**IN DIE HOOGGEREGSHOF VAN SUID-AFRIKA**

**(APPèLAFDELING)**

In die saak tussen:

**ADMINISTRATEUR, NATAL** APPELLANT

**V**

**TRUST BANK VAN AFRIKA BPK** RESPONDENT

Parallel citation: 1979 (3) SA 824 (A)

Coram: Rumpff HR, Jansen AR, Trollip AR, Joubert AR en Trengove AR

Heard: March 5, 1979

Judgment: May 25, 1979

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**UITSPRAAK**

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Case Information

Appèl teen 'n beslissing in die Natalse Provinsiale Afdeling (MOSTERT R). Die feite blyk uit die uitspraak van RUMPFF HR en uit die verslag in 1978 (2) SA 256 (N) .

M L Mitchell namens die appellant: (a) Our law does, or should, allow an action for damages based on negligent misstatement in certain defined circumstances. (b) The respondent made a negligent misstatement, causing the appellant to take certain action and thereby suffer damages. (c) The respondent had a "duty of care" to the appellant in making such statement (misstatement): that the appellant suffered damages in an agreed amount is common cause. (d) The respondent is liable to the appellant upon a proper application of the principles relating to agency on the facts of this case. Since the judgment was given there have been at least two articles in Law Journals dealing with the topic which is the subject of this appeal, namely (a) an article by D B Hutchinson 95 SALJ at 515; (b) an article by G F Lubbe Tydskrif vir Hedendaagse RomeinsHollandse Reg band 41 nr 4, November 1978 at 374 and at least one judgment of the Supreme Court: see Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd1978 (4) SA 901 (N). A claim for damages resulting from a negligent statement is actionable, according to our law of delict, if (a) the person making the statement knew, or ought to have known, that the plaintiff in the circumstances would rely upon such statement; (b) the defendant knew, or ought to have known, that the



plaintiff would suffer damages in consequence of such reliance, should the said statement be untrue; (c) the statement was given for a serious purpose; (d) a relationship between the parties exists in terms of which the defendant intended the plaintiff to rely upon the correctness of the statement, and the plaintiff was entitled to, and did, rely upon and act upon such statement; (e) the plaintiff, as a result of his reliance upon such statement, being false, suffers damages, whether by way of economic loss or otherwise. See Mathews v Young 1922 AD at 504; Van Zyl v African Theatres Ltd 1931 CPD 61; Perlman v Zoutendyk 1934 CPD 151; Fichardt's Motors (Pty) Ltd v Nienaber 1936 OPD 221; Alliance Building Society v Deretitch 1941 TPD 203; Western Alarm System (Pty) Ltd v Coini & Co 1944 CPD 271; Herschel v Mrupe 1954 (3) SA at 472; Currie Motors (Pretoria) (Pty) Ltd v Motor Union Insurance Co Ltd 1961 (3) SA 872; Murray v Mclean NO 1970 (1) SA 133; Bristow v Lycett 1971 (4) SA 223; Scottish Rhodesian Finance Ltd v Taylor 1972 (4) SA 436; Dillon NO v Bentley 1973 (2) SA 452; Latham v Sher 1974 (4) SA 687; SA Bantoe Trust v Ross en Jacobz 1977 (3) SA 184; Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd (supra). In accordance with the dicta in Minister van Polisie v Ewels 1975 (3) SA at 597A and Minister of Police v Skosana 1977 (1) SA at 34G the stage of social and economic development has been reached when it is desirable for this Court to settle and finally determine that, subject to the conditions referred to above, an action based upon a negligent statement causing economic or other loss, should be sustained by our Courts. The English law has long acepted the existence of such a right. Beginning with the dissentient judgment of DENNING LJ in Candler v Crane Christmas & Co (1951) 1 All ER 426;

