reading the notice, be aware of the steps that the seller intends taking. The notice itself must create that awareness. Merely referring the purchaser to the sale agreement would not achieve the same result.

Hurt AJA's statement also means that a notice mentioning a single remedy only would not meet the requirements of section 19(2)(c), if that remedy is not one of the remedies referred to in section 19(1). With respect, this cannot be faulted. However, it is respectfully submitted that this should not be construed to mean that a notice falls short of section 19(2)(c) if it mentions the remedies referred to in section 19(1) but then *in addition* refers to other remedies as well. As stated earlier, section 19(4) expressly reserves the seller's right to claim specific performance *after* a section 19(1) notice has been sent or delivered. Why could the notice not also refer to specific performance as an alternative remedy? Section 19(1), read with subsection (2)(c), does not limit the seller's choice of remedies; it merely says that the seller may not pursue any of the section 19(1) remedies unless the purchaser has been notified that the seller intends doing so. A purchaser is not misled if the notice records *all* the steps that the seller contemplates taking, including the steps contemplated in section 19(1). On the contrary, omitting a step that the seller contemplates taking may well have that result. The purpose of the notice is to warn the purchaser that unless he rectifies the breach he could be facing one of the drastic remedies referred to in section 19(1). Mentioning other (less drastic) remedies in addition to the drastic remedies would not mean that the purchaser has not been warned that the drastic steps are being contemplated. It merely means that the purchaser has been given the full picture of what he could be facing if the breach is not rectified. Restricting a section 19(1) notice to the remedies mentioned in the section, to the exclusion of all other remedies that the seller may be contemplating, would deprive the purchaser of the benefit of being fully informed of the consequences of his persistent breach of contract. This could never have been the legislature's intention.

7 Conclusion

Section 19(2)(c) of the Alienation of Land Act is worded in plain language, in one short sentence. It reads quite easily, and elicited relatively little comment from legal academics at the time when the Act was promulgated, or when the section was amended in 1983. In the circumstances a bystander may find it difficult to believe that sellers (let alone their legal representatives) could have had any difficulties in drafting a notice complying with the wording of the section. Yet, the true meaning of section 19(2)(c) has given rise to diametrically opposing views in the courts, and may still do so in future. It is safe to say that the last word on section 19(2)(c) has not yet been spoken.

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A TALE OF ATTEMPTED MURDER AND HIV ...*

S v Nyalungu 2005 JOL 13254 (T)

"Just as other individuals in society are held responsible for their actions outside the criminal law's established parameters of acceptable behaviour, HIV-infected individuals who knowingly conduct themselves in ways that pose a significant risk of transmission to others must be held accountable for their actions" (Hermann "Criminalizing Conduct Related to HIV Transmission" 1990 9 *Saint Louis University Public Law Review* 351 352)).

1 Introduction

The South African Law Commission (as it was then – hereinafter "SALC") was commissioned to investigate various aspects of the law as it related to HIV/AIDS. In its 5th and final report (Project 85, 5th Interim Report on Aspects of the Law Relating to AIDS – *The Need For A Statutory Offence Aimed At Harmful HIV-Related Behaviour*, April 2001 – hereinafter "SALC 5th report"), it dealt with "harmful (*ie* unacceptable) sexual behaviour by a person with HIV or AIDS that could transmit HIV or expose others to HIV, current measures available to address such behaviour and whether there is a need for statutory intervention" (viii of the executive summary of the report).

This note considers the SALC's recommendations in this regard and the reality that there have been no reported cases of successful prosecution under the common-law crimes for the wilful transmission of HIV, but that the case in point shows a willingness on the part of the courts to accept that such behaviour is dire and will be punished albeit under the guise of some "lesser" offence. Whether the decision is *S v Nyalungu* ([2005] JOL 13254 (T) (unreported)) has/will made/make it a less daunting task to prosecute crimes involving allegations of the wilful transmission of HIV/AIDS is yet to be seen.

