# NOTES / AANTEKENINGE

# VALUE (X 2) + FINE = DAMAGES? NOTES ON THE IMPOSITION OF SANCTIONS BY THE COURTS OF CHIEFS (SENIOR TRADITIONAL LEADERS) AND HEADMEN

## 1 Introduction

The main *fora* for the adjudication of customary-law cases on a daily basis are the courts of chiefs (senior traditional leaders) and headmen (the so-called traditional courts) which were given recognition by the Black Administration Act (38 of 1927; and Koyana "Customary Law and the Role of Customary Courts Today" 1997 *Consultus* 126 127). Section 12 of the Act conferred civil jurisdiction on designated chiefs (or senior traditional leaders) and headmen to hear cases arising out of Black law and custom, whereas criminal jurisdiction was regulated by section 20 of the same. It is the purpose of this note to consider the jurisdiction of these courts in so far as it relates to their judgments, or, in other words, the imposition of sanctions or orders. This will be followed by a consideration of the orders or sanctions that may be given by traditional courts in terms of section 10 of the Traditional Courts Bill ([B1–2012]). The note will be concluded by a discussion of the nature of customary sanctions, taking into account the current (official) law, proposed law (in terms of the Traditional Courts Bill) as well as the living law.

For purposes of the discussion, the imposition of sanctions by courts with civil jurisdiction will be emphasized and used as examples. To reflect the living law, regard will be had to a number of case studies compiled by Prof FA de Villiers, former professor of law at the University of the Western Cape (information obtained from and used with permission of the researcher). The case studies were recorded from official reports of chiefs' court judgments from 1995-2004 of the BaNkuna traditional authority to the Magistrates' Court with concurrent jurisdiction, Limpopo Province (reports in terms of R 6 of *GG* 1929 GN R2082).

## 2 Applicable legislation

The Black Administration Act was promulgated in 1927 with a view to firstly establish a national system for the recognition and application of customary law, and secondly, for the creation of a separate court system for Blacks (Bekker "Court Structure and Procedure" in Joubert (founding ed) *LAWSA Vol 32* 2ed (2009) par 246). The special courts were abolished in 1986 (in

terms of the Special Courts for Blacks Abolition Act 34 of 1986), with the retention of the courts of chiefs and headmen as courts of first instance.

The Black Administration Act was substantially repealed by the Repeal of the Black Administration Act and Amendment of Certain Laws Act (28 of 2005), leaving intact the provisions that regulate the courts of chiefs and headmen, pending the enactment of replacement legislation by Parliament by 31 July 2006 (Himonga and Manjoo "The Challenges of Formalisation, Regulation, and Reform of Traditional Courts in South Africa" 2009 *Malawi LJ* 157). In the absence of the passing of relevant legislation, the Repeal of the Black Administration Act and Amendment of Certain Laws Act was amended in 2012, further postponing the date for the promulgation of new legislation (Repeal of the Black Administration Act and Amendment of Certain Laws Act 20 of 2012). Thus, sections 12 and 20 of the Black Administration Act, regulating the civil and criminal jurisdiction of the courts of chiefs (senior traditional leaders) and headmen respectively, remain in force. In the interim, the Traditional Courts Bill ([B15–2008]) was drafted, withdrawn from the National Assembly on 2 June 2011 after several concerns were expressed at public hearings and by the press, and introduced in the National Council of Provinces. It was replaced by a revised version of the Bill (Traditional Courts Bill [B1–2012]). The latter was also withdrawn, and finally referred back to the provincial legislatures for their approval (on 15 October 2013. See Media alert "Victory for rural people as majority of provinces oppose Traditional Courts Bill, yet Parliament sends it back for more 'consultation'" http://www.cls.uct.ac.za (accessed 2014-06-11)). The respective Bills failed for various reasons, a discussion of which falls outside the scope of this note. It suffices to say that barring a few provisions relating to the imposition of sanctions, the main criticism relates to issues of *inter alia* consultation with key stakeholders, female representation in the courts, legal representation, tribal boundaries, access to justice, appeals, segregation of justice and the power of traditional leaders (see, eg, Ntlama and Ndima "The Significance of South Africa's Traditional Courts Bill to the Challenge of Promoting African Traditional Justice Systems" 2009 *International Journal of African Renaissance Studies* 6; Gasa "The Traditional Courts Bill: A Silent Coup?" 2011 *SA Crime Quarterly* 23; Weeks "The Traditional Courts Bill: Controversy Around Process, Substance and Implications" 2011 *SA Crime Quarterly* 3; "The Traditional Courts Bill: Regulating Customary Courts in Line with Living Customary Law and the Constitution" 2011 *SA Crime Quarterly* 31; "Regulating Vernacular Dispute Resolution Forums: Controversy Concerning the Process, Substance and Implications of South Africa's Traditional Courts Bill" 2012 *Oxford University Commonwealth LJ* 133; and Williams and Klusener "The Traditional Courts Bill: A Women's Perspective" 2013 *SAJHR* 276).