and culminating in the decision in Hedley Byrne & Co Ltd v Heller and Partners Ltd (1961) 3 All ER 891 this principle is now well-established as part of the English law, and has been applied in the following cases: W B Anderson and Sons Ltd and Others v Rhodes (Liverpool Ltd and Others) (1967) 2 All ER 850 (wholesaler); Ministry of Housing and Local Government v Sharp and Another (1970) 1 All ER 1009 (public official); Mutual Life and Citizens' Assurance Co Ltd and Another v Evatt (1971) 1 All ER 150 (insurance company); Dutton v Bognor Regis United Building Co Ltd and Another (1972) 1 All ER (officer of local authority); Howard Marine and Dredging Co Ltd v A Ogden and Sons (Excavations) Ltd (1978) 2 All ER 1134 (charter of barges). The official of the respondent, on behalf of the respondent, was negligent in stating that the first defendant in the Court a quo was the registered owner of the property in question. The respondent owed the appellant a "duty of care". The Court a quo erred in perfunctorily dismissing the claim of the appellant. The respondent had no authority to contract on behalf of the registered owner of the property, alternatively, he exceeded his authority. See Blower v Van Noorden 1909 TS 890; Claude Neon Lights (SA) Ltd v Daniel 1976 (4) SA 403. The respondent's servant was performing a function equivalent to that of an attorney and should have exercised the same degree of diligence as would be expected of an attorney. See Incorporated Law Society v Kantor 1914 TPD 510. The analogy in the judgment of the Court a quo that the respondent was doing what advocates and attorneys do daily, namely conveying information



to others on behalf of their clients in the form of letters and pleadings, is untenable.

David Gordon SC namens die respondent: (i) In fact the appellant's complaint is that it was induced to conclude an agreement as a consequence of an alleged negligent misrepresentation, which does not give rise to an action according to the principles of our law; (ii) on the facts as set forth in the stated case the actio legis Aquiliae is not available to it; (iii) any misrepresentation or misstatement made by the respondent was not a cause of the appellant's loss; (iv) even if the appeal succeeds the appellant was at fault in relation to the damage it suffered. The essential nature of the appellant's case is that it concluded a contract with a party in circumstances where it intended to contract with another party or parties and has suffered loss by performing its part of the bargain. If it was in fact induced to do so then the true nature of the appellant's case is that it was induced, by reason of a negligent misstatement, to conclude a contract. There is no such action according to the principles of modern South African law. See Hamman v Moolman 1968 (4) SA at 348, 349; Latham and Another v Sher and Another 1974 (4) SA 687; Du Plessis v Semmelink 1976 (2) SA 500.

The actio legis Aquiliae is available to a person, who has suffered pecuniary loss as a consequence of a statement made negligently by another. See Herschel v Mrupe 1954 (3) SA 464; Suid-Afrikaanse Bantoetrust v Ross en Jacobs 1977 (3) SA 184; Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd 1978 (4) SA 901; Price "Aquilian Liability for Negligent Statements" 67 SALJ at 138; 68 SALJ 78. In other common law jurisdictions the necessity to impose some judicial restraint on recovery for economic damage negligently caused has led to a denial of the remedy except where (i) a "special relationship" exists; see Hedley Byrne & Co Ltd v Heller and Partners Ltd 1964 AC 465; or (ii) the parties have a relationship in contract, Ultramares Corporation v Touche and Others 74 ALR 1139; Kessler and Fine "Culpa in Contrahendo" 77 Harvard Law Review at 406, 447 (1964); (iii) it is part of the business of the representor to supply information of the kind supplied for the guidance of others, see Mutual Life Ltd v Evatt 1971 AC at 802; or (iv) consideration of policy require the grant of relief, see Caltex Oil (Aust) (Pty) Ltd v The Dredge "Willemstad" 11 Aust LR 227 (per STEPHEN J at 260); cf Minister van Polisie v Ewels 1975 (3) SA 590. In our law, however, if due weight is given to the essential of "wrongfulness" in damnum iniuria datum there is no necessity to categorise actionable situations. In order to succeed the appellant must establish that Nel's conduct in writing "The registered owner of the above property, Mr P Bijo, has instructed me to negotiate with your Department with regard to the above expropriated land" was wrongful, in the sense that the inaccuracy contained therein invaded some right (i) enjoyed by the appellant; and (ii) recognised by law. In resisting the recognition of the existence of any such right or its invasion by Nel the respondent relies upon the decision in Herschel v Mrupe 1954 (3) SA at 464. For the purpose of this submission it is assumed that the judgments delivered in that case would have contained the same reasoning if Herschel had chosen to sue Mrupe's attorney. There is nothing in morals and good conscience which compels one to the notion that there existed a right in the appellant to rely upon the respondent for information and a duty on the part of the respondent to provide it with care. The risk that the appellant might pay compensation to a person not entitled to receive it was not a danger created by the respondent. Whatever steps the appellant claims the respondent ought to have taken are steps which were available to it and accordingly the appellant was at fault in relation to the damage suffered. Section 1 (1) (a) of the Apportionment of Damages Act 34 of 1956. In this regard portions of the judgment delivered by MOFFITT AJA in Dominion Freeholders Ltd v Aird and Another (1966) 67 SR (NSW) at 162 are pertinent.

