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Agrekon

VOL. 13 No. 4

OCTOBER 1974

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Articles in the field of agricultural economics, suitable for publication in the journal, will be welcomed.

Articles should have a maximum length of 10 folio pages (including tables, graphs, etc.) typed in double spacing. Contributions, in the language preferred by the writer, should be submitted in triplicate to the Editor, c/o Department of Agricultural Economics and Marketing, Pretoria, and should reach him at least one month prior to date of publication.

The journal is obtainable from the distributors: "AGREKON", Private Bag X144, Pretoria.

The price is 25 cents per copy or R1 per annum, post free.

The dates of publication are January, April, July and October.

"AGREKON" is also published in Afrikaans.

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LAND TENURE SYSTEMS IN WHITE SOUTH AFRICAN AGRICULTURE

IV : LEGAL ASPECTS OF LEASES*

by

J. JOUBERT

Division of Agricultural Production Economics

and

J.A. GROENEWALD

University of Pretoria

INTRODUCTION

As has already been shown, the vast majority of farms in South Africa are cultivated by their owners. In 1960, for example, 79,6 per cent of the farms fell in this category, 11,0 per cent were leased and 9,4 per cent were used under other forms of land tenure. During the period 1918 to 1960 the trend towards owner-occupation increased.¹ So, although owner-occupation definitely predominates, a considerable number of the farms in South Africa are nevertheless leased.

In certain regions of South Africa a good number of farmers are also to be found who own their own farms and lease more land or cultivate additional land on shares. There are definite indications that these mixed systems are increasing in importance in certain parts of the country. In certain summer grain areas more than 38 per cent of the farmers follow such practices, in the winter grain regions the figure is about 20 per cent and in the Karoo slightly over 20 per cent.² Leasing does therefore play a part which should arouse the interest of policy makers and legislators. In this article an attempt will be made to give an indication of the aspects which should be covered in leases and what the judicial position is in South Africa.

ASPECTS TO BE CONSIDERED IN LEASE AGREEMENTS

A lease is an agreement between two parties, namely, an owner and a tenant. In such an agreement the owner gives the tenant a right to use his property for payment in the form of cash rent or a share of the yield and subject to certain conditions. In farming the property is rented with the main objective of producing on it.

In this respect there may be a clash of interests between the parties. Each of the two has his own particular interests. The owner wants to receive the maximum return in the form of rental and he also wants the leased property to be maintained in good condition, in other words, the property must retain its value. The tenant, on the other hand, wants to obtain the highest possible profit, which implies that the rental must be relatively low. In the short term he may attach little value to conservation. If he is leasing on a long-term basis it is, however, important to him also. Both are interested in security. The owner, for example, hopes to benefit from rises in land prices. For the tenant this to some extent leads to higher risks, particularly if product prices do not rise proportionately. Other aspects of risk also influence the attitudes of the parties concerned.³

However, if both parties are interested in long-term benefits, the clashes are less serious than they

* Based on an M.Sc. (Agric.) thesis by J. Joubert, University of Pretoria.

1. Joubert, J. and Groenewald, J.A. Land tenure systems in White South African agriculture. II: The importance of different systems. Agrekon, July, 1974.
2. Joubert, J. and Groenewald, J.A. Land tenure systems in White South African agriculture. III: Regional analyses. Agrekon, July 1974.

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3. See, *inter alia*, Heady, Earl, O. and Jensen, Harold R. (1954). Farm management economics. Prentice-Hall, Inc., Englewood Cliffs, N.J., Chapters 18 and 20.

would otherwise have been. As Black *et al.*⁴ put it: "If we are thinking of management in terms of longer-run results, the interests of the two groups are identical. Under these assumptions, both are interested in keeping the farms at a high level of productivity; both need to have farms managed in such a way as to maximise the continuing income from them." Heady⁵ gives two requirements which, ideally speaking, a lease should fulfil. It should result in:

- (1) The most efficient organisation of resources relative to consumer demand; and
- (2) an equitable division of the product among the owners of the various resources.

According to him, there can only be an equitable division of the product if the return on the resources contributed by each individual is based on the marginal value product of the resources. The most efficient use of resources requires that the total product available should be equal to the total consumer demand at a specific price. It also implies the acceptance of the optimum combination of inputs in production.

