

A remarkable story about Lord Rodger of Earlsferry

An obituary on Lord Rodger of Earlsferry (1944-2011), written by Andrew JM Steven of Edinburgh, appeared in 2012 (18-1) *Fundamina* 189. Lord Rodger was, to quote Steven, the “Lord Justice General and Lord President of the Court of Session (the head of the Scottish judiciary)”. He became a House of Lords Judge in London in 2001 and subsequently a Justice of the newly established Supreme Court of the United Kingdom until his death (Steven at 190). Steven describes him as “indisputably the pre-eminent Scottish lawyer of his generation” (at 189). At one point (at 192) Steven writes the following about Lord Rodger: “Like his judgements, many of the statements made in his articles were eminently quotable and he rarely refrained from expressing his viewpoint. I take as an example his ‘Developing the law today: National and international influences’ (2002 (1) *Tydskrif vir die Suid-Afrikaanse Reg* 1) which is a revised version of his keynote address to the annual South African banking-law update conference in 2001”.

For purposes of what follows, some background is provided for the sake of international readers of *Fundamina*. The English translation of *Tydskrif vir die Suid-Afrikaanse Reg* is *The Journal of South African Law* (not to be confused with the *South African Law Journal*). The appellation, *The Journal of South African Law*, is seldom used. Instead, the journal is normally referred to by its Afrikaans acronym *TSAR*, which of course resonates rather well. The journal is published by Juta under the auspices of the Faculty of Law of the University of Johannesburg. The journal was launched by the Faculty in 1976 at the Rand Afrikaans University (which, in 2005, was merged with other institutions to become the University of Johannesburg). It has grown from strength to strength and the contributions in the journal are regularly quoted by the courts in South Africa and by writers. The journal appears four times per annum and is one of the most comprehensive and voluminous journals in South Africa. It consistently runs to more than 800 pages per annum and has done so for many years.

The annual South African banking-law update conference (generally referred to as ABLU) is offered by the University of Johannesburg and is attended every year by a large number of delegates. A keynote speaker is invited every year. Lord Rodger had his turn in 2001 and his paper was, as already mentioned, published in 2002 (1) *TSAR* at 1. When I read the obituary on Lord Rodger by Steven in *Fundamina*, it brought back memories of one of the most remarkable experiences that I have had in my career. It was an experience that bears testimony to Lord Rodger’s exceptional talents. Whoever reads this anecdote will know in the end that I am not the hero in the story, although it may appear so at the outset. Lord Rodger is the hero. And it is a story that is worthwhile sharing with

other lawyers around the world. Fortunately there are some people who can attest to the veracity of what follows.

The evening after Lord Rodger addressed the legal advisors to banks and other institutions, academics, attorneys (“solicitors” in English terms) and advocates (“barristers” as they are called in the United Kingdom) at the ABLU conference, he attended a dinner at the Rand Club in Johannesburg as the guest of the Faculty of Law. Present were a number of the Faculty’s professors and some judges. Among them were Judge of Appeal Ralph Zulman and two judges of the Witwatersrand Local Division (as it was then called), namely Judges Tom Cloete and Frans Malan, both of whom are now appellate judges in the Supreme Court of Appeal. The host for the evening was Professor Derek van der Merwe, then Dean of the Faculty and Professor of Roman law. He introduced Lord Rodger to us. Due to other commitments, I had not been able to attend Lord Rodger’s lecture earlier in the afternoon. When I was introduced to him, he told me that he had referred to one of my articles in his paper at ABLU. I replied by saying, “that is a huge honour, Lord Justice” (I do not know whether this was the correct way of addressing him). “Which article?” I asked. He replied, “The one on variable interest rate clauses in contracts”. The issue was a very important one in the late 1990s in South Africa and was settled by the Supreme Court of Appeal in *NBS Boland Bank Ltd v One Berg River Drive CC* 1999 (4) SA 928 (SCA). Incidentally, Lord Rodger commented extensively on the translations of the texts in the *Digesta* referred to by the court in this case (see his article in 2002 *TSAR* 14-16).

