COMPENSATION FOR WRONGFUL CONVICTION IN SOUTH AFRICA

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SUMMARY

South Africa acceded to the International Covenant on Civil and Political Rights (ICCPR) without reservations. Article 14(6) of this treaty requires South Africa to put measures in place to compensate people who have suffered miscarriages of justice (wrongful convictions). However, the right to be compensated for wrongful conviction is not provided for in South African law. This is so although case law shows that many people have been wrongfully convicted. A person who has been wrongfully convicted has to institute a civil case (delictual claim) or to apply for a free pardon. In this article, the author argues that these two options do not comply with what is required of South Africa under article 14(6) of the ICCPR. The author suggests ways in which South Africa could comply with its obligation under article 14(6) of the ICCPR. The author also suggests ways in which the common law (*actio iniuriarum*) could be developed to compensate people who have been wrongfully convicted.

1 INTRODUCTION

In December 1998, South Africa acceded to the International Covenant on Civil and Political Rights[1] (ICCPR) without any reservations.[2] At the time of accession, South Africa made a declaration that

> "it recognises, for the purposes of article 41 of the Covenant, the competence of the Human Rights Committee to receive and consider communications to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant".[3]

The Constitutional Court held that South Africa's accession to the ICCPR and other human rights treaties shows its "commitment to the advancement and protection of fundamental human rights".[4] The Constitutional Court held that by acceding to the ICCPR, "the Republic of South Africa has an

1 999 UNTS 171 and 1057 UNTS 407 (1966). Adopted: 16/12/1966; EIF 23/03/1976.

2 See United Nations Treaty Collection "Depositary: Status of Treaties" https://treaties.un.org/Pages/ViewDetails.aspx?chapter=4&clang=_en&mtdsg_no=IV-4&src=IND#EndDec (accessed 2023-02-27).

3 *Ibid.*

4 *Kaunda v President of the Republic of South Africa* 2005 (4) SA 235 (CC); 2004 (10) BCLR 1009 (CC) par 158.

international obligation" to give effect to its provisions.[5] However, the court also held that since the ICCPR had not yet been domesticated, it was not part of South African law, which meant that "the provisions of the ICCPR cannot form the basis of a justiciable claim" in any court in South Africa.[6] Article 14(6) of the ICCPR provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

Although article 14(6) does not expressly provide for the right to compensation, the drafting history of ICCPR shows that the intention of the drafters was to provide for such a right.[7] This explains why the arguments by some delegates that compensation was a favour as opposed to a right[8] and that compensation was only due when the state had acted in bad faith[9] were rejected and not included in article 14(6). Likewise, article 85(2) of the Rome Statute of the International Criminal Court,[10] which has been domesticated in South Africa,[11] provides for the right to compensation for a miscarriage of justice. Unlike some African countries (such as Rwanda)[12] where a treaty becomes part of domestic law after ratification and therefore enforceable in courts, in South Africa, a treaty only becomes part of domestic law after domestication. In other words, enabling legislation has to be enacted to give effect to such a treaty.[13] At the time of writing, South Africa had not domesticated the ICCPR, although many of the rights in this treaty have

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5 *Zealand v Minister for Justice and Constitutional Development* 2008 (6) BCLR 601 (CC); 2008 (2) SACR 1 (CC); 2008 (4) SA 458 (CC) par 30.

6 *Zuma v Secretary of the Judicial Commission of Inquiry Into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State* 2021 (11) BCLR 1263 (CC) par 113.

7 See for e.g., UN General Assembly, 14th Session, 3rd committee, 964th meeting, (A/C.3/SR.964) (23 November 1959) par 24; UN General Assembly, 14th Session, 3rd committee, 967th meeting, (A/C.3/SR.967) (25 November 1959) par 17.

8 UN General Assembly, 14th Session, 3rd committee, 962nd meeting, (A/C.3/SR.962) (19 November 1959) par 6.

9 UN General Assembly, 14th Session, 3rd committee, 962nd meeting, (A/C.3/SR.962) par 8.

10 Art 85(2) of the Rome Statute of the International Criminal Court (UNGA 2187 UNTS 90 (1998). Adopted: 17/07/1998; EIF 01/07/2002 provides: "When a person has by a final decision been convicted of a criminal offence, and when subsequently his or her conviction has been reversed on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him or her."