Although the Bill has been withdrawn, for purposes of this note its relevance lies firstly in the wide discretion given to the traditional courts in imposing an appropriate sanction; and secondly an observable distinct move towards reconciliation and restorative justice which will potentially not only enhance the well-being of the parties concerned, but ideally also repair community relations damaged by the underlying dispute (Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 18).

In terms of current legislation (s 12(1) of the Back Administration Act) courts with civil jurisdiction may only apply customary law to claims arising out of Black law and custom, with no limitation on the quantum or monetary value of a claim (Bennett *Customary Law in South Africa* (2004) 144). The court may, however, not order the nullity, dissolution or separation of civil and customary marriages (read with s 1 of the Recognition of Customary Marriages Act 120 of 1998). It may adjudicate on any matter arising prior to the dissolution of a customary marriage (s 8(5) of the Recognition of Customary Marriages Act). Moreover, a traditional leader may mediate in a dispute relating to a customary marriage (in terms of s 8(5) of the Recognition of Customary Marriages Act).

In the case of traditional courts with criminal jurisdiction (s 20(1) of the Black Administration Act), punishment that involves death, mutilation, grievous bodily harm, imprisonment, the imposition of a fine in excess of R100, or two head of large stock or ten head of small stock, or corporal punishment is not sanctioned. Bennett (*Customary Law in South Africa* 145) comments that these limitations on the courts' jurisdiction are in compliance with the constitutional imperatives of punishment that is not "cruel, inhuman or degrading" (s 12(1)(e) of the Constitution of the Republic of South Africa, 1996).

The powers of sanctions conferred upon traditional leaders as presiding officers of the 2012 Traditional Courts Bill are extensive. Sanctions in terms of both civil and criminal jurisdictions are listed in clause 10 of the Bill (clauses 10(2)(a)–10(2)(l)), and include the following:

- a fine, sounding in money, not exceeding the amount set by the Minister from time to time by notice in the *Gazette*;
- an order, expressed in monetary terms or otherwise, including livestock, which either effects a settlement between the parties an order of court; payment of damages in respect of any proven financial loss to a party, or to an appropriate body or organization; and payment of compensation to a party;
- an interdict;
- an order for an unconditional apology;
- an order compelling the accused or defendant to make progress reports to the court regarding compliance with any condition imposed by the court;
- a referral to the National Prosecuting Authorities for the possible institution of criminal proceedings;
- an order for unpaid service by one of the litigants, both or any other person, under supervision for the benefit of the community;
- an order that one of the litigants, both or any other person performs service or provides some benefit to a specified victim/victims;
- an order depriving the accused or defendant of any benefits that accrue in accordance with custom and customary law;

- an order of discharge, coupled with a caution or reprimand in the case of a criminal dispute;
- an order which constitutes a combination of any of the above, except where the matter is referred to the National Prosecuting Authority, in which case its decision will prevail; and
- any other order the traditional court deems appropriate and which is consistent with the provisions of the Bill.