A third possible requirement which may be added to the above is that the lease agreement should not increase the existing risk and uncertainty for one or both parties. As Sir Thomas Whittaker says: "The tenant should be protected against needless and unfair eviction, and against having his rent arbitrarily and inequitably raised. On the other hand, if the landlord be deprived of his present remedy of getting rid of an unsatisfactory tenant, he must be protected against undesirable use of his property... by inefficient tenants."⁶

Because these three requirements can serve as criteria for the perfect leasing system, and legislation in this connection should be tested against them.

LAND SETTLEMENT ACTS IN SOUTH AFRICA

Since the unification of South Africa in 1910 a number of land settlement acts have been passed.

The first important act of this kind was the Land Settlement Act, Act 12 of 1912, which was amended from time to time by, among others, the Land Settle-

ment Amendment Act, Act 23 of 1917, the Land Settlement (Amendment) Acts, Acts 6 of 1928, 57 of 1934 and 47 of 1935, the Land Settlement Amendment Act, Act 45 of 1937, the Land Settlement Laws Further Amendment Act, Act 26 of 1925, the Land Settlement Amendment Act, Act 42 of 1944 and the Finance Act, Act 48 of 1947.⁷ "This act may be regarded as a rehabilitation measure, since it aimed at rehabilitation: placing suitable people on Crown lands so that they could contribute to the progress and prosperity of the country in the agricultural field, and above all, at making independent citizens of those to whom Crown land had been granted."⁸

Applicants were considered if, in the opinion of the Minister of Lands, they were qualified to develop and work the land, possessed sufficient capital for this purpose and intended to farm the land themselves.⁹

In addition, subsection five of section twenty of the Act provides that in the allotment of any holding the Minister shall, as far as possible, give preference to applicants who own no land.

The provisions under which land is allotted in terms of this Act were also particularly favourable. All land was granted as leasehold land for a period of five years, after which the lessee had the option to purchase the holding. No rent was payable during the first two years, but —

- (a) in the third year it was two per cent per annum; and
- (b) in the fourth and fifth years it was three and a half per cent per annum of the purchase price of the holding as notified in the Government Gazette.

Under certain circumstances the lease could be extended by the Minister for a further period of five years.

When the lessee exercised his right to purchase, the purchase price plus four per cent interest per annum was payable in sixty-five equal yearly instalments.

Subsections 1 to 6 of section 7 of the Land Settlement Acts Further Amendment Act, Act 21 of 1922, as amended,¹⁰ made provision for an applicant to acquire a holding by paying an amount to be determined by the

4. Black, J.C., Clawson, M., Sayre, C.R. and Wilcox, W.W. (1947). Farm management. The Macmillan Company, New York, p. 651.

5. Heady, E.O. (1952). Economics of agricultural production and resource use. Prentice-Hall, Inc., Englewood Cliffs, N.J., p. 589.

6. Whittaker, T.P. (1914). The ownership, tenure and taxation of land. Macmillan and Co., Ltd, London, pp. 520–521.

7. The Union Statutes. Classified and Annotated Reprint, 1910–1947. Part 8, Butterworth & Co. (Africa) Ltd, Durban, p. 16.

8. Anon. (1960). Land Settlement Act. Farming in South Africa, No. 36, p. 188.

9. The Union Statutes, *op. cit.*, p. 39.

10. *Ibid.*, pp. 97, 99.

Minister, but not exceeding one-fifth of the purchase price. Interest would be calculated at four per cent per annum and the total amount payable in three equal instalments, the first of which would be payable two years from the date of the commencement of the lease.

The Act also makes provision for a Crown grant of the holding to be issued to the lessee after five years from the date of commencement of the lease if the value of the holding, together with permanent improvements on it, exceeded the total indebtedness of the lessee to the Government by 25 per cent or more.

The Land Settlement Acts Further Amendment Act, Act 38 of 1924, as amended,¹¹ in an attempt to raise the standard of the farmers on the State settlements, made provision for the granting of Crown land to "probationary lessees". The object of this was to grant temporary occupation of State land to persons for five years, during which they would receive training in farming practices. During this period they would receive considerable help from the authorities. At the end of this period as a probationary lessee, if the probationary lessee was considered suitable by the Minister, he could be allotted a holding under the Land Settlement Act of 1912 already mentioned.

