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# THE *ACTIO FUNERARIA*

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## 1 Introduction

It could be argued that it is in bad taste and lugubrious to dedicate an essay on the *actio funeraria* to a friend who is entering "la troisième age", but I am convinced that Eric, with his encompassing interest in Roman law, will be interested in this topic and its reception in South Africa where the action was pleaded as recently as 2002 in the Transkei High Court.<sup>1</sup> It would appear that the topic has received scant attention during the last century.<sup>2</sup> In consequence, this paper will focus on the texts dealing with the *actio funeraria* in Roman law. The reception of this action in old Dutch law, in particular by Voet,<sup>3</sup> is briefly discussed and from Voet to Umtata "ce n'est qu'un pas".

## 2 The funeral

"*Hodie mihi, cras tibi*" embodies the reality that nothing but death and taxes is certain in life. Johannes Voet thought it apt to commence his discussion of funeral expenses with a citation by Pliny:<sup>4</sup> "So rare is loyalty in friendships, so ready are men to forget the dead, that we have ourselves to build up our own last resting-places, and to anticipate all the duties of our heirs."<sup>5</sup> This essay intends to show that this cynical admonishment to make proper provision for one's own funeral formed the basis for the *actio funeraria*. The universal truth of Pliny's outburst is validated by the success of funeral insurance.

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1 *Nodada Funeral Services CC v The Master and Others* 2003 (4) SA 422 Tk (HC); Ph J Thomas "Who shall pay for the funeral? - *Nodada Funeral Services CC v The Master*" 2004 *THRHR* 331-335.

2 The dissertation of Heinrich Funcke *Die Actio Funeraria* (1890) remains the most comprehensive discussion on the topic, but does little more than paraphrasing the texts. Aldo Cenderelli "Gestione d'affari ereditari ed editto 'de sumptibus funerum' punti di contatto ed elementi di differenziazione" in *Studi in onore di Arnaldo Biscardi* Vol I (1982) 265-287 provides in n 2 further literature. Also Cenderelli "Gerere negotium humanitatis" in *Soladitas. Scritti in onore di Antonio Guarino* Vol II (1984) 793-801; and E.J.H. Schrage "De opgedrongen verrijking: Over de *actio funeraria*, de *actio negotiorum gestorum* en de kosten van de begrafenis" 1992 *Acta Juridica* 48-56. Both authors concentrate, however, on the relationship between the *actio funeraria* and *negotiorum gestio*.

3 Johannes Voet (1647-1713), a professor of law at the Universities of Utrecht (1673-1680) and Leiden (1680-1713), whose *Commentarius ad Pandectas* (Hagae Comitibus 1698-1704) has been a constant and sure guide to South African jurists. See HR Hahlo and Ellison Kahn *The South African Legal System and its Background* (1973) 556f; AA Roberts *A South African Legal Bibliography* (1942) 317-326.

4 Pliny the Younger (ca AD 61-114): See *The Loeb Classical Library Pliny Letters* I (1961) Lib VI X. *C Plinius Albino Sio S Tam rara in amicitii fides, tam parata oblivio mortuorum, ut ipsi nobis debeamus etiam conditoria exstruere omniaque heredum officia praesumere.*

5 *The Selective Voet being the Commentary on the Pandects of Johannes Voet* tr by Percival Gane (1955-1958) 11 7 7.

Title 7 of Book XI of the *Digest de religiosis et sumptibus funerum et ut funus ducere liceat*<sup>6</sup> deals with the last important event in every person's presence on earth, namely the funeral. The title opens with a text from Ulpian stating that if you spend something on a funeral you are deemed to have contracted with the deceased and not with the heir.<sup>7</sup> In spite of the metaphysical first impression of this pronouncement, this paper will show that this text verbalises the *crux* of the problem decisively.

### 3 *Actio funeraria*

The important questions with regard to any action are: Who can institute the action, and against whom can it be instituted? This translates in the case of the *actio funeraria* into the following: Who can attend to another's funeral, and who is responsible for the payment thereof? The transcendental Ulpianic text intends to explain that the two responsibilities are separate.

#### 3 1 Responsible to undertake the funeral

With regard to the first question the texts name an order of persons responsible for the funeral. The obvious candidate is the person nominated for this task by the deceased, which instruction can be given either during one's lifetime or in a will. If no such nomination was made, the heir instituted by the testator must bury the deceased, while in the absence of a valid will, the heirs according to the *ius civile* or praetorian law are under this obligation.<sup>8</sup> At another level religious duties, family ties and customs will also play a role. If none of the above mentioned persons exist, or do exist, but refrain from executing the funeral, anybody can take care thereof.

This raises two questions, namely whether this duty could be enforced and whether there were other legal consequences to performance or non-performance of the duty to take care of the funeral? The responsible persons may be divided into those nominated by the deceased and those indicated by law, the latter being the various categories of heirs. Thus the nomination can be distinguished in

6 On the edict *de sumptibus funerum* Cenderelli *Biscardi* (n 2) 273f 282f; R Taubenschlag "Miscellen aus dem römischen Grabrecht" 1917 ZSS (RA) 254.

7 *D 11 7 1 Ulpianus libro decimo ad edictum. Qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum herede.* See Cenderelli *Biscardi* (n 2) 265ff; B Kübler "Literatur" 1907 ZSS (RA) 416.

8 *D 11 7 12 Ulpianus libro vicensimo quinto ad edictum. 4. Funus autem eum facere oportet, quem decedens eligit: sed si non ille fecit, nullam esse huius rei poenam, nisi aliquid pro hoc emolumentum ei relictum est: tunc enim, si non paruerit voluntati defuncti, ab hoc repellitur. Sin autem de hac re defunctus non cavet, nec ulli delegatum id munus est, scriptos heredes ea res contingit: si nemo scriptus est, legitimos vel cognatos: quosque suo ordine quo succedunt.* See G Beseler "Miscellanea" 1924 ZSS (RA) 390f; W Kunkel "Übersicht über die italienische Rechtsliteratur 1915-1922" 1927 ZSS (RA) 540.

nomination *inter vivos* or in a will, and nominating an heir with instruction to manage the funeral, or nominating a non-heir to do so, with or without leaving him a legacy.