Mitchell in repliek.

Cur adv vult.

Postea (May 25).

Judgment

RUMPFF HR: In die onderhawige saak sou die respondent in die Hof a quo en in hierdie Hof kon betoog het dat in ons reg nalatige wanvoorstelling nie as deliktuele eisgrond bestaan nie. Dit het die eksipiënt gedoen in Suid-Afrikaanse Bantoetrust v Ross en Jacobz1977 (3) SA 184 (T). Klaarblyklik onder invloed van oa akademiese aanvoorwerk ná die gewysdes in Perlman v Zoutendyk 1934 CPD 151 en Herschel v Mrupe1954 (3) SA 464 (A) , het die Hof in die Bantoetrust- saak in 'n eksepsiestadium pertinent beslis dat so 'n eisgrond wel bestaan. Die Hof sê dan ook:

> "Ek twyfel of daar 'n enkele akademiese kommentator is wat gekant is teen so 'n aksie".

Die uitdrukking "nalatige wanvoorstelling", wat 'n vertaling van "negligent misrepresentation" is, gee nie wesenlik die probleem in ons reg behoorlik weer nie en skep die indruk van 'n voorstelling in kontraktuele verband. In kontraktuele verband het "wanvoorstelling" 'n ietwat regstegniese betekenis. Dit moet bv 'n voorstelling van 'n bestaande feit wees en behels dus gewoonlik nie die uitspreek van 'n mening of die gee van advies nie. Hierdie vereiste is nie noodwendig van toepassing op 'n "nalatige wanvoorstelling" nie. Miskien moet die uitdrukking "nalatige wanbewering" (negligent misstatement) liewer gebesig word, maar, indien die uitdrukking "nalatige wanvoorstelling" behoue bly, moet bogenoemde caveat in gedagte gehou word.

Die respondent in die onderhawige saak aanvaar nie alleen die bevinding in die Bantoetrust- saak nie maar betoog uitdruklik dat so 'n eisgrond wel in ons reg bestaan en verwys oa na 'n beslissing van die Natalse Hof in Greenfield Engineering Works (Pty) Ltd v NKR Construction (Pty) Ltd1978 (4) SA 901 (N), waarin die bevinding van die Bantoetrust- saak gevolg is. In die Greenfield Engineering- saak word oa verwys na 'n artikel van prof McKerron te 1 van die 1973 South African Law Journal ("Liability for Mere Pecuniary Loss in an Action under the lex Aquilia") en 'n artikel van prof Boberg in die 1972 Annual Survey of South African Law te 131 - 136, waarin sekere gewysdes bespreek word. In die uitspraak word ook na die volgende verwys te 916:



> "See further Pieter Pauw, 'Aanspreeklikheid vir "suiwer vermoënskade" in die Suid-Afrikaanse Reg' De Jure April 1975 at 2 31; Fleming James Jr "Limitations on Liability for Economic Loss caused by Negligence: a pragmatic appraisal' Vanderbilt Law Review vol 25 (1972) at 43 - 58; reprinted in The Journal of the Society of Public Teachers of Law New Series vol XIII No 2 (July 1972) at 105 - 118; Lawson Negligence in the Civil Law (1955) at 29 - 36.
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> The question whether pure economic loss is historically compatibble with the notion of damnum in Roman-Dutch law has been much debated - see, eg, Susan Scott 'Nalatige Wanvoorstelling in die Suid-Afrikaanse Reg' THRHR 1976 at 347; THRHR 1977 at 58, 165; Pieter Pauw 'Weer eens Nalatige Wanvoorstellings' THRHR 1978 at 53".

Soos in die Bantoetrust- saak, gaan dit in die onderhawige geval, wat die feite betref, nie oor die begrip van aanspreeklikheid in die algemeen vir suiwer vermoënskade weens nalatigheid nie, maar oor die spesifieke probleem van vermoënskade veroorsaak deur nalatige wanbewering.

