

# *BROWN V LEYDS NO (1897) 4 OR 17: A CONSTITUTIONAL DRAMA IN FOUR ACTS. ACT TWO: THE 1858 ZAR CONSTITUTION, MALLEABLE INSTRUMENT OF TRANSVAAL REALPOLITIK (1859-1881)\**

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## ABSTRACT

This is the second in a series of articles on the historical and jurisprudential background to the well-known case of *Brown v Leyds NO (1897) 4 OR 17*, central to Chief Justice Kotzé's interpretation of the provisions for law-making in the 1858 *Grondwet* (Constitution) of the *Zuid-Afrikaansche Republiek*. This article traces the subsequent history of the *Grondwet* against the background of the socio-political turmoil in which the Republic was engulfed, the annexation of the Transvaal in 1877 and the restoration of the Republic in 1881. It describes the *Volksraad's* readiness to amend the *Grondwet* from time to time, on matters big and small, and to adopt a somewhat *laissez faire* attitude to the manner in which the *Grondwet* was amended. The manner in which the *Volksraad* made laws, either by means of the constitutionally-prescribed legislative process or by means of resolutions – an

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issue that became severely contentious in later years – is discussed and analysed. Also discussed is the uneasy relationship between the sovereign authority of the *volk*, the supreme authority of the *Volksraad* and the executive authority of the state president. It was the inability of both President Pretorius and President Burgers to fully appreciate the centrality of the *Volksraad*'s supreme authority in the Republican constitutional dispensation that led to their political demise. A final section examines the rise to political prominence of Paul Kruger (emphasising his obedience to the sovereign voice of the people as the voice of God) and of John Kotzé (emphasising judicial independence and integrity), against the backdrop of the annexation of the Transvaal by Great Britain and the successful war for independence fought by the *Boers*. This background is important for an understanding of the approaches adopted by Kruger and Kotzé in the later constitutional crisis they became embroiled in.

**Keywords:** 1858 *Grondwet*; constitution; constitutional amendments; unification; civil strife; *volk's party*; state party; *Volksraad*; supreme authority; sovereign authority; *volk*; *volkstem*; *Boer/Boers*; Paul Kruger; John Kotzé; MW Pretorius; TF Burgers; Keate Award; Alexander McCorkindale; annexation; War of Independence 1880-1881; supreme court; chief justice.

## 1 Introduction

The *Grondwet* (Constitution) of the *Zuid-Afrikaansche Republiek*, approved by the people at Rustenburg on 18 February 1858,<sup>1</sup> was a significant landmark in the history of white settlement in the Transvaal, the more so because it had been achieved against heavy odds. It provided the final confirmation that in the republican democracy which the people presumed to embrace, the King's voice (the *koningstem*) belonged to the people (the *volk*). In the exercise of that sovereign authority the people had assigned to the *Volksraad* not only legislative authority but supreme authority (the *hoogste gezag*).<sup>2</sup> All (the president, the commandant-general, the Executive Council, the *landdrosts*) exercised their authority subject to the supreme authority of the *Volksraad*, an arrangement made possible through the people's exercise of their sovereign authority as captured in the *Grondwet*.<sup>3</sup>

The *Grondwet* was about much more than the codification of fundamental principles of government. It was also an important codification of much of the Republic's public law; in doing so it provided for settled and structured government. In the manner in which it steered a workmanlike course between competing claims to ultimate authority, it was and remained a symbol of hard-won unity, a triumph of dogged perseverance rather than jurisprudential acuity.

The *Grondwet* settled the form and nature of statehood in the society, but it did not transform that society. It did not bring prosperity, peace or harmony. The

1 The original 1858 *Grondwet* is published in Jeppe & Kotzé 1887: 35-69.

2 See arts 12 and 29 of the *Grondwet*. Unless otherwise indicated, all references to the *Grondwet* are to the 1858 *Grondwet*.

3 The manner in which the *volk's* sovereignty is captured in the *Grondwet* is discussed in the first of this series of articles: see *Fundamina* 2017 24(1) at 149-150 & 162-163

African co-inhabitants of the territory were still a real and present danger to the *Boers*, whether openly hostile to them or temporarily peaceable.<sup>4</sup> They remained locked into an agrarian economy that developed only intermittently and in patches beyond subsistence levels. They were united, but that did not mean that they liked each other. Nor did it mean that they would forego their essentially individualist and contrary mind-set.<sup>5</sup> To cap it all, MW Pretorius and Stephanus Schoeman both still harboured delusions of grandeur.

Soon after the formal approval of the *Grondwet*, the business of the inclusion of the self-proclaimed independent Republic of Lydenburg into the *Zuid-Afrikaansche Republiek (ZAR)* commenced. The formal unification of the Republic of Lydenburg and the *ZAR* was completed in April 1860, not without some acrimony.<sup>6</sup>

The years following the approval and implementation of the *Grondwet* were a time of turmoil and strife for the Republic. First, civil war disrupted the region; then the discoveries of large diamond and gold deposits in the southern African interior impacted severely on the brittle state administration of the *ZAR*; thereafter, Theophilus Shepstone annexed the *ZAR* to Great Britain in 1877, an event that re-ignited the dormant sense of national pride among the Transvaal *Boers* and gave Paul Kruger the opportunity to become the natural-born leader of the *volk*. The First Anglo-Boer War (*Eerste Vryheidsoorlog*) of 1880-1881 brought about the independence of the *ZAR* as a suzerain of Great Britain and a political stability that the *ZAR* had rarely enjoyed in the preceding years. The early 1880s also saw the parallel launch of the careers of State President Paul Kruger and Chief Justice John Kotzé, both aspiring, through different means, to leave their permanent imprint on the state. They regarded the *Grondwet* as their source of strength and inspiration.

## 2 MW Pretorius's designs to unite the *ZAR* and the Free State

As early as May 1858 the affairs of the Free State again loomed large in the government chambers of the *ZAR*.<sup>7</sup> Moshoeshoe had seized the advantage offered to him by the

4 The regular discussions in the *Volksraad* in the late 1850s and 1860s on the ever-present threat posed by African tribes and how to deal with them (as recorded in the minutes of the *Volksraad* meetings (and reflected in *Volksraadnotule II* and *Volksraadnotule III*) is testimony to this constant morale-sapping and resource-sapping struggle.

5 In fact, in September 1859 the *Volksraad* found it necessary to make a law criminalising language uttered in private or in public that caused dissent, contempt or denigration of the state and made the offender liable to a wide range of punishments that included death and banishment: see art 26b in the minutes published in *Volksraadsnotule III* at 198 and see, too, the law published in *Volksraadsnotule III*: 602.

6 See the discussion by Wichmann 1941: 223-234; see, too, arts 1-18 of the minutes of the *Volksraad* meeting held in April 1860 in *Volksraadsnotule IV*: 37-51 esp 38-42.

7 On what follows, see, in particular, Van Jaarsveld 1951: 211-274 as well as Wichmann 1941: 199-211 and 235-245.

internecine conflict that raged between the *Boers* on either side of the Vaal River to attack the Free State *Boers* mercilessly. The Free State President, Boshoff, having been refused Cape colonial assistance by Governor George Grey, felt compelled (he was no friend of Pretorius) to seek the assistance of the *ZAR* or suffer being overrun by the Basotho armies. Pretorius, who hardly needed a second invitation, sought and gained permission during a special session of the *Volksraad* for him to lead a commando to assist the Free State.<sup>8</sup> Yet again, as he had done the previous year,<sup>9</sup> he chose to focus on so-called international affairs rather than on the pressing issues of internal unification and national conciliation in his own troubled country. Of course he used the opportunity to vigorously promote unification between the two Republics, the more so after a *ZAR* delegation led by Paul Kruger had helped secure a ceasefire with Moshoeshe.<sup>10</sup> Circumstances were propitious for unification and some 1 500 Free State citizens demanded unification from their *Volksraad*.<sup>11</sup>

Governor Grey, though, with more than enough strife to contend with both within the Colony and on its northern borders, had no intention of allowing Pretorius's grand unification designs to flourish. His own grand design was to establish a federation of southern African nations, black and white, under the benign protection of Her Majesty's British Empire (a project which enjoyed the support of President Boshoff and an influential portion of the Free State citizenry).

He wrote to President Boshoff to inform him, with no small manipulation of the truth, that if unification were to take place, it would invalidate both the Sand River and the Bloemfontein Conventions (signed respectively in January 1852 and February 1854).<sup>12</sup> That would mean that Great Britain would no longer consider itself bound to recognise the Conventions, placing a huge question mark over the independence of the two states. Not so, of course. The Conventions gave Britain no right to interfere *ex post facto* in the affairs of independent states. But the *Boers'* fear of Great Britain was only surpassed by their fear of God. They judged, correctly, that Britain was powerful enough to make and break the rules and have its way in southern Africa. The unification drive fuelled by Pretorius was therefore halted until *Boer* deputations could meet with Grey to discuss the future.

Nothing came of Grey's federation plans, though. He had acted independently of his London superiors, whose avowed stance was not to expend further resources on the expansion of British influence in southern Africa. Boshoff became a casualty of Grey's failed federation scheme. Never very popular with the electorate, he resigned in early 1859, estranged from the unificationists as well as from the federationists..

8 Arts 16-17 of the minutes of the meeting published in *Volksraadsnotule III*: 169-178 esp 176.

9 See the discussion in the first of this series of articles in *Fundamina* 2017 24(2) at 157-158.

10 See Van Jaarsveld 1951: 222-223.

11 *Idem* at 281. See, too, Wichmann 1941: 206 and Van Jaarsveld 1951: 230.

12 See Wichmann 1941: 206-208 and Van Jaarsveld 1951: 229-230.

Unification was now back on Pretorius's (and his supporters') agenda. Not on that of the *ZAR Volksraad*, though. The *Volksraad* feared the retraction of the Sand River Convention and the impact this might have on their independence. The *de facto* hands-off relationship they enjoyed with Britain outweighed even the most impassioned arguments of unification supporters. But Pretorius, buoyed by continued pressure in the Free State for unification, persisted in the pursuit of his father's dream of a united and independent *Boer maatschappij*. He made himself available for the vacant presidency of the Free State in the hope that being president of both Republics would somehow strengthen and hasten the unification process. It did neither. He was elected as President of the Free State in December 1859. He was sworn in in February 1860 for a limited term of office, having secured from the *ZAR Volksraad* – surprisingly – a six-month leave of absence. A key component of his unification design was to convince the Free Staters that their Constitution was flawed. The clear divide that existed, in his view, between the Free State *volk* and their *Volksraad* was because their Constitution, unlike the *ZAR Grondwet*, did not clearly enough articulate the *volkstem* of which the *Volksraad* was meant to be the representatives and interlocutors.<sup>13</sup>

Pretorius's plans were half-baked and, without the active support of the *ZAR Volksraad*, doomed to fail. In April 1860 the *ZAR Volksraad* (now including representatives of Lydenburg, none of whom were impressed by Pretorius and his schemes) temporarily suspended him as president, fearful that his activities in the Free State as a sitting president of the *ZAR* would threaten their treasured independence. Pretorius reacted to his suspension first with bluster (threatening them that they had to support him since the *volk* supported him) and then with demands that the legality of their conduct be demonstrated. The *Volksraad* responded in vintage *Grondwet* fashion, straight out of the constitutional rule-book Pretorius had himself helped to draft.

Its authority to take action against him, they informed him, is derived from a disapproving *volk*. Potchefstroom and Pretoria might support him, and these towns may be more influential in affairs of state than the others (the former was, after all, the capital, and the latter the seat of government). Demonstrably, though, they told him that he did not have support in the rest of the country where the *volk* constitutes the majority, if not in influence, then certainly in numbers. Its right to act against him derives from the highest authority it enjoys in the state, given to it by the *volk* and enshrined in the *Grondwet*. The nature of the action taken against him is prescribed by the *Grondwet* to which all owe obedience.

On 10 September 1860 Pretorius, with not much good grace, sought and was grudgingly granted an honourable discharge by the *Volksraad*. He remained president of the Free State until he resigned in June 1863.

13 See Wichmann 1941: 240; Van Jaarsveld 1951: 264.

### 3 Civil strife in the ZAR (1860-1864): Paul Kruger's successful promotion of a constitutional *Rechtstaat*<sup>14</sup>

As a condition of Pretorius's discharge as president, he and Commandant-General Stephanus Schoeman, in order to promote peace and unity in the Republic, had to engage with the *volk* in public meetings to inform them why Pretorius had sought and was granted his discharge. They did nothing of the sort. Sworn enemies not two years before, comrades-in-arms now, they sought in October to drum up support for Pretorius and his unification ideal against the *Volksraad* primarily in the Potchefstroom region and the Marico district in the far west. Their line was that the *volkstem* must be heard and that the *Volksraad*, no longer representatives or mandatories of the *volk*, must be overthrown.<sup>15</sup> The good folk of Potchefstroom and those from the western parts of the country had kept the machinery of state going in the dark years of the previous decade and had been the driving force behind the *Grondwet*, while the people from Lydenburg and Soutpansberg had done little more than consistently derail well-intentioned efforts. And now these same nay-sayers were calling the shots. Hardly fair. Not two years earlier, Pretorius had campaigned tirelessly for unity and conciliation and the return of Lydenburg to the fold.

The *Volksraad* had appointed as acting president JN Grobler – one of the burgher members of the Executive Council – and not Schoeman, who, as the senior member of the executive, should have been appointed. Schoeman, though, would then have been obliged to give up the office of commandant-general, which the *Volksraad* did not want to happen. A Pretorius/Schoeman support group (calling themselves *Sprekers van die volk* – interlocutors of the people) then declared the decisions of the *Volksraad* invalid as they were contrary to the wishes of the people (and the *Grondwet*). They also gave President Pretorius leave of absence to pursue unification with the Free State, appointed Schoeman as acting president and replaced other members of the Executive Council. The revolution was underway.

When this revolutionary *volk's* party sought to drum up support in Rustenburg, they were met by a determined Paul Kruger. Kruger's stance was commendable: the integrity of the state and its institutions is guaranteed by the *Grondwet* and is sacrosanct. If there is indeed serious division in the country and if indeed the *Volksraad* is out of touch with the *volkstem*, this should be discussed at a general assembly of the *volk* and, if needs be, by referring the matter to a special court (as had happened with the 1857/1858 Pretorius/Schoeman fracas).<sup>16</sup> Soon large parts of

14 The main sources of reference for the following section are Van Jaarsveld 1951: 253-320; Ferreira 1978: 174-184, 192-206, 240-246 and 256-314; and the minutes (or, in some cases, unofficial reports) of the *Volksraad* meetings sporadically held during this period available in *Volksraadsnotule IV*: 37-223 and *Volksraadsnotule V*: 3-27.

15 See Van Jaarsveld 1951: 272-276; Ferreira 1978: 178-181.

16 See, further, Van Jaarsveld 1951: 279-281.

the country had chosen sides: either for the *volk's* party of Schoeman and Pretorius or for, what came to be called, the state party of Paul Kruger. The latter stood for the constitutional integrity of the state and rejected revolutionary activity.

The division also manifested itself along church-based lines. When, in 1859, Dirk Postma arrived from Holland as a minister of religion for the Transvaal *Boers*, he organised a church around the ultra-orthodox *Dopper* sect of the Calvinist-inspired Reformed Church. They called themselves the *Gereformeerde Kerk*, to distinguish themselves from the other Reformed churches, the *Hervormde Kerk* (the state church of the ZAR under the control of Potchefstroom-based Dirk van der Hoff) and the *Nederduits Gereformeerde Kerk* under the control of the Cape Synod (to which the majority of Lydenburgers owed allegiance). Paul Kruger was the best-known and most influential member of the *Dopper* church. To the consternation of the members of the *Hervormde* church, the formation of the *Dopper* church meant a disassociation from the state church. Members of the *Dopper* church and of the *Nederduits Gereformeerde* church, in turn, resented the anti-state agitation indulged in by the *volk's* party members, most of whom were members of the *Hervormde* church. They were adamant that all owed obedience to the Biblical injunction (also entrenched in Calvinist doctrine) to defend the integrity of the state. For these men, faith and politics were but two sides of the same coin.

Pretorius, true to form when decisive leadership was required, chose at this time to absent himself from the ZAR and returned to the Free State. Schoeman was now in his element. In early December 1860 he travelled to Pretoria, where Acting President Grobler had in the meantime resigned. Schoeman proclaimed himself acting president and appointed his own Executive Council. He also, with no little cheek, called for a meeting of the *Volksraad* in January 1861. The *Volksraad* would not kowtow to Schoeman. Defiantly, they arranged a special court sitting, in which five members of the *volk's* party were found guilty of various misdeeds and issued with hefty fines.<sup>17</sup>

Schoeman called a general meeting of the people in April 1861. Only his supporters arrived and obligingly denounced the *Volksraad* and confirmed his status as acting president. Pretorius, in the meantime, had been convinced by a joint commission that it was impractical to expect immediate unity of the two Republics and that fraternal co-operation between them was the best that could then be achieved. He informed Schoeman that he no longer saw his way clear to returning to the ZAR as president. A mere three years after the approval of the *Grondwet*, the ZAR once again found itself in a political crisis.

In September 1861 another people's assembly was organised by Schoeman in Pretoria. It merely entrenched divisions. Kruger now decisively entered the fray. He fulminated from public platforms that the only conceivable way forward was to

17 *Idem* at 282; Ferreira 1978: 194-1954.

remain true to the *Grondwet*. It was the source of legality and of the integrity of the state. This meant a return to the state of affairs that had prevailed before Pretorius and Schoeman began their agitation against the *Volksraad*. Schoeman would not be intimidated by Paul Kruger, whom he derided as the king of the Doppers, the Transvaal Garibaldi and nothing more than an insolent potbelly. Armed conflict between supporters of Schoeman's *volk's* party and Kruger's so-called state party on the western outskirts of Pretoria was avoided when Pretorius facilitated a truce. Part of the brokered deal was to constitute a new *Volksraad* – a moral victory for Schoeman.