The Land Settlement Relief Act, Act 25 of 1931, as amended,¹² shows to a large extent how the land settlement acts had come to play an increasing role as rehabilitation measures. Section 4 accordingly makes provision for the inclusion in the purchase price of the allotments of certain debts of the lessee or purchaser to the State.

What this amounted to was that the lessee or purchaser could then pay off his arrears of rent, interest, rates and advances over a long period in small annual instalments. However, it must be remembered that this Act was promulgated at a stage when the poor White problem was assuming ever-increasing proportions in South Africa.

The old Land Settlement Act of 1912 was superseded in its entirety by the Land Settlement Act, Act 21 of 1956, which made provision for three schemes under which State land could be granted to suitable applicants.¹³

Under the first scheme, as set out in section 20, which was superseded by section 10 of Act 68 of 1964, the applicant could choose the land he wished to apply for and then obtain an option to purchase from the

owner. If the applicant fulfilled all the requirements of the Act and his application was approved he had to pay not less than one-tenth of the approved purchase price. "During the first two years the settler makes no payments, but the interest for this period — 4½ per cent at present — as well as transfer costs, are included in the price of the land. The annual payment is calculated over a 63 year period. If the settler has satisfied all the prescribed conditions after 5 years, he is entitled to the title deed, after which he can make use of the land at his own discretion."¹⁴ Section 23 of the Land Settlement Act of 1956 makes provision for the second scheme, under which State land which has been divided into economic holdings or land which has reverted to the State is advertised for allotment in the Government Gazette and Press.

The land is then allotted to the successful applicant, on "hire purchase" after payment of an amount not exceeding one-fifth of the purchase price, for a period of five years, which can be extended to a maximum of ten years. "Provided that the purchase price of any such holding, less the amount contributed towards the purchase price by the lessee, together with interest at the appropriate rate shall be payable in sixty-three annual instalments, the first of which shall be payable at the expiration of two years from the date of the commencement of the lease."¹⁵

The third scheme under which land was allotted in terms of this Act was the one under section 29, in terms of which rights of temporary occupation were granted for a period not exceeding five years to probationary lessees. Once a probationary lessee had satisfactorily completed this training period under the supervision of trained agriculturists, a holding could be allotted to him in one of the closer settlement areas on condition that rent became payable annually, in respect of the first year of the lease at the rate of 1 per cent and thereafter increasing annually by 1 per cent up to the fourth year.¹⁶ Where the lessee exercised his option to purchase, the outstanding balance of the purchase price, together with interest at the appropriate rate, was payable by the lessee to the Government annually in 65 equal instalments. The first instalment was payable on the date on which the right of purchase was exercised.

Further general provisions of Act 21 of 1956 were among others, that —

- a lease in writing had to be issued to the lessee;
- the lease had to be registered with the Registrar of Deeds;

11. *Ibid.*, pp. 105, 107.

12. *Ibid.*, pp. 197-205.

13. Statutes of the Union of South Africa. Part I, Nos 1-47, Cape Times Ltd, Parow, 1956, pp. 189-291.

14. Farming in South Africa. No. 36, May, 1960, p. 189.

15. Statutes of the Republic of South Africa, 1964, Part II, Nos. 62-90, Cape & Transvaal Printers Ltd, Cape Town, p. 975.

16. *Ibid.*, p. 971.

- no fees were payable in respect of the registration of such a lease;
- every lease had to make provision for the lessee to exercise his option to purchase at any time during the period of the lease;
- the lessee had to live on the holding and occupy it beneficially for such period in each year as might be specified.

The Land Settlement Act of 1956 was repealed wholly by the Agricultural Credit Act, Act 18 of 1966, as amended. Among other things, provision is made for the Minister of Agriculture to appoint an Agricultural Credit Board.

The Board can grant financial aid to farmers or prospective farmers, subject to certain conditions. Section 10 (1)(b) is relevant to this discussion and reads as follows: "(b) by selling or letting to such a person immovable or movable property of the State not controlled by the Railway Administration, which in the opinion of the Board is suitable for farming purposes."¹⁷

It appears, therefore, that both the present land settlement legislation and previous acts have two general characteristics:

- (i) They deal with the settlement of farmers on State land.
- (ii) They are basically aimed at making the lessees into farm owners. Although the present Act makes provision for both the sale and the leasing of agricultural land by the State, the present policy is that land should be offered mainly for sale. Little provision is made for permanent leasing in the land settlement acts.

