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The Law of Cession

by Susan Scott
Second Edition
Juta & Co Ltd 1991
275 pages
Soft cover R78 incl. VAT

In the second edition of *The Law of Cession* Professor Scott has maintained a high standard of the previous edition. All topics normally associated with The Law of Cession are covered, including a short chapter on Private International Law and Factoring.

The first edition was basically an adaptation of her doctoral thesis accepted by the University of South Africa in 1977 under the title "Sessie in die Suid-Afrikaanse Reg" which was completed under supervision of Professor Van Warmelo. The first edition was published in 1980 and more than 10 years have lapsed since the publication of that edition. The second edition, as the author herself says in the preface of the book, was to update the case law and it is in general stated as at 30 June 1990.

The print is clear and pleasant to read, the various sections being separated with bold headings. The footnotes are not too finely printed; the information contained in them is therefore not lost to those who avoid very small print. Where a note is long it runs from one page to another.

The research is thorough, the decisions are well canvassed and ample authority is referred to in support of statements, opinions and submissions. This book therefore remains of great

value to the practitioner, the academic and the student.

There is a comprehensive and accurate index followed by a list of abbreviations, bibliography, and the table of cases. There is also a word index at the end of the book.

The author deals authoritatively with the various subjects and spends a whole chapter on Cession *in securitatem debiti* which she admits in the preface is highly controversial and can only be solved by the legislator. Although admittedly The Law of Cession is complexed and has gained tremendous importance over the past couple of years one does feel that certain aspects, for instance the so-called reversionary interest (p 146 and further), requires further analysis and examples.

There is no doubt however that *The Law of Cession* is a significant contribution to our law and will continue to be of great value to practitioners and teachers of law students.

JJ Goodey
Pretoria Bar



A Sourcebook of African Customary Law for Southern Africa

by TW Bennett
Juta & Co Ltd
543 pages
Soft cover R90,64 incl. VAT and handling

This book is an exhaustive and timely addition to the literature in a field which requires a great deal of attention from jurists. It is divided into ten chapters.

In the first chapter the author makes the valid point that a large number of the existing records of customary law were written during the time of colonial rule. It is therefore not surprising that certain institutions, fundamental to African life, were condemned outright. Prominent among these are the *lobola* custom (referred to by the author as brideswealth) and the system of polygamy.

In chapter 2, the question of the courts is fully considered by the author: the courts of chiefs and headmen and the recognition thereof as well as appeals therefrom; the Commissioners' and Magistrates' Courts, Divorce Courts and the small claims courts.

Dealing with the Commissioners' Courts (old Native Commissioners' Courts) Bennett speaks out and says that their creation was part of the Government's policy of racial segregation. The Hoexter Commission of Inquiry into the Structure and Functioning of the Courts, however, dealt a serious blow to the development of customary law when it successfully recommended the abolition of these courts and the amalgamation thereof with the ordinary courts.

In chapter 3 the author follows up the "recognition to less offensive areas of customary law" that he raised in chapter 1.

Chapters 4, 5, 6 and 10, all deal with marriage. Chapter 7 deals with women,

and the author takes a very interesting look at women in the city. Quoting Mayer on *Townsmen and Tribesmen*, he notes that the towns can be expected to be attractive to people who have little to lose in the country, but more so to women "whose disabilities in the rural social system are more pervasive and general."

In an interesting discussion on children (chapter 8) Professor Bennett records the judgment of the Native Appeal Court in the important case of *Mbuli v Mehlo-makulu* 1961 NAC(S) where the point in issue was whether the court should have applied common law or customary law in deciding the guardianship and custody of a child. The outcome was that the concepts of guardianship and custody are distinguished: guardianship is decided in terms of customary law and custody in terms of the child's best interests. The Supreme Court of Transkei follows the same line of reasoning, and this is the best method of administering customary law having due regard to the changing nature of our society.

In chapter 9 Professor Bennett deals with succession. By looking closely at the question of death and burials he departs from the beaten track followed by old writers such as Seymour and Whitfield who indeed espoused the "old" customary law.