A newly-constituted *Volksraad* met in Pretoria in April 1862. Commendably, they exhibited backbone during their extended session and meticulously worked through the available evidence, identifying numerous instances of unconstitutional conduct on the strength of which charges could be brought before a special court.<sup>18</sup> Schoeman, they decided, occupied his position unlawfully and should be suspended. Pretorius was not the president and could not claim to be so. WCJ van Rensburg (1818-1865), *voortrekker*, erstwhile *Volksraad* member and a former ally of Schoeman, was appointed acting president along with an acting Executive Council, until the special court had decided on all of the matters referred to it. Schoeman, Pretorius and their supporters, unsurprisingly, rejected the decisions taken.

The special court convened in Pretoria in August 1862. Hundreds of rowdy and boisterous supporters of both parties gathered and security measures were put in place. It never got underway: Schoeman and his supporters disrupted the proceedings and barricaded government offices, demanding Pretorius's re-instatement as president. Forces loyal to Acting President Van Rensburg surrounded the town and re-opened the government offices. Van Rensburg established his headquarters in Rustenburg and Schoeman entrenched himself in Potchefstroom. The revolution had begun and military confrontation was inevitable.

In September 1862 Schoeman's so-called *volk's* army and Paul Kruger's state army were ready for conflict, both sides spoiling for action. On 9 October the first shots of the so-called civil war were fired. Schoeman went to the Free State, spouting venom against Kruger and his army and accusing them of trying to impose a *Dopper* ascendancy on the country and of behaving not unlike Cromwell and his Puritans.<sup>19</sup> Upon his return, the two armies (neither boasting more than 1 000 men at full strength) squared off against each other near Potchefstroom, but bloodshed was averted when Pretorius mediated peace. Each party would submit their grievances to a special court constituted by non-ZAR burghers (Chief Justice Harding of Natal was mooted as chairman) and functioning in accordance with the provisions of the *Grondwet*.

18 The minutes of the session, held from 2 to 26 Apr 1862 in Pretoria, are published in *Volksraadsnotule IV*: 93-153.

19 Van Jaarsveld 1951: 300-301.

The date scheduled for the court hearing was 12 January 1863. None of those nominated to serve as judges was available, so Van Rensburg's government appointed a court comprised of locals to convene in January 1863. Schoeman would have none of it, though. In true revolutionary style, he entered Pretoria with an armed escort, took possession of the government offices, appointed his own officials and proclaimed himself acting president – and commandant-general for good measure. Kruger retaliated by assembling, with hostile intent, his men outside Pretoria. Again Schoeman fled the scene and retreated to the Free State.

The special court, in the meantime, found Schoeman and a number of his co-revolutionaries guilty of seditious behaviour. He and four others (including his son) were banished from the Republic, outlawed and their property confiscated.<sup>20</sup> A measure of peace had been restored and ordinary government business proceeded. Elections for the positions of president and commandant-general were held in April 1863. Pretorius had resigned as president of the Free State in the same month and made himself available for election. Chicanery at the ballot box was suspected and the elections were re-run in October.

At the October elections Van Rensburg was elected as president when he beat Pretorius by the narrowest of margins. Paul Kruger was elected as commandant-general by a huge majority. Suspicion, intrigue and plotting were the order of the day. Van Rensburg was deemed to be a mere puppet in the hands of the real power, Kruger, the so-called King of the *Doppers*. Pretorius began to gather significant support around his person country-wide. There was very little statesmanship on display; factional interest dominated.

The state was in turmoil. During this period the Lydenburgers had to expend all of their energy on yet another war with African tribesmen in the east, and withdrew from the seemingly endless bickering in the west. In fact, a number of petitions were received from Lydenburg stating that there should rather be no government, as the current government was patently inept.<sup>21</sup> The Lydenburg withdrawal left Kruger with much reduced support. President van Rensburg declared martial law on 5 December 1863. Kruger arrived in Potchefstroom in December with less than one hundred troops, to find that an army in excess of five hundred had gathered there under the leadership not of Schoeman (banned to the Free State), but of another leading member of the *volk's* party, the redoubtable Jan Viljoen of Marico, famed hunter and veteran of Boomplaats. The odds were stacked against Kruger. Most of his men were captured and this time it was he who had to beat an ignominious retreat over the Vaal River to the Free State.

Viljoen was now declared commandant-general and Pretorius was invited to take up his rightful position as president (a position, so it was argued, he had never foregone). With Schoeman in train, Viljoen marched to Pretoria. When told that

20 *Idem* 303-304; Ferreira 1978: 287-290.

21 See Swart 1963: 72-79.

Van Rensburg and his government had ensconced themselves in Rustenburg they continued their march to the west. Kruger, meanwhile, had re-grouped and the two armies met in the vicinity of the Crocodile River, west of Pretoria (near where the Hartbeespoort Dam is today). Kruger outmanoeuvred Viljoen, both sides suffered casualties and Viljoen was forced to retreat. As with all of the skirmishes in this civil strife, there was no decisive victory or defeat. Pretorius again mediated between the two parties. A peace treaty was signed in which (again) a special court was mooted and a form of co-government was agreed to that would precede yet another presidential election. The court never sat. No external parties were available for such a sitting. Both parties had hoped that the influential JH Brand, who had been elected as state president of the Free State in 1863, would be one of the judges. He (wisely) declined.

The presidential elections took place in May 1864 and this time forty four-year old Pretorius beat Van Rensburg by a comfortable majority to become president of the ZAR for the second time.

Peace at last. The Executive Council granted amnesty to all, including Schoeman, and everyone could return home. Peace, though, was not much better than war. Farms and families had been neglected, hostile African tribes were everywhere, the little trade there was had suffered and the struggle to subsist and survive became yet again the dominant force in the lives of the burghers. Peace, though, did have one inestimable benefit: it allowed for the sort of political stability on which sound government administration could be founded. Settled conditions allowed an industrious *Volksraad* and a hard-working government administration (staffed in large part by competent young Hollander immigrants) to achieve a great deal and to put the Republic's affairs of state on as sound a footing as the social and economic conditions of the country allowed.

The civil strife that plagued the benighted Republic in these years brought about no major constitutional revisions. It did, though, have an important constitutional impact and therein lies its interest for later constitutional discourse. In the run-up to the 1858 *Grondwet* it was easy to badmouth the latest constitutional effort and to dismiss it as partisan chicanery. Now the *Grondwet* stood firm. Both sides appealed to the *Grondwet* to bolster their claims that the other party was in the wrong. Much credit for this must go to that "*parmantige dikpens*"<sup>22</sup> (insolent potbelly), the *Dopper* Paul Kruger. He insisted throughout that the *Grondwet* was the benchmark against which to judge the merits of the statements made and actions engaged in by the combatants. His military skills apart, Kruger's firm stance in upholding the *Grondwet* much enhanced his reputation and provided the springboard for his later political dominance of Republican politics.

22 See Van Jaarsveld 1951: 288.

The civil strife also highlighted the lack of maturity of a political system that proclaimed the *volkstem* as the foundation of the Republican constitutional democracy. Both sides appealed to the *volkstem* as the arbiter of the justness of their actions. The *volk's* party appealed to the majority support they had in the Republican capital (Potchefstroom) and at the seat of government (Pretoria). To be sure, these areas – and Rustenburg – had been at the centre of the attempts in the 1850s to transform the Republic into a constitutional democracy and they certainly had been the torch-bearers of the constitutional cause. Their views mattered and they could not be faulted for their cynicism towards the actions of the eternally-oppositional Lydenburg and the uncouth hunting and fighting Soutpansberg good-lifers. The reality, though, as pointed out time and again by Paul Kruger and his state party, was that since 1858 the *volk*, for better or for worse, comprised *all* of the regions; the system adopted for the unified Republic was that of one-man (white, Dutch Reformed), one-vote. The best means to test the *volkstem* was to arrange for a people's assembly to have their voices heard and their votes recorded. But this was very difficult in the prevailing socio-economic conditions. In any event it would not have addressed the problem of the tyranny of the majority that the Lydenburg field-cornets had so fussed about in 1854. An appeal to the *volkstem* could readily be a fairly transparent political ruse and would remain so in later years when Paul Kruger exercised *de facto* autocratic powers.

## 4 The influence of *Boer Realpolitik* on the *Grondwet* in the 1860s

### 4 1 Introduction

In the mid-1860s the government presided over by President MW Pretorius and the state – of which the *Volksraad* was the *hoogste gezag* (highest authority) – remained isolated and poor. State revenue was insufficient even to consistently pay the salaries of all its officials. Some tin and lead mining took place and copper mining was lucrative for enterprising individuals, but in general mining was of no substantial benefit to the *ZAR* economy.<sup>23</sup> In the place of hard cash, and in the absence of a bank, the government had, since 1859, relied increasingly on government promissory notes – secured with government land – to meet its financial obligations, but the scheme lacked credibility and was a source of constant mockery. Despite the presence in the Republic of many foreign hunters, explorers, adventurers, traders and craftsmen, foreign interest in the *ZAR* was negligible and investment non-existent. African tribes within and outside of the Republican borders (borders imprecisely defined and determined by claim rather than agreement) remained aggressively hostile towards the *Boers*.

23 See Jeppe & Kotzé 1887: 125 & 295-296; and Bulpin 1953: 109.

Despite these depressing socio-economic conditions prevalent in the 1860s, once peace reigned, sincere efforts were made by a new generation of committed *Volksraad* members to run the country properly and in close conformity to the dictates of the *Grondwet*. They were assisted by a fair number of young Hollanders and some Germans who had trickled into the country in these years and whose capabilities considerably enhanced the administrative efficiencies of the Republic.

## 4 2 The malleability of the *Grondwet* demonstrated

The *Grondwet* had stood firm amidst the political turmoil. Afterwards *Volksraad* members and officials were scrupulous in their desire to adhere to the letter of the *Grondwet* in their official activities. This did not mean, though, that it remained unchanged. Sporadically, the *Volksraad* saw fit to make revisions to it, as circumstances demanded. As early as September 1858, a mere seven months after the *Grondwet* had been approved, the *Volksraad* passed a number of amendments to the *Grondwet*. One, in fact, had important political consequences, in that it allowed for the removal of one of the qualifications for enfranchisement, namely membership of the Transvaal Dutch Reformed Church. In the coming years the *Volksraad* would further approve a number of amendments to the *Volksraad*: on matters of important constitutional consequence (in 1860, an increase in the membership of ordinary burghers of the Executive Council from two to not more than four,<sup>24</sup> and, in 1862, to provide for a high court with the capacity to hear charges of misconduct against not only the president and his executive, but also against *Volksraad* members<sup>25</sup>); and on lesser matters (such as the regularity with which the president was obliged to visit the different regions<sup>26</sup>). In 1864 consideration was even given to a substantive revision of the *Grondwet*, although nothing came of this.<sup>27</sup>

The *Grondwet* was not only subject to regular amendment, it was also deemed necessary in 1859 for it to be supplemented. Four supplements were approved by the *Volksraad* in September of that year.<sup>28</sup> The first supplement clarified what was meant by the term *Hollandsche wetten* referenced in the Thirty-Three Articles and other legislation. In so doing it provided the well-known law of citations for the Roman-Dutch common law of the Transvaal.<sup>29</sup> The second provided clarification on the law

24 Art 42 of the minutes published in *Volksraadsnotule IV*: 48. This amendment was a consequence of Lydenburg's re-incorporation into the ZAR.

25 Art 62 of the minutes published in *Volksraadsnotule IV*: 111-112. The amendment was passed during the civil strife to make it possible for the special court of Apr 1862 to hear charges preferred against members of the recalcitrant 1860 *Volksraad*.

26 Art 26 of the minutes published in *Volksraadsnotule V*: 3-18 at 16.

27 Art 225 of the minutes published in *Volksraadsnotule V*: 27-68 esp 67.

28 Arts 52, 53, 55-58 and 61-62 of the minutes published in *Volksraadsnotule IV*: 9-33 esp 24-25 and see, also, 315-322 for the supplements.

29 On which see Wildenboer 2015: 465-468 and sources cited.

to be applied by the courts when adjudicating on matters involving land rights that had been left pending prior to the approval of the *Grondwet*.<sup>30</sup> The third supplement provided for rules of civil and criminal procedure and the fourth for a rudimentary tariff of legal costs.

Interestingly, the first set of amendments were done not by the passage of legislation in the format prescribed by article 12 of the *Grondwet*, but by means of a *besluit* (resolution). The enfranchisement amendment was passed subject to a three-month opportunity for public comment, but the other amendments had no such conditionality attached.<sup>31</sup> This flexible approach to the manner in which these amendments (and the 1859 supplements) were passed, set the tone for future *Grondwet* amendments: Sometimes the amendments were passed by means of laws, sometimes by means of resolutions; sometimes the proposed amendment was published for public comment three months prior to its discussion in the *Volksraad*, at other times the amendment was passed with a three-month period granted for public comment afterwards; again, at times amendments/supplements were approved with immediate effect because they “brooked no delay” (as provided for in art 12) while at other times this condition was not referenced. There was no discernible rationale for the different approaches adopted each time the *Grondwet* was amended by the *Volksraad*. Certainly, it did not reside in any distinction that could be drawn between mere administrative or regulatory amendments and amendments of a more substantive nature.

It is apparent from the minutes of the *Volksraad* meetings held during these years that the *Volksraad* was intent upon exercising the constitutional status they enjoyed as not only the legislative authority in the state, but indeed as the highest authority in the state, subservient to none in the manner in which it exercised that authority. Clearly, they did not allow themselves to be encumbered by rigid adherence to provisions in the *Grondwet* on how laws were to be made or how they were to be amended. Nor did they treat the *Grondwet* as sacrosanct or its provisions as immutable and fundamental.

### 4 3 Law-making by means of legislation and by means of resolution

As indicated above, the *Volksraad* in these years legislated either by passing laws as prescribed in article 12 of the *Grondwet*, or by means of the passing of resolutions

30 In 1867 State Attorney Kleyn, in a matter concerning State President Pretorius’s alleged unlawful conduct, extended the application of the second supplement to extend beyond only pending matters at the time the *Grondwet* was approved in 1858. His interpretation carried the approval of the *Volksraad*. See arts 212, 223 and 233 of the minutes of the Sep-Dec 1867 *Volksraad* meeting published in *Volksraadsnotule VII*: 3-80 esp 66, 69-70 & 74.

31 Arts 22-23 of the minutes in *Volksraadsnotule III*: 188-199 esp 195-198.

(*besluiten*) that had its origin in the exercise of its supreme authority. The passing of resolutions had in fact been the dominant form of decision-making by the *Volksraad* in the 1850s. Both means had the same outcome: they produced formal pronouncements of the *Volksraad* enforceable against all. Did the *Volksraad* itself recognise any distinction between law-making and resolutions? After all, the distinction between law-making by means of legislation (constitutionally-prescribed) and by means of resolution (nowhere prescribed but inherent in the nature of *Volksraad* authority) was the source of much contestation in later years.

When in September-October 1864 the *Volksraad* was called upon to approve rules of procedure for the *Volksraad*,<sup>32</sup> an opportunity presented itself to clarify this distinction. It did not happen, though. Perhaps the members thought the distinction was axiomatic enough for them not to bother. A draft law, according to the rules, was considered only after it had been published in the *Government Gazette* for three months unless the *Volksraad* itself decided (ie resolved) to dispense with the public notice. Draft laws, stated the rules, did not include *gewone raadsbesluiten* (ordinary council resolutions). So they did acknowledge a distinction between the two types of legislative activity.

If a *gewone raadsbesluit*, then, was not a “law”, what was it? Both had force of law, in the sense that both types of rule-making created rights and obligations, private and public, enforceable against all. Conjecturally, the distinction lay, firstly, in the *source of authority* of the *Volksraad*: the *Volksraad*'s competence to make laws resided in its *legislative authority*; its competence to make resolutions resided in its status as the *highest authority* in the state. Secondly, it lay in the *actual source*: the source of (draft) laws was the president and his Executive Council; the source of resolutions was the *Volksraad* itself, either reacting to the *volkstem* expressed through petitions or its own considered judgment on the need for a ruling on a particular matter. These distinctions, if indeed valid, were distinctions of form and not of substance. One suspects that any self-respecting *Volksraad* member in these years would have been perplexed had he been told, as Chief Justice Kotzé would write in *Brown v Leyds* in 1897, that a *besluit* had not the quality of binding law unless it complied with the public notice provisions of article 12 of the *Grondwet*.

#### 4 4 The evolving relationship between the sovereign authority of the *volkstem* and the supreme authority of the *Volksraad*

Having definitively spoken through the *Grondwet* of 1858, the *volk* had found no occasion to raise its collective voice in the ensuing years. To be sure, people's

32 The Rules of Procedure approved in 1864 are published in *Volksraadsnotule V*: 192-198. See, too, arts 10-21 of the minutes published in *Volksraadsnotule V*: 27-68 esp 32-36.

assemblies had been called on more than one occasion during the civil strife, but these gatherings had been partisan, rabble-rousing affairs and provided no platform for the king's voice of the entire *volk* to be heard.

The sovereign voice was raised, though, in 1865. Fourteen regulations and ordinances, drafted by the state attorney in 1864 and dealing with important matters of state and judicial administration, were proposed to the *Volksraad* by the president in September. This was the first *Volksraad* sitting after the civil strife had ended. The *Volksraad* had discussed each in turn and approved each draft with or without amendments – a thorough and a necessary exercise. However, at least 1 000 burghers had petitioned the president, voicing their opposition to all (or many) of the ordinances and laws passed and published in the *Government Gazette* in March 1865. For good measure, they also expressed opposition to State Attorney SJ Meintjes, who was responsible for their implementation.<sup>33</sup> Emotions still raw from the civil strife, there were disturbances among the burghers at the high-handedness of the *Volksraad* and its poor communication of the fruits of its legislative activity.<sup>34</sup> This prompted the *Volksraad* to acknowledge that these laws had not been published for public comment prior to their approval and that a three-month period should therefore be allowed for public comment, whereafter they would again be considered by the *Volksraad*.<sup>35</sup> Having learnt its lesson, the *Volksraad* decided in March 1866 to consider only the five most urgent sets of regulations and ordinances and to give yet more opportunity for public comment in respect of the others.<sup>36</sup>

The king might slumber but, when stirred, his – the *volk's* – voice would rise in protest. Its representatives in the *Volksraad* could amend the *Grondwet* as and when they deemed fit and they could do so by whatever legislative means they considered appropriate for the circumstances – they were, after all, the *hoogste gezag*. What they could not do, though, and against which the *volk* would rise in protest, was to adopt heavy-handed tactics such as to approve and implement a range of legislation that impacted directly on the *volk's* interests without proper consultation and communication.