Although in principle nobody could be forced to perform in the *formula* procedure,<sup>9</sup> Ulpian holds in *Digest* 7 11 14 2<sup>10</sup> that the *praetor* should compel the person elected by the deceased to attend to his funeral, and who had received money to do so, by extraordinary process to hold the funeral. However, the same jurist stated in a previous text that where the testator has nominated a person to take care of the funeral and has left this person an emolument in his will, only this emolument will be forfeited if the nominee does not arrange the funeral.<sup>11</sup> This apparent contradiction is to be explained that in the first instance the testator before his death mandated<sup>12</sup> a person to arrange his funeral and handed over the money to pay for this funeral,<sup>13</sup> while in the other text the funeral arranger was nominated in the will<sup>14</sup> and had been left something in the will for this task.<sup>15</sup> In respect of the other persons responsible for a funeral, namely testamentary and intestate heirs, no legal remedy was applicable in the event of non-fulfilment of this duty. Nor did the fact that a person falling within one of the categories responsible for the funeral omitted to attend to this duty, make such a person *ipso iure* liable for the funeral expenses incurred by another.<sup>16</sup> Thus, the duty to bury was a moral duty.

### 3 2 Who could institute the *actio funeraria*?

Once the funeral had been taken care of, the expenses incurred were reclaimable with the *actio funeraria*. The texts tell us that this action was introduced by the *praetor* to prevent corpses from lying unburied and that people are buried at another's expense.<sup>17</sup>

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9 Gaius 4 48. See JC van Oven *Leerboek van Romeinsch Privaatrecht* (1948) 97f.  
 10 *D* 11 7 14 Ulpianus libro vicensimo quinto ad edictum. 2. Si cui funeris sui curam testator mandaverit et illa accepta pecunia funis non duxerit, de dolo actionem in eum dandam Mela scripsit: credo tamen et extra ordinem eum a praetore compellendum funus ducere.  
 11 *D* 11 7 12 4. ... sed si non ille fecit, nullam esse huius rei poenam nisi aliquid pro hoc emolumentum ei relictum est: tunc enim, si non paruerit voluntati defuncti, ab hoc repellitur. See L Mitteis "Literatur" 1916 ZSS (RA) 335.  
 12 *Cf* *D* 11 7 14 2. ... mandaverit ...; *cf* also *D* 11 7 14 13. ... Et quid si testator quidem funus mihi mandavit, heres prohibet, ego tamen nihilo minus funeravi?  
 13 *Cf* *D* 11 7 14 2. ... ille accepta pecunia ... .  
 14 *D* 11 7 12 4. ... elegit ... .  
 15 *D* 11 7 12 4. ... pro hoc emolumentum ei relictum est.  
 16 *Cf* *infra* 3 3.  
 17 *D* 11 7 12 3. Hoc edictum iusta ex causa propositum est, ne insepulta corpora iacerent neve quis de alieno funeretur.

What is not clearly stated is whether the *actio funeraria* was only granted to a person falling outside the circle of persons responsible for the funeral, or whether the heir or third person nominated with or without receipt of an emolument were also entitled to the action.<sup>18</sup>

Kaser<sup>19</sup> and Buckland<sup>20</sup> represent the *communis opinio* which holds that only the outsider who out of decency towards the deceased, or motivated by public spirit, undertook the funeral, is the beneficiary of the *actio funeraria*. Furthermore they hold that the action is instituted against the person actually liable for the funeral. This paper will investigate whether not all persons, having taken care of the funeral, irrespective of whether such person be heir in whatever form, or nominated or not, could claim their expenditure relative to the funeral. The answer will be facilitated by first investigating the related question from whom the funeral expenses are to be claimed.

### 3 3 Funeral expenses claimed from whom?

The obvious defendant against the *actio funeraria* is the heir. This is confirmed by numerous texts in the title in question.<sup>21</sup> The principle of universal succession<sup>22</sup> combined with the fact that the nearest heirs did not have a choice to inherit or not<sup>23</sup> and in principle stepped automatically and immediately into the shoes of the deceased at the moment of the latter's demise,<sup>24</sup> make institution of the action by the persons who took care of the funeral<sup>25</sup> against the heir the apparent solution. However, the texts evidence that the heir was not the only potential defendant, and that in some instances he could even be a possible plaintiff.<sup>26</sup>

18 *D 11 7 12 2. Praetor ait: "Quod funeris causa sumptus factus erit, eius recipiendi nomine in eum, ad quem ea res pertinet, iudicium dabo."*

19 *Das römische Privatrecht* Vol 1 (1971) 734: "Hat ein anderer als der Verpflichtete die Kosten ausgelegt, so hat er gegen den Verpflichteten die *actio funeraria*."

20 *A Textbook of Roman Law from Augustus to Justinian* (1963) 544: "The *actio funeraria* is an *actio in factum perpetua*, akin to *negotiorum gestorum*, by which one who had undertaken funeral arrangements without legal liability could recover the cost from the person actually liable."

21 *D 11 7 14 15. ... adversus heredem; D 11 7 14 17. ... adversus heredem bonorumve possessorum ceterosque successores; D 11 7 15. ... patronus, qui bonorum possessionem petit; D 11 7 23. ... duas partes heres; D 11 7 27pr. ... et heredem; D 11 7 28. ... aut heredes; D 11 7 30 1. ... collaturos heredes bonorumve possessores; D 11 7 31pr. ... successores; D 11 7 32 1. ... heredem; D 11 7 46pr. ... heredem. See also Funcke (n 2) 37f; Kunkel (n 8) 540.*

22 Buckland (n 20) 282; Kaser (n 19) 223 872ff; Van Oven (n 9) 566.

23 Gaius 2 156f. See Kaser (n 19) 714; Van Oven (n 9) 520ff 562.

24 *Delatio hereditatis* in the event of intestate succession: Kaser (n 19) 713f; Van Oven (n 9) 562; or virtually immediately, namely at the reading of the will in the case of testamentary succession.

25 Irrespective on which basis. There could have been a request by the deceased in his will or *inter vivos*, but it could have been without any instruction, even against the wishes of the heir, as in *D 11 7 14 13*.

26 *Cf infra* 3 4.