I now go back to a brief review of the section dealing with marriage. This section accounts for nearly fifty percent of the whole book. This shows that the customary law relating to marriage is full of novelties by which the western lawyer, no less than the African lawyer, is always lured into a lengthy discussion. Prominent among these is the *lobola* custom. Professor Bennett rightly dismisses the view of *lobola* being the purchase price for a wife as being a complete fallacy; "... even a superficial knowledge of a customary marriage would show that the wife is neither a slave nor a chattel." (p 196).

Looking at the book as a whole I would say that Professor Bennett has adopted a method of presentation which will go a long way to bringing customary law "live" to all concerned. He reproduces some passages from selected old authors and in this way clarifies the points he wants to make beyond doubt. He also reproduces some judgments of the Native Appeal Court at the relevant places. In the Supreme Court of Transkei, and no doubt elsewhere as well, there is the problem of judges who have altogether no experience of customary law and your first difficulty as counsel seems to be to convince them that customary law is really law, and that the judgments of the Native Appeal Court given fifty years ago (and appearing in dusty and faded Native Appeal Court reports) on essential aspects such as "the taking of the

stomach" to tortfeasors' home in seduction and adultery cases, are valid and of full force, and have to be given effect to by the Supreme Court. Against that background, the reproduction of the judgments in an impressive new book such as Bennett's will alleviate the problem of the present day practitioner. The reproduction of the judgments in leading cases such as *Yako v Beyi* 1944 NAC (C & O) 72 - seduction-choice of law; *Phiri v Nkosi* 1941 NAC (N & T) - joining of women as parties in claims for return of *lobola* after dissolution of a civil marriage, *Bobotyana v Jack* 1940 NAC (C & O) - customary law method of dissolution of marriage; *Mshweshwe* 1945 NAC (C & O) - adultery by the wife no ground for dissolution of the marriage in customary; *Mlanjeni v Macala* 1947 NAC (C & O) - earnings of a minor accrue to the family head; *Mbonjwa v Scellan* 1957 NAC 41 (S) - significance of *lobola* agreement where the marriage is one of civil rights; *Mbuli v Mahlomakulu* 1961 NAC 68 (S) - guardianship and custody of children - is therefore much to be appreciated. Sections of statutes are likewise presented in full as part of the text. All these factors put together fully qualify Bennett's book as a sourcebook of customary law. Customary law students to whom I lent a copy of Bennett's work towards the end of last year's examination spoke highly of it and I have no doubt that all students of customary law will find it a real *vade mecum*.

I have already, in passing, touched upon a very important aspect of Bennett's work and that is his very progressive (as against reactionary) and emancipated attitude towards customary law. His attitude to chiefs' courts, for example, is only a part and parcel of this ideological emancipation. For already in his preface he complains bitterly about the isolation and utter neglect of customary law. As a result of such neglect, he says, South African customary law is now at variance with contemporary social conditions.

An outdated approach to customary law goes hand in hand with an outdated regard to the black people themselves. In this regard Bennett avoids derogatory words like Bantustans and speaks of self-governing territories. He does not speak of "kraals" (as if people were cattle!) but of homesteads. He does not speak of "kraal property" but of property. This is in line with developments in Transkei where, in terms of statute, the words "kraal" and "kraalsite" have been substituted by "homesteads" and "homestead allotment". He then rejoices at the fact that by present indications customary law seems to have an assured future, because even Albie Sachs of the African National Congress has as recently as 1989, when arguing for a bill of rights, called for "a special tolerance" for traditional law and custom.

In all the circumstances, regard being had to the fact that Bennett does not at all overlook the important question of reform in customary law, I feel that this work should be regarded as a clarion call for a completely new approach to customary law by all those judges, advocates, magistrates and attorneys who still operate under the shadow of the old colonial and *Herrenvolk* approach to customary law and the customary courts. It should be seen as a call for renewed interest in the study of customary law from even as early as matric level. This would be part of affirmative action aimed at redressing the neglect and somewhat even intentional degradation to which customary law has been exposed in the past.