STATUTES RELATING TO AGREEMENTS BETWEEN LANDLORDS AND TENANTS

Apart from the stipulations regarding State land granted to lessees under the Act already discussed, there is no specific legislation in the Republic of South Africa on the conditions which must be fulfilled by a lease in respect of agricultural land. It is therefore entirely the responsibility of the landlord and the tenant to ensure that every possible aspect affecting the lease agreement is included in a written lease and also that such a lease does in fact exist.

The only existing legislation in this connection is the Formalities in Respect of Leases of Land Act, Act 18 of 1969, which establishes certain requirements and section 1 of which covers the following:

- No lease of land shall be invalid merely by reason of the fact that such lease is not in writing.
- In order to be valid against a creditor, a lease of land which is entered into for a period of not less than ten years or for the natural life of the lessee or which is renewable from time to time at the will of the lessee indefinitely or for periods which together with the first period of the lease amount in all to not less than 10 years must —
 - (a) be registered against the title deeds of the leased land; and
 - (b) the creditor must at the time of the giving of credit or of the entry into the transaction by which he obtained the leased land or a portion thereof or obtained a real right in respect thereof, as the case may be, have known of the lease.¹⁸

Registration against the title deeds of the land can, however, only be effected if the lease is put in writing. In addition, our legal system also stipulates that: "Huur gaat voor koop". Therefore, where the lessee has a real right in respect of the leased land, the law safeguards him against third parties. Whether the lessee does in fact have a real right is determined as follows:

"(i) Korttermynhuurkontrakte

Dit is huurkontrakte vir minder as tien jaar. Die huurder verkry 'n saaklike reg indien hy in besit van die saak is, tensy die derde persoon (koper) geweet het van die bestaan van die huurkontrak in welke geval besit nie 'n vereiste is vir die verkryging van die saaklike reg nie.

(ii) Langtermynhuurkontrakte

Indien die kontrak nie geldig is teenoor 'n skuldeiser of 'n opvolger in titel van die verhuurder kragtens die bepalings van wet 18 van 1969 nie, sal die huurder ook nie oor 'n saaklike reg op die huursaak beskik nie en gevolglik nie teen skuldeisers van die verhuurder of teen kopers van die huursaak beskerm wees nie. Indien die opvolgers in titel verkrygers om niet is, sal hulle in al die gevalle gebind wees wanneer die verhuurder aan die huurkontrak gebind is. Sodanige verkryg-

17. Statutes of the Republic of South Africa. Classified and Annotated. Title: Agriculture, Part II, p. 1673.

18. Statutes of the Republic of South Africa. Title: Landlord and Tenant. p. 131.

ers is byvoorbeeld erfgename, persone wat ontvang by wyse van geskenke ens."¹⁹

Therefore, although it is not obligatory for a lease to be registered at the Deeds Office, or for it to be in writing, this would be desirable if the term of the lease is over ten years, because the lessee would then have a real right against third parties.

It is naturally very important to the lessee to have a real right in the leased land. One of the greatest criticisms of leasing as a land tenure system is the high degree of uncertainty that surrounds it. As soon as the lessee acquires a real right in the leased land, he also obtains the certainty that his lease can only be terminated under circumstances stated in the agreement. The lessee can then invest capital in the land with a reasonable degree of confidence, knowing that he will reap the benefit for a set period.

GENERAL LEGAL PRINCIPLES WITH REGARD TO LEASING

As has already been mentioned, South Africa has no specific legislation regarding leases of agricultural land. However, there is extensive legislation on the leasing of property, which can obviously not be covered fully here. This article will discuss only the obligations of the tenant and the lessor, subletting and the concept of "huur gaat voor koop" as dealt with by De Wet and Yeats,²⁰ to the extent to which they apply to agricultural land. Leasing is defined by De Wet and Yeats as: "'n Wederkerige ooreenkoms waarkragtens die een party, die verhuurder, hom verbind om aan die ander, die huurder, die gebruiks- (en vrug-) genot van 'n saak, in die geheel of gedeeltelik, tydelik te laat toekom teen geldelike vergoeding."²¹

In terms of the above definition, the term leasing can only be used if the remuneration by the lessee is in the form of money. However, an exception is made in cases where the payment consists of a fixed portion of the yield of the property.