In die onderhawige saak is daar aan die Hof a quo voorgelê 'n aantal feite by wyse van 'n gestelde saak en in die gestelde saak word dit nie ontken nie dat nalatige wanbewering (buite kontraktuele verband) tot verhaalbare vermoënskade aanleiding kan gee. In die uitspraak van die Hof a quo waarteen appellant in hoër beroep kom, is dan ook bevind dat daar wel 'n eisgrond weens nalatige wanbewering bestaan, maar daar is bevind, wat die feite betref, dat die eiser nie kon slaag nie. Die eiser in die saak is nou appellant en daar was wesenlik net een verweerder, die huidige respondent. Die uitspraak van die Hof a quo is te vinde onder Administrator, Natal v Bijo and Another1978 (2) SA 256 (N). Bijo was die eerste verweerder maar omdat vonnis by verstek reeds teen Bijo gegee was, het die Hof a quo na respondent verwys as die verweerder. Vanselfsprekend beroep appellant hom op die stelling dat daar in ons reg vergoeding van vermoënskade weens nalatige wanbewering geëis kan word. Wat die reg betref, is hierdie Hof dus in 'n ietwat eienaardige posisie geplaas. Wesenlik versoek beide partye hierdie Hof om die seël te druk op wat in die Bantoetrust- saak met weinig woorde en geen motivering nie, gesê is.

Ek dink dat dit aanvaar kan word, uit wat verskillende skrywers oor die onderwerp geskryf het, dat die reg op vergoeding van suiwer vermoënskade in sekere beperkte gevalle in die Romeinse reg erken is maar dat dié reg tog verband gehad het met 'n saak of 'n corpus. Dit kan ook aanvaar word dat in die Romeins-Hollandse reg in sekere gevalle vergoeding van suiwer vermoënskade toegeken is wat daarop dui dat Aquiliese aanspreeklikheid oor die Romeinsregtelike grens van saakbeskadiging uitgebrei is. In hierdie verband kan genoem word die uitspraak in Cape of Good Hope Bank v Fischer 4 SC 368, waarin na Voet 20.1.11 en Matthaeus De Auctionibus 1.19.86 verwys word; Van Bynkershoek Obs Tumult 11, 195; Pieter Pauw "Aanspreeklikheid vir Suiwer Vermoënskade in die Suid-Afrikaanse Reg" in De Jure band 1 te 23; J C van der Walt Risiko Aanspreeklikheid uit Onregmatige Daad te 309 (ongepubliseerde proefskrif); prof Price "Patrimonial Loss and Aquilian Liability" 1950 THRHR 87. Hoe ook al die uitsprake van die verskillende Regters in hierdie Hof in Herschel v Mrupe (supra) vertolk word, skyn dit duidelik te wees dat die bestaan van so 'n reg in die Suid-Afrikaanse reg nie deur hierdie Hof verwerp is nie. Die reg is eerder erken. Die onbevredigende toestand wat in ons reg bestaan ná die Herschel- saak, die



verskillende uitsprake van Provinsiale Afdelings sedertdien en die houding van sowel appellant as respondent in hierdie Hof is gegronde redes waarom daar tans 'n uitspraak gegee moet word wat die bestaan van so 'n reg in ons gemeenreg erken of verwerp. Ek is bewus van die volgende aanhaling wat verskyn in die 1974 SALJ te 408:

> "Nor is it desirable for a lower court to embrace the exhilarating opportunity of anticipating a doctrine which may be in the womb of time, but whose birth is distant (per LEARNED HAND J in Spectator Motor Service Inc v Walsh 139 F 2d 809 at 823 (1944))".

In die onderhawige geval duur die geboortepyne reeds so lank dat die tyd aangebreek het om selfs miskien met 'n keisersnee die kind in die wêreld te laat kom. Ek dink dat mens dadelik moet byvoeg dat dit voorspelbaar is dat hierdie kind 'n probleemkind gaan word. Met die nodige liefde, en veral dissipline, kan dit egter 'n nuttige rol in die regslewe speel.

By die ondersoek van hierdie probleem sou mens uitvoerig na die Anglo-Amerikaanse regstelsels kon verwys. Trouens, Susan Scott meld juis in haar artikel oor "Nalatige Wanvoorstelling as Aksiegrond in die Suid-Afrikaanse Reg" THRHR 1977 te 176:

> "Die posisie is duidelik baie onbevredigend en dit is jammer dat die Howe nie meer op die ontwikkeling in die Anglo-Amerikaanse regstelsels gelet het nie".

Dit skep egter 'n probleem. In sy artikel "Aquilian Liability for Negligent Statements" in die 1950 SALJ te 139 verklaar prof Price:

> "In Anglo-American law, where there is as yet no touchstone of liability for patrimonial loss, the matter is one of great confusion. In fact, it is no exaggeration to say that the law is in a deplorable condition".