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Jones: Conveyancing in South Africa

HS Nel
Vierde Uitgawe
Juta & Co Ltd
xviii en 522 bladsye
Hardeband R172,00

Ek het met gemengde gevoelens kennis geneem van die nuwe 4de uitgawe van Jones wat die afgelope bykans 30 jaar gevestig is as die standaardwerk vir aktevervaardiging in Suid-Afrika. Eensydig was ek verbaas en van mening dat hierdie uitgawe prematuur is, gesien in die lig van politieke verandering en hervorming in wetgewing oor grondsake wat die afgelope tyd plaasgevind het, en steeds besig is om plaas te vind by die skrywe hiervan. Die voorwoord is gedateer in Junie 1990 met die gevolg dat belangrike en ingrypende onlangse wetgewing ongelukkig nie vervat is in die nuwe uitgawe nie. Hierdie wetgewing sluit in die Witskrif op Grondhervorming, die Wet op Afskaffing van Rasgebaseerde Grondreëlings, die Wet op Minder Formele Dorpsstiging, die Wet op Grondbesitregte en verskeie ander nuwe wetgewing.

Andersynds het ek simpatie met die skrywer en uitgewers, aangesien die snelontwikkelende politiek en gepaardgaande nuwe wetgewing onvoorspelbaar is en tydsberekening vir die vrystel van 'n nuwe uitgawe bemoeilik. Die eerste uitgawe van *The Law and Practice Conveyancing in South Africa* deur R.J.N. Jones het in 1963 verskyn, terwyl die tweede en derde uitgawe onderskeidelik in 1976 en 1985 die lig gesien het. Die gerespekteerde skrywer is in November 1988 oorlede en Mnr HS Nel het die taak op hom geneem om die vorige derde uitgawe op te dateer en by te werk. As sulks is die huidige vierde uitgawe dus in wese

'n opgedateerde weergawe van die derde uitgawe en dieselfde uitleg en vorm as in die vorige uitgawes is gebruik in die nuwe uitgawe. Die enigste byvoeging is 'n nuwe hoofstuk 20 wat die Wet op die Ontwikkeling van Swart Gemeenskappe 4 van 1984 en dus huurpagpraktyk behandel.

As 'n ervare aktespraktisyn blyk Mnr Nel goed gekwalifiseerd te wees vir die taak en aangesien die voorwoord gedateer is in Junie 1990, word aanvaar dat hofbeslissings, wetgewing, omsendbriewe en konferensiebesluite bygewerk is tot op gemelde datum.

Dit is egter duidelik dat konferensiebesluite, wat al hoe meer 'n belangrike rol speel in praktiese aktevervaardiging, nie behoorlik bygewerk is nie en dit doen afbreuk aan die gesaghebbendheid van die boek. Die skrywer erken in die voorwoord die toekomstige wysigings van sekere wetgewing, onder ander die Wet op Deeltitels en die Wet op die Ontwikkeling van Swart Gemeenskappe, en vermeld dat hierdie wetgewing nie in diepte bespreek word nie. Ten spyte hiervan, is die behandeling van Deeltitels in Hoofstuk 19 en Huurpagreg in Hoofstuk 20 ietwat teleurstellend.

Wat betref Deeltitels behoort sekere aspekte soos die oorgangspesure tussen die vorige Wet op Deeltitels 66 van 1971 en die huidige Wet 95 van 1986, die werking en wysiging van reëls asook die vereistes van die eerste vergadering van die regs persoon, meer aandag te geniet. Daar bestaan die behoefte by praktisyns vir meer besonderhede aangaande die voorbereiding en advies aan ontwikkelaars oor die opening van deeltitel-skemas, wat insluit vereistes van die plaaslike bestuur, die hantering van huurders in bestaande geboue, nakoming van voorkoepsbepalings en sluiting van koopkontrakte voor die opening van 'n deeltitel-skema. Fase ontwikkeling en uitbreiding van skemas vereis meer inligting en daar is slegs 'n bondige bespreking van die Wet op die Beheer van Aandeleblokke 59 van 1980. Hoewel laasgenoemde Wet en die Wet op Beheer van Eiendomstydskedeling 75 van 1988 en die Wet op Behuisingontwikkelingskemas vir Afgetrede Persone 65 van 1988 tuishoort by die Maatskappyereg, sal 'n kort bespreking van gemelde wette en vergelyking met die Wet op Deeltitels verwelkom word.

