (Sien oa *Oshry v Feldman* 2010 6 SA 19 (HHA) 24E-F).

Onderhoud kan geëis word indien die eiser 'n behoefte daaraan het en die verweerder dit gedeeltelik of ten volle kan voorsien. (Sien oa *Botha v Botha* 2009 3 SA 89 (W) par 103; *EH v SH* 2012 4 SA 164 (HHA) parr 13-14.)

Wanneer die huwelik (en telkens wanneer na huwelik verwys word, sluit dit ook 'n huwelik en 'n burgerlike vennootskap ingevolge die *Civil Union Act* 17 van 2006 in) beëindig word, kom die onderhoudsaanspraak gemeenregtelik tot 'n einde (sien oa *Thomson v Thomson* 2010 3 SA 211 (W) 215G; *Oshry* parr 24-25; *EH v SH* 167H).

Beide artikel 7 van die Wet op Egskeiding 70 van 1979 en die Wet op Onderhoud van Langslewende Gades 27 van 1990 maak voorsiening dat onderhoud ook na beëindiging van die huwelik toegeken mag word.

Die onderhoudsaanspraak kom ook gemeenregtelik tot 'n einde wanneer 'n gade, die gesamentlike huishouding deur sy/haar onregmatige gedrag beëindig (vgl oa *Stern v Stern* 1928 (WLD) 148 150; *Behr v Minister of Health* 1961 1 SA 629 (SR) 630F-G 633F; *Alarakha v Alarakha* 1975 3 SA 245 (RAA) 251E-F; *Chamani v Chamani* 1979 4 SA 804 (W) 806H-807A, 807B-C). Die onderhoudsaanspraak word volgens

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die beskouings van beide hoofregter Murray en regter Young in die geval van onregmatige beëindiging van die gesamentlike huishouding eerder opgeskort as beëindig en herleef, indien die "skuldige" gade nie na die gesamentlike huishouding kan terugkeer nie as gevolg van die onregmatige gedrag van die "onskuldige" gade (*Behr v Minister of Health* 631D-E & 634A-E onderskeidelik). Hahlo (*The South African Law of Husband and Wife* (1985) 137) voer as rede vir die opskorting van die onderhoudsaanspraak aan dat kos en skuiling in die gesinswoning te vinde is.

Met bovermelde algemene beginsels vir onderhoudsvoorsiening as agtergrond, skuif die fokus na Reël 43(1) van die Eenvormige Hofreëls.

3 Reël 43(1) van die Eenvormige Hofreëls

3 1 Onderhoud *pendente lite* Ingevolge Reël 43(1) van die Eenvormige Hofreëls

Reël 43(1) maak voorsiening dat 'n getroude persoon vir onder andere onderhoud *pendente lite* aansoek mag doen. (Getroude persoon sluit in 'n applikant wat beweer dat hy/sy 'n getroude persoon is, en hierdie bewering sonder stawende getuienis, deur respondent ontken word (sien oa *Zaphiriou v Zaphiriou* 1967 1 SA 342 (W) 345G; *AM v RM* 2010 2 SA 223 (OK) 227G-H). In *Hoosein v Dangor* (2010 2 All SA 55 (WKK) par 28), gaan die hof selfs verder en beslis dat "getroude persoon", 'n gade insluit wat ingevolge die Muslim geloof getroud is. Sien ook Carnelley 'Enforcement of the maintenance rights of a spouse, married in terms of Islamic law, in the South African courts' 2007 *Obiter* 340ev).

Om suksesvol met 'n aansoek vir onderhoud *pendente lite* te wees, word twee vereistes gestel naamlik een, dat die applikant 'n redelike kans op sukses in die hoofgeding het (sien oa *Davis v Davis* 1939 (WLD) 108 110, 112; *Von Broembsen v Von Broembsen* 1948 1 SA 1194 (O) 1196; *Hamman v Hamman* 1949 1 SA 1191 (W) 1193; *Zaduck v Zaduck* 1966 1 SA 78 (SR) 78H; *Zaphiriou v Zaphiriou* 346A; *SH v EH* 2011 5 SA 496 (OKP) parr [15] & [20]; Nathan, Barnett & Brink *Eenvromige Hofreëls* (1984) 2271; Hahlo *supra* 432) en twee, dat die applikant tydens die aansoek *pendente lite* geregtig is op onderhoud (sien oa *Harrower v Harrower* 1909 TH 231 231; *Davis v Davis supra* 110-111, 112; *Von Broembsen v Von Broembsen* 1196; *Zaduck v Zaduck* 79A-C; *Zaphiriou v Zaphiriou* 346A; *Taute v Taute* 1974 2 SA 675 (OK) 676-677; *AM v RM supra* par 12; Hahlo *supra* 432). Dit bring mee dat aansoeke om onderhoud *pendente lite* gemeenregtelik afgewys is as die applikant nie geregtig is op onderhoud nie weens onder andere die rede dat applikant die gemeenskaplike huishouding onregmatig beëindig het (sien *Chamani v Chamani supra* 806H-807A & 807B-C). Die regsbeginsel wat hier toepassing vind, is die gemeenregtelike skuldbeginsel, wat sy ontstaan lank voor die nuwe egskeidingsbedeling in terme van die Wet op Egskeiding 70 van 1979, verkry het. Omdat die Wet op Egskeiding 70 van 1979 met 'n gemeenregtelike egskeidingsreg wat op skuld gebaseer