A question which should be addressed is whether the claimant had acted on behalf of the deceased or on behalf of the heir,<sup>27</sup> in other words whether the heir was sued for a debt of the deceased or for his own debt. *Digest* 11 7 1<sup>28</sup> and Ulpian's opinion in *Digest* 11 7 14 11<sup>29</sup> indicate that the plaintiff should be viewed as having acted on behalf of the deceased, which indication is supported by the texts dealing with nomination by the deceased.<sup>30</sup>

Furthermore, certain practicalities complicated the matter. For example, *extranei* had to accept,<sup>31</sup> *sui et necessarii heredes* were granted the *beneficium abstinenti*,<sup>32</sup> praetorian heirs had to apply for *bonorum possessio*,<sup>33</sup> and the *spatium deliberandi*<sup>34</sup> was introduced. All this meant that in a considerable number of cases, the continuity was interrupted and the estate did not pass immediately to the heir and we are confronted with the *hereditas iacens*.<sup>35</sup>

As a result of the above innovations the *hereditas iacens* must have become the rule rather than the exception. This was recognised by the jurists who evolved various solutions to accommodate this reality.<sup>36</sup> It falls outside the scope of this paper, but it should be mentioned that although it is generally held that Roman law did not recognise the *hereditas iacens* as a juristic person, for all practical purposes several of the texts regarding the *actio funeraria* veer in that direction.<sup>37</sup>

Another compelling reality was that, as heirs were granted the possibility to take their time, the funeral was a matter of urgency. In consequence the *praetor* said:

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27 Cf *D* 11 7 14 7. *igitur aestimandum erit arbitro et perpendendum, quo animo sumptus factus sit, utrum negotium quis vel defuncti vel heredis gerit vel ipsius humanitatis...*; Cenderelli *Biscardi* (n 2) 285. For the relationship with *negotiorum gestio*, Cenderelli *op cit passim*. On *gerere negotium humanitatis* Cenderelli *Guarino* (n 2) 793-801.

28 Cf *supra* n 7.

29 *Si quis, dum se heredem putat, patrem familias funeraverit, funeraria actione uti non poterit, quia non hoc animo fecit, quasi alienum negotium gerens: et ita Trebatius et Proculus putat. Puto tamen et ei ex causa dandam actionem funerariam.*

30 *D* 11 7 12 4; *D* 11 7 14 2.

31 Gaius 2 161ff; Buckland (n 20) 306 312ff; Kaser (n 19) 715ff; Van Oven (n 9) 562ff.

32 Gaius 2 158f; Buckland (n 20) 305; Kaser (n 19) 714f.

33 Gaius 3 32ff; Buckland (n 20) 386; Kaser (n 19) 719.

34 Gaius 2 162 167; Buckland (n 20) 315; Kaser (n 19) 718.

35 Buckland (n 20) 306ff; Kaser (n 19) 720ff; Van Oven (n 9) 565f; P van Warmelo 'n *Inleiding tot die Studie van die Romeinse Reg* (1971) 223f.

36 *D* 29 2 54 *Florentinus libro octavo institutionum. Heres quandoque adeundo hereditatem iam tunc a morte successisse defuncto intellegitur*. See also *D* 45 3 28 4 and *D* 46 2 24 which texts provide the estate with an owner by giving the acceptance retro-active effect until the moment of death. See, however, *D* 41 1 34 *Ulpianus libro quarto de censibus. Hereditas enim non heredis personam, sed defuncti sustinet, ut multis argumentis iuris civilis comprobatur est*. Also *D* 28 5 34 1, *D* 41 1 33 2, *D* 41 1 34 and *Inst* 3 17pr sustain the presumption that the deceased continued to be owner until acceptance. Finally see *D* 46 1 22 *Florentinus libro octavo institutionum. Mortuo reo promittendi et ante aditam hereditatem fideiussor accipi potest, quia hereditas personae vice fungitur, sicuti municipium et decuria et societas*. See also *D* 41 1 61pr and *D* 3 5 20 1, which texts recognise the estate as a separate entity. See Buckland (n 20) 307ff; Kaser (n 19) 721; Van Oven (n 9) 565f; Van Warmelo (n 35) 223.

37 Cf *infra* *D* 11 7 16; *D* 11 7 45; *D* 1 1 7 46 2. In the same vein Schrage (n 2) 50: "... degene die willens de boedel wou binden en dat ook mocht ..."; Cenderelli *Biscardi* (n 2) 285, Cenderelli *Guarino* (n 2) 796f.

"*Quod funeris causa sumptus factus erit, eius recipiendi nomine in eum, ad quem res pertinet iudicium dabo.*" This begs the question against whom the action is to be instituted in the event of a *hereditas iacens*.

### 3 3 1 Role of the praetor in case of *hereditas iacens*

It would appear that as a consequence of the serious public interest involved, the magistrates had extraordinary powers in this matter.<sup>38</sup> *Digest* 11 7 12 6<sup>39</sup> provides that if the *praetor* or municipal magistrate was approached by a person desirous to institute the *actio funeraria* the magistrate decided on the amount payable,<sup>40</sup> drew on the money in the estate or could sell assets to provide the money for payment of the funeral expenditure.<sup>41</sup> He could claim from debtors<sup>42</sup> and had to intervene if someone attempted to frustrate delivery of objects thus bought from the estate.<sup>43</sup> Where the estate did not have sufficient means for the funeral, assets bequeathed could be sold to provide the necessary funds.<sup>44</sup> It is obvious that the above could only apply in situations where no defendant was available, namely the case of the *hereditas iacens*.<sup>45</sup>

Thus the funeral expenses were paid out of the estate, which can either be construed as a separate entity or presumes continued ownership of the deceased. This implies that any person who had paid for the funeral, whether it be the mandatary, the nominee in the will, the heir, or a third party, would be reimbursed by the deceased, who thus paid for his own funeral.

38 Funcke (n 2) 8 was of the opinion that the *aediles curules* assisted the college of priests in this respect and issued an edict *de funeribus*.