Vir die wat lief is om sonder enige voorbehoud na die Engelse reg te kyk, is dit ook nuttig om die artikel van prof Price in die 1959 Acta Juridica "Aquilian Liability and the Duty of Care: A Return to the Charge" te 120 te lees. Te 138 verskyn oa die volgende:

> "That great exponent of the common law, Stallybrass, was at pains to remark 'Roman law dispensed with any special duty between the parties. In Roman law there was liability wherever there was damage unjustifiably done. The Roman doctrine, restricted as it was by rules similar to those of contributory negligence and remoteness, provided a simpler and better solution of the problems involved than English law with its reliance upon a duty to take care'.
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> In this the learned author was following the views of Buckland :
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>> 'There is a difference which is apt to be disregarded in comparisons of the two systems. The Roman law had no such tort as negligence. Possibly English law has not, but the discussion ordinarily proceeds on

> the assumption that there is such a tort. In Roman law there was the delict of wrongful damage to property, which might be committed by carelessness'.

To which one might reasonably add that the delict in its final and complete stage of development is committed by the wrongful causing of patrimonial loss of any kind, whether the incidence of that loss arises from physical harm to the person or corporeal property, or otherwise".

In para 5 van sy betooghoofde het appellant aangevoer dat na aanleiding van die beslissings in Minister van Polisie v Ewels1975 (3) SA 590 (A) te 597 en Minister of Police v Skosana1977 (1) SA 31 (A) te 34, die sosiale en ekonomiese ontwikkeling die stadium bereik het wat dit wenslik maak dat hierdie Hof, onderhewig aan voorwaardes genoem in para 4 van die betooghoofde, finaal beslis dat 'n eis gebaseer op nalatige wanbewering wat vermoënskade veroorsaak, erken word. Dan lees para 6 soos volg:

"The English law has long accepted the existence of the right set out in the



previous paragraph hereof. Beginning with the dissentient judgment of DENNING LJ in Candler v Crane Charistmas & Co (1951) 1 All ER 426 (CA) and culminating in the decision in Hedley Byrne & Co Ltd v Heller and Partners Ltd (1963) 2 All ER 575, this principle is now well-established as part of the English law, and has been applied in the following cases: W B Anderson and Sons Ltd and Others v Rhodes (Liverpool) Ltd and Others (1967) 2 All ER 850 (wholesaler); Ministry of Housing and Local Government v Sharp and Another (1970) 1 All ER 1009 (public official); Mutual Life and Citizens' Assurance Co Ltd and Another v Evatt (1971) 1 All ER 150 (insurance company); Dutton v Bognor Regis United Building Co Ltd and Another (1972) 1 All ER 462 (officer of local authority); Howard Marine and Dredging Co Ltd v Ogden and Sons (Excavations) Ltd (1978) 2 All ER 1134 (charter of barges)".

In 'n bespreking van die gewysde in die Bantoetrust- saak supra in die TSAR 1977 (3) verklaar prof J C van der Walt op 273 die volgende:

"Die tweede faktor wat van besondere belang by aanspreeklikheid op grond van nalatige wanvoorstelling is, is die feit dat suiwer finansiële verlies - dit wil sê vermoënsverlies wat nie voortspruit uit 'injury to person or property' nie - dikwels ter sprake is. Veral in die Anglo-Amerikaanse reg is die verhaalbaarheid van sulke vermoënsverlies om regspolitieke redes in beginsel ontken. Die deurbreking van hierdie diepgewortelde Engelsregtelike benadering en beginsel geskied besonder langsaam. Die oergrond vir die skeptisisme wat betref die prinsipiële beskerming van suiwer ekonomiese belange is weer eens die ou liberalistiesindividualisties getoë vrees vir 'n te wye en sware aanspreeklikheid. Fleming (The Law of Torts (1971) te 164) skryf tereg:

> 'Though rarely acknowledged with candour, the factor most strongly against the intrusion of negligence into the sphere of economic interests is the pervasive apprehension that it would involve too heavy and unpredictable a burden on enterprise'.

Die uitspraak in die Hedley Byrne- saak (hierbo) het oënskynlik hierdie beginsel 'n nekslag gegee veral as 'n mens Lord DEVLIN se verwerping daarvan lees (602 - 603):

> 'This is why the distinction is now said to depend on whether financial loss is caused through physical injury or whether it is caused directly. The interposition of the physical injury is said to make a difference of principle. I can find neither logic nor common sense in this... I am bound to say, my Lords, that I think this to be nonsense. It is not the sort of nonsense that can arise even in the best systems of law out of the need to draw nice distinctions between borderline cases. It arises, if it is the law, simply out of a refusal to make sense. The line is not drawn on any intelligible principle'.