is, weggedoen het, laat dit die vraag ontstaan in welke mate dit regshulp vir onderhoud *pendente lite* gaan beïnvloed. Sinclair ('Notes and comments' 1981 *SALJ* 89 97-98) huldig die volgende mening en stel die volgende oplossing voor:

> … it is suggested that the criteria for relief *pendente lite* must match those applicable to ancillary relief upon divorce and not those of the common law which determine the right to maintenance *stante matrimonio* … To justify to an errant wife the fact that she is not entitled to maintenance pending divorce because determination of the duty of support during marriage hinges upon marital good behaviour, when only weeks later or months later judgment in the main action and an award of maintenance can be granted in her favour, will not be an easy task. … The inescapable conclusion appears to be that legislative intervention to fill the hiatus just mentioned and to reconcile the opposing philosophies that underlie the common-law rules and the provisions of the new divorce legislation is called for.

Twee teenstrydige filosofieë blyk die onderliggende verskil in onderhoudstoekenning te onderlê. Die skuldbeginsel blyk ingevolge die gemenereg, die onderhoudsaanspraak te beëindig indien applikant, die gesamentlike huishouding onregmatig beëindig het, terwyl die skuldlose egskeidingsreg, wat die Wet op Egskeiding 70 van 1979 voorsien, die onderhoudsaanspraak lewend (kan) hou. Die wetgewer het nog nie die leemte aangevul nie.

Daar bestaan egter regspraak wat 'n antwoord mag bied en vervolgens bespreek word. In *Nilsson v Nilsson* (1984 2 SA 294 (K)) doen die applikante aansoek vir onderhoud *pendente lite* asook vir 'n bydrae tot koste vir die hangende huweliksgeding (295D). Die applikante en die respondent is beide bejaard. Sy is tydens die aansoek 78 en hy 85 jaar oud (295D). Hulle was vir ongeveer agtien maande getroud (295D), toe die applikante die gemeenskaplike huishouding en gesinswoning verlaat het (295D). Sy beweer dat die respondent die oorsaak is waarom sy die huishouding verlaat het aangesien hy haar beveel het om die huishouding te ontruim (295H). Die respondent is weer van mening dat die applikante die oorsaak vir die huweliksverbrokkeling is (296C) en dat sy hom verlaat het (296H). Regter Van Den Heever is van mening dat dit onbillik sou wees om aan applikante regshulp *pendente lite* te verleen sonder om op die meriete van die huweliksgeskil te let (295D). Hoe moet 'n aansoek soos hierdie beslis word sonder om onbillik te wees? Die antwoord in die woorde van regter Van Den Heever is dat "… law and fairness should if possible run hand-in-hand" (295C-D). Dit word bereik deur artikel 7(2) van die Wet op Egskeiding 70 van 1979 ook op aansoeke vir onderhoud *pendente lite* van toepassing te maak (297B & 297E-F). Dit stem, sonder om te vermeld, ooreen met die siening van Sinclair, hierbo genoem. Artikel 7(2) bepaal dat die gedrag van die partye vir sover dit op die verbrokkeling van die huwelik betrekking het as een van die genoemde faktore in ag geneem mag word. Die hof vermeld dat die skuldige gedrag van 'n party veral in ag geneem sal word, indien die huwelik van kort duur was en die beëindiging van die huwelik nie tot verlies lei nie, soos byvoorbeeld verlies aan vorige onderhoud, ander

huweliksverwagtinge of werk weens bedanking ensovoorts (297H-298A; sien *Grasso v Grasso* 1987 1 SA 48 (K) 53-54 waar die hof vermeld dat "[w]here, however, the misconduct of one of the parties is gross, fault not unnaturally assumes a greater relevance"). Die hof wys die aansoek vir onderhoud *pendente lite* van R600 per maand af op sterkte van die feit dat die huwelik van korte duur was en sy sedert sy die huishouding verlaat het haarself kon onderhou al was dit ook met die hulp van haar kinders (298A-C). Die hof is met ander woorde van oordeel dat sy in die hoofgeding nie suksesvol sal wees nie. Gedingkoste word wel toegeken aangesien respondent gewillig is om dit aan te bied (298D). Die belang van hierdie saak vir onderhoud *pendente lite* is dat die gemeenregtelike beëindiging van onderhoud deur skuldige gedrag nie absoluut toepassing vind nie, maar dat die faktore vir onderhoudtoekenning in 'n egskeidingsgeding wat hoofsaaklik met skuld weggedoen het, ook toepasbaar is by aansoeke vir onderhoud *pendente lite*.