39 *Ulpianus libro vicensimo quinto ad edictum. Praetor vel magistratus municipalis ad funus sumptum decernere debet, si quidem est pecunia in hereditate, ex pecunia: si non est, distrahere debet ea, quae tempore peritura sunt, quorum retentio onerat hereditatem: si minus, si quid auri argentique fuerit, distrahi aut pignerari iubebit, ut pecunia expediatur.*

40 Which is not necessarily the same as the amount spent; see *infra* 3 5.

41 *Cf also D 11 7 14 Ulpianus libro vicensimo quinto ad edictum. 1. Si colonus vel inquilinus sit is qui mortuus est nec sit unde funeretur, ex invecis illatis eum funerandum Pomponius scribit et si quid superfluum remanserit, hoc pro debita pensione teneri.*

42 *D 11 7 13 Gaius libro nono decimo ad edictum provinciale. ... vel a debitoribus si facile exigere possit.*

43 *D 11 7 14 Ulpianus libro vicensimo quinto ad edictum pr. Et si quis impediatur eum qui emit, quo minus ei res tradantur, praetorem intervenire oportere tuerique huiusmodi factum si quid impediatur quo minus ei res venditae tradantur.*

44 *D 11 7 14 1. Sed et si res legatae sint a testatore de cuius funere agitur nec sit unde funeretur, ad eas quoque manus mittere oportet: satius est enim de suo testatorem funerari, quam aliquos legata consequi. Sed si adita fuerit postea hereditas, res emptori auferenda non est, quia bonae fidei possessor est et dominium habet, qui auctore iudice comparavit. Legatarium tamen legato carere non oportet, si potest indemnitas ab herede praestari: quod si non potest, melius est legatarium non lucrari, quam emptorem damno adfici.*

45 *Cf D 11 7 14 1. ... sed si adita fuerit postea hereditas. Cf Funcke (n 2) 44.*

## 332 Dowry

The same principle recurs in the texts dealing with the funeral of a wife who had entered into marriage with a dowry.<sup>46</sup> At the death of his wife the husband could retain the dowry or a portion thereof, depending on the nature of the dowry and/or the arrangement made in the dowry contract.<sup>47</sup> In consequence, the person retaining or receiving the dowry or part thereof, had to contribute to the funeral expenses of the wife, even if the latter had a surviving father and/or heirs.

*Digest* 11 7 16<sup>48</sup> explains that the old jurists had thought it equitable that the funerals of women should be paid for from their dowries, as though from their estates. Accordingly, Julian held that funeral expenses are a debt incurred by the dowry and Ulpian concluded that the dowry should meet this debt.<sup>49</sup> Thus the *actio funeraria* was granted against anyone who received something by way of dowry at the dissolution of the marriage by death of the wife.<sup>50</sup> This meant that the question whether the dowry remained with the husband or returned to the father, was the decisive factor in answering the question who had to pay for the funeral.<sup>51</sup> If the husband was sued, but the father recovered the dowry later, the husband could recoup from the latter.<sup>52</sup> This rule could result in shared liability between husband and father,<sup>53</sup> while the situation became more complicated when the deceased wife had left an estate and the liability on the basis of the dowry would be combined with liability of the estate. In consequence, the husband and/or father as well as her estate or her heirs were proportionally liable.<sup>54</sup>

46 Buckland (n 20) 107ff; Kaser (n 19) 332ff; Van Oven (n 9) 457ff.

47 Buckland (n 20) 110; Kaser (n 19) 339; Van Oven (n 9) 461ff.

48 *Ulpianus libro vicensimo quinto ad edictum. In eum, ad quem dotis nomine quid pervenerit, dat praetor funerariam actionem: aequissimum enim visum est veteribus mulieres quasi de patrimoniis suis ita de dotibus funerari et eum, qui morte mulieris dotem lucratur, in funus conferre debere, sive pater mulieris est sive maritus.*

49 *D 11 7 18 Iulianus libro decimo digestorum. ... impensa enim funeris aes alienum dotis est: D 11 7 19 Ulpianus libro quinto decimo ad Sabinum. ... ideoque etiam dos sentire hoc aes alienum debet.*

50 *D 11 7 16. See too Funcke (n 2) 38f.*

51 *D 11 7 16. ... sive pater mulieris est sive maritus. D 11 7 20 1. Si maritus lucratur dotem, convenietur funeraria, pater autem non; D 11 7 22 Ulpianus libro vicensimo quinto ad edictum. Celsus scribit: quotiens mulier decedit, ex dote, quae penes virum remanet, et ceteris mulieris bonis pro portione funeranda est; D 11 7 23-27; D 11 7 29 1; D 11 7 30; D 11 7 32 1.*

52 *D 11 7 17 Papinianus libro tertio responsorum. Sed si nondum pater dotem recipaverit, vir solus convenietur reputaturus patri, quod eo nomine praestiterit; D 11 7 29 1.*

53 If the husband retained a portion and the remainder returned to the father, or where the wife left no estate and the dowry, which remained with the husband was insufficient to pay for the funeral; *D 11 7 20pr* and 1. For the liability of the father see *infra* 334.

54 *D 11 7 22 Ulpianus libro vicensimo quinto ad edictum. Celsus scribit: quotiens mulier decedit, ex dote, quae penes virum remanet, et ceteris mulieris bonis pro portione funeranda est; D 11 7 23 Paulus libro vicensimo septimo ad edictum. Veluti si in dotem centum sint, in hereditate ducenta, duas partes heres, unam vir conferet; D 11 7 24 Ulpian libro vicensimo quinto ad edictum. Julianus scribit. non deductis legatis; D 11 7 25 Paulus libro vicensimo septimo ad edictum. Nec pretiis manumissorum; D 11 7 26 Pomponius libro quinto decimo ad Sabinum. Nec aere alieno deducto; D 11 7 27 Ulpianus libro vicensimo quinto ad edictum. Sic pro rata et maritum et heredem conferre in funus oportet; D 11 7 30 1.*

3 3 3 *Insolvent estate*

In later Roman law the *sui et necessarii* would have abstained and the insolvent estate would find no heir. However, the public and religious interests in burial were strong, which led to a virtual guarantee of reimbursement of funeral costs by granting them preference over all other debts.<sup>55</sup> It must be assumed that in this instance the *actio funeraria* would be instituted against the *bonorum emptor*.<sup>56</sup>

The priority of this preference is confirmed by *Digest* 11 7 14 1 where the funeral expenses of a *colonus vel inquilinus* are paid out of the proceeds of the sale of his *invecta et illata* before any arrears in rent, in spite of the lessor's hypothec over all these goods.<sup>57</sup>

The above clearly confirms the overriding principle underscoring the *actio funeraria*, namely that everyone must pay for their own funeral,<sup>58</sup> which implied that primarily the inheritance was liable for the funeral expenses. In respect of married women with dowries, the *dos* was deemed to be their estate and thus concurred *pro rata* with the inheritance. In the absence of an estate the *dos* would have sole liability.