Die invoeging van 'n nuwe Hoofstuk 20 wat die Wet op Ontwikkeling van Swart Gemeenskappe 4 van 1989 behandel, is handig en waarskynlik die enigste naslaanwerk (afgesien van Hoofregistrateursomsendbrief 8 van 1989) waarin swart huurpagreg op so 'n bondige wyse uiteengesit word. Gesien in die lig van die nuwe wetgewing wat in elk geval die Wet op Groepsgebiede en hierdie Wet drasties wysig, is enige kritiek op hierdie hoofstuk in elke geval akademies.

In alle regverdigheid is die opmerkings oor die hoofstukke oor deeltitels en huur-

pag nie bedoel om afbreuk te doen nie, aangesien die skrywer tereg in die voorwoord opmerk dat hierdie onderwerpe nie in diepte bespreek word nie.

Ten spyte van onlangse publikasies oor aktevervaardiging, is en bly Jones steeds die mees gesaghebbende naslaanwerk en praktiese handleiding op hierdie gebied en is as sulks onmisbaar vir die aktespraktisyn. Reeds as gevolg van die groot aantal tersaaklike wetgewing wat in 'n toenemende mate meer verantwoordelikheid vereis van die praktisyn (afgesien van sy kennis van die akteswet), is die nut van die boek die feit dat hierdie verskillende faktore kortliks gekonsolideer is in hierdie werk.

Dit is onrusbarend dat al hoe meer aktespraktisyns betrokke raak in siviele eise en dissiplinêre ondersoeke en daar is 'n toename in litigasie wat voortspruit uit aktesaangeleenthede. Daarom kan die boek ook dien as verwysingsbron vir litigasie praktisyns.

Vir die student of kandidaatprokureur wat voorberei vir die transportbesoergereksamen, is hierdie werk van Jones nog steeds 'n noodsaaklike naslaanwerk ten spyte daarvan dat daar nie meer soos in die eerste en tweede uitgawes, 'n lys van vrae aan die einde van elke hoofstuk met modelantwoorde verskyn nie. (As gevolg van die ruimte- en kosteaspek).

Hoewel aktekantoorpersoneel soms meningsverskil het oor sekere praktykreëlings soos voorgeskryf deur Jones, sal die nuwe uitgawe steeds sy plek vind op die boekrak van heelwat akteonderzoekers.

Opsommenderwys is Jones steeds die standaardwerk, hoewel die uitgawe ietwat prematuur is en nie die onlangse wetgewing en veranderinge bevat nie en juis daarom is dit nodig dat 'n verdere uitgawe binnekort behoort te verskyn sodra nuwe ontwikkelings in die eiendomsreg stabiliseer. Hoewel die vier uitgawes tot dusver dieselfde uitleg van hoofstukke gevolg het, word voorgestel dat die volgende uitgawe verander word, veral om die nuwe ontwikkelings sinvol te verwerk en te inkorporeer met bestaande praktyk en wetgewing.

Afgesien daarvan, moet daar gewaak word teen stagnering van die geïllustreerde uitleg van die boek om voorsiening te maak vir die praktisyn wat meer inligting benodig oor ontwikkeling in die moderne sakereg soos die praktiese implikasies van dorpsstigting, opheffing van titelvoorwaardes, opening en fase uitbreiding van deeltitel-skemas, groepsbehuising en die uitwerking van kontraksluiting met betrekking tot eiendomme voor proklamasie van dorpe of opening van deeltitel-skemas. Daar bestaan 'n behoefte vir die bespreking van hierdie onderwerpe en 'n gevestigde naslaanwerk van hierdie formaat behoort daaraan te voldoen en voorsiening daarvoor in 'n verdere uitgawe sal verwelkom word.