Die Hedley Byrne- saak het egter, wat die Engelse reg betref, nie die gemelde 'nonsense' beëindig nie. Dit leef kragtig voort in die Engelse reg en verseker dat nog meer 'nice distinctions' gemaak word (vgl Weller & Co v Foot and Mouth Disease Research Institute (1965) 3 All ER 560; Electrochrome Ltd v Welsh Plastics Ltd (1968) 2 All ER 205; British Celanese Ltd v A H Hunt (Capacitors) Ltd (1969) 2 All ER 1252; SCM (UK) Ltd v Whittal and Son Ltd (1970) 2 All ER 417)".

Ek verwys na die Engelse reg op hierdie wyse omdat dit, vir sover dit beginselomskrywing betref, na my mening nie veel sal help om 'n beroep op die Engelse reg te doen nie, veral gesien ook die verskil tussen ons reg en die Engelse reg tov die oorsprong van die eisgrond. Dat by 'n oplossing van die begrensingsprobleem skere faktore in die Engelse reg in aanmerking geneem word wat ook in ons reg oorweeg sou kon word, val natuurlik nie te ontken nie.

Na my mening kan en behoort die eisgrond in die onderhawige saak in die uitgebreide trefgebied van die lex Aquilia geplaas te word. Hieruit sou volg dat, volgens ons heersende norme, daar onregmatigheid vereis



word en skuld. Die vrees van die sg "oewerlose aanspreeklikheid" kan ook alleen dan besweer word, indien by elke gegewe geval dit die taak van die Hof is om te beslis of daar in die besondere omstandighede 'n regsplig op die verweerder gerus het om nie 'n wanbewering teenoor eiser te doen nie, en ook of die verweerder in die lig van al die omstandighede, redelike sorg uitgeoefen het, onder andere, om die korrektheid van sy voorstelling vas te stel. By afwesigheid van 'n regsplig, is daar geen onregmatigheid nie.

Die Hof sal ook die eisgrond binne redelike perke hou deur behoorlik aandag te gee aan die aard van die wanbewering en die vertolking daarvan en ook deur behoorlik aandag te gee aan die probleem van kousaliteit. Dit gebeur in elk geval ook nie selde nie dat 'n hof gevra word om soortgelyke probleme op te los wat ontstaan uit wanvoorstelling in kontraktuele verband of uit estoppel. Dit is 'n bekende regterlike taak.

Omdat daar in die praktyk, soos in die onderhawige geval, na Engelse beslissings verwys sal word, in verband met sekere situasies wat mag aanleiding gee tot wat ons as 'n regsplig mag beskou, is dit noodsaaklik om aan te toon hoe basies die Engelse begrip van "duty of care", hoewel 'n onding in ons gemene reg tog, in hierdie besondere geval, tot 'n mate aansluiting vind by die opvatting van 'n regsplig soos dit in ons reg behoort te bestaan, omdat beleidsoorwegings ook hier ter sprake kom. Millner, in sy Negligence in Modern Law (1967), verwys te 24 ev na twee elemente van die "duty of care" begrip, nl: "(1) the negligence issue" en "(2) the duty issue". Te 26 verskyn oa die volgende:

> "The duty concept, on the contrary, shows abounding vitality. The key to this paradox is the utility of this concept as a device of judicial control over the area of actionable negligence on grounds of policy. Here the ascertainment of liability is linked to the second of the two elements of duty of care referred to above. This second element is not at all concerned with reasonable foresight;

> it is to do with the range of interests which the law sees fit to protect against negligent violation. It is only when this policy function of the duty of care concept is ignored and the matter examined exclusively in terms of reasonable foresight, that the conclusion that the duty concept is redundant, 'an unnecessary fifth wheel on the coach', is inescapable. Even so, the concept serves in practice as a mode of addressing that part of the negligence issue which is concerned with the risk to the particular plaintiff, and the reasoning of a judgment may be clothed in the language of 'duty', whatever the hidden springs of the decision may be.
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> Divorced from its role as a monitor of policy, the duty of care concept becomes dipensable, and is in fact dispensed with in other systems of law. The Roman law, as Buckland pointed out, made no reference to a precedent duty of care in the Aquilian action, which is a remedy somewhat analogous to the negligence action of the common law. Culpa, unlike negligence, was not defined with reference to a particular person or class. Failure to take that care which a reasonable man, the bonus paterfamilas or paterfamilias diligens, would take, was culpa, and, if damage to property resulted, there was liability (subject only to a causal nexus). This was unlawful damage, damnum injuria datum, and the 'unforeseeable plaintiff' rode home with the rest. Modern civil law still maintains this approach".