2 Judgment

The accused (Nyalungu) was charged with rape and attempted murder in the court *a quo*. He was found guilty on both counts in that he had unlawful sexual intercourse with the complainant without her consent, knowing that he was HIV positive at the time. The complainant alleged that on the day in question, she was walking alongside a set of railway tracks. A man, the

* A special thank you to Prof SV Hoctor for being my guard-rail. Your input was appreciated (and needed).

accused, who was a stranger to her, approached her and forced her into the bushes. She protested and even told him that she was menstruating. Despite such protestations, he raped her there and then. The complainant identified the accused in an identification parade. He was accosted close to the scene of the crime where he attempted to flee from the police. Semen smears were taken from the complainant and were matched with blood samples taken from the accused. A DNA expert testified that the DNA profile of the accused and the semen that was found on the complainant was identical and stated further that "(d)ie kanse dus dat iemand anders as beskuldigde die dader kon wees is bitter gering" (*S v Nyalungu supra* 3). There was a positive match (99.999% accurate) to the accused.

During the course of the investigation, the accused placed on record that he was aware that he was HIV positive before he raped the complainant (*S v Nyalungu supra* 3) and it is this statement which brought him under the ambit of the Criminal Law Amendment Act 105 of 1997 (Schedule 2 deals with special sentences for rape committed by "... a person knowing that he has the acquired immune deficiency syndrome or the Human immunodeficiency virus ..." ((iv)). He was thus found guilty on the charge of rape. The appeal court confirmed this charge.

The issue for closer contemplation was charge number 4, that of attempted murder, particularly whether the finding on this charge was sound and within the letter of our law.

The court *a quo* found that the accused was guilty on the charge of attempted murder in that he knowingly and intentionally attempted to murder the complainant by raping her when he knew that he was HIV positive (*S v Nyalungu supra* 4).

3 HIV/AIDs – The pandemic

The recent statistics of infection of HIV in South Africa are staggering. What stands out most prominently is the rate of infection amongst women. Recent statistics (UNAIDS Fact sheet, UNAIDS epidemic Update 2007, http://data.unaids.org/pub/EPISlides/2007/071118_epi_regional%20factsheet_en.pdf, accessed on 7/04/2008) suggest that in Africa "women are disproportionately affected by HIV. Women and girls make up almost 61% of adults living with HIV in sub-Saharan Africa". (UNAIDS Fact sheet, UNAIDS Epidemic Update 2007, http://data.unaids.org/pub/EPISlides/2007/071118_epi_regional%20factsheet_en.pdf – "Sub-Saharan Africa remains the most affected region. Some 1.7 million [1.4 million-2.4 million] people were newly infected with HIV in 2007, bringing to 22.5 million [20.9 million-24.3 million] the total number of people living with the virus. Unlike other regions, the majority of people (61%) living with HIV in sub-Saharan Africa are women.").

"Young women (aged 15-24) are bearing the brunt of new infections in Sub-Saharan Africa. Recent population-based studies suggest that there are on average 36 young women living with HIV for every 10 young men" (*ibid*).

Several reasons have been advanced as justification for the prevalence of the virus amongst women, although the most patent one is that of violence and sexual offences perpetrated against women (UNAIDS "Gender and Aids – HIV/AIDS and Gender Based Violence" http://www.unaids.org/html/pub/topics/gender/genderbasedviolence_en_pdf.pdf, accessed on 2005-01-07), particularly Partner Abuse, Sexual Assault and Child Sexual Abuse. Women are particularly prone to abuse by males because of the traditional and historical subservience of females to males.

The harsh reality is that women face two linked challenges, each compounding on the other. The first is violence against them and essentially being powerless to stop the violence; and the second is the HI virus itself (physiologically women are more susceptible to contracting the virus than men (Aids Law Project *Women, HIV and AIDS* Centre for Applied Legal Studies, University of the Witwatersrand, April 2004)). The statistics suggest that women are caught in a vicious cycle which is unlikely to end unless and until the government (both locally and globally) put the necessary measures in place in order to protect women from these hardships which they are powerless to deal with on their own.

In response to public outcry, the South African Law Commission was commissioned to look at the law and how it relates to the HIV/AIDS Epidemic. In its 5th Interim Report on Aspects of the Law Relating to Aids, it dealt with "The Need for a Statutory Offence Aimed at Harmful HIV-Related Behaviour".

The report deals with criminalisation of irresponsible behaviour as far as HIV transmission is concerned, as well as debating how to go about "giving" rights to innocent victims who have contracted HIV. Of particular note is the issue of wilful transmission of the HI virus, and what sanctions, if any, exist to curtail such behaviour. Issues which come to the fore, in light of the case in point, is whether or not the current dispensation is adequately armed to deal with the situation, or whether there are lacunae and thus a need to create a specific offence targeted at criminalisation of wilful transmission of HIV.