I was taken aback by his reference to this article of mine, since it was written in Afrikaans. For purposes of some readers this needs some explanation. Afrikaans developed out of the Dutch language over a period of three centuries. It is the mother tongue of millions of people in South Africa and Namibia. It has a strong literature and has developed its own technical terms in every field, be it in the natural sciences, the humanities, medicine, sport, the business world, the law, etc. An Afrikaans-speaking lawyer, particularly of my generation, can read the Dutch language with ease. A fair number of South African lawyers completed their doctoral degrees in the Netherlands over the years, particularly at the University of Leiden. A conversation between Dutch speakers and Afrikaans speakers may sometimes cause minor difficulties because of the differences in pronunciation, but is not impossible, particularly amongst Afrikaans speakers who regularly explore the *Lae Lande* (the Low Countries) and Dutch speakers who visit the beautiful shores of the Republic of South Africa.

After having read the obituary, I phoned the co-editor of *Fundamina*, Prof Rena van den Bergh, and asked her to have a look at his contribution in *TSAR*. In footnote 24 there is a reference to W de Vos *Verrykingsaanspreeklikheid in die Suid-Afrikaanse Reg* (Cape Town, 1982); in footnote 49 to JM Otto “Kontraktuele bedinge wat eensydige rentekoersvasstellings deur banke magtig” (1998) 4 *TSAR* at 603, 615-617 and in footnote 69 to JM Otto “Ou-wêreldse purisme in ’n nuwerwetse bankregkleed. Of was dit pragmatisme?” (2000) 1 *TSAR* at 79.

That evening in 2001 was the only time I met Lord Rodger, but what follows will confirm the huge regard in which he was held for his intellectual abilities, and indeed for his linguistic capabilities, and the facts are worth documenting. In the presence of the

Dean, Professor Derek van der Merwe, I asked him whether somebody had translated the Afrikaans texts referred to above for him. It should be borne in mind that even the Afrikaans titles of the texts will be intelligible only if you have a sound knowledge of the Afrikaans language. The title of De Vos' book may be translated as "Enrichment in South African Law", one of the all-time classics of South African legal literature. The titles of the two Afrikaans articles referred to may be translated as "Contractual terms that authorise unilateral interest rate determinations by banks" and "Old-world purism in new banking law apparel. Or was it pragmatism?" (The last-mentioned article dealt with an old rule of English banking practice, and English banking law, that is in conflict with Roman law and Roman-Dutch law regarding the appropriation of payments and the *ultra duplum* rule, and the case law in South Africa and Zimbabwe in this regard.) To our astonishment, Lord Rodger responded by informing us that he could read Afrikaans. He had read the decisions of the Appellate Division of South Africa (now the Supreme Court of Appeal) over the years and was suitably impressed by the quality of the judgments. (See also his remarks at 12 in this regard where he refers to "the superior intellectual attainments" of the South African judges.) Although many of the decisions of the South African courts at the time were delivered in English, a number were in Afrikaans, delivered by the same heavyweight and learned judges. He realised that he was hamstrung by his inability to read Afrikaans. He then studied Dutch until he was fluent enough in that language to be able to read Afrikaans with the aid of dictionaries. For example, in his article he refers to a judgment by Van den Heever JA (*Theron v Joynt* 1951 (1) SA 498 (AD)) that was delivered in Afrikaans. (See Rodger at 12 n 51.) The judge in this case, commonly known as Toon van den Heever (1894-1956), was not only a judge of appeal, but also an Afrikaans poet who often used poetic language in his judgments.

In our electronic and computer-dominated age languages often take a back seat and lack the importance they used to have. True scholars like Lord Rodger are indeed very rare these days and will be sorely missed.

JM Otto
Professor of Law; University of Johannesburg