Apart from this occasion, the people were seemingly happy to acquiesce in the manner in which the *Volksraad* conducted its business and the manner in which its interests were served through not only its representatives, but also the regular audience that was granted to the people's voice (*volkstem*) by means of the endless petitions the *Volksraad* were confronted with. No contemporary reflections exist on the nature of the relationship that existed between the *volk* and the *Volksraad*,

33 A summary of the petitions, prepared by a *Volksraad* committee commissioned for that purpose, is published in *Volksraadsnotule V*: 332-333.

34 Article 32 of the Jun minutes published in *Volksraadsnotule V*: 68-83 at 78.

35 Article 36 of the minutes published in *Volksraadsnotule V*: 68-83 at 80.

36 Article 480 of the minutes of the Feb to Apr 1866 meeting published in *Volksraadsnotule V*: 86-150 at 122.

between the sovereign and the supreme authority. An analysis of the minutes of the *Volksraad* meetings in these years and of the sundry documents that were presented to the *Volksraad* suggests that – subconsciously – the burghers of the *ZAR* employed two related fictions in the manner in which they conceived of democratic governance in their state.

The first fiction they embraced was that no distinction existed or could exist in their *Realpolitik* between *volk* and *Volksraad*.<sup>37</sup> They supported this fiction (because fiction it was, or at most a stylised representation of reality) as long as the *Volksraad* and the government exercised the authority described in the *Grondwet* in a way that was least intrusive on and most supportive of their chosen way of life. When, however, the government needed *them*, to pay taxes and licence fees, to enlist in commandos, to fairly treat their so-called apprentices, to submit to laws that placed limitations on the use of their property and on their personal rights and freedoms, to abide by the decisions of the law courts and to respect authority; then they were prepared to tolerate only so much intrusion and no more. Government weakness and limited resources meant that too severe intrusions happened but rarely. When it did, when the *Volksraad* did not *represent* them but *prescribed* to them, when it exercised its highest authority in a way that did not clearly or appropriately or even approximately articulate their *volkstem*, and did so in respect of matters that threatened their freedom, then they were ready to exercise their *koningstem*. In the *volkswil* resided the ultimate legitimacy of the state and its apparatus. This they understood. This was the political instrument to trump an overreaching government.

They adopted yet another fiction. This was the fiction that the *volk* was homogenous. This was so even though it was spread over vast distances in regional enclaves, embodying clear differences between town and country, between non-*Boer* and *Boer* burghers, between the manner in which they exercised their religious faith, between those who enjoyed some prosperity and those who were poor. According to the fiction the *volk* was like-minded enough, small enough in numbers and separated from the state apparatus by a recognisable enough mental layer, to have a definable concurrence of interests and to be stirred to like-minded passion by a heedless government. The fiction allowed burghers from a single district, when promoting merely regional interests in petitions, to glibly assert, in 1868, and as they had often done in the past, that their interests coincided with that of *het Volk, de koningstem des lands*.<sup>38</sup> It further allowed them, in 1871, to demand from their mandatories in the *Volksraad* an amendment to the *Grondwet*, despite opposition from the mandatories themselves.<sup>39</sup>

37 See, eg, arts 354-355 of the minutes of the Sep-Nov 1866 *Volksraad* meeting published in *Volksraadsnotule VI*: 3-79 esp 36-37.

38 See Kleynhans 1966: 23 with reference to a petition from the troublesome Wakkerstroom district, unhappy with the officials elected by the President.

39 Wypkema 1949: 379 n 3.

This fiction also informed the *Volksraad's* refusal to swear in SJ Meintjes, sometime State Attorney and State Secretary, when legitimately elected as *Volksraad* member for Pretoria in September 1867. The *Volksraad* refused to do so because State President Pretorius (he was styled “state president” since 1864) had informed them that he had received yet another petition, similar to many in the past, protesting vehemently against Meintjes as a member of the state apparatus. The petition (signed by eleven burghers only) warned that they would not recognise any *Volksraad* decision as lawful if Meintjes was a party to it. The state president then insisted that the *Volksraad* remove Meintjes as a member. Incredibly, the *Volksraad* acquiesced and Meintjes was not sworn in. They did so because the state president’s insistence was in compliance with the *wensch des volks* (the wish of the people). Whatever Meintjes’s demerits as an official and representative of the people<sup>40</sup> – they must have been many to excite so much opprobrium – he had been duly, that is, constitutionally elected as *Volksraad* member. No matter, decided the *Volksraad*: the people had badgered the state president for long enough and their will be done. The *Volksraad* was the highest authority and their (and their state president’s) judgment on the matter held sway, whatever the provisions of the *Grondwet*.<sup>41</sup>

At the same *Volksraad* meeting two elected members (backed by their constituents) refused to be sworn in according to the oath prescribed by the rules of procedure approved in 1864. They insisted on being sworn in according to the oath prescribed in the *Grondwet*. The *Volksraad*, anxious for it to be quorate and effective, approved a return to the oath prescribed by the *Grondwet*, because “*aan de bekende begeerte van het volk gehoor moet worden gegeven*” (the acknowledged wishes of the people must be complied with).<sup>42</sup> Here, then, a section of the *volk* exercised their voice on a matter deemed contentious and divisive. In compliance with the fiction that there was a concurrence of opinion among the entire *volk* on contentious issues, it was deemed to reflect the voice of all. There was much merit in a call to revert to the more appropriate *Grondwet* oath. However, the *Volksraad* did not base their decision on merit. They based it rather on the desire to be obedient to the *volkstem*, the voice of the people. The *volkstem* was apparent from a petition signed by twenty-six burghers from Pretoria on behalf of the two members; from the statements of four other members saying they were pretty sure their constituents felt the same; and from the opinion of Commandant-General Paul Kruger that he was sure the majority of the people wished the *Grondwet* oath to be administered.

## 4 5 Reflection

By the mid-1860s, then, the *Grondwet* stood firm, its democratic credentials and its legitimacy intact. The *Volksraad* and the president and his executive had provided

40 See Wildenboer 2013: 449 n 41.

41 See arts 2-3 of the minutes of the Sep-Dec 1867 *Volksraad* meeting published in *Volksraadsnotule VII*: 3-80 esp 4 (and see, too, at 3).

42 Arts 25 and 28 of the minutes published in *Volksraadsnotule VII*: 3-80 at 8-9.

ample evidence of their subservience to the *Grondwet*. It was an important instrument of sound administration and good governance as well as a source of rules and principles that guided the government and the legislator and to which considerable weight was attached. It was, though, a law like any other and, like any other law, was amended, revised or amplified from time to time to adapt to changing circumstances.

The changes were effected by law and by resolution. The *Volksraad* bowed to no one in its (re-)assertion of its highest authority, except to the *volk*, who retained its right to hold the *Volksraad* accountable for compliance with the provisions of the *Grondwet*. The approach adopted by the *Volksraad* towards the *Grondwet* – deference to its *volk*-based authority, but not blind deference to a flawed instrument, nor unquestioning obedience to a mythical supra-norm – set the tone for the role the *Grondwet* was to play in later years. This was also the case from the late 1880s onwards, when the social and economic circumstances of the country changed so radically that the 1858 *Grondwet* really by then reached its natural sell-by date and could no longer serve the country's governance needs through regular maintenance alone.

The people lived solitary and self-sustaining lives for the most part and did not, in fact, *need* much government. Their voice was the king's voice, to be sure, but they were satisfied that that voice found expression in the *Volksraad* and in the apparatus of government that supported *volk* and *Volksraad*. Their interests were served by the *Volksraad* members elected biennially and by the *memories* (petitions) that formed the staple of *Volksraad* discussions.

## 5 The late 1860s: The brittleness of the ZAR's constitutional fabric exposed

### 5 1 Introduction

Pretorius's Republic of the late 1860s and early 1870s would have struck the casual foreign observer as a very strange place indeed.

In Pretoria he would have met, first, a well-intentioned, but ineffectual president; secondly, the popular commandant-general, Paul Kruger – a natural leader, deeply religious, immersed in *Boer* politics; thirdly, stolid, bearded, black-froked *Volksraad* members, meeting in months' long annual *Volksraad* sessions, radiating dignity and serious-mindedness (if not always elevation of thought), conscious of their God-given duty to represent the *volk* and to create the conditions for good governance; and, fourthly, government officials, young Hollanders mostly, some *Boers*, some Germans and some Englishmen, eager to make their mark in a country very much in need of non-agrarian skills. In Pretoria, Potchefstroom and the larger towns he would have been surprised to find many foreigners among the citizenry, mostly but by no means only English, mostly traders and craftsmen, but also hunters, adventurers,

prospectors, teachers and journalists (the first newspaper in the ZAR, the bilingual *Transvaal Argus*, was first published in Potchefstroom in May 1866).<sup>43</sup> English, in fact, was an acknowledged *lingua franca* in the towns.

Those who lived beyond the urban areas on farms, big and small, were mostly the *Boers*, some 25 000-odd by now, spread thinly over the vast plains of the Transvaal. He would have found them unlike any Europeans he had met before. Fully attuned to their natural surroundings, they were deeply pious, conservative and inflexible, spiritual relics of the eighteenth century. The *Boers* were also hospitable and generous to co-burgher and foreigner alike, but ungenerous towards Africans (reduced through Biblical interpretation to inferior beings); solitary and taciturn by nature, but loquacious, disputatious and thin-skinned when stirred in religious and political debate; being no strangers to hardship, resilient and possessed of natural strength and fortitude; strong-willed, but lacking in more than rudimentary learning and not as a rule naturally enterprising. In fact, a race apart, neither Dutch nor even Cape Dutch, not still European nor yet African. They had, in a remarkably short period, developed a definable identity, one that espoused a set of values and a lifestyle closer to the eighteenth than the nineteenth century.<sup>44</sup>

It was a country that suffered severe socio-economic privations. Hostilities between Africans and *Boers* continued unabated. Thirty years after first trekking into the southern African interior, the policy of the *Boers* towards the Africans – vastly superior in numbers and increasingly able to match *Boer* firepower – had changed little. They were deemed an inferior people and not, as the British missionaries would have it, their equals in the eyes of God. African and *Boer* inhabited the same geographic space and there was mutual benefit (labour, trade – including trade in women and children – and security) to this close proximity. But neither *Boer* nor African was willing to treat the other as neighbours living in a cordial relationship of give-and-take. The *Boers* would subjugate the Africans to their will, if not through persuasion, then through force. One important consequence of this attitude was that living-space boundaries remained ill-defined, because they did not result from agreements negotiated between equals and so lacked the legitimacy that otherwise bind contracting parties that negotiate freely and willingly.<sup>45</sup>

43 Bulpin 1953: 109.

44 Many character sketches of the Transvaal *Boers* by contemporaries visiting the Transvaal in the nineteenth century (some written with more prejudice than others) exist. Giliomee 2003: 189-191 quotes extracts from some of these observers. See, too, Bulpin 102-106 and Giliomee 2003: 168, 176-177, 180-181 & 189-192.

45 Art 9 of the 1858 *Grondwet* decreed that there would be no equivalence in either Church or State between Whites and Blacks: see Jeppe & Kotzé 1887: 36. In June 1852 the *Volksraad* directed two commandos deployed against African tribes to dispossess the Africans of their arms, recover stolen cattle and to “force them into service”: see art 87 of the *Volksraad* minutes published in *Volksraadsnotule II* 70-84 at 83. See, generally, also Giliomee 2003: 176-177 & 180-181.

So, in the mid to late 1860s the *ZAR* was (still) at war with African tribes to the south-east, the west, the north and the east of the Republic, often at one and the same time. Indeed, Schoemansdal, the capital of the Soutpansberg region in the north, had to be evacuated by the *Boers* in 1867 when they lost their authority there in the aftermath of a Venda onslaught and humiliating *Boer* military inefficiency. The more sober-minded burghers were probably grateful, given the anarchic and wanton conditions under which most of the white settlers had lived there, dependent on the trade in ivory.<sup>46</sup> The *ZAR* could not afford even one of these wars: they were debilitating, demoralising and costly with little gain.

It also didn't help that some individuals in the far northern and north-western parts of the country still openly trafficked in African children. As late as 1866 individuals from the Soutpansberg were still being arrested and charged with child trafficking.<sup>47</sup> The *Volksraad*, at Pretorius's urging, yet again had to strengthen the law to proscribe and heavily punish activities that went beyond the euphemistically called "apprenticeships" of orphans and that resembled trafficking in child slaves.<sup>48</sup> With such activities still present in the Republic, constant warfare with African tribes and the well-documented wantonness of many of the whites (*Boers* and non-*Boers* alike) in the godless far north, Pretorius had no chance of securing an attentive, empathetic investor audience from Britain or Europe.

The state of education in the *ZAR* by 1867 was dismal. Only the government school in Pretoria was doing well with three teachers teaching fifty-odd Dutch speakers and forty-odd English speakers. However, there was only one state-funded teacher in Potchefstroom and one in Lydenburg, with one promised for Rustenburg. In March 1868 the *Volksraad* placed control of education in the hands of the Executive Council.<sup>49</sup>

Pretorius's biggest problem was the severe shortage of state revenue. This was due to various reasons: the *Boers* were notoriously difficult to extract tax from; there were no large industries in the Republic; income from licence fees was small and hardly recurrent; and such trade as did take place in *Boer* products (animals and animal products, wheat, grain, tobacco and fruit) was either conducted on a barter basis or else generated too small a cash flow to keep the state solvent. Metals and minerals (lead, copper, iron, tin and such-like) were being mined in the Republic, but the scale was small and the yield too insubstantial to generate recurrent state revenue. Gold and diamonds were rumoured to exist, but had yet to be found.

46 On the state of law and justice in and around Schoemansdal, see, most recently, Wildenboer 2013: 441-462.

47 See communication to the *Volksraad* of an Executive Council decision of 22 Oct 1866 published in *Volksraadsnotule VI*: 155-156.

48 Articles 423-431 of the minutes of the Feb to Apr 1866 *Volksraad* meeting published in *Volksraadsnotule V*: 86-150 esp 117-118. See, too, *idem* art 268 at 104.

49 Articles 380-381 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 116; see, too, reports published at 257-258 and 258-260.

In the late 1850s the *Volksraad* had introduced into the cash-strapped economy *goedvoren* (“good-fors”) and *mandaten* (mandates). The former were really “IOUs” in lieu of petty cash, the latter government promissory notes to be redeemed for cash at a later stage. In the absence of ready cash or a steady state revenue stream, neither system was economically viable and merely plunged the *ZAR* ever deeper in debt.<sup>50</sup>

Following the example of the Free State government, Pretorius spearheaded the introduction of a new payment system in June 1865. The *Volksraad* approved that government notes be printed; these would be secured by government land. Yet more notes were printed in 1867 and 1868. These notes, which were to be regarded as legal tender for public and private purposes, were disparagingly called “blue-backs” in both Republics, because of the bluish tint of the badly printed notes.<sup>51</sup> Unlike in the Free State, though, where the commercial benefits of the diamond fields allowed its government to redeem all of its blue-backs within a decade, this system, essentially a deferred cash-settlement system, did not and could not work in the *ZAR*, because there was little prospect of future prosperity. The blue-backs soon lost fifty per cent and more of their face value.<sup>52</sup> In September 1866 traders were even instructed to accept the government notes at their face value or face loss of their licences.<sup>53</sup>

All to no avail. In 1868 a *Volksraad* commission found that the state was hopelessly insolvent.<sup>54</sup> The *Volksraad* blamed the state president for the mismanagement of the state finances, but did not accept his offer to resign.<sup>55</sup> Presumably no one else wanted the thankless job. The Treasurer-General, Van der Linden, was dismissed and charged with embezzlement and fraud, found guilty and imprisoned.<sup>56</sup>

50 On the system of “good-fors” in southern Africa generally and in the *ZAR* in particular, see Engelbrecht 1987: 22, 30, 58-59 & 64. Engelbrecht provides a useful overview of the monetary system in the *ZAR* and elsewhere in southern Africa, but is not a specialist work on the topic. On the financial difficulties produced by the *mandaten* system, see art 99 of the minutes of the Sep to Oct 1864 *Volksraad* meeting published in *Volksraadsnotule V*: 27-68 esp 49; see, too, art 144 at *idem* 54-55 and art 171 at *idem* 60.

51 This new system elicited lengthy discussions in the *Volksraad*. See arts 31-32, 34, 41, 44-46, 54, 318, 652-672, 714 and 719-720 of the minutes of the Feb to Apr 1866 *Volksraad* meeting published in *Volksraadsnotule V*: at 68-150 esp 78, 79, 80, 81, 82, 109-110, 141-144, 147 and 148. On the “blue-backs” in general, see Bulpin 1953: 107 and 118 as well as Engelbrecht 1987: 57-60 and 64-66.

52 See Wildenboer and Dietrich 215: 295-301 for an interesting discussion of a legal dispute in 1872 in which a creditor demanded (in vain) that his debtor pay him in hard cash rather than in government notes, because of the loss of value of the notes.

53 Articles 257-258 of the minutes of the Sep to Nov 1867 *Volksraad* meeting published in *Volksraadsnotule VI*: 3-79 esp 26.

54 Article 383 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 116.

55 Articles 193, 212-224 and 230-237 of the minutes of the Sep to Dec 1867 *Volksraad* meeting published in *Volksraadsnotule VII*: 3-80 esp 66-75.

56 Article 556 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 150; see, too, *idem* 157-158.

By the end of the 1860s the *ZAR* was on a road – paved though it was with good intentions – to slow but steady rock-bottom decline. The best efforts of the Republican government and the *Volksraad* to achieve settled statehood and a measure of prosperity bore little fruit.