4 The role of the criminal law

Efforts to combat HIV/AIDS focus on measures which should be implemented to curb the spread of the virus (*ie*, to reduce the number of new infections), and one of those methods advocates that this could be achieved by relying on the criminal law and the sanctions which criminal behaviour merit.

Although some authors are of the opinion that the spread of HIV/AIDS is a public health issue and the criminal law should not be used as an instrument for achieving public health goals ("an integrated public health and human rights approach has over the years been accepted as having the best results in reducing the spread of HiV. It is recognised internationally that coercive legal measures, and the criminal law in particular, are to a great extent unacceptable as a public health tool and cannot reduce the unintentional

spread of HIV. The most effective means of limiting the spread of HIV is behavioural modification." SALC 5th report par 5.12), the criminal law still has a role to play when it comes to intentional transmission of the HI virus ("When individuals threaten the health of others by their deliberate or reckless behaviour, it has been urged that criminal prosecution should be considered an appropriate response by the state." SALC 5th Report par 5.13.1) as this deals with intention to cause harm (which the *boni mores* will not tolerate).

This note takes its stance in that the criminal law does have a role to play. But the extent of that role will not be canvassed here, save to say that it is not and should not be the only means/measure for curbing the spread of the virus. Neither should one's HIV status be used as an element of liability in of itself (the author is not advocating the criminalization of HIV status, only reckless, harmful behaviour in respect thereof – even "if it *is* (emphasis added) accepted that the criminal law does *not* have a role in actually preventing the spread of HIV, could it nevertheless have a role in terms of its traditional values, functions and objects *ie*, in deterrence, and in outlawing and punishing behaviour which society regards as harmful?" (SALC 5th report par 5 13 1). It is respectfully submitted that this is indeed the case. *S v Nyalungu* (*supra*) has shown that the courts will prosecute and pronounce judgment on what essentially *is* criminal (socially unacceptable) behaviour, and it will do this by relying on the basic principles of the criminal law to found liability (see also *R v Cuerrier* (1998) 127 CCC (3d) 1 par 140-142):

> "(T)he criminal law does have a role to play both in deterring those infected with HIV from putting the lives of others at risk and in protecting the public from irresponsible individuals who refuse to ... abstain from high-risk activities ... Where public health endeavours fail to provide adequate protection to individuals ... the criminal law can be effective. It provides a needed measure of protection in the form of deterrence and reflects society's abhorrence of the self-centered recklessness and the callous insensitivity of the action of the respondent and those who have acted in a similar manner. The risk of infection and death of partners of HIV-positive individuals is a cruel and ever present reality. Indeed the potentially fatal consequences are far more invidious and graver than many other actions prohibited by the Criminal Code. The risks of infection are so devastating that there is a real and urgent need to provide a measure of protection for those in the position of the complainants. If ever there was a place for the deterrence provided by criminal sanctions it is present in these circumstances. It may well have the desired effect of ensuring that there is disclosure of the risk and that appropriate precautions are taken."

The SALC (5th report par 5.20-5.43) looked at the creation of an HIV specific offence as a means of prosecuting the wilful transmission of HIV. It looked at arguments in favour of creation of an HIV specific offence as well as those which advocated use of the already existing common-law crimes as a means of initiating prosecutions and bring convictions for the wilful transmission of HIV/AIDS:

(a) The high prevalence of HIV coupled with women's vulnerability to HIV

FOR	AGAINST
The prevalence of HIV has increased markedly in SA; this coupled with women's vulnerability calls for legislative intervention	Statutory measures will not make a difference to the fact that women are subservient to men and therefore unable to make use of the preventative measures available to them
Although measures are available for the prevention or curtailment of the spread of HIV, these are inaccessible to women for several reasons, mostly because of gender issues	HIV-specific crimes will only make the situation worse for women as the men only become aware of their own HIV status after their women have been tested (usually at the birth of a child during ante-natal visits at the hospitals and clinics).