11 Implementation of the Rome Statute of the International Criminal Court Act 27 of 2002.

12 See art 168 of the Constitution of Rwanda, 2003 (as amended in 2015), which provides: "Upon publication in the Official Gazette, international treaties and agreements which have been duly ratified or approved have the force of law as national legislation in accordance with the hierarchy of laws provided for under the first paragraph of Article 95 of this Constitution."

13 See generally, Dugard "Treaties" in Dugard, Du Plessis, Maluwa and Tladi *Dugard's International Law: A South African Perspective* 5ed (2019) 406–425.

been included in the South African Bill of Rights.[14] The implication is that the ICCPR is not part of South African domestic law. However, South African courts are required to refer to this treaty, as is the case with any other treaty, when interpreting the Bill of Rights.[15] It is against this background that there are cases in which South African courts have referred to the ICCPR in some of their decisions.[16] Although South Africa included most of the fair-trial guarantees of article 14 of the ICCPR in its Bill of Rights, one right not provided for in the South African Constitution is the right to be compensated for wrongful conviction or miscarriage of justice, which, as seen above, is provided for under article 14(6) of the ICCPR. This approach is different from that taken by some African countries such as Seychelles and Ghana, as demonstrated below, where the right to be compensated for wrongful conviction is expressly provided for in the respective constitutions. Although some countries have given effect to article 14(6), South Africa has yet to enact legislation implementing this article, notwithstanding that there are cases where people have been convicted and imprisoned wrongfully. This means that such victims cannot invoke article 14(6) to argue for compensation.[17] Case law from South Africa shows that there are many instances in which courts have found that people were wrongfully convicted. Since there is no constitutional or statutory right to compensation for wrongful conviction, the victims have to resort to the law of delict if they are to be compensated. This issue came up in *Nohour v Minister of Justice and Constitutional Development*,[18] in which the Supreme Court of Appeal held that the applicants, although they had been acquitted of the offence after serving some time in prison, could not be compensated because they did not

14 See, for e.g., the right to a fair trial under art 14 of the ICCPR and the right to a fair trial under s 35(3) of the South African Constitution.

15 See s 39(1)(*b*) of the Constitution.

16 See, for e.g., *DE v RH* 2015 (5) SA 83 (CC); 2015 (9) BCLR 1003 (CC) par 47; *Shibi v Sithole* 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) par 55; *Bhe v Khayelitsha Magistrate* 2005 (1) SA 580 (CC) par 55; *Ferreira v Levin NO; Vryenhoek v Powell NO* 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 par 58; *Kaunda v President of the Republic of South Africa supra* par 34; *Ruta v Minister of Home Affairs* 2019 (3) BCLR 383 (CC); 2019 (2) SA 329 (CC) fn 77; *Claassen v Minister of Justice and Constitutional Development* 2010 (2) SACR 451 (WCC); 2010 (6) SA 399 (WCC); [2010] 4 All SA 197 (WCC) par 24; *The Right to Know Campaign v City Manager of Johannesburg Metropolitan Municipality* [2022] 3 All SA 466 (GJ) par 57 and 66; *Chauke v The State* [2022] ZAGPJHC 324 par 42; *Solidarity v Black First Land First* [2022] 2 All SA 549 (GJ) par 74; *Electoral Commission v Minister of Cooperative Governance and Traditional Affairs* 2022 (5) BCLR 571 (CC) par 180.

17 The same situation prevails in Canada although in that country the relevant guidelines have been adopted to compensate wrongfully convicted people. In *Hinse v Canada (Attorney General)* [2015] 2 SCR 621, 2015 SCC 35 (CanLII) par 84–85, the Supreme Court of Canada held that by ratifying the ICCPR, "Canada has recognized that it is desirable to compensate victims of miscarriages of justice" even though "Canada has not enacted legislation to incorporate the ICCPR into Canadian domestic law. There is no legislation establishing an obligation for the federal government or the provinces to compensate victims of miscarriages of justice, nor is there any legislation establishing a right to such compensation. The federal and provincial governments did adopt the *Guidelines* in 1988. The *Guidelines* establish a set of criteria that a wrongfully convicted person must meet to be entitled to compensation. In addition to fixing the maximum amount of such compensation, they require, inter alia, that the person first receive a statement to the effect that he or she is innocent: a free pardon or the quashing of a guilty verdict is not, on its own, sufficient. The Guidelines are not binding legislation, however, and have never been regarded as such."

18 2020 (2) SACR 229 (SCA).

meet the required threshold for compensation in the law of delict. Another remedy available to a person who has been wrongfully convicted is to ask for a presidential free pardon in terms of section 327 of the Criminal Procedure Act[19] (the CPA). However, section 327 does not provide for compensation.