## 5 2 Alexander McCorkindale promises much, delivers little and further enfeebles State President Pretorius’s standing

Alexander McCorkindale,<sup>57</sup> born in Glasgow in 1816, immigrated to Natal with his wife and about seventy co-immigrants in 1856. For eight years he tried his hand at all manner of schemes and industries, without significant success. In 1864 a young relative, David Forbes, who hunted and traded in the Transvaal, showed him a stretch of land in the eastern Transvaal (immediately south-west of present-day Swaziland) that bore a close resemblance to the hills, dales and lochs of the Scottish highlands. McCorkindale was immediately enamoured of the place and soon after met with President Pretorius at Pretoria in September 1864. A bond of friendship quickly developed between them. McCorkindale’s plan to buy the land on which to settle industrious and skilled Reformed Scots appealed greatly to the embattled president; even more so did his plan to establish a bank for the impecunious Republic. The *Volksraad* received the news of the Scotsman’s entrepreneurship with equal enthusiasm and by October 1864 agreement was reached<sup>58</sup> between McCorkindale and the *Volksraad*. It provided that a company, to be established by the Scot, would purchase two hundred farms over a four-year period and, further, that these farms would be settled within five years by “respectable immigrants from Europe and the Colonies” in order to cultivate the land and establish factories and industries. A grateful *Volksraad* provided McCorkindale with very generous terms.

McCorkindale had promised heaven and earth and, given the state of the country, Pretorius (and his executive and the *Volksraad*) can be forgiven for indulging McCorkindale in his fancy. After all, they had nothing to lose and much to gain.

He left for Britain almost a year later, in September 1865, and returned in the autumn of 1866. He had promised much, but he delivered little. He managed to induce some of his Scottish relatives and acquaintances to try their luck in the *ZAR*. However, they were not the major English investors he had hoped for. They had no stomach for his scheme in the back of beyond. Nevertheless, McCorkindale did manage to secure a supply of gunpowder for the *ZAR*, a rare and vital commodity in the strife-torn Republic.<sup>59</sup> He was a genuine propagandist and enthusiast for the

57 For biographical details on McCorkindale, see, in particular, Forbes 1938: 157-161; *DSAB* vol 1: 507-509 *sv* “McCorkindale, Alexander”; Pelzer 1970(a): 6-23; and Mackenzie 2007: 147, 148 and 157-161.

58 The agreement is published (in Dutch and in English) in *Volksraadsnotule VI*: 253-258.

59 See art 29 of the State President’s report to the *Volksraad* dated 19 Feb 1866 published in *Volkraadsnotule V*: 452-454 esp 454.

Republican cause (he became a citizen of the Republic at the end of 1864), but, like his good friend, MW Pretorius, he simply aimed too high and blurred truth with invention.

After McCorkindale returned from Europe, he continued to propagate any number of schemes that would benefit the Republic – and himself, of course. The schemes were big (land settlement, a bank, a harbour complete with customs house, a steady supply of ammunition and gunpowder, sourcing of cannons, rifles, even bombs, consular representation in England and the colonies of Natal and the Cape) and small (the mining of salt pans, printing of seals of office and of stamps, a postal system, supplying stationery). In his presidential address to the *Volksraad* in September 1866, Pretorius sang McCorkindale's praises, listing one project after the other that would bring prosperity to the country.<sup>60</sup> The *Volksraad*, with McCorkindale (and the public) present, shared in the president's enthusiasm.<sup>61</sup> The bank scheme in particular interested them greatly and a bank charter was hastily approved. It was the surest way to save them from the continued embarrassment of the government blue-backs.

McCorkindale's land-settlement scheme remained the focal point of interest. In the winter of 1866, McCorkindale and some prospective settlers were ready to settle on the land.<sup>62</sup> However, things had begun to unravel: first, the exact area on which the farms were established remained contested; secondly, McCorkindale had not established the company he had promised to do, but instead a different company with different articles of incorporation; thirdly, the registration of individual title deeds did not follow due process and the allocation and purchase of the farms were contrary to the terms of the 1864 agreement;<sup>63</sup> and, fourthly, mineral rights to the farms had since been added to the rights of the settlers, contrary to existing legislation that vested these rights in the state. McCorkindale and Pretorius were seemingly making up the rules as they went along. In an attempt to bring order to a situation that threatened to get out of hand, a tripartite agreement to provide clarity was concluded in October 1866 between the *ZAR* government, McCorkindale and the alternative company McCorkindale had registered in Glasgow.<sup>64</sup> It only served to further muddy the waters, though, and alienated the local inhabitants of the Lydenburg region in which the area lay.

The first fifty immigrants arrived from Natal in January 1867 and were met by Pretorius himself. They called the area identified by Pretorius *New Scotland*

60 The address is published in *Volksraadsnotule VI*: 233-237 esp 234-235.

61 Articles 291-305 and 332-336 of the minutes published in *Volksraadsnotule VI*: 3-79 esp 29-31 and 33-34. A *Volksraad* committee's report to the *Volksraad* is published in *Volksraadsnotule VI*: 144-155 esp 148-150.

62 The agreement is published in *Volksraadsnotule VI*: 258-259.

63 The new arrangement was captured in an agreement published in *Volksraadsnotule VI*: 260.

64 The tripartite agreement is published in *Volksraadsnotule VI*: 266-269.

(today broadly encompassing the Gert Sibanda Municipality – Ermelo is its main town – of the Mpumalanga Province). The district in which the eighty farms of the Glasgow-registered company were situated, was named Industria and this is where the earliest immigrants settled. The lake at the centre of this district was re-named “Chrissiesmeer” (Lake Chrissie), after Pretorius’s daughter, Chrissie. The title deed for the entire district (rather than for each individual farm) was finally conveyed in July 1867. Later, the remaining one hundred and twenty farms out of the originally-agreed two hundred (eighty for the district of “Londina” and forty for the district of “Roburnia”) for New Scotland) were duly inspected, surveyed and transferred to McCorkindale’s Glasgow company.

Now firmly ensconced on his farm(s) at New Scotland, McCorkindale next presented to the *Volksraad* via Pretorius a scheme for a harbour and customs house on the eastern seaboard, at the mouth of the Umzuti River (now the Maputo River) south of Delagoa Bay.<sup>65</sup> The *Volksraad*, increasingly uncomfortable with all of McCorkindale’s schemes and with his close relationship with the state president, had a close look at the proposals.<sup>66</sup> The *Volksraad*, after much debate, approved the harbour scheme, but only on the condition that a proper contract be drawn up. Typical of McCorkindale, the terms of the contract promised a great deal, among others, a £250 000 loan to the ZAR, the use of Scottish built, steam-driven traction engines to transport goods on a newly-built toll road to Potchefstroom as well as a large number of professional people to assist in the overnight commercialisation of the Republic. McCorkindale, of course, would benefit much from the entire project.<sup>67</sup>

If it sounds too good to be true, it is too good to be true. When Pretorius presented the draft agreement to the *Volksraad* some three weeks later, in October 1867, it took the casting vote of the chairman for it to be approved. McCorkindale, feeling insulted by the narrowness of the vote, wrote to the *Volksraad* that this amounted to a vote of no confidence in him and he refused to engage further in any public transactions with the ZAR.<sup>68</sup>

This put paid to the harbour scheme. In any event, it was clearly pie-in-the-sky: the rivers that were to have been used were not navigable and there was no chance that anyone would loan £250 000 to the ZAR. It also resulted in a deterioration in relations between McCorkindale and the *Volksraad* and between the *Volksraad* and the state president.<sup>69</sup> By November 1867 the *Volksraad* had had enough of McCorkindale’s glib assumption of privilege and his offhanded approach to the

65 Article 553 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 149; see, also, Pelzer 1970c: 151.

66 Articles 46-53 of the minutes published in *Volksraadsnotule VII*: 13-14.

67 Articles 73-79 of the minutes published in *Volksraadsnotule VII*: 19-21. The minutes of a specially-appointed *Volksraad* committee is published at 177-182 and the draft contract and accompanying memorandum of explanation from Pretorius at 187-193. See, too, Pelzer 1970c: 150-153.

68 Articles 100-101 of the minutes published in *Volksraadsnotule VII*: 25-26.

69 Article 113 of the minutes published in *Volksraadsnotule VII*: 29.

settlement of his debts. They found it necessary to assert their status as the highest authority in the land and to disabuse him of the assumption that his arrangements with the state president overrode their authority. A *Volksraad* committee was appointed to investigate all of the transactions between McCorkindale and Pretorius on behalf of the government. It was chaired by Hendrik Bührmann, the irascible, no-nonsense member for Lydenburg.<sup>70</sup> The committee was diligent and presented a comprehensive report to the *Volksraad* in early December.<sup>71</sup>

The *Volksraad* considered the report over a two-week period in early 1867.<sup>72</sup> It was inclined to judge the poor financial management, land management and record-keeping in respect of the settlement scheme exhibited by Pretorius and his government less harshly than the committee. The *Volksraad* was also less harsh than the committee in its evaluation of the evidence that McCorkindale, if not actually fraudulent, was stringing along the gullible Pretorius and the ill-informed *Volksraad*. It did, though, take exception to the transfer, approved by Pretorius, in November 1867, of the eighty Londina farms by Pretorius to the yet-to-be-established company that McCorkindale had promised to establish in terms of the 1864 agreement. The *Volksraad* decided to cancel the transfer of the Londina farms.

Member Lys voted against this decision on the grounds that only a court of law could cancel a transfer of property conducted in accordance with statutory requirements. Once the *Volksraad* assumed the authority, without proper investigation, to cancel a duly registered deed of title, he warned, the property rights of the citizenry would no longer be guaranteed.<sup>73</sup> This powerful argument fell on deaf ears. The *Volksraad* was, after all, the *hoogste gezag* and, so one imagines the line of thought, it was entitled, in fact duty-bound, to take steps to disentangle an affair that had become an embarrassment for the state president, the *Volksraad* and the people, even if it meant nullifying a lawfully conducted property transfer.

It was these Londina farms, or at least forty-five of them, that would form the subject-matter of a court action fifteen years later and would provide the first opportunity for Chief Justice John Kotzé to express an opinion on the validity of *Volksraad* resolutions passed in apparent contravention of existing law.

The *Volksraad* instructed the government to take immediate steps to disentangle the complexities that had enveloped the land-settlement scheme since its inception. This was easier said than done. By the time of McCorkindale's premature death in

70 On Bührmann and the leading, often controversial, role he played in *Boer* politics since the late 1840s see Swart 1963: *passim*. His descendants continue to play an influential role in the Ermelo district that incorporates the erstwhile New Scotland region. His role in the constitutional politics leading up to the final approval of the 1858 *Grondwet* is discussed in the first of this series of articles: see *Fundamina* 2017 24(1) at 152-161.

71 See the minutes of the committee meeting published in *Volksraadsnotule VII*: 229-240.

72 See, generally, arts 291-362 of the minutes of the Feb to Apr 1868 *Volksraad* meeting published in *Volksraadsnotule VII*: 80-154 esp 91-111.

73 Articles 316-320 of the minutes published in *Volksraadsnotule VII*: 98-100.

1871, his affairs were as hopelessly entangled as ever, his estate was insolvent and it would take until the early 1880s for his estate to be finally wound up.

After wading through the committee's report on the land-settlement scheme, the *Volksraad* had little sympathy left for McCorkindale's other schemes. It cancelled the deed of agreement in respect of the bank he would have been instrumental in setting up and continued to cut any further ties McCorkindale had with the state.

True to form, McCorkindale continued to promote commercial enterprises, but without success. He died of malaria on Inhaca Island (off the coast of modern Mozambique) in May 1871, by which time he was hopelessly insolvent.<sup>74</sup> When McCorkindale died, his dream of an influential, populous and prosperous Scottish settlement in the south-eastern Transvaal remained unfulfilled. Beyond the modern town of Chrissiesmeer and the immediately surrounding area with its Scottish farm names and some Scottish surnames, Alexander McCorkindale is remembered primarily in connection with the 1884 Supreme Court judgment of Kotzé CJ in *Executors of McCorkindale v Bok NO*.<sup>75</sup> It was the first of a number of Supreme Court judgments that dealt with the constitutionality of *Volksraad* resolutions that purported to amend or revoke existing law and legal process.

### 5 3 The diamond-fields Keate Award and the political demise of State President Pretorius

MW Pretorius had always had about him the faint whiff of failure. The whiff became a smell in the early 1870s. He had sought to take decisive, pro-active steps in the early months of the diamond rush on the Republic's western border to secure financial benefit for the Republic. In their follow-through the steps became mere clumsy assertions of dubious authority. It led to humiliation for him, another missed opportunity for the Republic and his resignation as state president in November 1871.<sup>76</sup> As much as he had relied on Alexander McCorkindale five years earlier to bring prosperity to the eastern borderlands of the *ZAR*, so he found, at least initially, another willing ally in a German, Theodore Doms, on whom to rely to bring prosperity to the western borderlands of the *ZAR* – with equally unfortunate consequences.

During the second half of 1869 a search for alluvial diamonds on the banks of the Vaal River commenced in earnest. Of particular importance to the *ZAR* was the area between the Vaal and the Harts Rivers, on the northern banks of the Vaal River (north of present-day Kimberley in the Northern Cape Province), where much of the initial alluvial diggings took place. This territory had, until then, been

74 On his later schemes and his death, see Pelzer 1970b: 156-162.

75 (1884) 1 SAR 202-219. This judgment will be discussed in detail in the third of this series of articles.

76 The following sources were primarily consulted in writing this section: Agar-Hamilton 1937: 37-131; Oberholster 1945: *passim*; and Meredith 2007: 13-26.

occupied by *Boer* farmers, and by sundry tribes. Already in April 1868 Pretorius had gained *Volksraad* approval for a proclamation that purported to provide a definitive description of the eastern, northern and western boundaries of the Republic.<sup>77</sup> Gold had been discovered in 1867 by the German explorer Karl Mauch in the Tati district in the north-eastern corner of present-day Botswana in an area mined by the Tswanas centuries before. There was also the real prospect of significant diamond discoveries being made along the banks of the Vaal River (north and south). Pretorius therefore saw fit, in April 1868, to stake an early claim to lands as far to the west as possible. The western boundary was drawn in such a way that it included the Tati district and the area enclosed by the Vaal and Harts Rivers. In fact, the boundary line enclosed large swathes of the north and east of present-day Botswana.<sup>78</sup>

In 1869 the presence of diamonds in large quantities along both banks of a 150 kilometres stretch of the Vaal River had, unlike Mauch's gold, become a reality. Large parts of land on both sides of the Vaal River became inundated with diamond diggers from near and far. The Cape Colony, the Free State, the *ZAR* and the local African tribes all became extremely interested in what, until then, had been a dry, forlorn and sparsely populated stretch of land.

Some, though, engaged not in alluvial diggings on the river banks, but in so-called dry diggings thirty to forty kilometres south of the Vaal River. On the farms Du Toit's Pan, Bultfontein and the De Beers's farm – an area of some 150km<sup>2</sup> – lay a series of diamond "pipes" in which were to be found hitherto unimaginable diamond riches. The rush to the diamond fields started in earnest towards the end of 1870. The early promise was confirmed in July 1871 when a diamond pipe was found on a *koppie* that was soon worked to such an extent that it became the famous Big Hole in what would later become the town of Kimberley.

The vitally important question was to whom this territory belonged, not only in respect of the fabulously rich dry diggings, but also the lucrative alluvial diggings along the banks of the Vaal River? Claims to parts or to the whole of the territory were staked by the Griquas, a number of Tswana tribes, the *ZAR*, the Free State and, of course, by Great Britain. The *ZAR* claimed for itself all lands beyond or north of the Vaal River, encompassing land claimed by the Ba'Thlaping and Barolong tribes and the Griquas. As far back as the 1850s, the *ZAR* had claimed the territory by way of conquest, occupation and a dubious treaty signed with a tribal chief in 1858. In pursuance of the 1868 proclamation, Pretorius, in November 1869, provisionally proclaimed the disputed area (between the Vaal and the Harts Rivers) to be *ZAR* property.

77 See art 552 of the minutes published in *Volksraadsnotule VII*: 148. The proclamation is published at *idem* 274-275.

78 See Agar-Hamilton 1937: 45; see, too, Oberholster 8-9.

Of course, this proclamation did nothing to assuage feelings running high among diggers, tribespeople and burghers. Agents of the different Tswana and Griqua tribes also involved themselves in the land disputes. One such was the German, Theodore Doms. No paragon of honesty, he was not averse to playing sides off against one another, and sided both with and against a gullible MW Pretorius.<sup>79</sup>

Into this cauldron of political and administrative conflict, suspicion and double-dealing, rode the Governor of the Cape Colony, Sir Henry Barkly, in February 1871, little more than a month after having taken up office. British interests were obviously focussed on the potential wealth of the diamond fields. The Cape Colony, like all of southern Africa, was in an economic slump and desperately needed the financial boost that the diamond diggings were sure to provide. In addition, Britain was anxious to secure for itself unfettered access to the north. The trade route to and from the north passed through the lands of the Griquas and if the ZAR and the Free State succeeded in laying claim to the land, or at least to parts thereof, it would inhibit the free access so essential to British commercial interests in the north.

It was important, therefore, for Barkly to co-operate closely with Nicolaas Waterboer, the Grique leader (*kaptijn*), and to secure him as a political ally. Annexation of the territory by Britain (or at the very least, self-government for the Griquas under British protection) was, politically and economically, the only viable solution for the promotion of British interests as the paramount power in South Africa. The two Boer Republics dared not gain a foothold in the territory. The Griquas were amenable to such protection against the Boers. To this end the Cape Colonial Secretary, David Southey, had developed a close working relationship with the Griquas and Waterboer's agent, smart but unscrupulous David Arnot, to achieve control over the diamond fields without resort to arms.

Arbitration was mooted as the best means to resolve the land disputes and the rival claims. Pretorius, though naturally suspicious of the British, grudgingly agreed to submit to arbitration the question of who exercised authority over the lands between the Vaal and the Harts Rivers (in other words, the lands to the north of the Vaal River). The arbiters were to be AA O'Reilly – the Irish-descended *landdrost* of Wakkerstroom – on behalf of the ZAR, and John Campbell – Special Magistrate for Griqualand West – on behalf of the Griquas. The umpire would be Robert Keate, the lieutenant-governor of Natal. President Brand of the Free State, far more politically astute than Pretorius, refused the offer of arbitration regarding ownership of the lands to the south of the Vaal River (the so-called Campbell Lands), unless such arbitration

79 Little biographical detail on Doms is available. Agar-Hamilton 1937: 46 describes him as “an accomplished adventurer who continued to change sides during the next few years with an engaging candour which seems to have daunted public comment”; and at 104 he calls him “the egregious Theodore Doms”. On Doms and his exploits in the region until his death in 1886, see, generally, Agar-Hamilton 1937: 46-48, 52-53, 65, 83-85, 189 and 198ff; see, too, Oberholster 1945: 117, 143-144 and 264-269.

was undertaken by an unbiased international tribunal. Barkly, of course, refused to consider international arbitration and threatened military intervention.