Regter Mullins in *Carstens v Carstens* (1985 2 SA 351 (SOK)) is ook van oordeel dat die faktore vermeld in artikel 7(2) van die Wet op Egskeiding 70 van 1979 toepassing moet vind by onderhoud *pendente lite* (354C-D). Applikante en respondent het struwelinge met verloop van tyd gedurende hul huwelik gehad. Die laaste was toe applikante, die huishouding verlaat het en by haar minnaar ingetrek het. Hulle het ook sedertdien 'n kind wat dit vir applikante moeilik maak om met haar werk voort te gaan. Nou eis sy onder andere onderhoud *pendente lite*. Die onderhoud *pendente lite* word nie toegeken nie, en die hof bied twee motiverings hiervoor aan. Een, die hof is van oordeel dat dit teen die openbare beleid is dat 'n vrou, 'n aanspraak op onderhoud *pendente lite* teen haar man het, terwyl sy skandalig en voorbedagt as man en vrou met 'n ander man saamleef (353E-F; sien vir dieselfde standpunt *Dodo v Dodo* 1990 1 SA 77 (W) 89F-G). Twee, die hof verwys (353H-I) ook na die mening van Hahlo (*The South African Law of Husband and Wife* (1975) 454) waar hy van oordeel is "… it is contrary to justice and equity that she should be able to collect support for the same period from her ex-husband as well as from her 'putative' second 'husband'". Die hof beslis dan (353I): "I see no reason why a claim for maintenance *pendente lite* should not depend on similar principles of justice and equity". Daar is myns insiens geen substantiewe verskil tussen hierdie twee motiverings nie. Dit is dieselfde motivering of rede met verskillende woordgebruik. Die hof is van oordeel dat hierdie bevinding nie op 'n toepassing van die skuldkonsep neerkom nie (353I) en verwys dan na *Singh v Singh* (1983 1 SA 781 (K) 787). In laasgenoemde saak bevind die hof dat skuld slegs 'n rol speel indien dit as grof beskryf kan word (sien vir dieselfde standpunt *Kroon v Kroon* 1986 4 SA 616 (OK) 617H-I; *Beaumont v Beaumont* 1987 1 SA 967 (A) 994D-H; *Kritzinger v Kritzinger* 1989 1 SA 67 (A) 80C-E; *Dodo v Dodo* 89D-F, 92D-E; sien Barnard 'Enkele opmerkings oor die voorgestelde nuwe Suid-Afrikaanse egskeidingsreg' 1978 *THRHR* 263 277; Barnard 'Nog 'n stap nader aan 'n nuwe egskeidingsreg' 1979 *De Rebus* 11 14; Nathan 'Divorce Act 1979: "Fault" as a ground and "fault" as a factor, distinguished: Kennneth Daniels in 1979 DR 513'

1979 *De Rebus* 675; Joubert 'Onderhoud na egskeiding' 1980 *De Jure* 80 91; Sonnekus 'Onderhoud na egskeiding' 1988 *TSAR* 440 442-443 is van mening dat die strafgrondslag vir onderhoudsonthouding uitgedien is). Die onderhoud word in *Carstens* geweier omdat die beginsels van geregtigheid en billikheid by die toekenning, 'n afkeur het waar 'n vrou deur twee mans op dieselfde tyd onderhou word.

Die hof in *Dodo v Dodo* word gevra om 'n bestaande onderhoudsbevel *pendente lite* te verhoog en om 'n bedrag vir gedingkoste bykomstig tot 'n vroeëre bedrag te beveel. Sedert applikante, die huishouding verlaat het, het sy ook haar werk verloor en kan geen ander vind nie en vra sy 'n verhoging vir onderhoud *pendente lite* (80D-E). Respondent staan egter 'n bevel ter verhoging van die onderhoud *pendente lite* teen onder andere op grond dat applikante haar aanspraak op onderhoud verbeur het weens haar gedrag met ander mans (80G, 87F). As gesag vir die verbeuring van die eis vir onderhoud word daar op onder andere *Chamani* en *Carstens* gesteun (88C). Die hof in *Dodo* onderskei die *Chamani*-beslissing. As rede word onder andere aangegee dat in *Chamani* die gemenereg met betrekking tot die voorsiening van onderhoud toepgepas is (88G). Dit het beteken dat die skuldige sy aanspraak op onderhoud verbeur het (sien *Chamani* par 3 2 hironder). Hier word die gemeneregbeginsel met betrekking tot die verlies aan onderhoud nie toegepas nie, maar artikel 7(2) van die Wet op Egskeiding 70 van 1979 (88G-H) en dit bemagtg die hof om ook ander faktore as die gedrag van die partye in ag te neem (88H). Die hof wys daarop dat *Carstens* die onderhoud *pendente lite* afwys omdat dit teen die openbare beleid sou wees om dit toe te staan (88H-I) en dan sê die hof:

> It would appear from the *Carstens'* case *supra* that, in refusing an order for maintenance *pendente lite*, the learned Judge considered that the living together as man and wife, coupled with that man furnishing her with some support, is conclusive or so overriding as to render irrelevant the other factors mentioned in s 7(2).