In this article, the author discusses the case of *Nohour v Minister of Justice and Constitutional Development* (the most recent decision of the Supreme Court of Appeal on compensation for wrongful convictions) and section 327 of the CPA and argues that neither of these procedures complies with South Africa's obligation under article 14(6) of the ICCPR. The author argues that in order for South Africa to comply with article 14(6) of the ICCPR, it would have to provide expressly for the right to be compensated for wrongful conviction. The author also demonstrates that the law of delict on the issue of compensation for wrongful conviction falls short of what is required of states parties under article 14(6) of the ICCPR. A wrongful conviction could result in a person either being imprisoned or not.[20] This article focuses on the right to be compensated for a wrongful conviction, especially in cases where the victim served a custodial sentence. In order to put the discussion in context, it is important to take a look at case law for an understanding of the circumstances in which persons have been convicted wrongfully in South Africa. This discussion forms the basis for a better understanding of *Nohour v Minister of Justice and Constitutional Development*[21] and section 327 of the CPA.

2 UNDERSTANDING WRONGFUL CONVICTIONS IN SOUTH AFRICA

That a person who has been wrongfully convicted should be compensated has been acknowledged by the Constitutional Court. One reason that the Constitutional Court found the death penalty unconstitutional is that "[i]ts inherently irreversible consequence, makes any reparation or correction impossible, if subsequent events establish, as they have sometimes done, the innocence of the executed".[22] The Constitutional Court observed further that "[u]njust imprisonment is a great wrong, but if it is discovered, the prisoner can be released and compensated".[23] Case law from South Africa shows that courts are mindful of the fact that it is impossible to rule out the possibility of a wrongful conviction in criminal matters. As a result, courts have suggested safeguards that should be observed by judicial officers and prosecutors in order to minimise the risk of wrongful convictions. These measures have included, for example, the need for judicial officers to approach the evidence of some witnesses with caution[24] and the fact that a

19 51 of 1977.

20 A person who pays an admission of guilt fine because of pressure put on him by the police is also wrongfully convicted although he is not imprisoned. See *S v Houtzamer* [2015] ZAWCHC 25.

21 *Supra.*

22 *S v Makwanyane* 1995 (6) BCLR 665; 1995 (3) SA 391; 1995 (2) SACR 1 par 269.

23 *S v Makwanyane supra* par 54.

24 *Mpotle v S* [2016] ZAGPPHC 63 par 23; *Dire v S* [2015] ZAGPPHC 334 par 14; *Cele v State* [2016] 2 All SA 75 (KZP) par 1; *Cekwana v S* [2017] ZAWCHC 47 par 52. The same

prosecutor has to execute their duties ethically.[25] The judiciary has also put in place a quality control system in terms of which completed cases are evaluated for possible errors and where such errors are discovered, measures are taken to rectify them.[26] Despite the existence of these measures, case law shows that some people have been convicted wrongfully and sentenced to imprisonment only to be released after their convictions have been set aside on appeal or review.

The Supreme Court of the United Kingdom, when interpreting the meaning of "miscarriage of justice" under the relevant law dealing with compensation for wrongful convictions,[27] proposed four situations in which a wrongful conviction could arise. The author adopts these categories in this article to classify cases of wrongful conviction in South Africa. The UK Supreme Court indicated the following as instances of wrongful conviction:

> "(1) Where the fresh evidence shows clearly that the defendant is innocent of the crime of which he has been convicted.
> (2) Where the fresh evidence is such that, had it been available at the time of the trial, no reasonable jury could properly have convicted the defendant.
> (3) Where the fresh evidence renders the conviction unsafe in that, had it been available at the time of the trial, a reasonable jury might or might not have convicted the defendant.
> (4) Where something has gone seriously wrong in the investigation of the offence or the conduct of the trial, resulting in the conviction of someone who should not have been convicted."[28]

The majority judgment was to the effect that people who fell into categories one and two above qualified for compensation. However, the minority view held that compensation should only be reserved for people who fell into category one.[29] South African case law shows that cases of wrongful conviction could also fall into one of the above four categories. The first category deals with cases where people were convicted and sentenced to imprisonment for offences that they did not commit and were subsequently acquitted on appeal or review. In other words, these are people who are

approach is followed in Mauritius, see *Police v Clair Jacques Erwin Francisco* 2008 INT 217.

25 *Van der Westhuizen v S* 2011 (2) SACR 26 (SCA) par 11.