3 3 4 *No estate*

This leaves the cases in which the deceased left no estate or dowry. *Digest* 14 7 21<sup>59</sup> deals with the case of a person *in potestate* whose funeral expenses can be claimed from the father. Similarly a father could be sued for the funeral of his daughter married without dowry and without estate.<sup>60</sup> In the absence of a father or were he insolvent, the funeral costs could be claimed from her husband.<sup>61</sup>

If the dowry remained with the husband but was insufficient to pay the funeral expenses, the father could be sued for the balance.<sup>62</sup>

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55 *D* 11 7 45 *Maecianus libro octavo fideicommissorum. Impensa funeris semper ex hereditate deducitur, quae etiam omne creditum solet praecedere, cum bona solvendo non sint.*

56 Buckland (n 20) 403; Van Oven (n 9) 191.

57 Cf Boudewijn Sirks "Ne colonus inscio domino suum alienet peculium" in Gerkens et al (eds) *Mélanges Fritz Sturm* (1999) 419-429. Cenderelli *Biscardi* (n 2) 271.

58 *D* 11 7 12 3. ... *neve quis de alieno funeretur*; *D* 11 7 14 1. ... *satius est enim de suo testatorem funerari*; *D* 11 7 14 13. ... *de suo enim expedit mortuos funerari*. See also Cenderelli *Biscardi* (n 2) 270ff.

59 *D* 11 7 21 *Paulus libro vicensimo septimo ad edictum. In patrem, cuius in potestate fuerit is cuius funus factum erit, competit funeraria actio pro dignitate et facultatibus.*

60 *D* 11 7 28 *Pomponius libro quinto decimo ad Sabinum. Quod si nulla dos esset, tunc omnem impensam patrem praestare debere Atilicinus ait aut heredes eius mulieris, puta emancipatae. Quod si neque heredes habeat neque pater solvendo sit, maritum in quantum facere potest pro hoc conveniri, ne iniuria eius videretur quondam uxorem eius insepultam relinqui.*

61 *D* 11 7 28.

62 *D* 11 7 20 1.

Thus in the absence of an estate, the responsibility and liability for the funeral vested in the father and if the deceased had been a married woman, subsidiarily on her husband. There is no indication whether this responsibility was extended to other members of the family.

### 3 4 Who can institute the *actio funeraria*?

The *praetor* granted the action to "*qui funeravit persequatur id quod impendit*".<sup>63</sup> This raises the issue whether only public spirited outsiders who did not wish for corpses to be left unburied, or felt some sense of duty or affection towards the deceased (but not enough to forfeit his claim), or also the heirs and *legatarii* were entitled to the action. The texts tell us that *heredes*,<sup>64</sup> *bonorum possessores*, *successores* and *legatarii* could avail themselves of the action. The heir could institute the *actio funeraria* against the husband if the latter was liable for the funeral;<sup>65</sup> prospective heirs could claim from the estate;<sup>66</sup> and the *bonorum possessor* who lost his claim<sup>67</sup> as well as the person believing himself to be heir<sup>68</sup> who had buried the deceased could sue with the action. The *legatarius* whose legacy had been used in the burial could also claim against the estate or the heir.<sup>69</sup> And finally, an heir could claim from his co-heirs.<sup>70</sup>

#### 3 4 1 Possible insolvency

An important question is whether sufficient funds would be available. This matter forms a recurring theme. It is latent in several texts stating that the amount reclaimable should be in relation to the financial status of the deceased.<sup>71</sup> It forms, in many instances, the rationale of the *hereditas iacens*. It emerges in the form of the heir who is willing to take care of the funeral, but wishes to take his time in

63 D 11 7 12 3. Funcke (n 2) 22-33 concentrates on the similarity with the *actio negotiorum gestorum*.

64 D 11 7 31 *Ulpianus libro vicensimo quinto ad edictum*. 2. *Haec actio non est annua, sed perpetua, et heredi ceterisque successoribus et in successores datur*; also D 11 7 47 1.

65 D 11 7 46 *Scaevola libro secundo quaestionum*. 1. *Si heres mulieris inferat mortuam in hereditarium fundum, a marito qui debet in funus conferre pro aestimatione loci consequatur*.

66 D 11 7 14 8. See also n 74.

67 D 11 7 32 *Paulus libro vicensimo septimo ad edictum*. *pr. Si possessor hereditatis funus fecerit, deinde victus in restitutione non deduxerit quod impenderit, utilem esse ei funerariam*.

68 D 11 7 14 11. *Si quis, dum se heredem putat, patrem familias funeraverit, funeraria actione uti non poterit, quia non hoc animo fecit, quasi alienum negotium gerens: et ita Trebatius et Proculus putat. Puto tamen et ei ex causa dandam actionem funerariam*. Schrage (n 2) 50f.

69 D 11 7 46 *Scaevola libro secundo quaestionum*. 2. *Ei, cui vestimenta legantur, si in funus erogata sint, utilem actionem in heredem dandam placuit et privilegium funerarium*.

70 D 11 7 14 *Ulpianus libro vicensimo quinto ad edictum*. 12. *Labeo ait, quotiens quis aliam actionem habet de funeris impensa consequenda, funeraria eum agere non posse: et ideo si familiae erciscundae agere possit, funeraria non acturum: plane si iam familiae erciscundae iudicio actum sit, posse agi*.