Hierdie woorde gee, ten spyte van die hof in *Carstens* se uitdruklike woorde dat die afwys van die bevel nie betrekking het op die gedrag of skuld van die applikante nie (353I), te kenne dat die buite-egtelike gedrag as oorheersende negatiewe faktor, die aansoek gekelder het. Alvorens die hof in *Dodo* sy bevinding maak, wys die hof (89B-F) op Hahlo (*supra* (1985) 371); *Swart v Swart* (1980 4 SA 364 (O) 368C-D); en *Singh*, wat almal met betrekking tot onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 aantoon dat "… misconduct may be merely one of many features in which both parties contributed to the breakdown of the marriage, in which event a fair sum may be allowed as maintenance" (*Dodo supra* 89F) Die hof staan die aansoek vir die wysiging van die onderhoudsbevel toe (101G-I), omdat daar gronde vir wysiging aanwesig is en geen stawende bewys vir die onregmatige gedrag voorgelê is nie (90F-G, 91A-B, 91G). Die hof gaan egter verder en sê dat artikel 7(2) aan die hof 'n wye diskresie gee wat inhou dat, desnieteenstaande applikante die huishouding verlaat en met 'n derde

saamwoon, ander faktore wat die erns van die huwelikswangedrag van applikante mag neutraliseer ook in ag geneem mag word (92D-E).

Applikante in *SP v HP* (2009 5 SA 223 (O)) het die huishouding verlaat en doen aansoek om onderhoud *pendente lite*. Sy baseer haar aansoek op die feit dat sy werkloos is en dat vriende by wie sy woon haar onderhou, waarop sy nie meer kan of wil aandring nie (par 3). Respondent staan die aansoek teen (224H-J). Hy voer aan dat applikant die huishouding verlaat het en by haar minnaar ingetrek het en sodoende haar onderhoudsaanspraak verbeur het (parr 5 & 6). Hierdie bewering word bevestig deur `n verslag van 'n maatskaplike werker vir die kinderhof wat beveel het dat die twee minderjarige kinders van die partye in die sorg van respondent se broer geplaas word (parr 6 & 7). Regter-president Musi wys die aansoek om onderhoud *pendente lite* van die hand. As motivering vir hierdie beslissing word *Carstens* as gesag gebruik. Regter-president Musi vermeld dat die aansoek in *Carstens* afgewys is, omdat die hof van oordeel is dat dit teen die beginsels van geregtigheid en billikheid is dat 'n vrou, gelyktydig deur twee mans onderhou word (226C; sien hierbo). Hierdie beswaar teen die toekenning van onderhoud is volgens regter-president Musi "… not so much about the moral turpitude attaching to the illicit cohabitation, but more about the notion of a woman being supported by two men at the same time" (226C-D; sien ook hierbo waar regter Mullins in *Carstens supra* 353I sê: "It is not a question of applying the 'guilt' concept to such an application"). Die toekenning word afgewys omdat dit, anders gestel, teen die openbare beleid of beginsels van geregtigheid en billikheid is dat 'n vrou deur twee mans onderhou word.

Die hof in *SH v EH* (2011 5 SA 496 (OKP)) word genader om 'n onderhoudsbevel ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979. Die beslissing is egter vir onderhoud *pendente lite* ook van belang. Daar is eenstemmigheid dat die huwelik tussen die eiseres en verweerder onherstelbaar verbrokkel het (par 2). Die feite van die saak word ook kortliks weergegee. Die partye is buite gemeenskap van goed getroud. Verweerder verlaat eiseres en die gemeenskaplike huishouding en trek by 'n vriendin in. Ses maande daarna trek die verweerder by 'n ander man in. Hierdie verhouding is tans tien jaar aan die gang (par 6). Eiseres knoop nadat verweerder die huishouding verlaat het 'n verhouding met 'n gesinsvriend aan by wie sy ook tans bly en 'n intieme verhouding mee het (par 7). Die partye bereik 'n skikkingsooreenkoms in Julie 2003 waarin die verweerder onderneem om aan eiseres R3 000.00 onderhoud per maand te betaal. 'n Dag voordat die egskeiding gefinaliseer sou word, word die boedel van verweerder gesekwestreer en al eiseres se bates word ook op beslag gelê (par 9). Haar bates word eers in 2008 aan haar oorgedra (par 9). Intussen het sy niks om van te leef nie en word sy en haar minderjarige seun deur haar vriend en minnaar onderhou (par 11). In 2006 het verweerder ook die eiseresse aanspraak op sy mediese skema laat stop en in 2009 is die eiseres met kanker van haar onderkaak gediagnoseer en behandel wat haar ongeveer R150 000.00 gekos het (parr 12 & 14). In April 2010 bring eisres `n aansoek vir onderhoud *pendente lite* wat geweier is "… on the basis, *inter alia*, that it is unlikely