The arbitration commenced in April 1871 at Bloemhof and continued for three months.<sup>80</sup> Pretorius himself and State Attorney Kleyn appeared on behalf of the ZAR. They did not distinguish themselves in the way they presented the ZAR's case. Keate was called upon to make the final arbitration, which he did in October 1871. The evidence left him with little choice but to find for one of the Tswana tribes. Since their chief was a vassal of the Griquas, he effectively found for the Griquas. In no time at all, the Griquas requested Britain to take control of the territory on their behalf (as Waterboer had been primed to do). In October 1871 Barkly annexed the whole of the territory specified in terms of the Keate Award (including the area between the Vaal and the Harts Rivers) in the name of the Queen and named it Griqualand West.

Pretorius came out of the affair poorly. The long-suffering *volk* had had enough of Pretorius's well-intentioned, but naïve, impetuosity and his embarrassing lack of political insight. He had betrayed what they regarded as the first principle of statehood: never trust the English (at least McCorkindale was Scottish) – and for this he could not be forgiven. In November 1871 the *volk* gathered at Potchefstroom (the region that bore the brunt of the land losses) and demanded from the *Volksraad* that Pretorius and his complicit officials be forced to resign and placed in a state of impeachment. The *Volksraad* heeded the clamorous voice of the people (of Potchefstroom). As the highest authority in the state, they should have been kept abreast of the details of the case presented at the arbitration and this Pretorius and Kleyn had not done – not that it would have helped, but still. They quibbled among themselves whether or not to grant him an honourable discharge (some wanted him tried for treason). He solved their problem by resigning on 20 November 1871. The *Volksraad* repudiated the Keate Award.<sup>81</sup>

The ZAR continued to lay claim to the land between the Vaal and the Harts Rivers.<sup>82</sup> The new state president, Burgers, enlisted the help of Doms to negotiate with the tribes in occupation of the territory. With Doms's assistance, Burgers managed to convince the tribes to align themselves with the ZAR and to accept its protection. Effectively, then, by mid-1873, the territory was once again under the control of the ZAR. Not that it had much economic benefit: the alluvial diamonds found in the territory was not commercially viable. Doms undoubtedly later served the Republican cause well as negotiator and facilitator. President Burgers was not ungrateful. He promised him farms in the Bloemhof-Christiana area.

80 On the arbitration and its consequences, see, in particular, Agar-Hamilton 1937: 60-88; and Oberholster 1945: 138-157.

81 See Appelgryn 1979: 2-3; and Agar-Hamilton 1937: 95-9729.

82 For what follows, see, in particular, Agar-Hamilton 1937: 89-131; Oberholster 1945: 263-275; and Appelgryn 1979: 32-38.

The colonial authorities (Lieutenant-Governor Southey of Griqualand West and Governor Barkly) continued to employ their best efforts to undo the machinations of the ZAR in securing possession of the Vaal/Harts Rivers territory. It was territory strategically important to British imperial interests and to the assertion of British paramountcy in southern Africa. Their overlords in London, however, had no appetite for the costly and disruptive annexation of yet more territory that was at best but sparsely inhabited by British citizens. Imperial policy then was more inclined to federation rather than annexation of southern African states.

Theodore Doms's political career was not yet over. He continued to play an active part in public affairs in the region throughout the 1870s and the early 1880s,<sup>83</sup> though his activities tended to excite condemnation rather than approbation. He was a prime mover in the brief, bloody and wholly unedifying rise and fall of the so-called independent statelets of Goshen and Stellaland.

He retired to Bloemhof and claimed from the ZAR twenty-one farms on the Harts River he said had been promised to him by President Burgers in 1874 when the latter appointed him diplomatic agent for the ZAR. Doms died in December 1886. His estate was insolvent. He had wheeled and dealt in land for close on two decades, distributing large tracts of land to others, claiming much of it for himself, but died unable to claim full and fair title to any of it. When the *Volksraad* refused to acknowledge the legitimacy of his arrangement with President Burgers, the trustees of his insolvent estate referred the matter to the Supreme Court. The judgments handed down in this matter in 1887<sup>84</sup> contributed significantly to the later debates about the constitutional validity of *Volksraad* legislative activities and were important precursors to the *Brown v Leyds* judgment in 1897.

## 6 The rise and fall of President TF Burgers, the *volkstem* silenced and the annexation of the Transvaal in 1877

### 6 1 The rise of President TF Burgers<sup>85</sup>

When MW Pretorius resigned in November 1871, the *volk* – at least the relatively small percentage among them who cared about the Republic, who concerned themselves with its government and who understood its precarious geopolitical situation – demanded fresh blood to lead them. The political system enshrined in the *Grondwet* was not working in practice. In this system the people awarded to the

83 See Agar-Hamilton 198ff.

84 See *Trustees in the Insolvent Estate of Theodore Doms v Bok NO* (1887) 2 SAR 189-204. The case will be discussed in some detail in the third of this series of articles.

85 The most comprehensive biography on Burgers is by Appelgryn 1979: *passim*.

*Volksraad* the highest authority in the land and elected a state president every five years, whose executive powers were subservient, both in theory and in practice, to that highest authority. The requirements for the office ensured that he was one of them and therefore not likely to get too far ahead of himself. The trouble with Pretorius was that he was no leader, no visionary, no astute political tactician. He was, like the others, only a farmer who wished well for the Republic. Like them, he was, in affairs of state, naïve and gullible and no match for politicians across the country's borders or for the likes of McCorkindale and Doms.

The country, it was now recognised, needed a proper leader, someone who could take them beyond the limited horizons of their abilities, their education and their experiences. Within the country itself there really was no-one willing and able to meet this demand. Commandant-General Paul Kruger was, to be sure, a man of courage and conviction and an active participant in constitutional engagements since the 1850s. He listened well enough to the *volkstem* and understood that the *hoogste gezag* resided with the *Volksraad*; yet he also had enough inherent authority to provide true leadership. He was, though, cut too much from the same cloth. A proud and true son of the soil, undoubtedly. He lacked, however, education and refinement, he was too immersed in the strictures of the *Dopper* creed to engage on an equal footing in a battle of wits and words with the likes of empire-backed colonial administrators.

Change was in the air. The discovery of diamonds on the western border of the *ZAR* and the intense international scrutiny of the Republic as a result of the less than salubrious interaction by its coarse-grained north-western burghers with the African tribes in that region had certainly re-awakened British interest in the *ZAR*. There were clear signs that London once again had imperialist, expansionist designs and the *ZAR*'s inherent weakness certainly made it a strong candidate.

Then, too, the constant discoveries of gold deposits and a variety of other metals and minerals within the Republic and beyond its northern and western borders meant that commercially-viable mining of those minerals was a real likelihood. Indeed, during the winter of 1871 a substantial discovery of gold had been made at Marabastad (midway between the present-day Polokwane and Mokopane in the Limpopo Province), the site appropriately named *Eersteling* (Firstling). Broad-ranging expertise was required and a sophisticated economic and social infrastructure, administered by knowledgeable administrators. It also meant a substantial growth in the number of foreigners settling in or active within the country.

The person most assiduously wooed by the people of the *ZAR* was Jan Brand, president of the Free State. Son of the formidable Sir Christoffel Brand, journalist, lawyer and first Speaker of the Cape Colony Legislative Assembly, he had breeding, he was educated (in law, at the University of Leyden and the Inner Temple) and intelligent – a man of principle and popular with the Free Staters.<sup>86</sup> If he could be

86 On Jan Brand (affectionately known as “Onze Jan” by the Free Staters) see, among many biographies on him, *DSAB* vol 1: 110-116 *sv* “Brand, Johannes Henricus”.

convinced to make himself available, there was the real possibility that the yearned-for union of the two *Boer* Republics could become a reality. Brand, though, withstood the intense pressure and declined the request.

The second-most popular candidate was Thomas Francois Burgers. Born in Graaff-Reinet in 1834, he had studied theology in Utrecht. There he had been ordained in the ministry and had also married his Scottish wife. During his five years in the Netherlands he became a close friend of Jacobus Kotzé, elder brother by seventeen years of John Kotzé, the later Chief Justice of the *ZAR*. After the friends' return to South Africa, both became *predikante* (ministers) in the Dutch Reformed Church. They became involved in a bitter controversy over Dutch Reformed Church doctrine. Both were suspended by the Synod for articulating liberal views at variance with established church dogma. Burgers's heresy was his statement that he doubted the separate existence or personality of the devil. He challenged his suspension in the Cape Supreme Court in 1864, which gave judgment in his favour. The Synod challenged the judgment in the Privy Council, but lost their appeal.<sup>87</sup> This liberal/orthodox struggle in the Dutch Reformed Church simmered for many years and in the case of Burgers became a political albatross around his neck.

When Brand finally made it clear that he was not available for the presidency, Burgers became the strongest candidate (Brand, in fact, urged his candidacy), because he would hold his own against the English. However, he did not enjoy universal support. The likes of Paul Kruger strongly resisted his candidature. Kruger, representing the ultra-orthodox *Dopper* view, would have none of his liberal theological views.

Burgers won the election by a landslide, accumulating almost 3 000 votes, substantially more than the combined votes of the handful of other candidates.<sup>88</sup> He was inaugurated in July 1872. Kruger, in his welcoming address as commandant-general, said that he had opposed Burgers because of his wrong religious views. As a staunch Republican, he would, however, submit to the voice of the majority of the people and support him in the hope that he would find Burgers more of a believer than he had thought.<sup>89</sup>

Burgers set about his duties with energy and enthusiasm. By July 1873 he had secured control over land between the Vaal and the Harts Rivers; he had secured approval from the Executive Council to build a railway line between Delagoa Bay and Pretoria; and, most importantly, he had, in December 1872, secured a loan of £60 000 from the Cape Commercial Bank, which allowed the *ZAR* government to rid itself of the worthless *mandaten* and blue-backs.

His presidential address to the *Volksraad* in February 1873 was in the nature of a reform manifesto. It was broad-ranging, comprehensive and met with general

87 See Kotzé 1934: 31 and 38-42.

88 On Burgers's candidature for the presidency and the election, see, in particular, Appelgryn 1979: 3-7.

89 *Idem* 8-11.

approval. He meant business. Politically he had to steer a course between two extremes: on the one hand, the conservative die-hards, among whom Paul Kruger featured prominently, who experienced Burgers's energetic reform-mindedness as an attack on *Boer* values, customs and way of life (he was, after all, Cape Dutch, not a *Boer*, and theologically liberal to boot); and, on the other hand, the growing population of progressive-minded *Boers* and, to a greater extent, British foreigners (or *uitlanders*, as they came to be called). The majority of the *uitlanders* wanted to live and work under British, not *Boer*, protection.

Burgers introduced many reforms in the Republic. These pertained to administrative, judicial and infrastructural changes, as well as those in respect of financial management and of the free movement of Africans in the Republic. He also worked hard at education reform and single-handedly wrote a comprehensive draft education law, which he presented to the *Volksraad* in February 1874. Large quantities of payable gold had been discovered in February 1873 in the Blyde River valley in the Drakensberg Mountains near Lydenburg, far more than at *Eersteling*. He visited the diggings in August 1873,<sup>90</sup> where a large community of prospectors, for the most part foreign and British, had congregated. Intent on making a favourable impression, he promised them local government and roads between the goldfields and Lydenburg and between the goldfields and Delagoa Bay.

Most of his plans and reform initiatives were enthusiastically received by a supportive *Volksraad* and by the people. However, not all the measures enjoyed support. He had early on proposed to reform the judiciary by amending the *Grondwet* to allow the Executive Council to appoint *landdrosts*. The prescribed system was for the Executive Council to present a list of candidates to the public, from which list a *landdrost* was elected by the people.<sup>91</sup> The danger that a popular rather than a competent person would be elected was obvious. This, though, was a ticklish matter: it went to the heart of the system of people's government given the important and wide-ranging, extra-judicial role of the *landdrost* in each region. The *Volksraad*, as it had often done before, deferred to public comment on the matter. Eighteen months later, in October 1874, the voice of the people was heard: change the electoral system for *landdrosts* at your peril.

Another jarring note was struck when, in June 1873, Paul Kruger had asked for his discharge as commandant-general.<sup>92</sup> This occasioned discussion on the hoary chestnut, namely whether or not the position should be occupied in peace-time. Burgers used the opportunity to push for abolition of the position in peace-time. The *Volksraad* agreed. It might be that Kruger's resignation was triggered by the fact that Kruger was no longer prepared to sit cheek-by-jowl in meeting upon meeting of the

90 *Idem* 18-19.

91 *Idem* 22-23.

92 *Idem* 24-25.

Executive Council with one whom he could barely be cordial with. Certain, though, is that the decision had consequences. With no commandant-general, the vacancy on the Executive Council was filled, not by an elected office-bearer such as the commandant-general was, but by the state attorney, a salaried official appointed by the state president. In an Executive Council comprising the state president, the state secretary and the state attorney – both of the latter working in close collaboration with the state president – and only two additional *Volksraad*-elected members, the state president's views were much more likely to hold sway. The *volk* was not happy (incited, it was said, by Paul Kruger, covertly accusing Burgers of dictatorial tendencies)<sup>93</sup> and heavily petitioned the *Volksraad*. As a result, in October 1874, the *Volksraad* changed its mind and again amended the *Grondwet* so that the Executive Council comprised the state president, the state secretary and three members elected by the *Volksraad*. *Volksraad*-elected members once again held the majority and one of these was Paul Kruger. State Attorney James Buchanan, having lost his place on the Executive Council, resigned and became a judge in the Free State, thereafter judge-president of the Griqualand West High Court and one of the leading jurists of the time.<sup>94</sup> In Buchanan the *ZAR* had lost a competent and industrious individual of the type they badly needed.

Burgers was a champion of education and personally drafted an Education Law.<sup>95</sup> It ran into difficulties in the *Volksraad*.<sup>96</sup> He proposed that no religious instruction should take place during school hours. Aware of his liberal theology, the *Volksraad* was unhappy with this provision. A *Volksraad* committee had recommended an intelligent compromise amendment, but Burgers's opponents had found a peg on which to hang their disaffection with the pushy president. When he then also appointed two theologically free-thinking Hollanders (one of whom was the later influential Dr EJP Jorissen)<sup>97</sup> to supervise education and to teach at the new high school (*gymnasium*) in Pretoria, his noble scheme was doomed to failure. Only four pupils attended the *gymnasium* and only four hundred-odd pupils attended the fifteen state schools. Petitions again flooded the *Volksraad* in May 1876, pleading for religious instruction in the schools and for the dismissal of the Dutch superintendent of schools. The *Volksraad*, to their credit, stood firm, but people-power (misguided,

93 See Kotzé 1934: 274.

94 *Idem* 274-276.

95 The Education Law 4 of 1874 is published in Jeppe & Kotzé 1887: 566-582; see, too, at 640 for its date of implementation in 1876.

96 See Appelgryn 1979: 57-62 for an analysis of the *Volksraad* discussions.

97 1829-1912. The abrasive Jorissen's supporting role, as Supreme Court judge since 1890 – as well as that of his son – in the unfolding drama that was *Brown v Leyds* is discussed in the third and fourth of this article series. For biographical details on Jorissen see, especially, his reminiscences on the period 1876-1896: Jorissen 1897: *passim*.

chauvinistic, but powerful nevertheless) – the *volkstem* – ensured that Burgers’s school reforms were a failure.

Furthermore, in October 1874 Burgers presented to the *Volksraad* the designs for a new flag and a new coat of arms for the Republic.<sup>98</sup> These symbols of nationhood had a powerful appeal to the burghers and excited much discussion in the *Volksraad*. The *Volksraad* approved the new coat of arms and the new flag. Again, though, dissent was fomented among the public by the die-hards. For reasons that had more to do with Burgers’s unpopularity among an influential minority of the burghers, resistance among the *volk* grew. It thus happened that in May 1875, during Burgers’s prolonged absence in Europe pleading the Republican cause, the *Volksraad* repealed their approval of the new flag and coat of arms. The tendency of the *Volksraad* to repeal decisions already taken when pressurised by the *volk* to do so and thereby to create an impression of vacillation, caused Burgers acute embarrassment at a time when he was desperately seeking funding and goodwill from European states. In a letter to the Executive Council he vented his frustration.<sup>99</sup> Its response is unknown. Conceivably, it could well have been as follows: “The *Volksraad* derives its highest decision-making authority from the *volk*. We must heed the *volkstem*, the voice of the people. To be sure, we should take it more upon ourselves to *represent* them by explaining to them why decisions are taken and what the meaning is of decisions that have been taken, thus disabusing them of their ignorance and their prejudices. But it is the *volk* that determines the legitimacy of our activities and that ultimately decides what is best for it. The *volk* has the *koningstem*, not us and not you.”

The September to November 1874 *Volksraad* session also held another surprise for the state president. The gold £1 coins he had had minted from the Pilgrim’s Rest gold diggings were displayed to the members. They viewed the coins with displeasure. It was the *Volksraad*’s prerogative to approve the coins, not his. In any event, Burgers’s image on the back of the coins suggested to the *volk* that he arrogated to himself that *hoogste gezag* that was the *Volksraad*’s exclusive prerogative – and it flouted the principle of egalitarianism.

The message after the 1874 *Volksraad* session from *volk* and *Volksraad* would have been clear: You are here to lead us, not to change us.

Burgers’s grandest and most ambitious scheme, though, was the railway line to Delagoa Bay.<sup>100</sup> On it hinged the future of the ZAR and his own success. When the original concessionaire appointed by the *Volksraad* was unable to meet the conditions set by the *Volksraad*, Burgers convinced them to make it a state project. Despite debilitating ill-health (he had been bed-ridden for three months in 1874) he went to Europe in February 1875, determined to secure a £300 000 loan from European investors, to negotiate with the Portuguese and to plead the Republican

98 *Idem* 48-52.

99 *Idem* 51.

100 *Idem* 77-94.

cause in Britain and in continental Europe. He was away for eighteen months and worked tirelessly for the Republic. He achieved many diplomatic successes, despite regular reports from the *ZAR* about mounting criticism against him and a not unreservedly loyal *Volksraad*. Importantly, he was able to interest an Amsterdam investment company to invest money in the scheme, which launched subscriptions on the Amsterdam stock exchange. Confident that the loan was secured, Burgers placed an order for £63 000 worth of railway stock and returned home to a hero's welcome in April 1876.