Obligations of the lessor

The lessor is responsible for delivering the leased property or *res* to the lessee together with the things without which the property or *res* cannot be used. This could mean, for example, that a tobacco farm leased as such may not be delivered without drying kilns.

The lessor has to deliver the property in the condition in which it was when the agreement was concluded, unless previously otherwise agreed. Where the property is leased for a particular purpose, the lessor tacitly guarantees that it is suitable for that purpose. If, therefore, a farm is leased as a tobacco farm and the lessee finds that the land is unsuitable for tobacco cultivation for some reason or another, the lessor is guilty of breach of contract. In such cases the lessee has the right, depending upon the seriousness of the defect in the property, to withdraw from the contract or to demand a reduction in his rental.

The lessor may not disturb the lessee in the use of the farm, except in cases where necessary repairs have to be carried out on the leased property.

The lessor is responsible for safeguarding the lessee against any claims by third parties on the right and title to the leased property.

The legal system also makes provision for the lessee to be compensated by the lessor on termination of the lease for affixtures made with the approval of the lessor. Where the affixtures are made without the approval of the latter, the lessee may remove them. If, however, this is not done before the lease expires, the affixtures become the property of the lessor. In the case of trees and vineyards, the lessee can claim no compensation except if they were planted on the lessor's instructions, in which case only the cost of the young trees and/or vines may be claimed. In the case of crops, the lessee is entitled to compensation for the ploughing, cultivation and sowing of the lands and for the cost of the seed. After the expiry of his terms of lease, however, the lessee has no right to harvest or remove crops.

Obligations of the lessee

The lessee's chief obligation is to pay his rent, which, unless otherwise agreed, is payable only at the end of the term of the lease. Should the lessee fail to pay his rent, the lessor would have a hypothec on any property on the leased farm, including crops, with the exception of items introduced on it for a purely temporary purpose. An interesting situation arises where the lessee's rent is in arrears, but he has sublet the land with everything on it. In such a case the lessor has a hypothec only in so far as the subtenant still owes rent to the lessee. This hypothec is only valid in respect of arrears of rent and cannot serve as insurance for proper fulfilment of the terms of the lease.

Because a lease is a reciprocal agreement, the lessee is automatically entirely or partly exempted from his obligation to pay rent should the lessor be guilty of breach of contract. This also holds if he is prevented by force majeure from the full enjoyment and use of the leased property. This means that, for example, a farmer who is prevented by war or a drought from

19. Anon. Unpublished notes supplied by the Department of Commercial Law, University of Pretoria, pp. 6-7.

20. De Wet, J.C. and Yeats, J.P. (1964). *Kontraktereg en Handelsreg*. Third edition, Butterworths, Durban, pp. 262-304.

21. *Ibid.*, p. 262.

producing a crop can be entirely or partly exempted from his obligation to pay rent. "So staan ons skrywers 'n kwytskelding of vermindering van huurgeld toe waar die huurder van lande weens buitengewone en onvoorsienbare weersomstandighede geen normale oes maak nie, of waar 'n huurder van huise of lande deur 'n vyandelike intog belet word om die huis te bewoon of die land voordelig te maak, of waar 'n aardbewing die verhuurde huis laat instort."²²

However, where the lessee has expressly or tacitly accepted the risk of such circumstances he has to pay the rent in full.

In the Cape and in the Free State the above-mentioned rules have been partially abolished. The laws of these two provinces exclude "inundation, tempest, or such like unavoidable misfortune" and also "war or insurrection" (the latter only in the Free State) from the above-mentioned stipulation. It appears that this stipulation still applies in the Transvaal and Natal. De Wet and Yeats passed judgment on this abolishment by the Cape in fairly strong terms: "Die Kaapse howe het hierdie artikel gaan uitlê as 'n algehele afskaffing van die gemene reg betreffende hierdie materie, behalwe vir die geval van algehele vernietiging van die verhuurde saak. Hierdie wye uitleg word egter nie deur die woorde van die wet geregtvaardig nie, en is verwerplik."²³ In spite of technical legal criticism, justified or not, it would be a great asset if standardised legislation in this connection was introduced in all the provinces of the Republic.