that the plaintiff will succeed with a claim for maintenance in the court hearing the action" (498H). Met betrekking tot die eis vir onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 voer verweerder twee verweersgronde aan waarvan die belangrike vir die saak onder bespreking is dat dit teen die openbare beleid is om onderhoud toe te ken aan 'n vrou wat deur twee mans onderhou word (vgl par 4). In antwoord hierop sê regter Schoeman (500B-C): "Through a long line of cases dealing exclusively with maintenance *pendente lite*, it has become customary not to award maintenance to a spouse who is living in a permanent relationship with another".

As gesag vir hierdie stelling verwys die hof na drie sake naamlik *Carstens* (500G); *SP v HP* (501A); en *Qonqo v Qonqo* (2010 (FSHC) 107; op 501B van *SH v EH*). *Carstens* en *SP v HP* is direk toepasbaar (sien ook die bespreking hierbo). In *Qonqo,* word die aansoek nie afgewys nie en die rede, volgens *SH v EH* (501C), is omdat daar geen bewys is dat applikante deur haar minnaar onderhou is nie. Aanvullend tot bogenoemde gesag met betrekking tot die toekenning van onderhoud *pendente lite* vermeld die hof in *SH v EH* (par 32):

> Marriage entails that the parties establish and 'maintain an intimate relationship for the rest of their lives which they acknowledge obliges them to support one another, to live together and to be faithful to one another'. [*Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 (3) SA 936 (CC) par 30].

Hierdie woorde regverdig die gevolgtrekking dat onderhoud *pendente lite* onder omstandighede soos in *SH v EH* nie toegeken sou word nie, indien dit vir beslissing gedien het (vir die bespreking van die onderhoudseis ig a 7(2) van die Wet op Egskeiding 70 van 1979, sien par 4 hieronder). Dit is jammer dat *SH v EH* nie *Dodo* as gesag aanhaal dat artikel 7(2) van die Wet op Egskeiding 70 van 1979 'n wye diskresie ook by die vraag na onderhoud *pendente lite* verleen nie (sien die bespreking van *Dodo* hierbo). Daar is by my geen twyfel dat onderhoud *pendente lite* aan die applikante (eiseres) toegestaan sou gewees het, indien *Dodo* toegepas is.

Op appèl in *EH v SH* lewer appèlregter Leach die volgende kommentaar (167E-H):

> Relying on judgments such as *Dodo v Dodo* …; *Carstens v Carstens* …; and *SP v HP* …, it was argued, both in the high court and in appellant's heads of argument, that it would be against public policy for a woman to be supported by two men at the same time. While there are no doubt members of society who would endorse that view, it rather speaks of values from times past and I do not think in the modern, more liberal (…) age in which we live, public policy demands that a person who cohabits with another should for that reason alone be barred from claiming maintenance from his or her spouse. Each case must be determined by its own facts, and counsel for the appellant (…) did not seek to persuade us to accept that the mere fact that the respondent was living with Mr Smith operated as an automatic bar to her recovering maintenance from the appellant. Instead he argued that the

> respondent had failed to prove that she was entitled to a maintenance order in her favour.

Hierdie *dictum* van die Hoogste Hof van Appèl stel dit, nieteenstaande dit 'n *obiter dictum* met betrekking tot onderhoud *pendente lite* is, sonder twyfel duidelik dat dit nie noodwendig teen die openbare beleid is nie om onderhoud *pendente lite* toe te ken aan 'n gade wat die huishouding verlaat het en in 'n buite-egtelike verhouding met 'n minnaar betrokke is. Die standpunt van Sinclair word, myns insiens, hier sonder uitdruklike vermelding deur die Hoogste Hof van Appèl aanvaar en ondersteun.

Ek sluit hierdie paragraaf af en doen dit by wyse van 'n opsomming. Gemeenregtelik is onderhoud *pendente lite* verbeur indien die applikant, die skuldige party was en die gesamentlike huishouding beëindig het. (*Chamani v Chamani supra*). In *Carstens* word die onderhoud ook geweier uit hoofde van die feit dat dit teen die beginsels van geregtigheid en billikheid is dat 'n vrou deur twee mans op dieselfde tyd onderhou word (sien ook *SP v HP*; *SH v EH* hierbo bespreek). Sinclair (*supra* 97-98) kritiseer die gemeenregtelike skuldbeginsel en stel voor dat die wetgewer ingryp en onderhoud *pendente lite* op dieselfde basis as onderhoud ingevolge artikel 7(2) toeken. Laasgenoemde standpunt word vir die eerste keer sonder vermelding in *Nilsson* toegepas (sien ook *Dodo*; *EH v SH* hierbo bespreek). Die mees resente gesag ondersteun die gedagtegang dat die faktore in artikel 7(2) van die Wet op Egskeiding, 70 van 1979, die toekenning *pendente lite* ook moet beheer en onderlê.