The scheme collapsed, for two reasons. First, it had not been in the bag and only about £100 000 had been subscribed to by September 1876. Second, war had broken out between the *ZAR* and the Pedi paramount chief, Sekhukhune, in the north-eastern regions near Lydenburg. News of the war put paid to any hope there might have been that the remaining amount would be fully subscribed. In any event it soon became clear that the railway would cost significantly more than estimated and that it faced severe infrastructural obstacles unforeseen at the time of planning. The *ZAR* was certainly in no financial position to fund any loan. Burgers was accused of being less than transparent in the matter of the loan and he suffered severe censure from friend and foe alike. The railway stock ordered was left to rust in the sun.

The war with Sekhukhune, which started little more than a month after his return from Europe, was another humiliation.<sup>101</sup> Ostensibly the war was meant to counter Pedi aggression against *Boer* inhabitants of and *uitlander* prospectors of the Lydenburg region. Sekhukhune's defeat would have the added advantage of securing more land for the Republic. Faced with a recalcitrant citizenry unwilling to go on commando to fight Sekhukhune, Burgers, with more courage than common sense, decided that he, with MW Pretorius as commandant-general, would lead the commando as commander-in-chief. It was a sorry, drawn-out affair, with many of the *Boers* and foreign volunteers (officers and men) distinguishing themselves only through their cowardice, their lack of discipline and their willingness to desert. A drawn-out siege of Sekhukhune's stronghold ensued and eventually, to everyone's relief, Sekhukhune sued for peace in December 1876, which Burgers was only too happy to accept.

## 6 2 The fall of President Burgers and the annexation of the Transvaal in April 1877

Burgers had won the battle but lost the war. The war with Sekhukhune had strained the already parlous Republican finances beyond breaking point. The manner of its conduct had left the outside world, and a censorious Great Britain in particular, with a distinctly poor impression of the Republic's ability, first, to look after itself, let alone

101 *Idem* 110-134.

protect the large numbers of prospectors on the goldfields (close to Sekhukhune's land); and second, to secure peaceful co-existence with Africans through means other than hostile action. War in the Transvaal on all fronts between white and black and between black and black was a distinct possibility and British interests were under threat. Thus argued the colonial office. The railway fiasco and the debilitating war had led to Burgers becoming deeply unpopular, even among his supporters. Ill and disillusioned, Burgers tried hard to make the best of a bad situation and to turn things around for himself and the country.

The *ZAR*, though, was ripe for imperial plucking. Benjamin Disraeli's Conservative government, in power since 1874, was pursuing an expansionist imperial programme, meant to further increase the prosperity and prestige of an already immensely powerful and wealthy empire.

A ready case was made in London for annexation: The rights of British citizens on the diggings and elsewhere could not be guaranteed by an enfeebled Republic; a militarily weak Republic threatened British interests in Natal, where the Zulus were threatening British hegemony in the region; the strategic value of Delagoa Bay to Britain was under threat from the *ZAR*'s railway scheme; and the conduct of the burghers towards the Africans in the north-west continued to excite vituperative comments from British administrators and missionaries. Of course, most importantly – but discreetly underplayed – the country was rich in gold and other minerals already and still waiting to be discovered. These (potential and actual) riches could be utilised far better to the greater glory of the British Empire in the whole of southern Africa rather than to shore up an inept, insolvent and altogether inferior *Boer* Republic, so the argument would have run.

Sir Theophilus Shepstone – erstwhile native commissioner in Natal, son of an 1820 Settler, speaker of many African languages as well as of the Afrikaans-Dutch language of the *Boers* and well-versed in South African affairs and conditions – was sent to the *ZAR* in October 1876. As special commissioner his brief was to investigate the extent and nature of African (the Zulus, the Pedis and the Swazis) unrest in and on the borders of the *ZAR* and to take the steps he deemed necessary to protect British citizens and their possessions. If a sufficient number of inhabitants so required and supported it, he was to proclaim the *ZAR* a British possession, and to serve as its administrator; he could even annex it outright if deemed necessary. Shepstone, then sixty years old, arrived in Pretoria on 22 January 1877 with an armed escort of twenty men and a number of administrative assistants, among whom counted twenty-one year-old Henry Rider Haggard, later famed Victorian adventure novelist, author of such novels as *King Solomon's Mines* and *She*.

As a result of his arrival and the general stir it caused in the country, the presidential election scheduled for 15 February was postponed. Burgers, despite misgivings, had decided to make himself available for re-election. Paul Kruger, initially reluctant, was also persuaded to make himself available as a candidate.

Both sides, the progressives/free thinkers and the conservatives/dogmatists were vociferous in their support for and denunciation of the respective candidates. In his election manifesto, made public on 22 December 1876, Kruger had stated that two of the pillars on which his presidency would be based were obedience to the law and obedience to the *volkstem*, which was, after all, the *koningstem*.<sup>102</sup> During his tenure Burgers had too readily sought to change fundamental principles in the *Grondwet* (such as the election procedure for *landdrosts* and the composition of the Executive Council) as a means to increase executive power at the expense of the sovereignty of the *volk*. In the process he had failed to listen to the *koningstem* and arrogated too much sovereign power to himself.

The elections never took place. When Burgers fully grasped the real underlying intent of Shepstone's arrival in Pretoria, he called for a special session of the *Volksraad* in February/March 1877 and delayed the elections. It was high noon for the Republic. A significant number of inhabitants were all for annexation. There were also those who opposed it vehemently. Then there was the silent majority, apathetic to the political undercurrents and who simply longed for an improvement in the way the country was governed – be it by the British, the *Boers* or within a federal scheme. Anything was better than the present state of affairs.

Burgers was eager to convince Shepstone that the Republic was intent on reform of such a nature as to make British interference unnecessary. He presented to him a new constitution,<sup>103</sup> modelled after the Constitution of the United States of America.<sup>104</sup> Among many innovations to the system of government, and to the administration and national defence, he also proposed a Supreme Court of three judges, separate from and superior to the *landdrost* courts, to ensure judicial independence and a professional judiciary.<sup>105</sup>

The *Volksraad* refused to consider these amendments, accusing Burgers of autocratic tendencies. The *volkstem* would be silenced. The president would devolve state power away from the *Volksraad* and from the *volk*. The *Volksraad* would also not be swayed to accept a supreme court of final appeal, in the composition of which the *volk* had no say. Burgers responded that he demanded no more power than was accorded the presidents of the Free State and the United States of America.<sup>106</sup>

The *Volksraad* prevaricated, refusing to acknowledge that the country was in a crisis and steadfastly refusing to be swayed by Burgers's pleas to take decisive reform action. Shepstone bided his time. It became increasingly clear that Shepstone,

102 The manifesto was published in the *Government Gazette* of 3 Jan 1877. See Wypkema 1939: 255; Smit 1951: 19; Gey van Pittius 1941: 15; and Appelgryn 1979: 187.

103 Assisted in the drafting by EJP Jorissen – see Jorissen 1897: 14 & 29.

104 See Burgers's posthumously-published "Defence" in Appelgryn 1979: 261-269 esp at 265.

105 Already in the mid-1860s there had been agitation among the *landdrosts* for the establishment of a professional judiciary: see art 495 of the *Volksraad* minutes of 10 Feb to 9 Apr 1868 published in *Volksraadsnotule VII*: 136.

106 See Appelgryn 1979: 207-208.

contrary to his initial protestations of friendship and assistance, had one object in mind only, namely annexation as a precursor to a broad-ranging confederation of southern African states under British hegemony. It was plain for all to see that the Republic was in desperate straits, that it suffered from crippling debt and had a pitifully weak government.

Burgers continued to urge the *Volksraad* through impassioned cajolery to do something to save republican independence; as a result, he was already at the time accused of playing a double game and of being a traitor to the cause of the *volk*. The weight of current opinion suggests that Burgers played both sides but in the final analysis genuinely sought to preserve the Republic's independence against overwhelming odds. He did this despite the Kruger-fomented suspicion and impassivity of many of the *Volksraad* members.

Burgers's addresses to the *Volksraad* took on increasingly harsh overtones. A *volk* who professed their independence to be sacred, but was unwilling to earn it, did not deserve to be independent. The *volk* and its representatives needed to assume the responsibilities that necessarily attach to the independent participative democracy they professed to espouse. Translated into a language Kruger would appreciate, this meant that if you arrogate the *koningstem* to yourself, then you must behave like a king and accept massive responsibilities along with the privileges he enjoys. Otherwise the king's voice will be silenced.

Burgers's pleas eventually got through to the *Volksraad*. On 7 March, weeks after Burgers had convened the session to urgently address the crisis, the *Volksraad* approved the new constitutional dispensation.<sup>107</sup> Paul Kruger was elected as vice-president. Feeling that what they had done was sufficient, they dispersed.

Burgers feverishly sought to give effect to the new dispensation. In between his many activities he wrote to John Kotzé, younger brother of his friend, Jacobus Kotzé, and offered him the position of chief justice. John had recently returned from London where he had studied law for five years. He also offered the two junior judgeships to Jan Preller and Abraham Munnich, law agents practising in Pretoria and Potchefstroom respectively.<sup>108</sup> By offering the junior judgeships to local practitioners

107 See Appelgryn 1979: 214-219.

108 JC Preller was a leading inhabitant of Pretoria, who served for a brief period as State Attorney in 1868 and would, in December 1880, be elected Pretoria's first mayor (although he did not take up the position, because of the outbreak of the war of 1880-1881: see *Pretoria 1855-1955* 1955: 47 and 370. AI Munnich was a colourful (not to say slightly off-colour) character. He served as State Attorney in 1866, but was dismissed from office in the same year by the Executive Council for dereliction of duty, negligence and accepting a bribe (accusations he vehemently denied): see Executive Council decision at 155-156 in *Volksraadsnotule VI* at 155-156 and see, too, arts 452 and 553 of the minutes of the Sept-Nov 1866 *Volksraad* meeting published in *Volksraadsnotule VI* 3-79 at 52 and 63 (and see, too, arts 646-649 at 76-77). In 1869 he was also a member of a consortium of speculators to whom President Pretorius awarded a dubious concession to dig for diamonds on the northern banks of the Vaal River: see Agar-Hamilton 46-47 and 83-84. See, at 73 *infra* a discussion of his dialectical machinations in court in the matter of *Baumann Bros and Co v Munnich*.

he clearly sought to assuage the *Volksraad*'s protests that the *volk* would have no voice in the administration of justice.

However, it was too little, too late. Shepstone made it clear that the annexation would proceed, whatever reform measures were implemented. After some delays the annexation proclamation was read out in Pretoria on 12 April 1877. The *Zuid-Afrikaansche Republiek* had become the Transvaal Territory under British rule.<sup>109</sup>

The proclamation listed a number of reasons for the annexation (and justification for the obvious deviation from the terms of the Sand River Convention): the threat posed by the Africans to white supremacy in the region; the inherent weakness of the ZAR government; the country's insolvency; and the fact that the majority of the population favoured annexation.<sup>110</sup> It mattered not that Burgers's new government that had met on 9 April 1877 had published a strongly-worded protest on 11 April against the annexation and that Burgers had done likewise in his capacity as state president. It also mattered not that the government gave notice to Shepstone of an intention to send a delegation to London (comprising the Hollander EJP Jorissen, appointed as state attorney by Burgers in June 1876, Vice-President Paul Kruger, with WE Bok as secretary) to petition the Queen. Nor that the excitable burghers were enjoined to remain calm pending the outcome of the petition.<sup>111</sup> Nor that a pro-annexation majority proved to be a fiction: although many non-*Boers* who farmed and traded in the Republic, a number of whom were well-off and well educated, indeed favoured annexation, as did some of the more affluent and therefore influential *Boers*, they were not a majority. Nor that the death of the Republic had been greatly exaggerated by Shepstone and his willing allies in his despatches to Cape Town and to London. The deed had been done.

The *Zuid-Afrikaansche Republiek* was no more. The *Boers* had lost what they prized (or used to prize) above all else: their independence as a nation. The voice of the people, the *volkstem*, a mere whisper in the months preceding the annexation, had grown silent. The *volk* had been replaced by a collective of individuals pursuing, not national interests, but self, sectional and regional interests. The government had made little tangible difference to the lives they led, whether for good or ill. To the poor and the destitute, of which there were large numbers, a change of government might actually improve their lives. For most, "independence" had come to mean

109 The annexation proclamation is published in Jeppe & Kotzé 1887: 691-696.

110 Kotzé 1934: 336-383 analyses at length the reasons advanced for the annexation (both in the proclamation itself and in the run-up to it) and concludes that the annexation was "a fatal step and a blunder" (at 382). At the same time he viewed it as a blessing for the *Boers*, as it taught them the value of settled government, law and order, of promoting trade and commerce and providing them with a market for their produce as well as enhancing the creditworthiness of their country and the value of their land. When the Republic regained its independence in 1881, the British recognised the righteousness of the *Boer* cause, which recognition, wrote Kotzé, was striking proof of "the greatness of the British nation" (*ibid*).

111 See Appelgryn 1979: 239.

merely non-interference. As Shepstone had promised a soft-touch approach, they did not care enough to influence events.

Burgers retired to the Cape Colony, ill, broken in spirit and impecunious, unable to look after his wife and ten children. They survived on the generosity of friends and a small pension awarded him by the British government and paid out of the Transvaal treasury. He died in 1881. Illness and disillusion had made him a mere shadow of the energetic, genial, but fatally impatient, even obstinate, young state president ready for any challenge.<sup>112</sup> He had been maligned as a traitor to his people, by the very same people whom he accused of having betrayed him.<sup>113</sup>

## 7 The annexation years: The rise of Paul Kruger and John Kotzé and the raising of the *volkstem*

### 7 1 The rise to national political prominence of Paul Kruger

In early May 1877 Kruger, Jorissen and Bok left for London to protest the annexation. They met with Lord Carnarvon, the secretary of state for the colonies, and described by less-than-neutral Jorissen<sup>114</sup> as an unimpressive and vain aristocrat who received the delegation with opprobrious condescension. He would not yield on the annexation question, despite the delegation's pleas and protests. The majority of the population wanted British control in the Transvaal, said Carnarvon, and this was the best course to preserve European (read: British imperial) interests in southern Africa. When asked if he would allow a plebiscite to determine the true feelings of the population, he demurred. Plebiscites belonged to Napoleon's rabble-rousing style of government and he would certainly not allow the pure constitutional principles by which Britain was governed to be thus adulterated. The *Boers* were like children who did not know what was in their best interests. Britain had assumed a burden of responsibility towards the Transvaal and it would do its duty towards them.<sup>115</sup> The delegation returned in December 1877, not quite empty-handed: a loan of £100 000 was made available to the Transvaal, the recognition of Dutch as one of the official languages was guaranteed and telegraph communication as well as the building of a railway in due course was promised.

In early 1878 a series of report-back meetings began. It was upon the delegation's return that Paul Kruger now came into his own. No longer burdened with the presence

112 Jorissen (1897: 18-19), who worked closely with Burgers and with whom he developed a close friendship, describes his personality well.

113 Kotzé 1934: 260-330 and 384-399 is fulsome in his praise of Burgers's qualities and severely critical of those who denigrated him and accused him of being a willing accomplice of the British.

114 1897: 36.

115 *Ibid.*

of Burgers, he shed his image of the dour, taciturn, narrow-minded religious fanatic<sup>116</sup> and assumed the mantle of leadership for the *Boer* fight to reclaim its independence. In the eyes of the British observers of the time, he was physically ugly, with coarse features, coarse manners, coarse speech and lacking in any of the accepted social refinements. There was, though, more to him than met the eye. He was quick-witted, possessed of a native shrewdness, persuasive and eloquent when called for, and not easily swayed.<sup>117</sup>

He proved to be a leader of men. Under his influence the *Boers* set aside their debilitating factionalism and their apathy, and began to actively organise their resistance to the annexation. It was, in the hyperbolic language of Jorissen's fervent patriotism,<sup>118</sup> an awakening of the slumbering *volksgeest* (spirit of the people), which complemented and fed off (and into) the nationalist Afrikaner movement that had been burgeoning in the Cape Colony since the mid-1870s.<sup>119</sup>

Kruger's leadership was inspired by the zeal of one who believed, and allowed others to believe, that he was divinely chosen to lead his people, as Moses had done with the Israelites, to a land where they could live freely and independently, submitting only to the will and the word of God.<sup>120</sup> His leadership was guided by a fierce, almost fanatical, desire for independence. It included both *freedom from* non-interference and *freedom to* make one's own friends and enemies – political and commercial – that had animated the *Voortrekkers* and continued to animate their immediate descendants. He was supported across political and religious divides and particularly by the women who, in the opinion of Olive Schreiner,<sup>121</sup> were the driving force behind the agitation to resist rather than surrender.

Initially he was, to be sure, ethically ambivalent towards the British authorities and intimated more than once that he would accept the inevitable were Carnarvon to refuse to retract the annexation. He justified his early lukewarm attitude by stating that it was only upon his return that he became aware how strident the *volkstem* was in its opposition to the annexation. Only then did he begin to act accordingly, since he was always implacably led by (his interpretation of) the *volkstem*.<sup>122</sup>

A *Boer* committee of some sixty members<sup>123</sup> was set up, with MW Pretorius as chairperson to guide and organise the resistance movement. A petition against the annexation was circulated to demonstrate that the majority of the *Boers* were, in fact, dead against the annexation. Some 6 500-odd signatories expressed their opposition to and some 500-600 in favour of annexation (the enfranchised, that is white and

116 This is how Jorissen saw him when he first met him in 1876: see *idem* 15-18.

117 See Meredith 2007: 77-79.

118 See Jorissen 1897: 39.

119 See Meredith 2007: 81-83.

120 See Giliomee 2003: 229.

121 *Idem* 231.

122 On Kruger's apparent double-dealing with Shepstone, see the discussion and exculpation of Kruger by Kotzé 1934: 501-511.

123 Jorissen 1897: 61.

male, population at the time was roughly 8 000). Armed with this evidence, a second deputation, comprising Kruger and Piet Joubert (Kruger's later political opponent), with Bok again as secretary, went to London to plead the Republican cause once more.