Dit is duidelik dat die tyd aangebreek het om die uitleg van die boek te ver-

ander en uit te brei. As gevolg van die volume en omvang van die werk, word voorgestel dat die uitgewers oorweging moet skenk aan meer as een volume en om 'n paneel van skrywers opdrag te gee om elk verskillende hoofstukke op te stel, ten opsigte waarvan elke skrywer 'n kenner moet wees van sy betrokke onderwerp. Dit is bykans onmoontlik vir een skrywer om die inhoud van die boek behoorlik by te werk en sinvolle kommentaar daarop te lewer. Ek is van mening dat indien hierdie stappe geneem word, die boek van Jones as gesaghebbende naslaanwerk kan voortleef in die toekoms.

Ten slotte kan opgemerk word dat afgesien van die ongelukkige tydsberekening van die vrystelling van hierdie uitgawe, die boek nie werklik iets nuuts bied vir die aktespraktisyn nie en dat die opdatering van nuwe inligting gebrekkig is, veral ten opsigte van konferensiebesluite.

MJ Ferreira

Prokureur, Pretoria

(MacRobert, De Villiers, Lunnon & Tindall)

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The Customary Law of Immovable Property and of Succession

by AJ Kerr

Third edition

Grocott & Sherry 1990

232 pages

Soft cover R38,50 incl. VAT

According to the preface a number of recent legislative changes have given rise to the need for a new edition of this work. The work discusses the statutory and non-statutory customary law of immovable property and of succession. It does not deal with the rules on the application of customary law, the choice of law, judicial notice of customary law or customary family law, which are to be found in the author's contribution on Customary Family Law in the *Family Law Service* edited by Prof. ID Schafer published by Butterworths.

The work contains the non-statutory customary law of the Cape Nguni tribes. The work does not make a distinction between statutory customary law applicable in the independent black states, the self-governing territories and the rest of South Africa. Such distinction might have been of great practical use in view of the uncertainty under legal practitioners as to what legislation applies to those areas.

The author deals, in chapters 9 and 10, with the statutory customary law in respect of ownership of immovable property which at the time of the writing of the book, was contained in the Black Land Act, 27 of 1913, the Development Trust and Land Act, 18 of 1936 and the

Trust Land Regulations, 1969 (Proclamation No. R188 of 1969). Both the Black Land Act of 1913 and the Development Trust and Land Act of 1936 were repealed by the Abolition of Racially Based Land Measures Act, 108 of 1991. In terms of section 11(2) of Act 108 of 1991 the provisions of Proclamation R188 of 1969 (which was made under section 48 of Act 18 of 1936) remains in force until it is repealed or amended by the State President in terms of section 87 of Act 108 of 1991.

The author warns, in the chapter on terminology (p. 9-11) against a confusion of the meanings of the same term in the common law and the customary law relating to immovable property because it must be remembered that in designating a right in customary law, the courts have used the English language term which seemed most appropriate although the finer aspects of the right so designated in South African common law or in English law may not have been apparent or even existed in customary law, as for example ownership and trusteeship.

The Upgrading of Land Tenure Rights Act, 112 of 1991 provides for the conversion of quit rent tenure, permissions to occupy and the right to occupy tribal land granted under indigenous law into ownership under Act 112 of 1991. It also describes the content of such rights pending conversion thereof into ownership. Much of the confusion as to ownership to immovable property in customary law will therefore disappear after conversion of land tenure rights into ownership (according to common law).

It is a very useful book especially insofar as it relates to the non-statutory customary law of the Cape Nguni tribes. Insofar as the book relates to statutory customary law in respect of immovable property, the book will have to be read in conjunction with the Abolition of Racially Based Land Measures Act 1991, the Upgrading of Land Tenure Rights Act 1991, and the Less Formal Township Establishment Act 1991.

Louis Van Wyk
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Law, Life and Laughter

by Professor Ellison Kahn

Juta & Co Ltd 1991

358 pages

Hard cover R73,40 incl. VAT and handling

Glowing reviews on Prof Kahn's book have already appeared in the media and it would be carrying coals to Newcastle if I were to add my own impressions in detail. Suffice it to say that I found the book highly entertaining and interesting, and that I fully agree with what the Honourable Chief Justice said in the

foreword, namely that in reading the book "one has the sensation of sitting near the front of the stalls and seeing passing before one like players on the stage these men of the law."

