AT LAST A SOUTH AFRICAN PROPER LAW OF DELICT

Burchell v Anglin 2010 3 SA 48 (ECG)

> "If the matter (of choice of law in delict) is therefore not entirely *res nova*, it is plain that it will be open to our courts to adopt any particular rule or approach to the question when it arises" (Forsyth *Private International Law* 4ed (2003) 327).

1 Introduction and background

The laws of defamation all over the world share a common denominator – the balancing of two basic human rights: the right to freedom of expression and the right to reputation. In spite of this common objective, the laws pertaining to defamation often differ substantially from country to country and courts are often reluctant to apply legal rules or recognize judgments of foreign courts in this regard (see, *eg*, Jerker and Svantesson *Private International Law and the Internet* 2007 Kluwer Law International 356).

Until recently the question as to which law to apply in cases involving delict was neglected in most legal systems. Although this position has changed in many countries as a result of technological development as well as modern communication systems, South African choice of law in delict remained almost non-existent (Forsyth 325).

In spite of the prevalence of the *lex fori* as connecting factor under the influence of Von Savigny in the past, and until recently in England, it is today generally accepted that the *lex loci delicti* should, at least as a point of departure, be used as the connecting factor in delict (Forsyth 327 and 328) As Forsyth points out, the application of the *lex loci delicti* is in accord with the *locus regit actum* principle as well as the vested rights theory (Forsyth 329). The application of the *lex loci delicti* is not without problems however. One problem is that the place where the delict was committed is not always clear. The elements constituting the delict may have their origin in different jurisdictions. A product manufactured in one country, may cause damage in another. Is the *lex loci delicti* the place where the conduct (manufacturing) took place or the place where the damage was caused? Moreover, harm may be caused in different countries where the defective products are available. Another example is defamation. A defamatory statement published in one country may cause damage in another jurisdiction. The problem becomes even more prevalent where a defamatory statement is uploaded on the Internet. A statement uploaded on a server in one country can be and generally is accessible in a multiplicity of countries. To complicate matters further, the statement may cause pecuniary damage in one or more countries and personality infringement in another. Moreover,

because the requirements for defamation are closely linked to public policy and a country's attitude towards the protection of freedom of expression, the statement may be regarded as defamatory in one country but not in another. A second problem is that the *lex loci delicti* may be perfectly clear, but may be almost irrelevant. The typical example is illustrated in the American case of *Babcock v Jackson* (191 NE 2d 279 (1963)), where a car, registered and insured in New York with driver and passengers resident in New York, left the road in Ontario during an over-the-border drive with resultant injury to one of the passengers. In this scenario the place where the delict occurred is clearly Ontario but this single fact is less significant than all the other factors that have connection with the delict and the parties, namely New York. The *lex loci delicti* rule fails to assign an appropriate system in this type of case (see Forsyth 331). That is the reason why the New York court in *Babcock* applied New York law.

In South Africa very little case law exists regarding the choice of law in delict and, until now, regarding choice-of-law in defamation. The few cases that were reported did not deal with the matter satisfactorily (see *Mckay v Phillips* (1830) 1 Menz 455; *Rogaly v General Imports (Pty) Ltd* 1948 1 SA 1216 (C); and *Minister of Transport, Transkei v Abdul* 1995 1 SA 366 (N) discussed by Forsyth 327). The matter is therefore still very much *res nova* and open to our courts to break new ground (Forsyth 327; and Edwards "Conflict of Laws" Vol 2 LAWSA par 341). This is exactly why the judgment of Crouse AJ in *Burchell v Anglin* (2010 3 SA 48 (ECG)) can be regarded as a ground-breaking decision.

2 Facts and questions before the court

The salient facts of the case are as follows:

The plaintiff operates a game reserve and generates income through the provision of hunting safaris and related activities such as observer fees, photographic services and taxidermy services. His business, Frontier Safaris and Burchell Taxidermy, is situated near Alicedale in the Eastern Cape. Most of the business generated by the plaintiff came from the United States through Cabelas, one of plaintiff's booking agents. Cabelas is situated in Sydney, Nebraska. Prior to 2005 the relationship between Cabelas and the plaintiff was very good. Since early 2005, however, business originating from Cabelas declined dramatically and as from February of that year no bookings were received from Cabelas (par 88).