Specific limitations are placed on the imposition of criminal sanctions in that the court may not impose inhumane, cruel or degrading punishment; any form of detention and imprisonment; banishment from the community; a fine in excess of an amount determined by the Minister from time to time in the *Gazette*; or finally, corporal punishment (clause 10(1) of the Bill). There is a similar limitation placed on the monetary ceiling of a fine levied in the case of civil disputes, but not for any of the other sanctions listed.

## 3 Legislation unpacked

### *3 1 Black Administration Act*

It is clear that the absence of a monetary ceiling for both civil claims and sanctions in terms of current official law (Black Administration Act) seems inappropriate when considering that the courts may adjudicate disputes with substantial financial implications (Bennett *Customary law in South Africa* 144). This is compounded by the prohibition of legal representation in the courts of chiefs (senior traditional leaders) and headmen. In Discussion Paper 82 (*Traditional Courts and the Judicial Function of Traditional Leaders* Project 90 (1999) ix) the South African Law (Reform) Commission raised the issue whether the monetary jurisdiction of courts of chiefs and headmen should continue to be unlimited. It was pointed out that in the past claims arising out of customary law did not involve a lot of money, whereas inflation and other factors have meant that at that time some claims run into thousands of rand (Discussion Paper 82 *Traditional Courts and the Judicial Function of Traditional Leaders* 25–26). There were a number of responses to the Discussion Paper on this matter, reflected in the Commission's *Report on Traditional Courts and the Judicial Function of Traditional Leaders* (Project 90 (2003)). Koyana and Bekker submitted that customary courts should continue to have unlimited monetary jurisdiction as this had not created problems in the past. They argued that "[i]n traditional courts the monetary value of a claim is hardly ever material. For instance, in the claim for damages for adultery the fine in the Eastern Cape is five head of cattle" and that should have nothing to do with the monetary value of the beasts (*Report on Traditional Courts and the Judicial Function of Traditional Leaders* 15–16). Also Mqeke opposed a monetary ceiling on the civil jurisdiction of customary courts on similar grounds. He argued that it would be difficult to put a monetary ceiling as the value of livestock differs from area to area. Moreover, in matters of seduction and pregnancy a chief was considered competent to award damages fixed by the custom of the tribe in

question (*Report on Traditional Courts and the Judicial Function of Traditional Leaders* 16).

The Commission considered the above reasoning as problematic. It pointed out that the number of animals payable was fixed at a time when ordinary people normally held large numbers of cattle, but that the scarcity of cattle nowadays has made such payments more burdensome (*Report on Traditional Courts and the Judicial Function of Traditional Leaders* 16).

On the other hand, some respondents submitted that courts of chiefs and headmen should have the same monetary ceiling as Small Claims Courts. However, traditional leaders objected to the suggestion that their jurisdiction be equated with that of Small Claims Courts in civil matters on the ground that the ceiling is too low. Nevertheless, at the workshops with traditional leaders in the provinces, there was general agreement that a monetary ceiling be imposed in civil cases although no amount was agreed upon (*Report on Traditional Courts and the Judicial Function of Traditional Leaders* 16). Thus, when taking into account the price tag of cattle and other large livestock, often the subject-matter of civil claims or sanctioned as customary fines, a realistic, reasonable limitation on the quantum of a claim or sanction imposed, as the case may be, seems more appropriate.

In its draft Bill on traditional courts the South African Law (Reform) Commission recommended the imposition of a ceiling, but left the decision to the Minister to determine the ceiling from time to time (*Report on Traditional Courts and the Judicial Function of Traditional Leaders* 17). Thus, in clause 8(1) of the draft Bill a court of chiefs and headmen may not hear a matter in which the claim or the value of any article claimed exceeds an amount to be determined by the Minister by notice in the *Gazette*, and clause 8(2) allows for the variation of the maximum amount by the Minister from time to time as circumstances require.

In the case of courts with criminal jurisdiction, current official law (Black Administration Act) the maximum fine to impose is R100. Although the South African Law (Reform) Commission in its project on *Traditional Courts and the Judicial Function of Traditional Leaders* raised the matter specifically during provincial workshops, no consensus emerged as to an appropriate amount. Suggestions of a monetary ceiling in criminal matters ranged from R1 000 to R10 000. However, considering the nature of the offences in respect of which the courts have jurisdiction, as well as the level of poverty in rural areas, the Commission considered an amount of R500 as a reasonable ceiling (*Report on Traditional Courts and the Judicial Function of Traditional Leaders* 25).