26 See generally, *S v Kotze; S v Ntulo* [2023] ZAWCHC 15.

27 S 133 of the Criminal Justice Act 1988.

28 *Hallam, R (on the application of) v Secretary of State for Justice* [2019] UKSC 2 par 18 (the court referred to its earlier case law in which this formulation was adopted). The law was amended subsequently to provide that only those in category one (innocent of the offences for which they were convicted) qualified for compensation. See *Kay, R (on the application of) v Secretary of State for Justice* [2021] EWHC 2125 (Admin) par 25–26.

29 *Hallam, R (on the application of) v Secretary of State for Justice supra* par 18. S 133 of the Criminal Justice Act 1988 was later amended to restrict the right to compensation to people who had been convicted of offences they had not committed – i.e., those who were innocent. S 133(1ZA) of the Criminal Justice Act 1988 provides: "For the purposes of subsection (1), there has been a miscarriage of justice in relation to a person convicted of a criminal offence in England and Wales or, in a case where subsection (6H) applies, Northern Ireland, if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence (and references in the rest of this Part to a miscarriage of justice are to be construed accordingly)."

innocent.[30] The second category, which deals with cases under (2) and (3) above (as developed by the UK Supreme Court) includes people who were convicted even though the prosecution had not adduced enough evidence to prove beyond reasonable doubt that the accused committed the offence.[31] In other words, this includes "borderline cases" where people were acquitted on appeal or review because the prosecution could not prove beyond a reasonable doubt that they committed the offence. Differently put, there is some evidence to show that the accused possibly committed the offence, but it is not enough to meet the required standard of proof. In such a case, the accused is given the benefit of the doubt.[32] As the High Court held in *S v Tanatu*:[33]

> "When a court finds that the guilt of an accused has not been proved beyond reasonable doubt, that accused is entitled to an acquittal, even if there may be suspicions that he or she was, indeed, the perpetrator of the crime in question. That is an inevitable consequence of living in a society in which the freedom and the dignity of the individual are properly protected and are respected. The inverse – convictions based on suspicion or speculation – is the hallmark of a tyrannical system of law."[34]

In the third category, there is evidence to show that the person in question committed the offence, but his conviction was based on an irregularity. In

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30 See for e.g., *Mulaudzi v S* [2016] ZASCA 70, *Mojapelo v S* [2016] ZASCA 22 (the court found the evidence of an accomplice was insufficient to prove the appellant had committed the offence); *Ndlangamandla v S* [2012] ZAGPPHC 4 (evidence showed that the accused was not at the crime scene when the offence was committed); *Munkhambe v S* [2017] ZAGPPHC 1274 (the appellant was convicted of rape; before he was sentenced, the complainant informed the probation officer compiling a pre-sentencing report that she was never raped by the appellant and that she lied in court because she was afraid of her aunt); in *Lelala v S* [2017] ZAFSHC 105 par 12, both the prosecution and the accused's lawyer agreed on appeal that there was no evidence that the accused had committed the offence and the court held that "there was no evidence whatsoever" that the appellant had committed robbery. In *S v Chauke* 2010 (1) SACR 287 (GSJ), the court held that the convicted person was "clearly innocent" of the offence. In *Opperman v S* [2016] ZAGPJHC 304 par 16, the court held that one cannot rule out the possibility that a person could be convicted of a crime he/she never committed.

31 See for e.g., *Kwahla v S* [2015] ZAECGHC 89 (in this case, the prosecution agreed with the appellant's lawyer that his conviction for rape by the magistrate had been wrong because there was no evidence to prove that he had committed the offence – the evidence available was contradictory and unreliable). See also *Kula v S* [2017] ZAECGHC 113 par 13.

32 See for e.g., *Buti v S* [2015] ZAECGHC 77 (the rape conviction of the accused was set aside because the complainant was a single witness who contradicted herself in material respects); *Dyira v S* 2010 (1) SACR 78 (ECG) (rape – evidence of the child should have been admitted with caution and there was a delay in reporting the case); *Mnyakane v S* [2014] ZAGPPHC 716 (murder – there was insufficient evidence to link the accused directly to the offence); *Mothwa v S* [2015] ZASCA 143; 2016 (2) SACR 489 (SCA) (the appellant's version that he had not committed the robbery was more probable); *Martins v S* [2014] ZAECGHC 62 (the conviction of the appellant for murder was set aside because his version was reasonably possibly true); *Nkomo v S* [2017] ZAGPJHC 329 (robbery and murder – the evidence adduced against some of the appellants was not satisfactory enough to secure a conviction); *S v Maphumulo* [2005] ZAKZHC 1 (after the appellant's death, his relatives appealed his conviction for murder and the court set it aside on the ground that the circumstances in which his gun was used to commit the murder showed that other inferences apart from the one that the deceased had committed the murder could also be drawn).