(b) Difficulties with application of common-law crimes

FOR	AGAINST
HIV-specific offences would minimise ambiguities associated with the application of common law crimes. Statutory offence could be created to circumvent evidentiary problems associated with trying to make the HIV crime fit in with the pre-existing common law crime (fitting a square peg in a round hole)	The available remedies are good enough. The common law already provides for prosecution for harmful HIV-related behaviour. The victim would have both criminal (via the common law) as well as civil remedies. Intervention will not make a difference in curtailing the spread of HIV
It would create clarity and certainty in the law - clear guidelines as to what acceptable behaviour is. It is submitted that those against the codification have asked the wrong question: Instead of asking whether codification will prevent the spread of HIV, they should be asking whether codification will curtail harmful HIV-related behaviour!	Problems associated with proving guilt will not be curtailed by making HIV-specific offences. The same hurdles will still have to be overcome. A better approach is to continue with education regarding the harm associated with unprotected sexual relations

(c) The possible influence of statutory intervention on public health initiatives

FOR	AGAINST
The criminal law should reflect the needs of society. Harmful HIV-related behaviour of itself necessitates criminal sanction.	Creating such measures would have serious public health implications in terms of further misconceptions and stigmata
Persons who know/suspect that they are HIV positive have a responsibility to inform their partners. Failure unnecessarily puts partners at risk. It is submitted that this is a powerful proponent of it self. It solidifies the requirement that human beings must take responsibility for their actions - take responsibility for your HIV status	Statutory provisions directed to prevent HIV transmission require a person to KNOW that he is infected. It may serve to inhibit people for finding out their status
It is most unlikely that there will be any such deterrent effect from knowing ones status because of stigma. It will only allow partners to act responsibly towards each other, and encourage openness and fair-play	Such measures will not create an environment which supports people with HIV - 'anti HIV laws' will only serve to further austorcise them.

(d) The danger of selective enforcement of HIV-specific offences

FOR	AGAINST
This will not be the case. What is being prosecuted is not HIV status, but an abuse of such status, or rather failure to act responsibly in terms of such status	HIV-specific laws will be used against specific groups of individuals e.g. gay men

(e) Constitutional considerations

FOR	AGAINST
Statutory intervention is constitutionally justified because it is justified to target unacceptable HIV-related behaviour and that an HIV-specific codification is justified in terms of the principle of legality	Cannot be justified in terms of s36 of the Constitution
The purpose is to maintain human and civil rights	The right to humane treatment and individual liberty is at stake
Relying on Public Health Policy may have the undesired effect of being truly anti-constitutional (quarantine can be for an indefinite period). Also with quarantine you are punishing "HIV status" and not the "HIV crime"	Inequitable to use criminal sanction to discourage behaviour related to HIV-status

(f) Currently available alternatives

FOR	AGAINST
Current measures are inadequate. How can you justify "quarantine" as a sanction (where quarantine is for a period of 14 days) where the victim has been infected with HIV by the perpetrator when HIV is a virtual death sentence?	Opponents agree with this argument
Although civil remedies exist and are available, they are costly and time consuming. The state should and does have an interest in protecting its citizens from harm - why is protecting from harmful HIV-related behaviour any different?	The civil law should be used together with the common law

(g) The justice systems capacity to deal with an additional offence

FOR	AGAINST
Because of the high incidence of violent sex crimes, the disregard for women's rights *etc*, there is a need for HIV-specific crimes. It is submitted with respect that the argument raised by the opponents is the lamest excuse for not criminalising the behaviour. The legislature should not avoid passing legislation because it means more work!	The creation of HIV-specific crimes will result in an over utilisation of the criminal justice system. The courts are already too busy and so making HIV-related harmful behaviour a crime will make the work load for the courts too heavy.

(h) The absence of prosecutions under existing common law

FOR	AGAINST
No prosecutions have been brought because it is impossible to obtain conviction for HIV-related crimes under the common law and therefore a specific crime/s is/are necessary	There is no need, because thus far there have been no crimes prosecutions under the common law which have been brought

(i) The possible deterrent effect of an HIV specific offence

FOR	AGAINST
It will have deterrent effect, both for the community (by setting an example) as well as to the individual criminal. The argument by the opponents is flawed in that what is sought to be punished is "deviant" HIV-related behaviour	Unlikely to have a broad deterrent effect, because AIDS is not only spread by those with criminal intent, but also by those in consensual relationships

In the final analysis though, the SALC recommended that the same objectives (prevention of wilful transmission) could be achieved through prosecution under the auspices of the already existing common law crimes; and until *S v Nyalunga* (*supra*), we have waited to see if the situation as prophesized would materialize.