There is also no correlation between maximum fines of R100 and two head of large stock or ten head of small stock as alternatives. In this regard the provisions of the Black Administration Act are outdated and thus inappropriate. The South African Law (Reform) Commission also considered the determination of the equivalent in money of stock if the payment of fines in the form of stock is to continue to be permissible. In submissions to the Commission it was, for example, suggested that a goat should be valued at R200, a sheep at R300 and a large beast at R1 000 (Limpopo Province. See *Report on Traditional Courts and the Judicial Function of Traditional Leaders*

25). Taking into account inflation and an increase in the cost of living twelve years later, these amounts are to date arguably even higher.

### *3 2 Traditional Courts Bill*

When considering the orders and sanctions contained in the Traditional Courts Bill, it is obvious that the prohibited sanctions in the case of a criminal dispute resemble those contained in section 20 of the Black Administration Act. These appear constitutional and consistent with legislation, such as the Abolition of Corporal Punishment Act (33 of 1997; and Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 19).

To its credit, the Bill makes provision for both reparative and compensatory damages (Weeks 2012 *Oxford University Commonwealth LJ* 149). This is in line with its object of affirming "the values of the traditional justice system, based on restorative justice and reconciliation" (clause 2(a) of the Traditional Courts Bill). This is evidenced by clause 10(2)(b), which sanctions a settlement between the parties to the proceedings (clause 10(2)(b)(i)), the payment of compensation to a party (clause 10(2)(b)(ii)), the payment of damages in respect of a proved financial loss (clause 10(2)(b)(iii)), or the payment of damages to an appropriate body or organization (clause 10(2)(b)(iv)), rather than to the chief (senior traditional leader) or the court. Weeks opines that ideally these orders of a monetary value should be restricted to amounts that are in reasonable proportion with income levels in rural areas (2011 *SA Crime Quarterly* 36). This is, however, in conflict with the provision that damages should be awarded in respect of a *proven financial loss* (my own emphasis). Arguably, Weeks's argument should similarly apply to orders effecting the payment of livestock. However, this is complicated by payments in terms of custom, where often a specific number of cattle is payable, for example three to five head of cattle for adultery, irrespective of the defendant's financial status (see par 4 2 below).

The customary value of reconciliation is further affirmed by the provisions of clause 10(2)(d), which provides for an order of an unconditional apology. By analogy, this seems consistent with the adjudicative competence of Equality Courts as envisaged by the Promotion of Equality and Prevention of Unfair Discrimination Act (4 of 2000; and see Ntlama and Ndima 2009 *International Journal of African Renaissance Studies* 19). Moreover, it resembles the medieval remedy of the *amende honorable*, a remedy of apology by a defendant in a case of defamation (Mukheibir "*Ubuntu* and the *amende honorable* – A Marriage between African Values and Medieval Canon Law" 2007 *Obiter* 583). With this remedy a potential defendant does not face financial ruin in the exercise of his right of freedom of expression, and at the same time his apology restores the dignity of the plaintiff. This, Mukheibir notes, is fully compatible with African restorative justice and the notion of *ubuntu* (Mukheibir 2007 *Obiter* 587).

Of concern are the following sanctions, for the reasons discussed below.

The Traditional Courts Bill is silent on the implications of the payment of a fine (in civil and criminal cases). It is assumed that in civil disputes the fine would be payable to the person/s designated by custom and customary law

to benefit from it. The same could apply in criminal cases where the victim/s of the offence benefits/benefit from the payment of the fine. This is compatible with the notion of restorative justice. Should the fine not be payable to the victim/s of the criminal offence, the question is where monetary fines should be deposited and how it should be used. In this regard clause 19 of the draft Bill of the South African Law (Reform) Commission provided that (1) the court must keep a special account into which all fines paid to the court must be deposited; and (2) money from an account established under (1) must be used for the development of the area over which the court has jurisdiction. Neither Bill deals with the question as to what would happen to livestock paid as a fine in criminal cases.