33 [2004] ZAECHC 35.

34 *S v Tanatu supra* par 37.

other words, his right to a fair trial was violated.[35] Section 35(3) of the South African Constitution provides for the right to a fair trial and lists 15 different components that make up this right. The Constitutional Court held that the list of the rights provided for under section 35(3) is not exhaustive.[36] For a person's conviction to be valid, it has to meet the standards set out in section 35(3). However, the mere fact that an accused was convicted of an offence at a trial that met the standards set out in section 35(3) does not necessarily mean that they actually committed the offence. In other words, there are cases where innocent people have been convicted at trials that complied with section 35(3), and where their innocence only comes to light after they have served their sentences or part of those sentences. It is now important to discuss the measures that exist in South African law to address the plight of people who have been convicted wrongfully.

3 MEASURES IN PLACE TO ADDRESS INSTANCES OF WRONGFUL CONVICTION

As mentioned above, there are two remedies available to a person who has been wrongfully convicted in South Africa. The first is to institute a civil case and recover damages after being released from prison, and the second is to apply for a free pardon. The civil option is discussed first, in particular the judgment of the Supreme Court of Appeal in *Nohour v Minister of Justice and Constitutional Development*.[37]

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35 See for e.g., *Makhokha v S* [2013] ZASCA 171 (the appellant was sentenced to 15 years in prison for robbery and spent eight years in prison before the Supreme Court of Appeal set aside his conviction on the ground that it was based on an inadmissible confession. It was clear that he had committed the offence). In *Nndwambi v S* [2018] ZASCA 99, the appellant was convicted of murder and robbery on the basis of a co-accused's extra-curial admission and sentenced to life imprisonment. Although there was evidence that he had committed the offence, his conviction was set aside on appeal after he spent over 10 years in prison. In *Opperman v S* [2016] ZAGPJHC 304 and in *S v Segopolo* [2007] ZAFSHC 130, the appellants' convictions were set aside because his trial records could not be traced or reconstructed). In *S v Duda* [2008] ZAECHC 86, the court observed that the evidence showed that the appellants most probably committed the offences, but the magistrate misdirected himself in many respects, which rendered the trial unfair. In *S v Mbane* [2013] ZAECBHC 1, a juvenile was prosecuted as an adult and the conviction had to be set aside because it was contrary to the Child Justice Act 75 of 2008. In *S v Mdyogolo* [2005] ZAECHC 3, the court set aside the appellant's conviction on the ground that his trial had not been fair because the magistrate had admitted an inadmissible confession against him and had prevented him from properly defending himself. However, the court also observed that "it seems to me that it may well be that the appellant is in fact guilty of the offence with which he was charged" before it ordered his retrial. In *Sodede v S* [2014] ZAECGHC 59, the accused's right to defend himself was violated when the magistrate did not assist him to call his witnesses (he was unrepresented). In *Nahour v Minister of Justice and Constitutional Development* [2018] ZAKZPHC 65, it was held a conviction will be set aside because of the failure by the prosecutor to disclose the existence of an exculpatory statement to the accused or his lawyer.

36 See *Bogaards v S* 2012 (12) BCLR 1261 (CC); 2013 (1) SACR 1 (CC) par 49.

37 *Supra.*

3 1 The facts and finding in *Nohour v Minister of Justice and Constitutional Development*

In *Nohour v Minister of Justice and Constitutional Development,*[38] the appellants were prosecuted and convicted of rape and kidnapping and sentenced to seven years' imprisonment.[39] Their argument that the complainant was a prostitute who had, therefore, consented to the sexual act was dismissed by the High Court.[40] The High Court granted them leave to appeal to the Supreme Court of Appeal against the conviction and sentence. Their appeal to the Supreme Court of Appeal was successful as the court set aside both the conviction and the sentence. However, by the time the Supreme Court of Appeal set aside the conviction and sentence, the appellants had served the required minimum custodial sentence and had been released on strict parole conditions.[41] The appellants argued that the prosecutor had failed to disclose to them the following facts that were critical to their defence during the trial:

> "(a) that the complainant (RM) had admitted to the investigating officer that she was a prostitute; (b) that the investigating officer had witnessed the complainant soliciting and plying her trade as a prostitute; and (c) that the complainant's sworn statement which, in accordance with the practice at the time was not in possession of the appellants or their legal representatives, materially differed from her evidence in court."[42]

The appellants argued that the prosecutor's failure to disclose that information to them was contrary to her "common law duty to disclose to the defence any material deviation between the evidence given by the complainant and the contents, statements and information in the docket".[43] They added that if the prosecutor had disclosed the above information to them, they "would have been acquitted of the charges against them" because "the withheld information was critical in their defence of consensual sex with the complainant".[44] The appellants added that the prosecutor's conduct showed that she had the intention to injure them or that she acted negligently and that they were entitled to damages because they were wrongfully convicted and "as a consequence of [their] wrongful conviction they were imprisoned".[45] They added that because of the custodial sentence imposed on them,

> "[t]hey were … subjected to stringent parole conditions [after serving the custodial sentence] which restricted their rights and freedoms until their appeals succeeded. They were unable to be employed in the time they were in prison and, consequently, they suffered loss of earnings. They … suffered loss of amenities of life, loss of freedom of movement and loss of opportunities to interact with family and friends. They … suffered depression

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38 *Supra*.

39 *Nohour v Minister of Justice and Constitutional Development supra* par 1.

40 *Ibid*.

41 *Nohour v Minister of Justice and Constitutional Development supra* par 2 and 6.

42 *Nohour v Minister of Justice and Constitutional Development supra* par 4.

43 *Nohour v Minister of Justice and Constitutional Development supra* par 5.

44 *Ibid*.

45 *Nohour v Minister of Justice and Constitutional Development supra* par 6.

> from which they continue to suffer. They claimed specified amounts of money representing general damages, past loss of earnings etc."[46]

There were two issues for the Supreme Court of Appeal to decide: first, "whether the appellants would have been acquitted if the prosecutor had discharged her common-law obligations and disclosed to the defence material deviations between the complainant's evidence and the contents of the docket";[47] and secondly, whether the State was obliged to compensate the appellants although they had admitted that they had paid for sex (the *ex turpi causa* maxim).[48] After explaining the common-law duty of the prosecutor to disclose the case material to the accused, the court referred to the information in the police docket, which showed the complainant was indeed a prostitute.[49] Against that background, the court held that the prosecutor's failure to disclose that information to the trial court in time and to the appellants "was most certainly gross".[50] The court added:

> "If the prosecutor concerned acted deliberately in omitting or failing to disclose the aforementioned discrepancies to the court and to the defence, the requirement of *animus iniuriandi* would be established. On the other hand, if the prosecutor acted negligently, then liability can only arise where the circumstances give rise to a legal duty to avoid negligently causing harm."[51]

The court discussed in detail the relevant South African case law on negligence, wrongfulness and causation (in the law of delict),[52] and held:

> "The general principle of the law of delict is that loss is recoverable only if it was factually caused by a defendant's wrongful and culpable conduct. One purpose of the law of delict is to encourage those who commit delict to admit their liability and to pay damages to their victims without the need for lengthy, divisive and prohibitive expensive litigation."[53]

The court added that it had to apply the "but-for-test" to determine whether the prosecutor's failure to disclose the material information caused the appellants' conviction.[54] The court summarised the evidence given by the prosecution at the appellants' trial, explaining how they had committed the offences and also the circumstances in which they were arrested by the police (immediately after committing the offence).[55] Against that background, the court held that

> "[t]he claim by the appellants that if the information contained in the docket had been made available to them they would have used it such that they would have been acquitted goes too far."[56]

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46 *Ibid*.
47 *Nohour v Minister of Justice and Constitutional Development supra* par 8.
48 *Ibid.*
49 *Nohour v Minister of Justice and Constitutional Development supra* par 10.
50 *Ibid*.
51 *Nohour v Minister of Justice and Constitutional Development supra* par 11.
52 *Nohour v Minister of Justice and Constitutional Development supra* par 12–17.
53 *Nohour v Minister of Justice and Constitutional Development supra* par 17.
54 *Nohour v Minister of Justice and Constitutional Development supra* par 18.
55 *Nohour v Minister of Justice and Constitutional Development supra* par 19–23.
56 *Nohour v Minister of Justice and Constitutional Development supra* par 24.