5 Use of the common-law to secure convictions: in foreign jurisdictions

Other jurisdictions have faced the same arguments around the creation of an HIV-specific offence (at all times the mischief sought to be remedied was spread of the virus and curbing of harmful behaviour).The United States of America, Zimbabwe and Australia have adopted HIV-specific legislation.

In Australia the creation of an HIV-specific offence has been done mainly via public health legislation which contain provisions either targeted at harmful HIV-related behaviour or the general transmission of infectious diseases (see s 37(1) of the Public and Environmental Health Act of 1987: "A person infected with a controlled notifiable disease shall take all reasonable measures to prevent transmission of the disease to others. Penalty: Division 3 Fine." See also Queensland Health Act Amendment Act (No 3) of 1998; New South Wales Public Health (Proclaimed Diseases) Amendment Act of 1985; Victoria Health (General Amendment) Act of 1988). It is important to note that in the states in Australia that have enacted such legislation, AIDS has been declared a notifiable disease.

The Zimbabwean Sexual Offences Act 8 of 2001, affords criminal liability (in particular circumstances) to an HIV-positive person (Part V – see particularly ss 15 and 18).

The following tables have been taken from "Evaluating the Impact of Criminal Laws On HIV Risk Behavior A State of the Art Assessment of Law and Policy" (http://www.publichealthlaw.net/Research/PDF/HIV_Crim.pdf). The tables are self-explanatory and are indicative of the successfulness of HIV-specific legislation enacted in the United States of America.

Figure 1 - prosecutions per year:

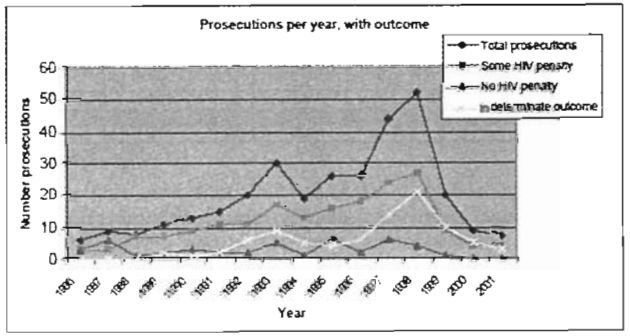

Figure 2 - prosecutions by state:

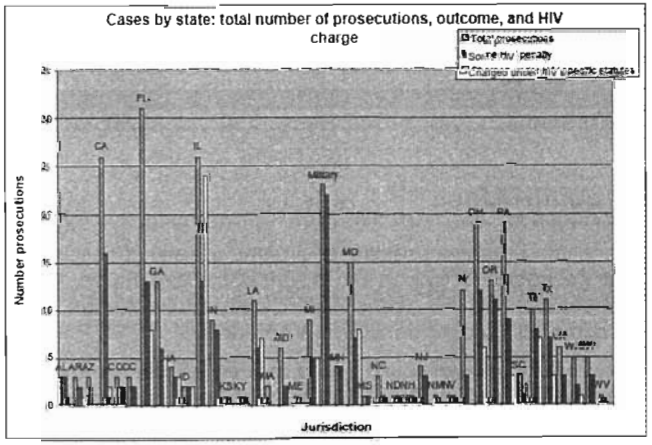

Table II - prosecutions and outcomes by mode of exposure:

	Total prosecutions		Total with some HIV penalty		
	#	As % of all prosecutions	#	Conviction rate within exposure category	Convictions as % of all prosecutions of known outcome (n = 228)
Sexual exposure	211	67.0	138	64.8	60.5
Prostitution	40	12.7	22	55.0	9.6
Solicitation of prostitutes	1	0.3	1	100.0	0.4
Consensual sex	84	26.6	64	76.2	28.1
Unconsensual sex, unclear consent	95	30.1	58	61.1	25.4
Spitting, biting, or scratching	75	23.4	32	42.7	14.0
Spitting	24	7.6	8	33.3	3.5
Biting	49	15.5	24	49.0	10.5
Scratching	1	0.3	0	0.0	0.0
Selling blood	5	1.6	4	80	1.8
Syringe injection or threat	12	3.8	5	41.7	2.2
Needle-sharing	0	0	0	0.0	0.0
Mode of exposure unknown	2	0.6	0	0.0	0.0
Other mode of exposure	10	3.5	3	30	1.3
No alleged exposure	2	0.6	2	100	0.8
Total	*316*	100	184	N/A	80.6