In the case of a criminal dispute, a traditional court may not order banishment from a traditional community (clause 10(1)(b)). However, banishment is not prohibited as a sanction in the context of civil claims. This omission is inexplicable. Thus, an order depriving the defendant "of any benefits that accrue in terms of customary law and custom" (clause 10(2)(i)) could be interpreted to mean the loss of community membership (Weeks 2012 *Oxford University Commonwealth LJ* 150; and 2011 *SA Crime Quarterly* 36) or even the loss of land rights (Weeks 2012 *Oxford University Commonwealth LJ* 150). In terms of customary law a right to land (for example, for residential and arable purposes) could be terminated by the traditional leader, in consultation with the council of elders, for public purposes or as a result of the commission of a serious offence (Olivier "Land tenure" in Joubert (founding ed) *LAWSA Vol 32* 2ed (2009) par 45). To prevent such an invasive sanction where access to land is a scarcity, it would have to be excluded legislatively. However, the possibility still exists that "benefits that accrue in terms of customary law and custom" may be interpreted to mean the deprivation of access to and use of communal land.

Of further concern are the provisions that "one of the parties to the dispute, both parties or any other person" performs some form of free community service (clause 10(2)(g)) and "one of the parties to the dispute, both parties or any other person" performs some form of service or provides a benefit to a specified victim/s (clause 10(2)(h)). Although the latter sanction seems restorative in nature, there is no justification for ordering "any other person" to render his/her services or benefit to the victim. Moreover, in the case of both clauses 10(2)(g) and (h) the sanctions of service are not accompanied by a time limit. In clause 23 of its draft Bill the South African Law (Reform) Commission provided for a limited period of three months, and also prohibited the community service to include service on the personal property of a traditional leader or other public official (*Report on Traditional Courts and the Judicial Function of Traditional Leaders*). The latter limitation prevents an abuse of powers by traditional leaders to have their subjects labour on their property.

## 4 Customary-law sanctions

What follows is a brief exposition of the sanctions imposed by customary law for civil wrongs as reflected in academic writings.

### *4 1 Seduction*

The sanction imposed for the defloration of an unmarried woman usually consists of one beast. The obligation to deliver the beast has been described by the courts as "punishment" and not as "damages" (Bekker "Law of Delict" in Joubert (founding ed) *LAWSA Vol 32* 2ed (2009) par 147). Moreover, in several traditional communities seduction requires the additional payment of a ritual beast, the "virginity" or *ngquthu* beast payable to the girl's mother to signify the loss of virginity (Bennett, Mills and Munnick "The Anomalies of Seduction: A Statutory Crime or an Obsolete, Unconstitutional Delict?" 2009 *SAJHR* 330 338).

### *4 2 Adultery*

In the south-eastern parts of South Africa (amongst the Nguni groups) three head of cattle are claimed for adultery, and five for adultery and an ensuing pregnancy. For other groups the sanction is determined by the courts (Bekker *LAWSA* par 165; and Labuschagne and Van den Heever "Liability for Adultery in South African Indigenous Law: An Analysis of the Case Law" 1999 *CILSA* 98 117–118).

### *4 3 Damage to property*

#### 4 3 1 Damage caused by persons

There is no uniformity amongst the various ethnographic groups in the imposition of a sanction for damage caused by persons. However, damage to public property is generally considered as a crime, whereas damage caused to private property gives rise to the sanctions of restitution or damages (actual damage suffered). For intentional causation of damage the damages payable are generally accompanied by an additional penalty (Labuschagne and Van den Heever "Aanspreeklikheid vir Saakbeskadiging in die Inheemse Reg" 1997 *Tydskrif vir Regswetenskap* 133 134–135 and 144).

#### 4 3 2 Damage caused by animals

As a general rule actual damages are claimed for damage caused by animals (Bekker *LAWSA* par 175, 177 and 178).