This was so, the court explained, because the trial court had not ruled out the possibility that the complainant was a prostitute and also that there was other evidence to corroborate the complainant's testimony.[57] The court added that the evidence before the trial court was "not reconcilable with consensual sex, whether for reward or otherwise".[58] The court added that it would have been speculative of it to conclude that had the fact that the complainant was a prostitute been disclosed to the appellant and they cross-examined her on that, they would have been acquitted.[59] The court also added that the prosecution had disclosed to the trial court that the complainant was a prostitute.[60] Against that background, the court concluded:

> "The submission that the appellants would never have been convicted but for the prosecutor's non-disclosure lacks substance. There are no facts established by evidence advanced that support the assertion that they would have been acquitted but for the omission by the prosecution. They failed the test for factual causation which is the condition *sine qua non*. The appellants have thus failed to produce evidence that the prosecutor's conduct 'caused or materially contributed to' the harm suffered. The wrongful act on the part of the prosecution has not been proved to be linked sufficiently closely or directly to the loss alleged to have been suffered by the appellants. There is no causal link proved. The appeal must clearly fail. The *ex turpi causa non oritur actio* maxim, accepting that it is part of our law, had no application on the facts of this case. But having regard to the conclusion to which I have come, nothing more need be said about it."[61]

The facts and finding of the case show that for a person to be compensated for wrongful conviction, he or she has to prove the link between the wrongful act of the prosecutor and the conviction. In other words, he or she had to prove that the "prosecutor's conduct 'caused or materially contributed to' the harm suffered". Failure to do so will result in the case being dismissed. This judgment shows that in the South African law of delict there is still the possibility for a person who has been convicted wrongfully to be compensated for such conviction. However, he or she has to meet all the requirements as stipulated by the Supreme Court of Appeal. The question to be answered is whether this approach complies with article 14(6) of the ICCPR. Although article 14(6) of the ICCPR provides that the right to compensation should be "according to law", such a law should not defeat the purpose of this provision. Article 14(6) provides for the right to compensation if there has "been a miscarriage of justice" and that right falls away when it is "proved that the non-disclosure of the unknown fact in time is wholly or partly attributable" to the convicted person. Neither the drafting history of article 14(6) nor its literal interpretation require the applicant to prove that his wrongful conviction is attributable to a wrongful act by a state official (for example, prosecutor, judge or police officer).[62] The applicant is also not required to prove that he or she was innocent of the offence of which they

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57 *Nohour v Minister of Justice and Constitutional Development supra* par 24–25.

58 *Nohour v Minister of Justice and Constitutional Development supra* par 25.

59 *Nohour v Minister of Justice and Constitutional Development supra* par 26.

60 *Nohour v Minister of Justice and Constitutional Development supra* par 27.

61 *Ibid*.

62 See generally, Mujuzi "The Right to Compensation for Wrongful Conviction/Miscarriage of Justice in International Law" 2019 8 *International Human Rights Law Review* 215–244.

were convicted.[63] All that is required for the applicant to be compensated under article 14(6) is that they were wrongfully convicted. The argument by the Philippine,[64] French[65] and Israeli[66] delegates that article 14(6) should expressly provide that for a person to be compensated for miscarriage of justice, he or she had to be innocent of the offence of which they had been convicted was rejected by the drafters of the ICCPR. Likewise, the argument that a person should only be compensated after "a retrial of the case in which such new material [new or newly discovered fact] was taken into consideration" was rejected.[67] The right falls away if the wrongful conviction is attributable to that person's non-disclosure of the relevant facts. Even then, one should not forget that an accused has the right to remain silent under section 35(3) of the Constitution.[68] In simple terms, the law of delict, to the extent that it requires the victim of a wrongful conviction to prove causation on the part of any government official, falls short of what is required under article 14(6) of the ICCPR. This means that if legislation is not enacted to provide expressly for the right to wrongful conviction, courts may have to invoke their powers under sections 8, 39(2) and 173 of the Constitution and develop the common law. This issue is discussed in detail below. This raises the further related question of whether there is another route through which a person who has been wrongfully convicted can be compensated.

3 2 The Criminal Procedure Act route

Section 327 of the CPA provides:

> " (1) If any person convicted of any offence in any court has in respect of the conviction exhausted all the recognized legal procedures pertaining to appeal or review, or if such procedures are no longer available to him or her, and such person or his or her legal representative addresses the Minister by way of petition, supported by relevant affidavit, stating that further evidence has since become available which materially affects his or her conviction, the Minister may, if he or she considers that such further evidence, if true, might

63 Mujuzi 2019 *International Human Rights Law Review* 215–244.

64 Draft International Covenant on Human Rights and Measures of Implementation: The General Adequacy of the Provisions Concerning Civil and Political Rights: memorandum by the Secretary-General, E/CN.4/528/Add.1 (20 March 1952) par 95.