Hierdie laaste paragraaf weerspieël ook natuurlik die posisie in ons gemene reg, nieteenstaande die veelvuldige verwysing na die begrip van "duty of care" in ons gewysdes. Die beskouing van hierdie skrywer dat "the unforeseeable plaintiff" saam huistoe gery het, moet gesien word in die lig van die betekenis van daardie uitdrukking in die Engelse reg. Fleming verklaar in The Law of Torts 4de uitg te 136:

> "In short, recognition of a duty of care is the outcome of a value judgment, that the plaintiff's invaded interest is deemed worthy of legal protection against



> negligent interference by conduct of the kind alleged against the defendant. In the decision whether or not there is a duty, many factors interplay: the hand of history, our ideas of morals and justice, the convenience of administering the rule and our social ideas as to where the loss should fall. Hence, the

> incidence and extent of duties are liable to adjustment in the light of the constant shifts and changes in community attitudes".

Ten slotte kan ook met nut vewys word na die minderheidsuitspraak van Lord REID en Lord MORRIS of Borth-Y-Gest in Mutual Life & Citizens' Assurance Co Ltd and Another v Evatt (1971) 1 All ER 150 te 162 waar oa die volgende gesê word:

> "In our judgment it is not possible to lay down hard and fast rules as to when a duty of care arises in this or in any other class of case where negligence is alleged. When in the past Judges have attempted to lay down rigid rules or classifications or categories they have later had to be abandoned".

Natuurlik kan by wyse van eliminasie sekere basiese omstandighede by voorbaat uitgeskakel word as grond vir 'n eis om skadevergoeding weens nalatige wanbewering. So gaan die hierbo genoemde minderheidsuitspraak verder, wat die feite van daardie saak betref, en sê:

> "In this class of case the first principle is that no duty beyond the duty to give an honest answer can arise when advice is given casually or in a social context, and the reason is that it would be quite unreasonable for the enquirer to expect more in such circumstances and quite unreasonable to impose any greater duty on the adviser. The law must keep in step with the habits of the reasonable man and consider whether ordinary people would think they had some obligation beyond merely giving an honest answer.
>
> It may be going too far to say that a duty to take care can only arise where advice is sought and given in a business or professional context, for there might be unusual cases requiring a wider application of this principle. But for present purposes we think that the appropriate question is whether this advice was given on a business occasion or in the course of the appellant company's business activities".

Wat wel in gedagte gehou moet word, is dat in ons reg die aanspreeklikheid weens nalatige wanbewering ter sprake kom as deliktuele aanspreeklikheid, buite kontraktuele verband. Dit is onnodig om te beslis of daar deliktuele aanspreeklikheid binne kontraktuele verband kan wees, vgl Hamman v Moolman1968 (4) SA 340 (A) te 348.

Wat die feite van die onderhawige saak betref, is dit onnodig om die gestelde saak volledig te herhaal omdat dit reeds in 1978 (2) SA 256 (N) gedoen is. Art 9 (1) van Ord 19 van 1945 (N) bepaal dat, wanneer die Administrateur (die eiser) besluit het om enige grond te onteien, hy op die eienaar van sodanige grond 'n kennisgewing van onteiening moet laat dien. Sub-art (2) van art 19 bepaal dat:

> "Elke kennisgewing van hierdie aard moet òf persoonlik op die eienaar bedien òf per aangetekende pos aan hom gestuur word mits die plek waar hy hom bevind geredelik vasgestel kan word".

Dit moet in die onderhawige geval aanvaar word dat die Administrateur, deur sy beamptes, vasgestel het dat "Bijo, colonial born Indian No 8536/8537 of Ottowan, Natal", in 1928 die geregistreerde eienaar van die grond geword het. Dit moet ook aanvaar word dat die beamptes van die Administrateur sonder behoorlike ondersoek bevind het dat "Mr Bijo, 50/52 Russom Street, Verulam", dié mnr Bijo is wat die geregistreerde eienaar was. As gevolg van hierdie nalatigheid is die brief aan "Mr Bijo" gerig wat in Russomstraat, Verulam, woon en daarin word gesê dat hy die geregistreerde eienaar van die grond is. Gewapen met hierdie brief