### *4 4 Defamation*

There are various forms of defamation in customary law, with no uniformity in the sanction imposed. However, research has shown that amongst some groups (Northern Sotho and Xhosa) a fine is payable to the chief (Labuschagne and Van den Heever "An Ethnographical Survey of Defamation in South African Customary Law" 1998 *Obiter* 294 295 and 301). Should the fine be an animal, amongst the Ndebele it is slaughtered and both the plaintiff and defendant are invited to a reconciliation meal with the

members of the court (Labuschagne and Van den Heever 1998 *Obiter* 302), or the slaughter-animal is used for purification (amongst the Zulu; and see Labuschagne and Van den Heever 1998 *Obiter* 301). Amongst the Southern Sotho the defendant is usually ordered to make a public apology and is severely reprimanded by the court (Labuschagne and Van den Heever 1998 *Obiter* 298). Labuschagne and Van den Heever compare this sanction of a public apology to the *amende honorable* of Roman-Dutch law (1998 *Obiter* 298; and see also par 3 above).

### *4 5 Theft*

In customary law the theft of cattle constitutes both a crime and a delict, whereas the theft of other goods gives rise to a delict only. In the case of theft of cattle a sanction of twice (or more) the value of the stolen cattle is imposed. In many cases an additional fine is levied. In the case of the theft of other goods, the thief must repay twice (or more) the value of the stolen goods (Bekker *LAWSA* par 187).

## 5 Case studies

The following examples are illustrative of official reports of particulars of claim and defence, as well as judgments made by chiefs' courts of the BaNkuna traditional authority in the Limpopo Province (referred to in par 1 above; and the names of plaintiff and defendant, as well as the date of adjudication, are omitted). These cases constitute examples of a collection of 94 judgments recorded, the particulars of which in several cases correspond to a large extent.

The extracts utilized have not been edited linguistically. The identity of all litigants and the presiding chief is protected.

### *5 1 Delictual claims*

#### 5 1 1 Damage to animals

**Particulars of claim**: His dogs killed two of my calves. I want R500 each.

**Particulars of defence**: I agree. I'll give him R1000 but he must give the calves so that I eat them.

**Judgment**: Pay R1000 for two calves and R100 fine.

This is an example of a sanction combining damages and a monetary penalty.

#### 5 1 2 Damage to property (other than animals)

**Particulars of claim**: My dog killed his goat and he charged me a goat. Now his goat ate my mealies in my land. I want R600.

**Particulars of defence**: I pay him.

**Judgment**: Come and pay R600 for M [plaintiff], a goat as a fine and R100 order.

This is an example of a sanction combining damages, a fine in the form of livestock, as well as an amount for "opening" and "closing" the case.

#### 5 1 3 Accusation of witchcraft

**Particulars of claim**: She pointed me as a witch.

**Particulars of defence**: I did it ignorantly. I apologise.

**Judgment**: Pay R500 for apology, R100 court fine and R10 order. Never repeat.

This is an example of what constitutes satisfaction (but not expressed as such), a fine payable to the court, an amount for "opening" and "closing" the case, as well as a reprimand.

### *5 2 Marital claim*

#### 5 2 1 Dissolution of marriage and return of *lobolo*

**Particulars of claim**: My wife left me for no reason. I paid R1000 for lobola. We have no child.

**Particulars of defence**: I'm tired. I'm divorcing him.

**Judgment**: Marriage dissolved. Refund his R1000 and pay R100 fine and R10 order.

This is an example of a sanction combining an order of restitution, the payment of a court fine as well as an amount to "open" and "close" the case. The court does not have the jurisdiction to dissolve a marriage. However, it may make a declaratory order to confirm that the marriage has previously been dissolved.

### *5 3 Contractual claim*

**Particulars of claim**: He owe me the sum of R2 200. He paid R150 and he still owes me R2 050.

**Particulars of defence**: I admit. I'll pay R100 every beginning of the starting in March month.

**Judgment**: Pay R100 every month, R100 court fine and R10 order.

This is an example of a sanction combining a settlement order, a court fine and an amount to "open" and "close" a case.