The deputation reached London in July 1878. They presented their case to the then secretary of state for the colonies, Sir Michael Hicks Beach. Hicks Beach rejected the petition on the grounds that the signatures were clearly obtained through intimidation and, in any event, represented the views of people who, for the most part, were incapable of forming a true and deliberate judgment on the matter.<sup>124</sup> Insult added to injury. Poorly educated and ignorant though many of the *Boers* undoubtedly were, the petition did reflect the *volkstem*. To Kruger, Joubert and others in whom the *Boer* political psyche was deeply ingrained, the importance of the *volkstem* was both axiomatic and foundational. It did not matter that there existed little clarity on the means to determine how the voice of the people on a particular matter was gauged and on how the representatives of the people were meant to react upon hearing that voice. Nor that the average member of that *volk* lacked the qualities commonly associated with sophisticated political discernment.

As with Lord Carnarvon, for Hicks Beach the *volkstem* was neither axiomatic nor foundational. Britain, as the paramount power in the region, was responsible first and last for the peace and safety of the country and in that matter it alone was entitled to decide. Power makes the rules and might rules. Surely the delegation did not seriously suggest that the *Boers* would resist by force the duly established government established in the Transvaal?<sup>125</sup> Kruger and Joubert reported back to the *volk* in early 1879 and thus the fires of resistance remained stoked.

1879 was an eventful political year for Great Britain in southern Africa. Cetshwayo, paramount chief of the Zulus, was frustrating the efforts of the British High Commissioner, Sir Bartle Frere, to implement his grand imperial federation scheme for southern Africa. Frere then brazenly provoked a dispute with Cetshwayo by making unreasonable demands on him. When Cetshwayo, to no-one's surprise, ignored the demands, Frere, in early January 1879 and without obtaining explicit approval from London to do so, sent a large British force to invade Zululand. Thus commenced the Anglo-Zulu War of 1879. At the Battle of Isandlwana on 22 January 1879 the British forces were decisively beaten by a Zulu army with vastly inferior weaponry but vastly superior numbers. It was a humiliating defeat for the British and severely damaged their reputation for invincibility and paramountcy. In a series of subsequent bloody battles, Britain succeeded in subjugating the Zulus in August of that year at the Battle of Ulundi.<sup>126</sup>

124 See Kotzé 1934: 565-566.

125 *Idem* 568-573.

126 See, among many descriptions of the Anglo-Zulu War of 1879 in general histories, especially Cameron & Spies 1986: 176-179; Saunders 1988: 182-188; and Giliomee & Mbenga 2007: 165.

While dealing with the Zulus in 1879, Frere also sought to deal with the Transvaal *Boers*. Unimpressed by Shepstone's administration of the Transvaal (official reports described him as "an execrably bad manager"),<sup>127</sup> he recalled Shepstone and replaced him with Sir Owen Lanyon in March 1879. Lanyon was deeply unpopular in the Transvaal. In contrast to Shepstone's conciliatory approach, Lanyon's high-handed and condescending attitude towards the *Boers* (he called them "inflated toads" and "mortal cowards"),<sup>128</sup> aggravated tensions between *Boer* and Briton.<sup>129</sup> Frere visited the Transvaal in April. He did not impress the *Boers* favourably, nor did they impress him: like Lanyon, he regarded them as simple-minded, inferior people who had to be dealt with firmly. They in turn experienced him as duplicitous and untrustworthy.<sup>130</sup>

Frere and Lanyon met with delegates of the *Boer* committee on 12 April 1879, in the presence of a large gathering of some 4 000 excitable *Boers* who had waited for weeks on end for him to arrive. To the patriotic Jorissen the gathering represented the best evidence of a vibrant national spirit and a clear expression of the *volkstem*.<sup>131</sup> Kruger, Joubert and William Robinson (the latter no doubt for his proficiency in English) were deputed to engage with them on behalf of the *volk*, who demanded full and unconditional independence. Frere was prepared to offer them no more than the self-government enjoyed by other colonies.

The *Boer* committee prepared a memorandum of their demands for presentation to the colonial secretary, and Frere duly sent the memorandum to Hicks Beach. It was futile. They never even received a response. Frere had some days earlier written to Hicks Beach to inform him that, in his view, the agitation was driven by a disaffected minority who posed no real threat and who should be effectively and forcefully dealt with.<sup>132</sup> His use of quotation marks in his despatches when referencing "the people" made it clear that he shared Hicks Beach's lack of comprehension for this amorphous, ill-defined concept of the *volk* and the importance the *Boer* committee attached to it.<sup>133</sup>

In July Sir Garnet Wolseley was appointed as governor of Natal and Transvaal and commander-in-chief of the imperial forces in southern Africa. He then went to the Transvaal to bring to heel the *Boers* and Sekhukhune's Bapedi in the eastern Transvaal. In a major offensive that included some 6 000 Swazi troops, he defeated

127 See Meredith 2007: 83; Kotzé 1934: 544-551. Kotzé's account contains an extract of an exculpation by Shepstone (at 549-551). His sympathies lay with Shepstone, and definitely not with Frere.

128 See Meredith 2007: 99.

129 Kotzé 1934: 580-581 provides a character portrait of Frere.

130 See Jorissen 1897: 41-42. Kotzé 1934: 596-608 is surprisingly scathing in his assessment of Frere's character, temperament and his lack of discrimination, notwithstanding his undoubted ability, breeding and dedication to duty.

131 See Jorissen 1934: 42-45.

132 See Kotzé 1897: 601-602.

133 See extracts from Frere's despatch to Hicks Beach on 14 Apr as quoted by Kotzé 1934: 596-597 n 1.

the Bapedi after facing stern resistance, had Sekhukhune imprisoned in Pretoria and secured the safety of the British dominated inhabitants of the Lydenburg goldfields.

The diplomatic offensive he conducted against the *Boers* was less successful. He was no less prejudiced against the *Boers* than Lanyon and lacked the required tact and good judgment. In his diary he records his first impressions of the *Boers*: “These Transvaal *Boers* are the only white race I know that has been going steadily backwards towards barbarism ... Altogether I regard them as the lowest in the scale of white men & to be the very most [*sic*] interesting people I have ever known or studied.”<sup>134</sup> In a proclamation he issued immediately after being sworn in as governor of the Transvaal colony he made it abundantly clear that the Transvaal would be “for ever” an integral part of the British empire.

The *Boer* committee arranged for a mass meeting just north-west of Krugersdorp in December 1879 (on the farm Luipaardsvlei, where sixteen years later Robert E Brown’s pegging off of gold claims would trigger a constitutional crisis and an acrimonious stand-off between Kruger and Kotzé). The defiant *Boers* reiterated their desire not to be treated as British subjects and demanded the restoration of the government and *Volksraad* of the ZAR. They expected from a re-constituted *Volksraad* that it would participate with all southern African states in the formulation of a single so-called native policy and in the establishment of a confederation of southern African states and colonies. They set early April 1880 as a return date for a progress report from the committee.

Wolseley had MW Pretorius, chairman of the *Boer* committee, and WE Bok, the secretary, arrested in early 1880 on charges of treason. Also in early January he gazetted a constitution for the Transvaal. This provided for an executive council and a legislative assembly, the members of both bodies being nominated by the government rather than elected by the people. This was contrary to the terms of the annexation proclamation, which provided for an *elected* legislative assembly. Quirkily, he then had Pretorius released and offered him a position on the executive council. Pretorius declined.

The king’s voice of the people rose ever more stridently in the wake of Wolseley’s autocratic actions. His (and Lanyon’s) attitude would have been a harsh reminder to those who remembered why, forty years earlier, their *Voortrekker* forebears had left first the Cape Colony and then Natal to escape precisely the sort of dictatorial rule and imperial arrogance Wolseley and the colonial office sought to impose on them. Agitation also spread to the Free State and the Cape Colony. Petitions were addressed to William Gladstone – whose defeat of Disraeli saw the Liberal Party returned to power in April 1880 – by Kruger and Joubert on behalf of the *Boer* committee and by an increasingly large and influential number of *Boer* sympathisers in the Cape. Given his liberal credentials and his stance against the annexation in his pre-election

134 Meredith 2007: 95-96.

campaigning, it was thought that Gladstone would be more sympathetic to the *Boer* cause. However, he was not.<sup>135</sup>

## 7 2 Paul Kruger leads his *volk* in the War of Independence of 1880-1881

Wolseley left South Africa as early as April 1880, after only seven months in office, for yet more imperial duties and honours. He left behind a Transvaal *Boer* population indignant and resentful. Many had little stomach for a war with Great Britain and strongly advocated a diplomatic solution. The *Boer* committee had postponed the planned gathering of the *volk* scheduled for April 1880 to January 1881. They hoped that Prime Minister Gladstone would be moved by their own petition and the one emanating from the Cape Colony to revise imperial policy in respect of the Transvaal. When Gladstone remained unmoved, the warmongers began to gain the ascendancy. The hotheads sought and found a *casus belli* when Lanyon had the wagon and oxen of a local farmer in the Potchefstroom district attached for his failure to pay taxes. When sympathetic *Boers* prevented the sheriff from attaching the property, Lanyon was forced to send troops to Potchefstroom. Hostilities were now inevitable.

The *Boer* committee called a mass meeting of the *volk* in early December 1880 at the farm Paardekraal, where Krugersdorp was later established. Between 12 000 to 15 000 came, among whom were some 8 000 armed and belligerent potential conscripts. The committee was disbanded by the Executive Council and the *Volksraad* of the Republic was restored. The *Volksraad* appointed, instead of a state president, a triumvirate comprising Paul Kruger (who was also designated vice-president, the position he occupied immediately prior to the annexation), MW Pretorius and Piet Joubert (the latter was appointed commandant-general). On 16 December Heidelberg became the provisional seat of government. On the same day Lanyon responded by publishing a proclamation declaring the Transvaal to be in a state of rebellion.

In his acceptance speech on 14 December 1880, Kruger said: "I stand before you, called by the People. In the Voice of the People I have heard the Voice of God, the King of all nations, and I obey."<sup>136</sup> In doing so he echoed the language used by Piet Retief when appointed governor of the *Voortrekkers* in 1837. It was also the language employed in 1859 by a *Volksraad* member in describing the influence of the will of the people on those elected to draft the 1858 *Grondwet*. It was, the member then said, a manifestation of the notion of *vox populi vox Dei*.<sup>137</sup> This re-affirmation of a long-held Calvinist precept in his acceptance speech represented a

135 On the presumed reasons for his non-interference, see Jorissen 1897: 58-59; see, too, Kotzé 1934: 694-695 & 722-724.

136 See Smit 1951: 14; Kleynehans 1966: 23.

137 Wypkema 1939: 381-382.

subtle but important shift in perspective on the primacy of the *koningstem* concept, a shift that became crucial in later years. The *volk* has the *koningstem* and not the British sovereign, Queen Victoria. This is so not only because in a Republic the people, and not the king, have ultimate authority; but also because God, the King of all Nations, speaks through them. The *volk* therefore not only has sovereign authority, but also divine authority. And he, Paul Kruger, by the grace of God, was the bodily representation of that divine authority.

The gathering of the *volk* at Paardekraal and Kruger's rousing commitment to lead them to victory, was the culmination of the awakening of a national identity. It was cultivated by speaker after speaker, promoting a patriotism that fed off anti-British sentiment and was infused with religious fervour.<sup>138</sup>

The first shots in the war were fired in Potchefstroom on 16 December 1880. The *Boers* laid siege to the larger towns where pro-British sentiment (including many loyalist *Boers*) dominated. On 20 December 1880 British forces suffered heavy casualties near Bronkhorstspuit, east of Pretoria. They also suffered a succession of defeats under General Sir George Colley (he had succeeded Wolseley as high commissioner for south-east Africa and governor of Natal) on the Transvaal/Natal border in January/February 1881, culminating in the Battle of Amajuba, where Colley himself was killed. The British and *Boer* forces agreed to a ceasefire on 6 March to discuss the terms of peace. Negotiations were conducted between Kruger and his advisers and Colley's successor, Sir Evelyn Wood and his advisers on 14 March. Kruger led the peace talks on behalf of the *Boers*. President Brand of the Free State mediated the talks. Initial peace terms were agreed to soon thereafter in March.

The terms of the peace were fleshed out by a royal commission comprising Sir Hercules Robinson, high commissioner for Southern Africa, as chairperson; Sir Evelyn Wood and Sir Henry de Villiers, chief justice of the Cape Colony. They met with the *Boer* leaders in June and July, with Brand serving as mediator. The final terms were captured in a convention between the *ZAR* and Britain (De Villiers was the primary draftsman) and signed by both parties on 3 August 1881 in Pretoria.<sup>139</sup>

The convention provided for "retrocession": complete self-government for the inhabitants of the Transvaal Territory. Nevertheless, self-government was subject to British suzerainty.<sup>140</sup> Self-government was granted subject to a range of other terms, conditions and limitations.

The newly established *Volksraad*, which commenced its first sitting on 15 August, was given three months within which to approve the terms of the convention. They balked at many of its provisions. It was a severe curtailment of the full independence

138 Giliomee 2003: 234.

139 The convention is published in Jeppe & Kotzé 1887: 996-1009.

140 "Suzerainty", a term pregnant with political meaning, meant that the suzerain (Great Britain), though granting to the inhabitants self-government of and control over the internal affairs of their country, retained control over and in fact conducted its foreign affairs.

they had enjoyed since 1852, particularly with regard to the conduct of and control over their foreign affairs and their relationships with Africans, inside and outside Transvaal borders. To insert provisions related to slavery, religion and the freedom of citizens was deemed an insult to national honour. The borders, in particular those to the east and the south-west, were unsatisfactorily drawn. They fulminated against English interference in their affairs. All in vain. Refusal to approve the convention would have unleashed the full might of Britain upon the Republic, as Britain had done with the Zulu kingdom after Isandlwana. The convention was finally, grudgingly, approved by the *Volksraad* on 25 October 1881.

### 7 3 The rise to judicial prominence of John Kotzé<sup>141</sup>

Johannes Gysbertus Blanckenberg Kotzé, anglicised to John Gilbert Kotze, was born on the Leeuwenhof Estate in Cape Town (currently the residence of the Premier of the Western Cape) in 1849, the fourth of six children, the eldest of whom, his brother Jacobus, was seventeen years his senior. His father was a member of Parliament in the Cape legislative assembly and was twice mayor of Cape Town.

John studied at the South African College from 1864 to 1868. He went to London in 1869 to continue his studies. He sat for his matriculation examination at the University of London in December. In January 1870 he entered the Inner Temple as a student and read for the LLB degree of the University of London. In his first year he studied jurisprudence alongside Roman law and constitutional law. Kotzé was much impressed by the writings of the legal theorist, John Austin (1790-1859), whose virtues he extolled in his *Memoirs*:<sup>142</sup> “His clearness of expression, original and logical mind and contempt of sophistry appealed to me, and I probably owe more to him than to any other jurist with whom my early course of reading made me familiar ... . He has indeed performed abiding work, and rendered great and lasting service to the scientific study of law in England.” Austin’s so-called scientific command theory of law was the peg on which Kotzé would hang his arguments in his early constitutional judgments in the 1880s. In his later judgments he jettisoned Austin in favour of more liberal American constitutional jurisprudence. He always retained a fondness, though, for the so-called scientific jurisprudence he had been introduced to as a young student.

He passed his first examination for the LLB degree in December 1870 and his second examination in December 1872, graduating with a LLB from the University of London. In that same year he married Mary Bell, described twice in the *Memoirs* as being eighteenth in descent from King Edward I. Kotzé, having kept his terms, was admitted to the Inner Temple. He remained in London for another two years,

141 Kotzé’s *Memoirs* served as the primary source for biographical details on Kotzé’s early career: see Kotzé 1934: *passim* and 1941: *passim*.

142 See Kotzé 1934: 117.

studying and also translating and commenting on Roman and Roman-Dutch law texts and, in 1874, serving a period of pupillage. He was called to the Bar on 30 April 1874. In this same year he was contracted to engage on his well-known English translation of Simon van Leeuwen's *Het Rooms-Hollands Regt – the Commentary on Roman-Dutch Law*, which he finished in two volumes, one in 1881 and the other in 1886.

The five years he spent in London as a student made a deep impression on the young Kotzé. He became a confirmed Anglophile. His *Memoirs*, written sixty years later, breathe the awe and admiration he felt as he first sampled and then fully absorbed the sights, sounds and sophistication (intellectual, industrial and technological) of the largest and richest city in the world.<sup>143</sup>

Twenty-four year old John Kotzé, his wife and first child arrived in Cape Town in August 1874. He was admitted as an advocate of the Cape Supreme Court before Chief Justice Sir Henry de Villiers in the same month. Hoping to earn more money than in Cape Town, he began to practise law at the Bar of the Eastern Districts Court in Grahamstown in July 1876.

On 4 April 1877, while on circuit in Queenstown, he received a telegram informing him that President Burgers had offered him the chief justiceship of the ZAR. He accepted the offer and soon afterwards left by stagecoach for Kimberley. While there, the news reached him that the ZAR had been annexed by Shepstone. He decided to go to Pretoria anyway. He reached the town on the weekly mail coach on 28 April.

Shepstone met with Kotzé in early May. Preller had declined Burgers's offer of a judgeship. Munnich, however, had accepted. Shepstone's administration had insufficient funds to appoint a second judge; in any event, Munnich was unqualified and lacked the judicial temperament.<sup>144</sup> Shepstone, despite Kotzé's urging, would not implement the erstwhile *Volksraad's* constitutional reform of the judiciary. In a proclamation of 18 May 1877 Shepstone established a single-judge high court for the Transvaal. Kotzé was appointed to this position. He wanted to be a chief justice (the Free State had established a supreme court in 1874 with initially a single judge only as chief justice). Kotzé accepted the appointment subject to the consideration of his claim by the colonial office to be appointed as chief justice. This did not happen, much to Kotzé's indignation. When the British administration did appoint a Chief Justice, in April 1880, it was JP de Wet, then a judge in the Griqualand West District court, who was given the position, with Kotzé the junior judge. Kotzé had questioned some of the appointments made by the administration and this seemed to suggest to them that he had not the true imperial spirit.<sup>145</sup> Only when the ZAR was restored in

143 See chaps IV-VI of his *Memoirs*: Kotzé 1934: 103-165.

144 On Munnich's unsuitability for high office, see, also, Wildenboer 2011: 357-358.

145 For Kotzé's views on his claims to the Chief Justiceship and on the reasons for his failure to secure the position in 1880, see Kotzé 1934: 695-711. On JP de Wet and his post-ZAR career, see Schulze 2010: 98-120.