71 D 11 7 12 5. *Sumptus funeris pro facultatibus vel dignitate defuncti*. 6. *Praetor vel magistratus municipalis ad funus sumptum decernere debet*.

deciding whether to accept or decline. This brings us to acceptance,<sup>72</sup> and more specifically *pro herede gestio*.<sup>73</sup> In order to prevent that arranging the funeral might be constructed as *se immiscuere*, to have involved himself, it is advised that the prospective heir who is attending to the funeral should make a formal declaration to the effect that he is arranging the funeral out of duty and not as heir.<sup>74</sup>

### 3 4 2 *Piety*

However, such a statement may have other unforeseen consequences. An imperial rescript, in other words, a free legal opinion by emperor Alexander Severus<sup>75</sup> with strong authority, laid down that if a person paid for the funeral without intention to recover his expenses, he could not afterwards avail himself of the *actio funeraria*.<sup>76</sup> At first glance it is difficult to envisage a situation in which a person paid for someone's funeral out of the goodness of his heart<sup>77</sup> and later decided to institute the *actio funeraria* to recover his expenses. However, the question was addressed to the emperor and his incidental *dictum* gave rise to a certain confusion, in so far as a sense of duty will always play a part in attending to a funeral.<sup>78</sup> It also led to the most bizarre legalise, namely distinguishing between and assessing the degrees of compassion.<sup>79</sup> The result was that it was

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- 72 Gaius 2 164ff; Buckland (n 20) 312ff; Kaser (n 19) 715ff; Van Oven (n 9) 562ff.
- 73 D 29 2 20 Ulpianus libro sexagesimo primo ad edictum. *Pro herede gerere videtur is, qui aliquid facit quasi heres; D 11 7 14 8. Plerique filii cum parentes suos funerant, vel alii qui heredes fieri possunt, licet ex hoc ipso neque pro herede gestio neque aditio praesumitur, ... . See Buckland (n 20) 314; Cenderelli Biscardi (n 2) 269f 280ff; Kaser (n 19) 717f; Van Oven (n 9) 564f.*
- 74 D 11 7 14 8. *Plerique filii cum parentes suos funerant, vel alii qui heredes fieri possunt, licet ex hoc ipso neque pro herede gestio neque aditio praesumitur, tamen ne vel miscuisse se necessarii vel ceteri pro herede gessisse videantur, solent testari pietatis gratia facere se sepulturam. Quod si supervacuo fuerit factum, ad illud se munire videntur, ne miscuisse se credantur, ad illud non, ut sumptum consequantur: quippe protestantur pietatis gratia id se facere. Plenius igitur eos testari oportet, ut et sumptum possint servare; Cf D 29 2 20 1. Et ideo solent testari liberi, qui necessarii existunt, non animo heredis se gerere quae gestunt, sed aut pietatis aut custodiae causa aut pro suo. ut puta patrem sepelivit vel iusta ei fecit: si animo heredis, pro herede gessit: enimvero si pietatis causa hoc fecit, non videtur pro herede gessisse. See also Cenderelli Biscardi (n 2) 275ff; F Pringsheim "Animus donandi" 1922 ZSS (RA) 315ff; Taubenschlag (n 6) 255ff.*
- 75 D 11 7 14 Ulpianus libro vicensimo quinto ad edictum. *7. et ita imperator noster rescripsit. Funcke (n 2) 23 n 63.*
- 76 D 11 7 14 7. *Sed interdum is, qui sumptum in funus fecit, sumptum non recipit, si pietatis gratia fecit, non hoc animo quasi recepturus sumptum quem fecit: et ita imperator noster rescripsit. Igitur aestimandum erit arbitro et perpendendum, quo animo sumptus factus sit, utrum negotium quis vel defuncti vel heredis gerit vel ipsius humanitatis, an vero misericordiae vel pietati tribuens vel affectioni. Potest tamen distingui et misericordiae modus, ut in hoc fuerit misericors vel pius qui funeravit, ut eum sepeliret, ne insepultus iaceret, non etiam ut suo sumptu fecerit: quod si iudici liqueat, non debet eum qui convenitur absolvere: quis enim sine pietatis intentione alienum cadaver funerat? Oportebit igitur testari, quem quo animo funerat, ne postea patiatur quaestionem. See further Cenderelli Guarino (n 2) 793; Kunkel (n 8) 539f; Pringsheim (n 74) 313ff; Schrage (n 2) 50. Taubenschlag (n 6) 259ff.*
- 77 D 11 7 14 7: *piety, love, compassion or a sense of duty.*
- 78 D 11 7 14 7. *... quis enim sine pietatis intentione alienum cadaver funerat? Kübler (n 7) 417.*
- 79 D 11 7 14 7. *Igitur aestimandum erit arbitro et perpendendum, quo animo sumptus factus sit, utrum negotium quis vel defuncti vel heredis gerit vel ipsius humanitatis, an vero*

advised to make the necessary precautionary statement before witnesses to safeguard reimbursement.<sup>80</sup> This statement could coincide with the statement made by a prospective heir to avoid *pro herede gestio*,<sup>81</sup> with the result that the prospective heir might have avoided constructive acceptance, but waived the *actio funeraria* at the same time. Thus, a more detailed statement was required.<sup>82</sup>

### 3.5 Quantum

What are considered to be true funeral expenses?<sup>83</sup> The bringing home of the body, preparing and clothing the body, the price or rent of the burial plot and the sarcophagus,<sup>84</sup> guarding the body,<sup>85</sup> carrying out of the body, preparing the burial plot,<sup>86</sup> vestments for the body,<sup>87</sup> everything according to rank and wealth may all be considered as such.<sup>88</sup> A rescript of Hadrian decreed that a funerary monument fell outside the funeral expenses.<sup>89</sup> The wishes of the deceased may be ignored if they were out of kilter with his rank and wealth and the action may be refused if a cheap funeral had been arranged as an insult.<sup>90</sup>

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*miserecordiae vel pietati tribuens vel affectioni. Potest tamen distingui et misericordiae modus, ut in hoc fuerit misericors vel pius qui funeravit, ut eum sepeliret, ne insepultus iaceret, non etiam ut suo sumptu fecerit.*

80 *D 11 7 14 8. See n 74 above; Kunkel (n 8) 539f.*

81 *D 11 7 14 8. See n 74 above.*

82 *D 11 7 14 8 in fine.*

83 *D 11 7 14 3. Funeris causa sumptus factus videtur is demum, qui ideo fuit ut funus ducatur, sine quo funus duci non possit, ... . See Kunkel (n 8) 539.*