### *5 4 Criminal matter*

**Particulars of claim**: He come to my home and said I stole his cow. He refused to go to the Induna's Court and said he wants to come to the Hosi's Court.

**Particulars of defence**: I don't want to talk to this man I will bewitch him.

**Judgment**: Stock theft and witchcraft is tried by the court of law. We refer it to the police.

This is an example of a sanction where the case is referred to the South African Police Services for investigation because the court lacked jurisdiction.

### *5 5 Order coupled with progress report*

**Particulars of claim**: She quarrelled with her children and she ran to her parents.

**Particulars of defence**: My children promise to kill me that is why I ran away.

**Judgment**: [To husband] Send people to collect your family. After three months come back to me to feed me back of the condition.

This is an example of a sanction which appears to be an order directing that specific steps be taken to stop or address the conduct being complained of, combined with an order of a progress report.

## 6 Nature of customary-law sanctions

When considering the sanctions imposed for civil wrongs, as well as the judgments in the case studies above, the following conclusions regarding the nature of sanctions in customary law can be drawn.

Firstly, there is a perception that customary law does not distinguish between the law of delict and criminal law (Hoctor "Comparing Criminal Law Rules: A Role for Customary Law Concepts?" 2006 *Fundamina* 168 170). Thus Bekker points out that, generally speaking, damages for civil wrongs "are in fact usually fines or penalties fixed by custom or usage" and "once the wrongful conduct has been proved, the prescribed fine or penalty is normally awarded as a matter of course" (*Seymour's Customary Law in Southern Africa* 5ed (1989) 345). The perception is furthermore strengthened by the imposition of damages and a fine in one and the same dispute (see, eg, par 5 1 2 above). This is reflected not only in official customary law (see, eg, par 4 5 above), but also in the living law (see, eg, par 5 1 2 above). Moreover, clause 10(2) of the Traditional Courts Bill does not differentiate between the sanctions to be imposed in the case of both civil and criminal disputes (par 3 2 above). However, Hoctor points out that in customary law there is a presence of "pure criminal-law cases" such as contempt of the ruler, as well as "pure civil-law cases" such as seduction (2006 *Fundamina* 170). Moreover, custom and customary law on this issue

differ from one ethnographic group to another. Amongst the Venda, for example, there is a sharp distinction made between criminal offences and civil cases (Labuschagne and Van den Heever "Die Oorsprong van en die Onderskeid tussen die Fenomene Misdaad en Delik in Primigene Regstelsels" 1991 *Obiter* 80 89).

Secondly, it seems as if the chiefs (senior traditional leaders) and headmen have yet to develop a scientific theory regarding the sanctions available for civil wrongs. Consequently there is not much information on the nature and scope of delictual sanctions in customary law (Labuschagne and Van den Heever "Deliktuele Remedies in die Inheemse Reg" 1993 *TSAR* 561 563). However, the question is whether a scientific theory is in fact needed, considering the generalized, concrete and pragmatic nature of customary law itself.

Thirdly, in the customary law of delict there seems to be no clear distinction between patrimonial (special) damages and satisfaction in so far as these relate to a specific action (special damages in the case of the *actio legis Aquiliae* and satisfaction in the case of the *actio iniuriarum* in South African common law; and see Labuschagne and Van den Heever 1993 *TSAR* 563). That is not to say that customary law does not recognize conduct which is subject to satisfaction as an actionable wrong (see in this regard the customary delict of defamation in par 4 4 above).

In the fourth place, it appears as if the delictual sanctions in customary law have a (partly) punitive function (Labuschagne and Van den Heever 1993 *TSAR* 564; and 1991 *Obiter* 89–92). This can be deduced from various phenomena (Labuschagne and Van den Heever 1993 *TSAR* 564–571 and 573):

- Damages are often awarded in the form of a fine, determined by custom.
- The quantum of damages is often standardized.
- In some instances the court includes in the damages awarded a penalty payable to the plaintiff, and not to the court as a fine.
- Sometimes factors such as the status of the plaintiff (and defendant) and the defendant's degree of guilt impact on the quantum awarded.
- Amongst some ethnographic groups the quantum of damages payable is higher than the actual damages suffered (contra clause 10(2)(b)(ii) of the Traditional Courts Bill which makes provision for the payment of damages "in respect of any proven financial loss").
- In some instances an animal awarded as a fine is slaughtered, thereby signifying that it was not intended as compensation, but rather a penalty.