1881 did he become chief justice. His insistence on being made chief justice and his indignation when he was refused this title exhibited in him, already as a young man, a headstrong streak and a self-confidence that shaded into vanity. It would later characterise his dealings with another headstrong and vain man, Paul Kruger.

When he was sworn in, wigged and robed, as judge of the High Court on 19 May 1877, he was, at twenty seven years of age, the youngest judge in the British empire, a matter he records with much pride. The High Court was established three days later. Rider Haggard was appointed the first registrar of the High Court.<sup>146</sup>

Kotzé and his family settled into what he described as the “simple and natural” life in Pretoria, so vastly different from life in London and in Cape Town. Soon after, in early August 1877, he went on a three-month circuit to six of the major towns in the country, accompanied by Rider Haggard. This journey into the African hinterland and the characters they met on circuit certainly stimulated Haggard’s imagination and laid the foundation for his stories of African adventure. At Potchefstroom in October the Victorian novelist Anthony Trollope, then touring the southern African interior, saw the youthful Kotzé in action on circuit and made his famous comment that “[o]ne expects a judge to be reverend with years, but this was hardly more than a boy judge”.<sup>147</sup> Trollope had earlier, when in Pretoria, visited Kotzé at his home in Pretoria, “the first distinguished stranger who visited us in our new home”, as Kotzé proudly records in his *Memoirs*.<sup>148</sup>

While in session in Potchefstroom, Kotzé J granted an order for the re-transfer of a property in Potchefstroom from AJ Munnich to Baumann Bothers and Co of Bloemfontein.<sup>149</sup> In February 1875 the local *landdrost* court had found that an agreement of sale had been entered into between Munnich and Baumann Brothers and Co and that the latter was therefore bound to transfer the property to Munnich. Baumann Bros appealed this decision to an appeal court in Potchefstroom in April. The appellants asked for leave to amend their summons so that they were correctly identified as “Baumann Bros and Co” rather than merely as “Baumann Bros”. Munnich objected to the appeal being heard, as the appellants had been described in the summons as “Baumann Bros” and not “Baumann Bros and Co” (undoubtedly a mere clerical error on the part of the scribe). There had been no judgment in a matter between Munnich and “Baumann Bros” (only one between Munnich and “Baumann Bros and Co”). Therefore, so ran the argument, there could be no appeal against a fictitious judgment and Munnich could not be called upon to defend himself

146 See Jeppe & Kotzé 1887: 703-707 for the Dutch version of the proclamation; see, too, Kotzé 1934: 417-435. Kotzé and Haggard developed a strong friendship, even though the latter had strong anti-*Boer* sentiments: see Kotzé 1934: 523-524.

147 Trollope 1878: 121-122. Kotzé describes this circuit in some detail in his *Memoirs*: see Kotzé 1934: 458-488. See, too, Kahn 1959: 399.

148 See Kotzé 1934: 516.

149 Kotzé describes the background to the case and the case itself in some detail in his *Memoirs*: see Kotzé 1934: 480 at n 1 and 805-807.

against a non-existent judgment. Surprisingly, the appeal court accepted Munnich's argument and dismissed the appeal with costs. For good measure, some three days later the court provided a memorandum to the court registrar informing him that what the court had meant to convey was that Baumann Bros and Co were barred from pursuing the matter any further.

The Baumanns were nothing if not persistent in their fight against such people's justice. They lodged a new appeal against the original judgment in January 1876 when the appeal court sat at Zeerust. This court considered the merits of the case afresh and decided that there had not in fact been a contract of sale. They set aside the original judgment, found that the property still belonged to Baumann Bros and Co and that Munnich had to bear the costs both in the *landdrost* court and the appeal court. Faced with two contrasting appeal court judgments, the registrar of deeds sought advice from the state attorney on which judgment to give effect to. Acting State Attorney Swart advised that the first appeal court judgment should be followed, as the court had held that Baumann Bros and Co could not further pursue their appeal. When, a week later, EJP Jorissen was appointed as state attorney, he confirmed the opinion of his predecessor. On the strength of this advice the Executive Council resolved to set aside the judgment of the Zeerust appeal court and to order the transfer of the property to Munnich.

The Baumann brothers, fighting for justice to the very last, petitioned the *Volksraad* soon after the Executive Council resolution had been passed. The *Volksraad*, to their credit, refused to approve the resolution. They did this on the grounds that the Executive Council had acted unconstitutionally by arrogating to itself a judicial authority not provided for in the *Grondwet*.<sup>150</sup> When the matter came before Kotzé's circuit court in November 1877 (almost eighteen months later) he was petitioned to order the re-transfer of the property from Munnich (the registrar of deeds having meanwhile acted on the Executive Council's resolution) to Baumann Bros and Co. Kotzé J found little difficulty in granting the order: the application to amend the summons in the first appeal court should have been granted, since the summons plainly contained a mere formal error which could not possibly have prejudiced Munnich. In any event, the appeal court had no authority to rule, in its explanatory memorandum and after the fact, that Baumann Bros and Co was barred from instituting a fresh appeal. Kotzé in his *Memoirs* recounts the Baumann Bros and Co matter in some detail as an example of the propensity of the executive to interfere unconstitutionally in the administration of justice. It was this propensity for interference that would surface from time to time during his tenure as chief justice, with increasingly far-reaching consequences.

150 For the *Volksraad* resolution see Jeppe & Kotzé 1887: 669. This was not the first time the Executive Council had unconstitutionally arrogated to itself the authority to encroach on the independence of the judiciary. It happened in 1872 as well: see Wildenboer and Dietrich 2015: 297-298.

True to his character Judge Kotzé soon found an opportunity to stamp his authority on the administration of justice. EJP Jorissen had been recruited by Burgers in Holland in 1875. He had a doctorate in divinity and had been a minister of the Dutch Reformed Church until his professed liberal views led to him resigning from the Church. He was asked by Burgers to head up the new *gymnasium* in Pretoria. This high school was not a success and Jorissen soon sought other employment. Burgers offered him the position of state attorney vacated by James Buchanan. He accepted, after immersing himself in the *Hollandsche wetten* and the *locale wetten* and passing an examination for admission as an attorney.<sup>151</sup> This was conducted by a Board of Examiners of four practitioners (one of whom was the ever-present AJ Munnich). Only one of them was trained in law. Kotzé referred to this examination disparagingly as being “of no intrinsic value, judged by the usual and accepted standard”. Jorissen continued to serve as state attorney after the annexation and was admitted as an advocate and attorney of the High Court.

Kotzé had high expectations for the judiciary of the Transvaal. Those who practised law and who held high office in the judicial administration needed to be trained lawyers, like him and a handful of others. Jorissen was not a professionally trained lawyer. In April 1878 Kotzé J ordered the release of a man who had been arrested in Pretoria on the strength of a warrant signed by the magistrate in Kimberley and counter-signed by State Attorney Jorissen. Kotzé J found that the statutorily prescribed procedure for the arrest of an individual as a result of a foreign warrant had not been followed. Kotzé publicly commented on the irregularity perpetrated by Jorissen as state attorney. No doubt Jorissen, cantankerous and quick-tempered, took umbrage at the judicial dressing-down he received from the twenty-eight year-old, twenty-one years his junior.

A week later the high court was in session in Potchefstroom. There had been agitation for more judges to be appointed to alleviate the heavy judicial workload. Kotzé saw fit, in an address to the public from the bench, to support the call for more judges. He went further, though. He also said that such additional judges, and indeed the state attorney as the head of the legal profession, should be fully trained and qualified lawyers. Jorissen again took umbrage. The matter was taken up with Shepstone, who sided with Kotzé. Shepstone told Jorissen that his lack of legal training and his public reprimand by the judge made him unfit to hold the office of state attorney. Jorissen was dismissed from office and replaced on 1 October 1878 by Christian Maasdorp of the Cape Bar (he would later become a judge of the appellate division of the Union of South Africa).<sup>152</sup> Jorissen felt hard done by and it does seem as if one relatively unimportant mistake was insufficient justification for his dismissal – “with shame”, in Jorissen’s view – from office at the instigation of Judge

151 See Jorissen 1897: 7-11.

152 On CG Maasdorp see Roberts 1942: 370. He was the younger brother of Sir Andries Maasdorp, who also became a judge and was an accomplished legal scholar: see Roberts 1942: 370.

Kotzé.<sup>153</sup> Observers at the time had no doubt that there was little love lost between John Kotzé and Eduard Jorissen.<sup>154</sup> Interestingly, in Jorissen's own memoirs, he makes no mention of the role played by Kotzé in his dismissal and attributes the dismissal to the need for a more compliant, less oppositional state attorney.<sup>155</sup>

State Attorney Maasdorp, who had had to oversee the preliminary investigations against Pretorius and Bok after their arrest on charges of treason, resigned in protest at what he perceived to be a politically-inspired witch-hunt against Pretorius and returned to the Cape Colony. He was replaced, much to Kotzé's chagrin, by WB Morcom who was an admitted attorney in Natal. Morcom had no legal qualifications and would not have been admitted to legal practice elsewhere. Kotzé protested against this appointment which offended his sense of the dignity, traditions and standing of the Bench and Bar – to no avail. In fact, worse was to come for Judge Kotzé. Finally responding to repeated requests for an increase in the number of judges of the high court, in April 1880 Governor Wolseley announced in the *Government Gazette* that JP de Wet, a former colleague of Kotzé's at the Eastern Districts Bar in Grahamstown, from 1873 solicitor-general of the Cape Colony and from 1878 to 1880 recorder<sup>156</sup> of Griqualand West, had been appointed chief justice and that Kotzé had been appointed as puisne judge.<sup>157</sup> Kotzé protested vigorously at this perceived slight. Not only had he expected to become chief justice of the enlarged court, he had argued consistently since 1877 that he was, in fact, entitled to the position, having been appointed into that position by Burgers just prior to the annexation. Kotzé had incurred the wrath of Wolseley by earlier questioning Lanyon's suitability for the office of administrator and more recently questioning the appointment of Morcom. His protests fell upon deaf ears. He resolved to petition the Privy Council to claim his right to the position of chief justice. His first petition was rejected and, not satisfied with the reasons provided, he drafted a further petition to the Privy Council in December 1880.

To his credit, while pursuing legal avenues to address his grievance, he continued to serve in the high court alongside De Wet CJ, and the two judges retained cordial and professional relations. In his *Memoirs* Kotzé devotes considerable space to his thwarted claims to the chief-justice position.<sup>158</sup> It is clear that he had been deliberately overlooked for the position. His prolix argument to justify his entitlement to the position is not persuasive. In reading Kotzé's *Memoirs* one is struck by his enthusiasm for politics and his readiness to express himself on political

153 Kotzé devotes a number of pages to Jorissen's dismissal from office in his *Memoirs*: see Kotzé 1934: 526-540. He surely protests too much at the suggestion that he was animated by ill-feeling towards Jorissen.

154 Kahn 1959: 399.

155 See Jorissen 1897: 37-38.

156 Judges in the Cape Colony controlled districts of Natal and Griqualand West and were called "recorders".

157 On JP de Wet, see *idem passim*.

158 See Kotzé 1934: 695-711.

affairs. Both a confirmed Anglophile and a *Boer* sympathiser, he promoted a politics of compromise: He foresaw a self-governing republic under British protection, its external relations and its relations with the African inhabitants subject to British federation policies.<sup>159</sup> In the increasingly febrile atmosphere of 1878 to 1880 such compromise proposals made little impression on either *Boer* or Briton. Kotzé would retain his predilection for politics in later years; it would contribute in no small measure to the later antagonism between him and Kruger.

When the government of the country was restored to the *Boers* on 8 August 1881, one of its first actions was to establish the Supreme Court of the South African Republic, which had been approved by the *Volksraad* immediately prior to the annexation. JP de Wet was not offered the position of chief justice by the government. He had served on a commission – with Kotzé and the newly-appointed British resident, Hudson – appointed in terms of the Convention to assess individual claims for war damages. Upon completion of his committee duties in March 1882, De Wet left for Ceylon (Sri Lanka) where he became the acting chief justice for a brief period before his health-induced retirement.<sup>160</sup> John Kotzé, who had wisely withdrawn his petition to the Privy Council, was offered and accepted the position of chief justice. On 8 August 1881 he was sworn in as chief justice of a three-judge supreme court of the *ZAR*. EJP Jorissen, who had rendered sterling service to the *Boer* committee and the government-in-exile and had been responsible for much of the written communications, was re-appointed as state attorney of the *ZAR*.

As mindful of the dignity of the judicial office (and of his own) as ever he had been when first appointed as a judge, Kotzé had asked for, and received, an undertaking that he would be consulted before any additional judges of the supreme court were appointed. In March 1882 the Executive Council sought his advice on the appointment of a particular individual as an additional judge (he mentions no name in his *Memoirs*). Kotzé was adamant that, though duly qualified, the individual was not fit for office and intimated that if Kruger were to persist with the appointment, he would rather resign his own position. Though Kruger took none too kindly to this show of resistance from the young judge, the Executive Council did not make the appointment. Soon thereafter Kotzé was informed that the executive had decided to fill both judicial vacancies and to offer the positions to Maasdorp (former state attorney) and a practitioner from the Free State. Though both declined the offers, Kotzé felt scorned that he had not been consulted on the appointments and feared that the course of action, with the accompanying spectre of political interference in judicial affairs, would be repeated. When, therefore, while on holiday in Cape Town in July 1882, he was offered the position of judge of the newly constituted district court of Griqualand West in Kimberley (Griqualand West had recently been

159 His political views are best captured in a memorandum he wrote to Administrator Lanyon in Dec 1880 on the eve of the outbreak of war and published in the *Memoirs*: see Kotzé 1934: 731-735.

160 See Schulze 2010: 111.

incorporated into the Cape Colony) he accepted and resigned his position in the ZAR. Whether motivated by his sense that Kruger was an unpalatable dictator in the making, to the clear detriment of judicial integrity; or by a desire to be in a society where British *mores* dominated and where his wife and daughters were able to live stable, refined lives; or by a desire to test Kruger and try to strengthen his own position in the ZAR, his resignation caused anxiety for him and for the country.<sup>161</sup>

The government had in the *interim* appointed EJP Jorissen as acting chief justice<sup>162</sup> and approached Melius de Villiers, brother of Sir Henry and a judge in the Free State, to become the chief justice. De Villiers declined and many prevailed upon Kotzé to reconsider his position. Kotzé was no doubt gratified at being fêted by so many influential burghers. In fact, in their desire to curry favour with him, some even went so far as to ask him to stand as a candidate in the presidential elections to be held in early 1883. Recognising the inappropriateness of the request, some then withdrew the request. Kotzé nevertheless decided to “think the matter over” before declining.<sup>163</sup> A seed had been planted.

Kotzé once again interviewed the triumvirate. He withdrew his resignation and again took up his position as chief justice. Kotzé also suggested, and the government approved, the appointment of Piet Burgers, nephew of President Burgers and then law student at the University of Leyden, and of Christoffel Brand, son of President Jan Brand and then advocate at the Cape Bar, as additional judges of the Supreme Court.

## 8 Concluding remarks

A tumultuous decade was closed out by a war that never should have happened. It was the condescending attitude adopted by imperial Britain towards the *Boers* and an ill-conceived desire among its administrators not to lose face, that led to hostilities. It was the spiritual torpor of the *Boers* at the beginning of 1877, their apathy and self-pity that provided additional justification for the annexation and generated the need to undo militarily what had been done without force of arms. The war brought peace and resuscitated dormant *Boer* nationalism. It left both sides with a sense that there were still scores to be settled, and that little that was decisive and lasting had been achieved. Sides had irreversibly been chosen and the choices made would influence political decision-making for the next two decades. Everything – the treatment of the African indigenous inhabitants of the region, the mineral wealth of the country, its

161 He insisted that his reason was “solely the vacillating and unsatisfactory policy of the Government, in regard to the Transvaal” and that “my heart, I confess, was with the Transvaal”: see Kotzé 1941: 21.

162 See Jorissen 1897: 124.

163 See Kotzé 1941: 24.

strategic position in southern Africa – became subordinated to a battle for ultimate control of the *ZAR*.

The *Boers* interpreted the peace terms and the convention as a victory over Britain and a resumption of the independence from Britain they had enjoyed since the 1852 Sand River Convention. Victory in the battle of Amajuba was an act of God, a sign of divine intervention meant to restore to the *Boers* what was rightfully theirs.<sup>164</sup> From their side, the British interpreted the peace terms and the convention as a magnanimous gift of self-government by Queen Victoria to the inhabitants of the erstwhile Transvaal territory, as a token of her might and generosity.

Whether as a result of divine intervention or sovereign magnanimity, a careful reading of the convention certainly suggests that the *Boers* got what they wanted, namely the right to govern themselves. Their independence, though, was substantially circumscribed to the extent that Britain retained significant influence over the affairs of the *ZAR*. Britain had lost prestige, the *Boers* had gained prestige. But Britain's power in the region had not diminished and the *Boers'* power had not been enhanced.

Paul Kruger, then fifty-five years old, emerged triumphant as the undisputed *Boer* leader. His policies for the next two decades would remain shaped first, by what he had achieved and by how he had achieved his successes, and second, by his desire, which had by then mutated into a holy calling, to defend his *volk's* independence by keeping them sanitised against *uitlander* (ie, British) influence and overrun. John Kotzé, then thirty-one years old, had decided to adopt the country as his own and to fully identify with the country and its inhabitants (both *Boer* and *uitlander*). As chief justice he enjoyed a seat at the high table of the state and rendered excellent judicial and legal service to it. He retained the compromise politics he had adopted in the 1870s and sought to encourage, rather than discourage, British influence in the *ZAR*. As Kruger became ever more of a nationalist demagogue, so Kotzé became ever more committed to and embedded in extra-judicial politics. Full-blown conflict between the president and the judge was inevitable. It bubbled under the surface during the 1880s, but erupted into a constitutional crisis in the 1890s with consequences more far-reaching than either had imagined. Robert Brown happened to be in the right place at the wrong time and became the victim of an ideological battle he had no part in.

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164 *Idem* at 8-11.

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