The defendant resided in San Antonio, Texas. In 2002 plaintiff and the defendant became business associates and friends. They entered into agreements whereby several properties were purchased. In 2003 the relationship between them soured and in 2005 it broke down completely. The plaintiff instituted five claims against the defendant based on different causes of action. One of these claims, the subject matter of this discussion, is for defamation. The plaintiff alleges that he suffered damage to his reputation and general damage to the amount of R1 500 000 as well as loss of profit of more than ten million rand. The loss, it is alleged, is as a result of loss of hunting business from the USA. Such loss, according to the plaintiff, is the direct result of defamatory statements made by the defendant and his

nephew to the employees of Cabelas. The defendant admitted that he made the statements but alleged that the statements were true and that he made them under circumstances where he could rely on privilege under the American Constitution. The defendant applied in an earlier case for an order that the choice-of-law issue regarding the alleged defamation be determined separately and before the other issues. This application was granted. The case under discussion deals *inter alia* with this issue.

The main question before the court in *casu* was therefore one of choice of law: does the law of Nebraska or South African law apply to the dispute? If the applicable system is the law of Nebraska, the statements would, according to the defendant, not be regarded as defamatory because they were true and he would be able to rely on privilege. If South African law were to be applied, the statements were more likely to constitute defamation. The court was not asked to pronounce on the merits of the allegation of defamation.

The court had to decide two issues. The first issue revolved around which party had the duty to begin and to prove the allegation that a foreign legal system should apply in a case where it is alleged by the defendant that such foreign legal system is applicable to the dispute. The second and main issue was which of the South African legal system or the law of Nebraska ought to govern the defamation dispute between the parties.

3 Decision

As far as the first issue is concerned, it was argued on behalf of the plaintiff that the onus to begin was on the defendant. The argument was that, because the defendant asked for a separation of claims and alleged that a foreign legal system is applicable, it was not merely a denial of the claim but a special defence. Such special defence, so went the argument, puts the onus to begin and to prove that the law of Nebraska is applicable, on the defendant.

In canvassing this question, Crouse AJ, with reference to case law, came to the correct conclusion that the question of choice of law is not a question of fact but a question of law. Such question can arise at any stage during the proceedings. As such it is not a fact that needs to be proved. There is thus no duty on the person who alleges that a foreign legal system should be applied to prove the "allegation" and therefore, in *casu*, also no duty to begin. On the other hand, the content of a foreign system is a question of fact and that must be pleaded and proved by whoever alleges that content (par 18) except if judicial notice can be taken thereof in terms of section 1 of the *Law of Evidence Amendment Act*, 1988 (Act 45 of 1988). In the absence of proof (or judicial notice) of the content of the foreign law, the domestic law of the *forum* will be applied, because until the opposite is proved, the presumption is that the content of the foreign law is the same as that of the law of the *forum* (par 18).

With regard to the main question, namely whether the South African law or the law of Nebraska should apply to the defamation matter, the Court heeded the invitation by Forsyth: "If the matter (of choice of law in delict) is therefore not entirely *res nova*, it is plain that it will be open to our courts to

adopt any particular rule or approach to the question when it arises" (Forsyth 327). To that end, the court analyzed the South African law (or lack thereof) as well as the development of the issue in English and American Law before determining what it deemed the best approach regarding the matter at hand (par 87).

With regard to South African law, the court referred to *Rogaly* (*supra*), where it was assumed that South African law was the same as that of England, where the double-actionability rule (to be discussed in the next paragraph) applied but where Herbstein J also stated that he could find no authority in Roman Duch law that it was necessary to prove the two conditions required under the double-actionability rule. Crouse J then referred to the *Minister of Transport, Transkei* where, according to Forsyth "a garbled version of the unreformed English rule" (Forsyth 327) was applied (par 96).

The court then continues with a detailed overview of the development of the English choice-of-law rule in delict. The so-called "double actionability rule" was applied in English tort cases. This rule as originally formulated in *Phillips v Eyre* (1870 LR 6 QB 1) was to the effect that a tort committed in a country outside England would only be actionable in England if it was actionable both in the *locus delicti commissi* as well as in England. After a series of decisions (most notably: *Boys v Chaplin* ([1971] AC 356); and *Red Sea Insurance Co v Bouygues SA* [1994] 3 WLR 926 (PC)) the practical effect of the rule was tempered (for a general discussion of these cases see Forsyth 335-337). Crouse AJ summarized the development as it was pre 1995 as follows (par 101):

> "The practical effect of the double actionability rule is that a plaintiff must have a cause of action under both the law of the place of the court (*lex fori*) and the law of the place where the delict occurred (*lex loci delicti*). A defendant will not be liable if he has a defence under either of those two laws. The basic rule is therefore favourable to the wrongdoer. Exceptions to this general rule were created in *Boys v Chaplin* ([1971] AC 356) and *Red Sea Insurance Co Ltd v Bouygues* SA ([1994] 3 WLR 926 (PC)). In the latter case it was held that the double actionability rule was not inflexible, and that it was possible to depart therefrom on clear and satisfying grounds in order to avoid injustice, by holding that a particular issue should be governed by the law of the country which, with respect to that issue, had the most significant relationship with the occurrence and with the parties. That exception to the general rule could be applied not only to enable a plaintiff to exclude the *lex loci delicti* in favour of the *lex fori*, but also, in an appropriate case, to rely on the *lex loci delicti* if the claim would not be actionable under the *lex fori*. This may mean that in a particular case a court could apply either English law alone or the *lex loci delicti* alone, or another law alone."