Table III - case outcomes:

Outcome	Number	As % of all prosecutions
Defendant died before trial or sentencing, or was too ill to be tried	8	2.5
Unable to determine if conviction was for HIV charges or non-HIV charges	8	2.5
Outcome unknown	72	22.8
Total with no determinate conclusion to the case	*88*	*27.8*
Convicted on HIV charges	164	51.9
Convicted under HIV-specific criminal statute	55	17.4
Convicted of other, non-HIV charges as well	33	10.4
HIV led to penalty enhancement in sentencing	21	6.6
Total with some HIV-related penalty	*184*	*58.2*
Acquitted of HIV charges, or HIV charges dropped/dismissed	30	9.5
Convicted only of non-HIV charges without HIV penalty enhancement	14	4.4
Total with no HIV-related penalty	*44*	*13.9*
Total number of cases	*316*	*100.0*

6 In South Africa

The SALC concluded that the creation of an HIV specific offence is "neither necessary nor desirable" (5th report xi). In light of the fact that the conviction in the present case was on the crime of attempted murder, only that common law crime will be considered in what follows.

Snyman (*Criminal Law* 4ed (2001) 421) defines murder as "the unlawful and intentional causing of the death of another human being". Attempted murder thus occurs where acting deliberately and intentionally, the accused attempted to kill someone; and the accused did something that was a substantial step toward committing the crime. Mere preparation is not a substantial step toward committing a crime.

On the facts, in order to find the accused guilty on a charge of attempted murder, the prosecution would have to prove that it was the accused's intention to cause the death of the complainant.

The accused in the case in question admitted to having raped the complainant. He also made the admission that he knew that he was HIV-positive and that he had been warned of the consequences of engaging in unprotected sex. He was also receiving treatment for his illness (*S v Nyalungu supra* 5-6). The prosecution relied on *dolus eventualis* to secure a conviction of attempted murder. The charge laid against the accused was "dat die beskuldigde skuldig is aan poging tot moord deurdat hy wederregtelik en opsetlik gepoog het om die klaagster dood te maak deur haar te verkrag terwyl hy daarvan bewus was dat hy HIV positief is" (*S v Nyalungu supra* 4). This is sound as Schreiner JA in *R v Huebsch* (1953 2 SA 561 (A)) states "[i]n order to support a conviction for attempted murder there need not be a purpose to kill proved as an actual fact ..." [it is sufficient to show] "an appreciation that there is some risk to life involved in the action contemplated, coupled with recklessness as to whether or not the risk is fulfilled in death" (567H).

There are two elements that must be manifest in order to secure a conviction on attempted murder. These have been depicted as "a) an intent to commit the offence and b) an overt act ... directed towards the carrying out of that intention" (*R v Sharpe* 1903 TS 868). Preparatory acts which are just that, will not serve as proof of an attempt to commit the offence. It is a thin line which the attempter will cross before acts of preparation cement themselves into attempts. Proof of causation is also not required to establish the offence of attempt.

It has been contended that, at the very least, in order to secure a conviction on attempted murder, the prosecution will have to prove that the accused completed one of a series of actions which were intended to cause the death of a person. What is important for our purposes is that the actual death of the person is not required; the question being whether "...his acts have reached such a stage that it can properly be inferred that his mind was finally made up to carry through his evil purpose ..."(*R v Schoombie* 1945 AD 541; and *R v Madikela* 1994 1 SACR 37 (BA)).

The enquiry for establishing guilt on a charge of attempted murder would thus begin by establishing that the accused commenced with the consummation of an act that would cause the ultimate harm. On the facts before us, this is easily established in that there was unprotected sexual intercourse between the complainant and the accused. Further that the accused admitted to raping the complainant.

The difficulty arises in that it will be necessary to show that the accused intended to use HIV/AIDs as the means of causing the death of the complainant through the act of unprotected sexual intercourse. This will have to be established through *dolus eventualis* – "... the accused foresees the possibility that the prohibited consequence might occur, in substantially the same manner as that in which it actually does occur, or the prohibited

circumstance might exist and he accepts this possibility into the bargain (*ie*, is reckless as regards this possibility)" (Burchell *Principles of Criminal Law* 3ed (2005) 467).