3 2 Bydrae tot die Koste van `n Hangende Huweliksgeding Ingevolge Reël 43(1) van die Eenvormige Hofreëls

'n Bydrae tot die koste van 'n hangende huweliksgeding word ingevolge Reël 43(1) van die Eenvormige Hofreëls gemagtig (Spiro 'Contributions towards costs in matrimonial causes' 1948 *SALJ* 421 is van mening dat omdat bydraes ook geëis kan word voordat die huweliksgeding ingestel is, 'n beter benaming bydrae *stante matrimonio* is).

Indien die partye binne gemeenskap van goed getroud is, het beide gades gelyke bevoegdhede met betrekking tot onder andere die beskikking oor die bates van die gemeenskaplike boedel en die bestuur van die gemeenskaplike boedel (A 14 van die Wet op Huweliksgoedere, 88 van 1984). Desnieteenstaande die feit dat artikel 17(1) van die Wet op Huweliksgoedere 88 van 1984, bepaal dat litigasie deur 'n gade teenoor derdes nie sonder die skriftelike toestemming van die ander gade mag geskied nie, is daar geen verbod in die Wet wat huwelikslitigasie tussen gades verbied nie. Hahlo vermeld in hierdie verband die volgende (*supra* (1985) 428):

> Seeing that both spouses have equal powers of disposition, it is, at first blush, difficult to perceive why either of them should ever require a contribution towards costs from the other. However, in fact or in law, one spouse may hold the purse strings. … In this case, she will be entitled to a contribution towards

> her costs, provided, of course, she can satisfy the court that she has a reasonable prospect of success.

In *Carstens* word die aansoek vir onderhoud *pendente lite* afgekeur (sien hierbo par 3 1), maar die aansoek vir tussentydse gedingkoste word egter toegestaan (354F). Die hof is van mening dat "[h]er application for a contribution is in a somewhat different position" (354D). Waarom is die hof van hierdie mening? Die hof verwoord dié mening só (354E-F):

> However, I am prepared to accept in applicant's favour that she may have some patrimonial claim in respect of the assets of the joint estate. The parties were married *in community of property* and there is a house in the joint estate with a net value of about R60 000. I do not feel I should deprive applicant of the opportunity to seek to establish some claim to a share thereof (eie beklemtoning).

Hierdie motivering stem in wese ooreen met die mening van Hahlo hierbo. Die gade getroud binne gemeenskap van goed is geregtig op koste hangende die huweliksgeding omdat die applikant(e) 'n aandeel in die gemeenskaplike boedel het en redelike kans op sukses in die vermoënsregtelike eis in die egskeidingsgeding het. Hy wil haar nie haar eis met betrekking tot 'n aandeel in die gemeenskaplike boedel ontneem nie, desnieteenstaande haar aansoek vir onderhoud *pendente lite* onsuksesvol is.

'n Kostebydrae word as deel van die onderhoudsplig beskou waar die partye buite gemeenskap van goed getroud is (sien oa *Lyons v Lyons* 1923 (TPD) 345 346; *Boezaart & Potgieter v Wenke* 1931 (TPD) 70 83; *Butterworth v Butterworth* 1943 (WLD) 127 129; *Reid v Reid* 770; *Zaduck v Zaduck supra* 80C-D; *Chamani supra* 806D; *Dodo v Dodo supra* 96F; *AM v RM supra* 227H; Spiro *supra* 420; Hahlo *supra* (1985) 428; sien egter *Davis v Davis supra* 114, waar die hof aantoon dat daar 'n belangrike verskil tussen onderhoud en tussentydse koste bestaan en dit skep *prima facie* die indruk dat tussentydse gedingkoste nie deel van die onderhoudsplig is nie. Die eerste indruk word egter later duidelik gestel dat hoewel die logiese basis vir onderhoud en gedingkoste dieselfde is, die toekenning van die een van die ander mag verskil; sien ook *Reid v Reid supra* 770). Die aanspraak op gedingkoste word ook verbeur, indien 'n gade getroud buite gemeenskap van goed sy/haar reg op onderhoud verbeur (sien *Chamani supra* 806H-807A, 808G; *Dodo supra* 97A). Die geldigheid van hierdie standpunt word vervolgens ondersoek.

Die hof in *Carstens* verwys (354F) na *Chamani* waar aanvaar is dat die partye buite gemeenskap van goed getroud was (*Chamani supra* 805D) en die aansoek om tussentydse gedingkoste afgekeur is omdat applikante haar aanspraak op onderhoud verbeur het (*Carstens supra* 354F-G). Hierop antwoord *Carstens* (354G): "This case was decided before the Divorce Act 70 of 197 came into operation. In view of the provision of that Act relating to property rights on divorce, it does not seem to me that the views expressed in *Chamani's* case necessarily still apply".