84 *D 11 7 37 Macer libro primo ad legem vicensimam hereditatium. pr. Funeris sumptus accipitur, quidquid corporis causa veluti unguentorum erogatum est, et pretium loci in quo defunctus humatus est, et si qua vectigalia sunt, vel sarcophagi et vectura: et quidquid corporis causa antequam sepeliatur consumptum est, funeris impensam esse existimo; D 11 7 14 4. ... in marmor. See Funcke (n 2) 48 n 152 and 49 nn 153 155.*

85 *D 11 7 14 4. Impensa peregre mortui quae facta est ut corpus perferretur, funeris est, licet nondum homo funeretur: idemque et si quid ad corpus custodiendum vel etiam commendandum factum sit, vel si quid in marmor vel vestem collocandam. Cf Funcke (n 2) 48 n 150.*

86 *D 11 7 14 3. ... ut puta si quid impensum est in elationem mortui: sed et si quid in locum fuerit erogatum, in quem mortuus inferretur, funeris causa videri impensum Labeo scribit, quia necessario locus paratur, in quo corpus conditur; D 11 7 37pr.*

87 *D 11 7 46 2. Ei, cui vestimenta legantur, si in funus erogata sint, utilem actionem in heredem dandam placuit et privilegium funerarium; D 11 7 14 4. ... vel vestem collocandam. Cf Funcke (n 2) 47 n 149: "Das Totengewand der Römer ist die Toga."*

88 *D 11 7 12 5. Sumptus funeris arbitrantur pro facultatibus vel dignitate defuncti; D 11 7 14 6. Haec actio quae funeraria dicitur ex bono et aequo oritur: continet autem funeris causa tantum impensam, non etiam ceterorum sumptuum. Aequum autem accipitur ex dignitate eius qui funeratus est, ex causa, ex tempore et ex bona fide, ut neque plus imputetur sumptus nomine quam factum est neque tantum quantum factum est, si immodice factum est: deberet enim haberi ratio facultatum eius, in quem factum est, et ipsius rei, quae ultra modum sine causa consumitur. Quid ergo si ex voluntate testatoris impensum est? Sciendum est nec voluntatem sequendam, si res egrediatur iustam sumptus rationem, pro modo autem facultatum sumptum fieri.*

89 *D 11 7 14 4; D 11 7 37 1. Monumentum autem sepulchri id esse divus Hadrianus rescripsit, quod monumenti, id est causa muniendi eius loci factum sit, in quo corpus impositum sit. Itaque si amplum quid aedificari testator iusserit, veluti incircum porticationes, eos sumptus funeris causa non esse. Neither were ornaments buried with the deceased deductible; D 11 7 14 5. Non autem oportet ornamenta cum corporibus condi, nec quid aliud huiusmodi, quod homines simpliciores faciunt. See Funcke (n 2) 54.*

90 *D 11 7 14 10. Ludicem, qui de ea aequitate cognoscit, interdum sumptum omnino non debere admittere modicum factum, si forte in contumeliam defuncti hominis locupletis modicus factus sit: nam non debet huius rationem habere, cum contumeliam defuncto fecisse videatur ita eum funerando. See Schrage (n 2) 50.*

### 3 6 The characteristics of the *actio funeraria*

The action was *quasi ex contractu*,<sup>91</sup> *ex bono et aequo*,<sup>92</sup> and the judge had equity jurisdiction.<sup>93</sup> It is obvious that the *actio funeraria* had a close affinity with the *actio negotiorum gestorum*,<sup>94</sup> and Trebatius,<sup>95</sup> Proculus<sup>96</sup> and Labeo<sup>97</sup> applied the principles of the latter action to the *actio funeraria*.<sup>98</sup> However, Ulpian disagrees and argues for a more lenient application. He argues that the just judge should seek an equitable decision along more liberal lines since the nature of the action allows him this freedom.<sup>99</sup>

The action is subsidiary. Examples of other actions to be used are the *actio familiae erciscundae* in *Digest* 11 7 14 12,<sup>100</sup> the *actio mandati* of *Digest* 11 7 14 15 and the *actio dotis* of *Digest* 11 7 30. The mention of the *actio familiae erciscundae* confirms that even the heir could make use of the *actio funeraria*.

### 3 7 Johannes Voet's *Commentarius ad Pandectas*

Voet followed the order of the *Digest* and thus discussed the *actio funeraria* in 11 7 7-15. The main interest is provided by the fact that Voet missed the point that a person had to fund his own funeral. On the authority of Groenewegen,<sup>101</sup> Voet states that the Roman law regarding the liability of the dowry was not followed since the husband was not considered to be a universal successor in regard to the dowry.<sup>102</sup> In consequence, the good professor provided some awkward explanations. In the opening lines of *Digest* 11 7 8 he categorically states that the expense of the funeral is a debt of the heir and not of the deceased.<sup>103</sup> However,

91 *Inst* 3 27 1; Funcke (n 2) 13, who also mentions that the action is *perpetua*.

92 *D* 11 7 14 6. *Haec actio quae funeraria dicitur ex bono et aequo oritur ...*; Schrage (n 2) 50.

93 *D* 11 7 14 10. *Iudicem, qui de ea aequitate cognoscit*; 13. ... *Et generaliter puto iudicem iustum non meram negotiorum gestorum actionem imitari, sed solutius aequitatem sequi, cum hoc ei et actionis natura indulget*. See Funcke (n 2) 12.

94 Schrage (n 2) and Cenderelli (n 2) have dealt with this aspect of the *actio funeraria*; cf also Funcke (n 2) 16-22.

95 *D* 11 7 14 11.

96 *D* 11 7 14 11.

97 *D* 11 7 14 13; cf however also *D* 11 7 14 16.

98 *D* 11 7 14 7. ... *Igitur aestimandum erit arbitro et perpendendum, quo animo sumptus factus sit, utrum negotium quis vel defuncti vel heredis gerit vel ipsius humanitatis, an vero misericordiae vel pietati tribuens vel affectioni*; *D* 11 7 14 9. ... *ut quis pro parte quasi negotium gerens, pro parte pietatis gratia id faciat ...*; *D* 11 7 14 11. ... *quia non hoc animo fecit, quasi alienum negotium gerens ...*; *D* 11 7 14 13. ... *Et generaliter puto iudicem iustum non meram negotiorum gestorum actionem imitari, ...*; *D* 11 7 14 16. ... *Si tamen quasi negotium heredis gerens funeravit, licet ratum non habeat, tamen funeraria eum agere posse Labeo scribit*. See Schrage (n 2) 51.