It will not be necessary to show that the complainant actually contracted HIV or that the accused was the cause of the victim becoming HIV positive. The inquiry stems from the mental state of the accused and his appreciation of the cause of his illness and the nature of its further transmission ("Dit is onbekend of die klaagster inderdaad deur die beskuldigde met die virus besmet is ... Die klaagster weier om te gaan vir 'n toets omdat sy bang is vir die uitslag. Hierdie feit is egter na my oordeel irrelevant. Die blote feit dat A na B skiet om hom te vermoor en mis skiet neem nie weg die feit dat A aan poging tot moord skuldig is nie. *Solank die handeling voltooi is met die oogmerk om 'n bepaalde gevolg teweeg te bring wat om een of ander rede nie intree nie, is poging bewys*" (*S v Nyalungu supra* 7, emphasis added)). The question thus being, "what was the mental state of the accused at the time of commission of the criminal act?"

7 Conclusion

Nyalungu is the manifestation of the assurance given by the SALC in its 5th report. It does everything that the SALC said could be achieved without resorting to the creation of an HIV specific offence. That being said, it is acknowledged that the prosecution's case in *Nyalungu* was made somewhat easier by the fact the accused admitted that he had raped the complainant and that he was HIV positive at the time, and that he knew how and under what circumstance the virus could be transmitted. The writer waits with keen interest to see how the courts will deal with the same issue where the criminalizing elements are less forthcoming. Jordaan J has, through various *obiter* statements help lay the foundation for such eventualities. He also states boldly that the issue of whether or not the complainant actually contracted the virus is irrelevant as culpability stems from the mental state of the accused, and not the harm suffered by the complainant (*S v Nyalungu supra* 7).

It is hoped that this note will bring to the attention of prosecutors the length and breadth of this notion, that prosecutions, successful prosecutions, can be instituted in instances where HIV is an element of criminal misconduct.

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REKTIFIKASIE (EN KONDONASIE?) VAN VERKEERDELIK-ONDERTEKENDE TESTAMENTE

Giles NO v Henriques [2007] 4 All SA 1409 (C)

1 Inleiding

Ondanks die statiese beeld van die erfreg (De Waal "The Social and Economic Foundations of the Law of Succession" 1997 *Stell LR* 162) kom Suid-Afrikaanse howe tog van tyd tot tyd voor 'n *res nova* op dié regsgebied te staan. Die vraag wat regter Goliath in *Giles NO v Henriques* [2007] 4 All SA 1409 (C) moes beantwoord, het nog nie tevore voor 'n Suid-Afrikaanse hof gedien nie (par [30]): is rektifikasie moontlik ten opsigte van testamente wat die wense van die betrokke testateurs korrek verwoord, maar deur die "verkeerde" testateurs onderteken is?

2 Die feite

Die testateurs, mnr en mev Cammisa, se afsonderlike testamente is ooreenkomstig hul instruksies deur ene Ronald Ness opgestel. Op 15 September 1999 het die Cammisas Ness se kantoor besoek ten einde die testamente te onderteken. Hulle het die betrokke dokumente gelees en, nadat die inhoud en regsgevolge van beide testamente aan hulle verduidelik is, het hulle hul tevredenheid daarmee verklaar. Tydens voorgenoemde verduideliking is die twee dokumente tydelik uit die Cammisas se besit geneem. Nadat die bespreking van die testamente afgehandel is, is die dokumente weer aan die Cammisas oorhandig vir ondertekening. Sonder dat enigeen van die teenwoordiges dit besef het, het mnr Cammisa per abuis die testament wat vir mev Cammisa voorberei is, onderteken en mev Cammisa het dieselfde gedoen met die testament wat vir mnr Cammisa voorberei is (par [13]). Dieselfde attesterende getuies het beide testamente in die teenwoordigheid van die testateurs onderteken (par [46]). Ingevolge mev Cammisa se testament moes haar hele boedel na mnr Cammisa gaan en, sou hy voor haar sterf, na hul seun, Carlo, of by ontstentenis van Carlo, na sy (Carlo se) afstammelinge (par [15]). Carlo was die hoof-begunstigde ingevolge mnr Cammisa se testament – voorsiening is gemaak vir 'n kapitaalbelegging waaruit mev Cammisa inkomste moes put sowel as die betaling van enkele legaat-bemakings, waarna Carlo die restant van mnr Cammisa se boedel moes ontvang (par [16]).