From the above, it is clear that it is possible to depart from the "double actionability rule" in appropriate circumstances. The English rule in delict was therefore no longer a hard and fast "double-actionability" rule but was flexible to such an extent that, under appropriate circumstances, it allowed for the choice of a legal system other than the *lex fori* or the *lex delicti*. In other words: even a third system could be applied, for instance the system to which the delict has its most significant relationship. The double-actionability rule was criticized because the original, inflexible rule was anomalous, and unnecessarily biased in favour of the defendant. After its development into

the more flexible system it was still criticized because the exceptions created uncertainty (par 102). The English legislator eventually intervened and the Private International Law (Miscellaneous Provisions) Act 1995 now determines that the law of the country in which the event constituting the tort occurred applies (s 11). Section 12 allows for an exception if it appears on a comparison of all the relevant factors that it is more appropriate to apply the law of another country. In that case, the law of that country can replace the *lex loci delicti* (par 105). Unfortunately, for political reasons, defamation actions were excluded from the operation of the act (see also Forsyth 333-337).

As far as the English law is concerned, Crouse AJ then concluded that the more flexible version of the "double-actionability" rule remains in place in defamation cases but that, for other torts, the *lex loci delicti* applies subject to certain exceptions (par 106).

The court then discussed the development of American choice of law in delictual claims (par 107-111). Although the double-actionability rule was originally applied, the *lex loci delicti* (the last-event doctrine) was applied since the First Restatement in 1834. After criticism by academics such as JC Morris, the American courts moved away from the application of the *lex loci delicti* to a centre of gravity approach (par 107). Since 1972 the Second Restatement provides that the rights and liabilities of the parties in respect of an issue of tort are determined by the law of the state which has the most significant relationship with the occurrence and the parties (par 109). Crouse AJ mentions that, in spite of the Second Restatement, different states sometimes deal differently with choice-of-law issues (par 110). She then concludes her discussion of the American law by stating that American law evolved from the double actionability to the *lex loci delicti* and eventually "to a balancing approach where the presiding officer assesses different issues connecting the delict to the law of possible jurisdictions" (par 111).

She then proceeds to discuss the matter at hand. She "cautioned herself" (par 112) to keep in mind that there is a difference between jurisdiction and choice of law issues; that different types of delicts ought to be approached differently; that some judgments are based on policy considerations; that there might be a distinction between the law relating to the merits of the delict and the law relating to the quantum of damages in delict; that "choice of law issues should not depend upon the application of rigid rules, but upon a search for the most appropriate principles to meet particular situations and achieve justice between the parties and that, very often, one size does not fit all" (par 112).

She then states (par 113):

> "My point of departure is that I am not bound by any South African authority in deciding the *lex causae* in this matter. If I accept that the double actionability rule must be applied in our law, I would have to find that the plaintiff must prove the delict in terms of both South African and American law, unless I find that the English exceptions are part of our law and should be applied. This would mean that I can then find that either American law or South African law can apply. But in considering the English development of this rule, I am not convinced that it is the answer to developing our law. In my opinion the development, especially in the *Boys* and the *Red Sea* matters, has shown that this rule per se (without the exceptions) does not always lead to just results and that, because of these

> developments, the implementation of the rule is uncertain. The unreformed form of the rule always works in favour of the defendant and to the prejudice of the plaintiff. The reformed rule, in my opinion, is but a shadow of the original rule and now merely a term used to describe the discretion that the presiding officer exercises."

She seemingly decides not to follow the English rule (original or reformed) and asks herself: "How am I to decide the issue?" (par 114). She then characterizes the matter as substantive law of delict and more specifically as defamation. She refer to LAWSA (Vol 2(2) 2ed par 284) as authority for her statement that in a delictual claim, the connecting factor is the place where the delict was committed and she then proceeds with a process to determine the place where the delict was committed (she cautions herself that not all delicts should necessarily be treated alike (par 116)).