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het Bijo (in werklikheid P Bijo) na die verweerder gegaan en hom geïdentifiseer as P Bijo van Russomstraat, Verulam. Verweerder word beskryf as 'n maatskappy wat besigheid dryf oa as bankiers en finansiële adviseurs en wat ook deur sy eiendomsafdeling besigheid dryf deur eiendomstransaksies. Volgens die gestelde saak is die funksie van die eiendomsafdeling om op te tree as eiendomsagente maar nie gewoonlik om klante advies te gee in verband met vergoeding weens onteiening nie. Die verweerder erken egter dat ene Nel wat namens verweerder opgetree het in die loop van sy diens opgetree het. Soos gesê, het die eiser self, deur sy beamptes, in die brief aan Bijo voorgestel dat "Bijo" die geregistreerde eienaar is. Verweerder het, nadat hy deur Bijo geraadpleeg is, 'n brief geskryf aan eiser en gesê:

"The registered owner of the above property Mr P Bijo has instructed me to negotiate with your Department with regard to the above expropriated land".

In daardie stadium kan dit aanvaar word dat verweerder voorsien het dat as gevolg van sy vertoë en bemiddeling daar uiteindelik 'n bedrag aan Bijo uitbetaal sou kon word. Die eerste vraag wat ontstaan, is of daar 'n regsplig was wat op verweerder die las gelê het om nie in sy brief aan eiser na P Bijo as die geregistreerde eienaar van die grond te verwys nie. Dit is duidelik dat Bijo verweerder as agent gebruik het om te onderhandel. In die onderhawige geval het eiser self skriftelik beweer dat Bijo aan wie die brief geregistreer is die geregistreerde eienaar was. Verweerder moes klaarblyklik hierdie brief gesien het en het dus aanvaar dat eiser erken dat Bijo, wat die brief ontvang het, die geregistreerde eienaar was. Wat verweerder gedoen het, was bloot om sy klant te identifiseer en om te herhaal wat eiser self skriftelik verklaar het. Al sou verweerder egter nie die brief van eiser aan Bijo gesien het nie en slegs op mondelike voorstelling van Bijo opgetree het, sou die bewering in verweerder se brief dat P Bijo die geregistreerde eienaar is, nietemin slegs 'n bewering wees ter identifikasie van sy klant. Verweerder kon nooit droom (laat staan nog redelikerwyse verwag) dat eiser, op wie die statutêre plig gerus het om vergoeding te betaal aan die geregistreerde eienaar, nie behoorlik sou vasstel wie die geregistreerde eienaar is nie. Dit skyn my duidelik te wees dat verweerder slegs as agent vir onderhandelingsdoeleindes opgetree het en in geen ander hoedanigheid hoegenaamd nie. Dit is natuurlik waar dat verweerder 'n fout begaan het maar, in die besondere omstandighede van die onderhawige saak, waar daar mi geen regsplig op verweerder om nie 'n onjuiste bewering aangaande wie die geregistreerde eienaar was, aan eiser te doen nie. Selfs as sou verwag gewees dat verweerder redelike stappe moes doen om vas te stel of sy bewering korrek was, is dit nog mi vergesog van eiser om te verwag dat 'n hof moet bevind dat verweerder na die Akteskantoor moes gaan (en in hierdie geval ook nog verdere stappe moes doen) om vas te stel of sy klant wel die geregistreerde eienaar is. In die onderhawige saak sou enige redelike persoon in die posisie van verweerder immers verwag dat eiser nie die fout sou begaan om vergoeding aan te bied aan iemand wat nie die geregistreerde eienaar is nie en enige redelike stappe wat verweerder moes gedoen het, moet beoordeel word in die lig van daardie feit. Daar is ook nog 'n opmerklike omissie in die gestelde saak. Tevergeefs soek mens 'n bewering (wat erken sou moes gewees het) dat eiser die bedrag aan P Bijo uitbetaal het

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as gevolg van die bewering wat verweerder in sy brief aan eiser gedoen het. Klaarblyklik is die uitbetaling nie gedoen weens wat in verweerder se brief verskyn nie, maar weens die fout wat eiser oorspronklik begaan het om mnr Bijo van 50/52 Russomstraat, Verulam, te beskou as die geregistreerde eienaar. Die appèl word afgewys met koste.

JANSEN AR, TROLLIP AR, JOUBERT AR en TRENGOVE AR het saamgestem.

Appellant se Prokureurs: Adjunk-Staatsprokureurs, Natal en Bloemfontein. Respondent se Prokureurs: Wartski, Greenberg & Vennote, Durban; E G Cooper & Seuns, Bloemfontein.