Hierdie stelling regverdig die gevolgtrekking dat 'n aansoek vir tussentydse gedingkoste nie outomaties verbeur word nie, as onderhoud *pendente lite* verbeur word nie. Onderhoud *pendente lite* mag verbeur word, omdat daar geen redelike vooruitsig op sukses daarvoor in die hoofgeding bestaan nie, desnieteenstaande die onderhoud nie outomaties verbeur word weens die onregmatige verlating van die gemeenskaplike huishouding nie (dit is presies wat in *Chamani* en *Carstens* gebeur het, sien hierbo par 3 1). Wanneer dit kom by tussentydse gedingkoste verander die prentjie, indien die hoofgeding in plaas van of addisioneel tot onderhoud na egskeiding, ook 'n vermoënsregtelike eis bevat. Die fokus is nie alleen op onderhoud nie, maar bevat ook 'n aanspraak op bates. Die bepaling waarna in die Wet op Egskeiding 70 van 1979 in die aanhaling verwys word, is waarskynlik artikel 9 wat verbeuring van vermoënsregtelike voordele beheer. Die hof sou myns insiens ook 'n bevel vir tussentydse gedingkoste toegestaan het waar die eis in die hoofgeding, 'n eis met betrekking tot ouerlike verantwoordelikhede is (sien ook Heaton *South African Family Law* (2010) 189), desnieteenstaande applikante die huishouding onregmatig verlaat het en die alleenoorsaak vir die huweliksverbrokkeling was. Dieselfde beslissing sou ook gehandhaaf word waar die applikante, 'n aansoek om tussentydse gedingkoste bring vir 'n hoofeis by egskeiding ingevolge die aanwasbedelling of herverdeling van bates ingevolge artikel 7(3) van die Wet op Egskeiding 70 van 1979, en die eis vir onderhoud *pendente lite* nie suksesvol is nie.

Hierdie siening word myns insiens in *SP v HP* ondersteun wanneer regter-president Musi daarop wys (par 11) dat desnieteenstaande applikante se aansoek in *Carstens* vir onderhoud *pendente lite* afgewys is, sy wel met tussentydse gedingkoste geslaag het. Die rede hiervoor verwoord hy só (226D-F):

> The rationale for this was that the parties were married **in community of property** and as such the applicant had a share in the assets of the joint estate. It was held that she was entitled to claim such share through the divorce action and for that reason she was entitled to a contribution towards the costs to enable her to pursue her claim. *In casu* the parties are married **out of community of property** and there is no indication on the papers that she is making any claim against the estate of the respondent (eie beklemtoning).

Die aansoek vir tussentydse gedingkoste word gevolglik in *SP v HP* van die hand gewys (par 12) omdat applikante geen hoofeis met betrekking tot vermoënsregte maak nie.

Die gesag hierbo vermeld, toon myns insiens aan dat dit irrelevant is of die partye binne of buite gemeenskap van goed getroud is. Die sukses van die aansoek vir tussentydse gedingkoste berus op die redelike vooruitsig van sukses op die regshulp in die egskeidingsgeding. Dit regverdig verder dat die grondslag van die aansoek vir tussentydse gedingkoste, wat as deel van die onderhoudsaanspraak gesien is waar die partye buite gemeenskap van goed getroud is (par 3 2 hierbo en gesag

daar vermeld), verander is en dat dit op die beskerming van die regshulp in die egskeidingsgeding berus.

4 Onderhoud Ingevolge Artikel 7(2) van die Wet op Egskeiding 70 van 1979

Die hof in *SH v EH* staan vir die eerste keer in ons regspraak, onderhoud aan die eiseres toe, desnieteenstaande die feit dat die eiseres in 'n buite-egtelike verhouding met haar minnaar saamleef (parr 49 & 51; vir 'n opsomming van die feite sien par 3 1 hierbo). Die hof kom tot hierdie beslissing deur op drie aspekte te wys.

Eerstens, verwys die hof na die doelstelling van artikel 7(2) en vermeld dat artikel 7(2) se bewoording nie voorsiening maak dat onderhoud verval wanneer die ontvanger in 'n verhouding verwant aan 'n huwelik met iemand saamleef nie. Dit sal plaasvind wanneer die onderhoudsooreenkoms ingevolge artikel 7(1) daarvoor voorsiening maak (par 31).

Tweedens, skep saambly geen onderhoudsplig *ex lege* nie en die hof verwys (par [33]) dan na *Volks v Robinson* (2005 5 BCLR 446 (KH) parr 55 & 56). Dit bring mee (par 34):

From this decision it is clear that the plaintiff has no right to maintenance from S now or in the future unless they get married. … The plaintiff is adamant that she cannot marry S due to her age and health. It is also clear from her evidence that she cannot earn an income for the same reasons. … The reasons for plaintiff's decision not to marry S are reasonable under the circumstances of the case.