It is sincerely hoped that there will in due course be a second edition of this publication. If so, I should like to make a few suggestions. All the material has been taken over from existing literature. The result is that some of the items do not really do justice to the persons concerned. For example, the contribution on LC Steyn, p. 255 *et seq.*, is surely lacking in several important respects – a much clearer picture of the late Chief Justice ought to emerge in a book of this nature. (Interesting anecdotes on Steyn are to be found in *inter alia* (1971) 1 and (1977) 7 *Nuntius*). In addition, there are a fairly large number of well-known judges and other lawyers who do not figure in the book. The reason, of course, is that no material on these persons was available to the author. My suggestion is that he should approach persons to whom such judges or lawyers had been well-known to write appropriate contributions on them, for inclusion in the book. And to avoid the book becoming too bulky I suggest that some of the people now included in the text be omitted. For instance, a man like Grotius seems rather out of place in the book; he, as well as quite a few others, can be left out.

Law, Life and Laughter is a worthy addition to a long list of outstanding contributions already made by the author in the field of legal literature. There is little doubt that at least among lawyers the book will become a best-seller.

JPJ Coetzer PC
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Aviation Legislation in South Africa

by ZA Beek

Digma Publications

R76,45 incl. VAT

To most lawyers in South Africa, Aviation Law is an arcane subject which is best avoided. Nonetheless, in recent years it has become a branch of the law which has experienced burgeoning litigation, most of which is, unhappily, associated with tragedy. Well-publicised air disaster enquiries have served to popularise such hitherto mysterious occurrences as the Chicago Convention and such terminology as the "ICAO Annexure XIII accident enquiry". Happily, however, much of Aviation Law has nothing to do with tragedy and mishap but is designed rather to prevent them. To this end a myriad of regulations and rules have been promulgated over the years which ought to be the stock-in-trade of all pilots who use the airways of

our skies. Recently, too, ingenious tax experts, replete with a good knowledge of that many-headed hydra, the Income Tax Act, have flirted with Air Law in order to devise schemes for their clients in relation to the ownership of aircraft. The coming into operation of the Air Services Licensing Act 115 of 1990 will also demand of many members of the legal fraternity a working knowledge of air law in order to allow them to prepare applications on behalf of clients to the Air Services Licensing Council.

Beek's *Aviation Legislation in South Africa*, published by Digma in convenient loose leaf form, represents a most welcome compendium of the relevant legislation in a well indexed and easily readable form. When used in conjunction with excellent comment such as that of Mr Justice Margo and his co-authors in LAWSA, *Aviation Legislation in South Africa* will be an invaluable tool for aviation lawyers, pilots and other persons interested in flying in South Africa.

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Deliktereg

deur Neethling, Potgieter en Visser

Tweede Uitgawe

Butterworths Professionele Uitgewers (Edms) Bpk 1992

427 bladsye

Sagteband R101,20 BTW ingesluit

Hierdie uitgawe het pas verskyn en volg kort op die hakke van die eerste uitgawe van 1989. Nuwe gesag en literatuur is bygewerk. Sekere gedeeltes soos die hoofstuk oor skade is aansienlik uitgebrei terwyl talle aspekte weens nuwe regspraak, wetgewing of akademiese navorsing grondig hersien is.

Volgens die skrywers is die werk bedoel as 'n volledige inleiding tot die algemene beginsels van deliktuele aanspreeklikheid en die belangrikste verskyningsvorme van delik, en is dit in die eerste instansie geskryf met die oog op studente vir sover die vernaamste beginsels van die deliktereg sistematies en krities behandel word.

Alhoewel die skrywers hulle nie daarop beroep dat die positiewe reg absoluut volledig weergegee word nie, moet daar met hulle saamgestem word dat die boek ook met vrug deur die praktisyn gebruik kan word, aangesien die gesaghebbende bronne aangehaal en bespreek word. Die regspraak is bygewerk tot en met die Augustus 1991-uitgawe van die *Suid-Afrikaanse Hofverslae* en die werk beskik oor 'n omvattende bibliografie, lys van hofbeslissings en wetgewing, en register. Daarbenewens is die regsbegin-sels en standpunte saaklik en duidelik uiteengesit.

CM Van Niekerk
Pretoria-Balie