The lessee is responsible for using the leased property properly and returning it in the condition in which he received it. Moreover, the lessee may only use the leased property for the purpose for which it was leased, or for which it is usually used, unless the use is specified in the agreement. This would mean that, if a person leased a poultry farm in the Karoo and began to plough up the whole farm, the lessor could prove him guilty of breach of contract.

Lastly, the lessee has to vacate the leased property upon the expiry of the term of the lease and return it to the lessor, even if he has not finished harvesting his crop.

Subletting

There is evidently no agreement as to whether the law makes provision for the subletting of land. De Wet and Yeats²⁴ maintain that under the Cape and Free

State courts subletting of fields is not permitted. The Transvaal court, however, has decided that subletting is lawful.

Kerr²⁵ quotes the case of *Spies versus Lombard*, 1950 (3) S.A. 469 A.D., in support of the view that subletting of agricultural land without the approval of the lessor is illegal: "Professors De Wet and Yeats consider that the rule is otherwise, saying at p. 275: (Die huurder van lande kon ... net so vryelik as die huurder van huise onderverhuur.) It seems better, however, with Professor Wille (p. 122), the learned editors of Wille and Millin (p. 233), and Professor Gibson (p. 156), to accept that the decision in *Spies'* case settles the law."²⁶

There is, therefore, at present a difference in the attitude towards subletting of land between the Cape and Free State, on one side, and the Transvaal and Natal on the other. The legislators would therefore be doing the country as a whole and agriculture, in particular, a favour by introducing uniform legislation in this connection in all four provinces.

"Huur gaat voor koop"

"Die Romeins-Hollandse opvatting dat die huurder van huise en lande 'n saaklike reg verwerf, is hier by ons gehandhaaf; 'huur gaat voor koop' is 'n spreuk, wat vandag nog geld."²⁷ The most important aspect of this matter is the determination of whether the lessee does in fact have a real right against third parties or not. This aspect has already been discussed. It will therefore suffice to conclude that a real right will only come into being through possession or registration in the register of deeds of the leased property.

It should perhaps also be mentioned that where more than one person or body lays claim to a real right, the old maxim holds that the older real right takes precedence over the newer.

Termination of the lease

The lease agreement may be terminated by the expiry of the term of the agreement or by termination by one of the parties.

Expiry of the term of the lease can obviously only happen when the lease was concluded for a specified period. If, however, a lease was entered into for an unspecified period, the agreement becomes terminable by either party. Notice of the termination must be given so

22. *Ibid.*, p. 271.

23. *Ibid.*, pp. 271-272.

24. *Ibid.*, p. 275.

25. Kerr, A.J. (1969). *The law of lease*. Butterworths, Durban p. 135.

26. *Ibid.*, p. 135.

27. De Wet, J.C. and Yeats, J.P. *op. cit.*, p. 278.

that the lease expires at the end of a leasing period and must be given in such a way that the parties concerned have reasonable opportunity to make other provision.

The death or insolvency of the lessee or lessor does not terminate the lease agreement. There are, however, certain exceptions to this general rule, particularly as regards the death of one of the parties. A terminable lease, that is to say, one in which one of the parties may continue the lease as long as he wishes, cannot remain in force after the death of the relevant party. "a lease at the will of a party which has not previously been terminated terminates on the death of that party."²⁸ The lessee must, however, be granted enough to vacate the property in the case of the death of the lessor.

GENERAL

The position in South Africa is, therefore, that there are no laws which are primarily aimed at prescribing the basic points to be included in leases relat-

ing to agricultural land, except in cases where State property is involved. Even in that case the main emphasis is on the eventual transfer of the property to a lessee.

South African legislation is largely directed at guaranteeing justice, within the framework of the law of lease, to both parties, in the concluding of leases. The statutes define what is valid within the framework. Unfortunately there are conflicting interpretations on certain aspects in different provinces.

No provision is made in the legislation for guidance as to what condition as to terms of leases, rentals, etc., can be regarded as reasonable.

One may well ask whether such legislation would serve a purpose in South Africa. For this reason the following article will discuss such legislation elsewhere in order to assess whether it appears useful to this country.

28. Kerr, A.J., *op cit.*, p. 153.