Derdens, verwys die hof na die faktore vermeld in artikel 7(2) en sê dat die faktore nie eksklusief of uitputtend is nie en dat die hof enige ander faktor wat na oordeel van die hof in aanmerking geneem behoort te word, in ag mag neem (par 36). Die hof opper dan die vraag (503I): "Can it be said that the fact the the plaintiff is living with S is determinate of the issue?" Die hof beantwoord die vraag in die volgende woorde (503I-504D):

> When the plaintiff and her son were in dire straits due to the sequestration of the defendant's estate and the subsequent attachment of the plaintiff's property, it was S who supported plaintiff and M when the defendant failed to do so. It is immaterial whether the defendant was unable to support the plaintiff and their son, or whether he was merely unwilling to do so.
>
> [41] Other legislation also makes it clear that the legislature envisaged that a man can be supported by two women. In terms of the provisions of s 8(4) of the Recognition of Customary Marriages Act 120 of 1998, a court dissolving a customary marriage has the powers contemplated in ss 7, 8, 9 and 10 of the Act. This has the effect that with polygamous customary marriages a husband will have the right to be supported by more than one wife, post-divorce, if circumstances demand it. Although it might have been a concept that was unacceptable in a previous dispensation, the concept is not unacceptable today.

> [42] I am of the opinion that in the circumstances of this case it cannot be said that it is against public policy that the defendant should be liable to pay maintenance to the plaintiff; there is no legislative prohibition and I find that there is no general public policy to that effect or moral prohibition.

Die hof maak gevolglik 'n onderhoudsbevel van R2000.00 per maand ten gunste van eiseres (par 48). Eiseres het R5000.00 per maand geëis en selfs dit merk die hof op, sou nie ten volle in haar onderhoudsbehoeftes voorsien nie (504H-I). Omdat die verweerder se boedel onder sekwestrasie is, is hy ook nie in 'n posisie om, volgens die hof, haar meer as die toegekende bedrag te betaal nie (parr 44 & 48). Hoe die tekort aan haar lewensonderhoud aangevul word, word nie vermeld nie, maar dit is nie vergesog om te dink en te meld dat dit deur S aangevul sal word nie, alhoewel hy nie daartoe verplig is nie. Die gevolgtrekking kan gehandhaaf word dat dit nie teen die openbare beleid is nie dat 'n geskeide gade beveel mag word om onderhoud te betaal indien omstandighede dit regverdig, desnieteenstaande die feit dat die ander gade in 'n buite-egtelike verhouding betrokke is en ook deur die minnaar onderhou word.

Die verweerder appelleer egter teen die beslissing en die hof in *EH v SH* staan die appèl toe (parr 15 & 17). Die rede waarom die appèl suksesvol is, word gemaak op `n basiese beginsel wat op onderhoudstoekenning van toepassing is, naamlik die eiseres (of dan die respondent in die appèl) het nie 'n behoefte aan onderhoud bewys nie (parr 13 & 14). Die Hoogste Hof van Appèl het egter nie bevind dat die beginsel soos verwoord in die hof *a quo*, sonder regsbegronding is nie. Inteendeel, daar is stilswyende goedkeuring dat onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 toelaatbaar is, wanneer die eiser in 'n buite-egtelike verhouding met 'n minnaar saamleef en omstandighede die onderhoudstoekenning regverdig (sien die bespreking hierbo par 3 1).

5 Slot

(a) Die beleid met betrekking tot onderhoudstoekenning *pendente lite* het verander. Die gemeenregtelike skuldbeginsel dat die applikant(e) onderhoud *pendente lite* weens onregmatige gedrag verbeur, word deur die meerderheid van resente gesag verwerp. Die sukses van die aansoek berus op die redelike vooruitsig van sukses in die hoofgeding (sien par 3 1 hierbo).
(b) Die standpunt dat die onderhoudsaanspraak, die grondslag vir 'n aansoek vir tussentydse gedingkoste is waar die partye buite gemeenskap van goed getroud is (par 3 2 hierbo en gesag daar vermeld), word ook verander. Die sukses van 'n aansoek vir tussentydse gedingkoste berus op die redelike vooruitsig op sukses van die hoofgeding.
(c) Paragrawe (a) en (b) plaas dus die sukses van beide aansoeke op dieselfde beleid en grondslag.

(d) *SH v EH* bevind vir die eerste keer in ons regspraak dat onderhoud ingevolge artikel 7(2) van die Wet op Egskeiding 70 van 1979 toelaatbaar is, ook as 'n gade in 'n buite-egtelike verhouding met 'n minnaar saamleef. Die hof kom tot hierdie beslissing op grond van onder andere artikel 7(2) wat die hof magtig om enige faktor te gebruik wat na oordeel van die hof in aanmerking geneem mag word (sien par 4 hierbo).

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