With reference to the American academic Fridman, who stated that a delict can be committed in one or more of only seven places, the court then lists and applies the facts of the case under discussion to every one of these places (par 117). Taking into account further that it is well established that the delict is committed where the defamatory statement is published (*Tsichlas v Touch Line Media (Pty) Ltd* 2004 2 SA 112 (W)), she then comes to the conclusion on the evidence, that the defamation was published and the delict committed in Nebraska (par 118). One would think that the matter would end here but Crouse AJ proceeds to a discussion of a Canadian case (*Tolofson v Jenson* [1994] 3 SCR 1022), where the double-actionability rule was disregarded in favour of the *lex loci delicti* but where the court mentioned that there should be exceptions to this approach (par 119). The (Canadian) court found the exceptions in the real and substantial connection test, coupled with a *forum non conveniens* rule (whereby the court can refer parties to another more appropriate court because such court can render better justice than the forum (par 119)). The *forum non conveniens* rule is, according to the judge, not relevant *in casu*.

In order to ascertain whether the *lex loci* is a sufficient test to achieve justice in *casu*, she proceeds to investigate the substantive law of defamation in South Africa as well as in Nebraska (par 120). After a summary of the law of defamation in the two systems (par 120-121) she does not, as one would have expected, pronounce on the sufficiency or otherwise of the *lex loci delicti*. She simply proceeds with a balancing test to determine the jurisdiction with the most significant relationship to the parties and the delict. This, according to her, is done "internationally". She firstly looks at the relationship that each of the parties and the delict has with South Africa and then deals with the relationship of each of the parties and the delict to Nebraska. Eventually she finds that Nebraska's relationship with the parties and the delict is more significant than South Africa's relationship (par 125).

Lastly the court decides to address "some other aspects" (par 125). She starts off by dealing with the submission on behalf of the plaintiff that the Nebraska law of defamation is not settled on certain aspects relating to the facts and that therefore the court cannot find that the law of Nebraska is applicable (par 126). Crouse AJ points out, in my view correctly so, that she must at this stage merely decide on the choice-of-law question and that the

content of the Nebraskan law will only come into play once the choice-of-law question is answered.

The court then proceeds to state that it is necessary to take moral values and public policy into consideration in the choice-of-law process. Just as all South African law is under constitutional scrutiny, she can only apply foreign law if it also passes constitutional scrutiny (par 127). She then states that this scrutiny can only take place once the content of the chosen law is known. This is, according to her, also a matter to be left open for decision at the end of the trail (par 127).

Eventually the court summarizes its judgment as follows:

> "In summary, to reach the decision I departed from the premise that there is not any South African authority by which I am bound. I was therefore obliged to look at the general development of private international law for guidance. I came to the conclusion that the double actionability rule is no longer the best test available. After considering the *lex loci delicti* as a possible test, I ultimately decided that the *lex loci* was only to be used as a factor in a balancing test to decide which jurisdiction would have the most real and significant relationship with the defamation and the parties. After deciding that a foreign law had the most significant relationship, I found that before applying the foreign law, I must test whether it passes constitutional muster before deciding that it should be applied."

Crouse AJ concludes that the law of Nebraska should be the applicable law on the substantive matter. She makes it clear that the law of Nebraska will not necessarily be applicable to the quantum of damages. She consequently left the question as to the applicable system on the quantum open.

4 Discussion and comments

There is no doubt that this decision must be welcomed as ground-breaking for the South African choice of law in delict and more specifically for choice of law in defamation. Although the eventual outcome of the decision is to be commended there are some comments that must be made.

The court should be commended for the lucid way in which it distinguished between the legal and factual questions pertaining to the applicability and proof of foreign law. As is clear from the plaintiff's arguments about the duty to begin and the court's discussion of the matter, this distinction can have significant consequences for both parties. While it is necessary for a party who relies on foreign law to prove the content of such foreign law, it is not necessary for a party who alleges that a specific foreign system should be applicable in a given situation to prove that such system is applicable. It is the content of foreign law which is regarded as a fact "albeit a rather peculiar question of fact" (Forsyth 98) which needs to be proved. The question of what system of law should be applicable is, as the court correctly pointed out (par 18), a question of law which can be posed by any party at any stage of the proceedings and which does not attract a duty to prove or to begin.

As far as her treatment of the English law is concerned it must be mentioned that, although I am in agreement that the English law should not

be applied to the South African choice of law in delict, the adapted English rule after *Boys* and *Red Sea* creates, in exceptional circumstances discretion for the presiding officer. The criticism expressed by the court that the implementation of the rule is uncertain (par 113) may be true but the result is not entirely different from the American approach and indeed from the approach which the court in *casu* eventually followed. The court can nevertheless be commended for finally steering away from the English double-actionability rule in choice of law in delict.