The punitive nature of or penal elements inherent to customary law sanctions are a potential contentious issue. In *Fose v Minister of Safety and Security* (1997 (3) SA 786 (CC) par 65) the Constitutional Court per Ackermann J held that "[p]unitive damages exact punishment without the protection which the criminal law affords and can lead to multiple sanctioning". As such, punitive damages should have no place in South African law (Mukheibir 2007 *Obiter* 583). Mukheibir similarly cites one of the

reasons for this viewpoints the notion that punitive damages would violate the public law-private law divide (2007 *Obiter* 583).

The legal issue before the Court in *Fose* was whether "constitutional damages" could and ought to be awarded to the appellant as appropriate relief in terms of the interim Constitution (Act 200 of 1993) for the alleged breach of his constitutional rights not to be tortured, not to be subject to cruel, inhuman or degrading treatment and for infringements to rights to dignity and privacy. It was argued that the State (the Minister of Safety and Security) should be required to pay the appellant constitutional damages over and above common law damages for an alleged series of assaults by members of the South African Police Services. The Court found that an award of extra constitutional damages would be inappropriate. It pointed out that if the appellant succeeded in proving that he was indeed assaulted by members of the South African Police Services, he would be awarded substantial compensatory damages. In the result his constitutional rights would be effectively vindicated. The Court also found that in the circumstances of this case punitive damages would be inappropriate. It was not satisfied that punitive damages against the Government would significantly deter the type of abuses that were alleged to have occurred. Nothing in South Africa's recent history, where substantial monetary awards for death and brutality in detention were given, suggests that this had any preventative effect. Moreover, in order to deter the Government the awards of damages would have to be very substantial. This would mean that the plaintiff would get a large amount of money over and above the compensatory damages to which he or she is entitled under the common law. The taxpayer would ultimately have to pay these extra damages. According to the Court it was inappropriate to use the country's scarce resources to pay punitive damages to plaintiffs who have already been fully compensated for the injuries done to them with no real assurance that such payment will have any deterrent or preventative effect on the State in the future (extract from the media summary of the case).

When considering the case, it is clear that it was dealing with a very specific set of facts, not remotely related to customary-law sanctions for civil wrongs. Moreover, it did not declare punitive damages unconstitutional. In fact, in a separate judgment Didcott J held as follows (*Fose v Minister of Safety and Security supra* par 87):

> "[T]he argument in favour of punitive or exemplary damages would be stronger, were they not sought against the state. It is obviously unnecessary and would be most imprudent to express any view on the effect of those considerations, and I refrain from doing so. Indeed, I have nothing more to say about the possibility raised by me than this. My judgment is not intended to apply, as should be clear by now, to claims lodged against any defendant but the state."

Seen against this background, for the purposes of this note it suffices to say that the constitutionality and appropriateness of punitive damages as customary-law sanctions have yet to be determined.

## 7 Conclusion

To sum up: For purposes of civil jurisdiction in terms of section 12(1) of the Black Administration Act the court may, for example, in the absence of revised legislative imperatives, impose sanctions of compensation, damages, customary fines or penalties (in the form of livestock or money, with no monetary ceilings), orders to take steps to stop or address conduct complained of, reprimand, orders of specific performance, orders of apology, progress reports, court fees, referrals to other courts or the South African Police Services and a combination of these orders. Evidence of the imposition of these sanctions is borne by the living law.

Sanctioning fines and penalties for civil wrongs has been described as punitive. The question still to be answered is whether punitive damages are consistent as order of courts which have been heralded as courts where reconciliation and rehabilitation are the main goals.

In the absence of new legislation, sections 12 and 20 of the Black Administration still apply. Thus, an order for twice the value of a stolen item, combined with a fine, does in fact constitute damages in customary law (value (x 2) + fine = damages).

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