99 *D* 11 7 14 13. ... *Et generaliter puto iudicem iustum non meram negotiorum gestorum actionem imitari, sed solutius aequitatem sequi, cum hoc ei et actionis natura indulget*.

100 Also *D* 10 2 49; *D* 42 5 17pr. See too Funcke (n 2) 13 n 36 14 n 37.

101 *De Legibus Abrogatis ad D* 11 7 16.

102 *XI* 7 8. *Quod jus nostris moribus non videtur servari*, which is based on the fallacious argument *dum maritus ratione lucri, quod ex dote vi pacti dotalis aut statuti capit, donatarii potius aut legatarii, quam successoris universalis loco habetur*.

103 *In quantum scilicet impensa funeris non defuncti, sed heredis, ad funerandum obligati, aes alienum esse, & funus ad heredem pertinere dicitur*.

in the following paragraph he feels obliged to explain *Digest* 11 7 1 in which text Ulpian held that "[h]e who spends anything on a funeral is deemed to contract with the deceased and not with his heir". Voet held this to mean that the person spent his money on behalf of the deceased out of piety and not on behalf of the heir; thus such expense must be made good, not out of the property of the heir, but out of that of the deceased, so that he would be buried not from the funds of another, but from his own funds.<sup>104</sup> He strengthened this argument by adding that for this reason the funeral expenses had to be deducted before the calculation of the *quarta Falcidia* and in the event of the *beneficium inventarii*.<sup>105</sup> It is thus confusing that he continued in the same section by holding that the action is instituted against those whose concern the funeral is, namely civil and praetorian heirs and owners, fathers and husbands.<sup>106</sup>

The greater part of his discussion deals with the preferential privilege of the funeral expenses.<sup>107</sup> The problem caused by the urgency of burial and the delay of acceptance and the special solution of Roman law in this respect, is interpreted by Voet as follows: "If they (ie blood relations) also are wanting, it is the duty of the magistracy to take care that the deceased is buried out of his own money or property."<sup>108</sup>

### 3 8 ***Nodada Funeral Services CC v The Master and Others* 2003 (4) SA 422 (Tk HC)**

Reliance on Voet brought the *actio funeraria* before Miller J in the Transkei High Court in the case of *Nodada Funeral Services CC v The Master and Others* 2003 (4) SA 422 (Tk HC). The funeral parlour had, on mandate of the sister of the deceased, collected his body and held a funeral on the assumption that the deceased's life policy would pay out to the estate. However, the policy nominated the deceased's minor daughter as beneficiary and was paid into the Guardian's Fund administered by the Master of the Supreme Court. The Master refused to pay for the funeral and informed the applicant that the funeral costs had to be paid from the estate.<sup>109</sup> Since there were no assets in the deceased's estate, the

104 *Ac proinde, quod Ulpianus scripsit, qui propter funus aliquid impendit, cum defuncto contrahere creditur, non cum herede, l 1 ff h t, non alio sensu accipiendum videtur, quam quod impendens propter defunctum magis, pietate ductus, quam propter heredem sumptus (sic) fecisse credendus sit; ad id ut impensa talis non ex heredis sed defuncti bonis praestetur, quo is non de alieno sed de suo funeretur.*

105 *Unde et ex bonis defuncti deducenda fuit impensa funeris, antequam falcidiae ratio iniretur. uti & per heredem, inventario confecto hereditatem adeuntem.*

106 *Idque generaliter adversos eos, ad quod funus pertinet, heredes civiles vel praetorios, dominos, & patres, quorum servi aut filifamilias funerati sunt; ut tamen ante patrem conveniendi sint heredes filiifamilias, si quos habeat in suis peculiiis.*

107 XI 7 9-13.

108 XI 7 7. *His quoque cessantibus, magistratus officium est, curare, ut defunctus funeretur ex pecunia rebusve suis.*

109 425H.

undertaker instituted the *actio funeraria* against the Master. The court decided that the *actio funeraria* as a remedy against the daughter could not succeed as the heir was no longer the universal successor of the deceased.<sup>110</sup> Also, the action should have been instituted by the sister who had given mandate to Nodada Funeral Services.<sup>111</sup> Finally, the action is auxiliary and the applicant should have exhausted his contractual remedies against the sister.<sup>112</sup> The court also expressed doubt whether the *actio funeraria* is still available.<sup>113</sup>

### 39 Conclusion

The facts of the case were simple. The argument that in modern South African law the action should be instituted against the executor is correct, as is the argument that the mandator and not the mandatory must institute the action. However, both arguments are not in keeping with reality. Where would Ms Moko find the resources to institute an action in the High Court? Mr Moko's situation is also rather common, namely an estate without assets, but an insurance policy with a nominated beneficiary. This leaves us with the question whether it would have stressed the limits of the law extravagantly if the court were to have followed the example of Roman law, which took assets to pay for the funeral wherever they could be found, such as a legacy or dowry, in order to adhere to the principle that a person should pay for his own funeral.

In Roman law a clear distinction was made between the person responsible for arranging the funeral and the person who had to pay for the funeral. The first group consisted of the persons elected (and compensated?) by the deceased for this purpose, the testamentary heir and the intestate heirs. However, these people could not be forced to arrange the funeral, but would forfeit whatever they had received for this purpose, which made the duty to arrange the funeral moral rather than legal.

Regarding the question who had to pay for the funeral, the Romans adhered to the principle that a person should be buried at his own expense. This principle is found in the texts granting the *praetor* extensive powers over a *hereditas iacens*, the voiding of legacies to pay for the funeral, the liability of the dowry for funeral expenses and the preference of funeral expenses in the event of insolvency. The salient point was that the *actio funeraria* was an *actio ex aequo*

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110 *Rondalia Assurance Corporation of SA v Britz* 1976 (3) SA 243 (T) at 246 B-C; *Finlay v Kutoane* 1993 (4) SA 675 (W) at 682H.

111 427E-G.

112 4127G-I.

113 428A.

*et bono* which gave the judge equity jurisdiction. The *actio funeraria* represent the precept of the law of nature that "*neminem cum alterius detrimento et iniuria fieri locupletioem*", and is an important example of the quest for equity by the Roman jurists.