My main concern with the judgment flows from the statement of Crouse AJ that:

> "Internationally, a balancing test is used to determine the jurisdiction with the most significant relationship to the parties and the delict and then the law of that jurisdiction is applied. I will follow this route. Having decided that the *lex loci* of the delict is Nebraska, I must now decide whether this is indeed the jurisdiction with the most significant relationship to the parties and the delict. In order to come to this decision, I will endeavour to establish whether our law or Nebraskan law will weigh more heavily on the balancing scale" (par 122).

From the above it seems that, in a nutshell, the *ratio decidendi* of the decision (as is clear from its "summary") is, that in a choice-of-law question relating to the law of delict and more specifically defamation, the court must find the legal system with the most real and significant relationship with the delict and the parties and that system should then, subject to constitutional scrutiny, be applied. In order to find the system with the most real and significant relationship all factors which might have an influence should be considered. The *lex loci delicti* is but one such factor. The court, it seems, settled for what Forsyth calls "the sufficient link" approach (Forsyth 339). It is further clear that this approach is similar to the general American "centre of gravity" approach where the proper law of the delict is searched and applied (Second Restatement arts 145,146 mentioned by Forsyth 331).

The problem with the proper-law-of-delict approach is that it brings an element of uncertainty into the equation. This can be avoided and it would have been perhaps better to, as Forsyth suggests, take the *lex loci delicti* as connecting factor and to deviate to a "most significant" system as connecting factor only in those cases where the *lex loci delicti* is uncertain or *prima facie* irrelevant. Such a rule would ensure greater certainty and stability in choice of law and delict. It is further in line with what was favoured by old authorities such as Van der Keessel, Van Bynkershoek and even it seems, according to Forsyth (327) by a decision of the Hooge Raad!

It seems that the *ratio decidendi* relates only to the delict of defamation. Crouse AJ, before she discussed the *lex loci delicti* in the current case, "kept in mind that all delicts should not necessarily be treated alike" (par 116). In my view the court missed a golden opportunity to formulate a general choice-of-law rule for the law of delict. One can understand the caution because of the novelty of the matter in South African law. One would hope that the rule will in time be extended as a general rule for choice-of-law in delict. It can perhaps be argued that a general rule for delict was formulated, keeping in mind that there may be exceptions to the rule.

It must further be noted, as the court pointed out, that the question of constitutional scrutiny only comes into play once the content of the foreign

law is known (par 127); that is in the application stage where the court must decide whether a specific foreign rule should be applied or excluded (see Forsyth 109) It is therefore, strictly speaking, not part of the enquiry as to choice of law and thus not part of the question that the court needed to answer *in casu*. One can, however, understand why Crouse AJ mentions the matter here. It is indeed also a novel matter in the sense that constitutional scrutiny before application of foreign rules in the law of delict, was not before our courts in this type of matter previously. It must be mentioned that, if the court in the application stage would find that the chosen law does not pass constitutional scrutiny, such law cannot be applied. It is doubtful whether a court will *de novo* entertain the question of choice of law. It will simply refuse to apply the foreign system.

Further, after weighing the factors that connect the delict and the parties to Nebraska the court said that these factors "are sufficiently strong to make it substantially more appropriate to displace the law of South Africa as the applicable law on this substantive matter" (par 130). In my view this is an unfortunate choice of words. In a choice of law matter the South African law is not "displaced" by the chosen system. It is the South African law that decides, for the sake of justice, to incorporate the rules of the chosen system for a specific purpose into the South African law.

Lastly, the court's discussion of the substantive South African and substantive American law of defamation in order to answer the question "whether the *lex loci delicti* is a sufficient test to achieve justice between the parties" (par 120) is not only out of place but it is also not warranted under the circumstances, simply because the substantive law of the United States has not been proved. It is therefore not surprising that the court does not make a finding as to whether the *lex loci delicti* is sufficient after her discussion. She simply goes over into an investigation of what the system with the most significant connection would be.

5 Conclusion

It seems that after the decision of Crouse AJ in *Burchell v Anglin* (*supra*) that South Africa may now be on its way to a clear choice-of-law rule in delict: the legal system with the most significant connection with the parties and the delict is the applicable system. Do we have a proper law of delict? This decision of may well open the door for a proper law of delict.

Only time will tell whether we did not move too fast in this direction; whether it would not perhaps have been better to look for the *lex loci delicti commissi* and in exceptional circumstances to venture on the more uncertain path of "the most significant connection".

Fact is: the debate to a more acceptable choice-of-law rule in delict has been opened and one can indeed look forward to further decisions in this regard.

Frans E Marx
Nelson Mandela Metropolitan University, Port Elizabeth