65 UN General Assembly, 14th Session, 3rd committee, 964th meeting, (A/C.3/SR.964) (23 November 1959) par 24. The French delegate had argued that article 14(6) should provide that ["'t]he judicial recognition of the innocence of a convicted person shall confer on him the right to request the award of damages in respect of the prejudice caused him by the conviction.'"

66 UN General Assembly, 14th Session, 3rd committee, 967th meeting, (A/C.3/SR.967) (25 November 1959) par 11. Israel argued that "that the right to payment of compensation should be recognized in two cases only: when the real offender had voluntarily confessed his crime and there was no reason to doubt the truth of his confession; and when it was irrefutably proved that the act for which a person had been convicted had never taken place."

67 *Draft International Covenant on Human Rights and measures of implementation: the general adequacy of the provisions concerning civil and political rights: memorandum by the Secretary-General*, E/CN.4/528/Add.1 (20 March 1952) par 94 (Israel).

68 For the consequences of remaining silent at an accused's trial, see *S v Boesak* 2001 (1) BCLR 36; 2001 (1) SA 912.

reasonably affect the conviction, direct that the petition and the relevant affidavits be referred to the court in which the conviction occurred.

(2) The court shall receive the said affidavits as evidence and may examine and permit the examination of any witness in connection therewith, including any witness on behalf of the State, and to this end the provisions of this Act relating to witnesses shall apply as if the matter before the court were a criminal trial in that court.

(3) Unless the court directs otherwise, the presence of the convicted person shall not be essential at the hearing of further evidence.

(4) (*a*) The court shall assess the value of the further evidence and advise the President whether, and to what extent, such evidence affects the conviction in question.

(*b*) The court shall not, as part of the proceedings of the court, announce its finding as to the further evidence or the effect thereof on the conviction in question.

(5) The court shall be constituted as it was when the conviction occurred or, if it cannot be so constituted, the judge-president or, as the case may be, the senior regional magistrate or magistrate of the court in question, shall direct how the court shall be constituted.

(6) (*a*) The State President may, upon consideration of the finding or advice of the court under subsection (4) –

(i) direct that the conviction in question be expunged from all official records by way of endorsement on such records, and the effect of such a direction and endorsement shall be that the person concerned be given a free pardon as if the conviction in question had never occurred; or

(ii) substitute for the conviction in question a conviction of lesser gravity and substitute for the punishment imposed for such conviction any other punishment provided by law.

(*b*) The State President shall direct the Minister to advise the person concerned in writing of any decision taken under paragraph (*a*) … and to publish a notice in the Gazette in which such decision … is set out.

(7) No appeal, review or other proceedings of whatever nature shall lie in respect of–

(*a*) a refusal by the Minister to issue a direction under subsection (1) or by the State President to act upon the finding or advice of the court under subsection (4)(*a*); or

(*b*) any aspect of the proceedings, finding or advice of the court under this section."[69]

The Minister can only invoke section 327 when the case has merit.[70] No court has the power to release on bail a person whose application is being considered under section 327.[71] However, a court may stay the issue of the warrant of arrest in execution of a sentence it imposed if it is considering the application to reopen the sentenced person's case in terms of section 327.[72] In *Liesching v S*,[73] the Constitutional Court held that "[t]he procedure in section 327 of the CPA [Criminal Procedure Act] is not an appeal"[74] and that the section is "geared at preventing an injustice".[75] The court added:

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69 For a brief explanation of the circumstances in which s 327 was included in the Criminal Procedure Act, see *Hoosain v Attorney General, Cape* (1) 1988 (4) SA 137 (C).

70 *S v Nofomela* 1992 (1) SA 740 (AD) par 26.

71 *S v Hlongwane* 1989 (4) SA 79 (T); *Chunilall v Attorney General, Natal* 1979 (1) SA 236 (D).

72 *S v Titus* 1984 (1) SA 505 (C); *Masuku v Minister van Justisie* 1990 (1) SA 832 (A) (this is done by way of interdict).

73 2017 (4) BCLR 454 (CC); 2017 (2) SACR 193 (CC).

74 *Liesching v S supra* par 59.

75 *Liesching v S supra* par 60.

> "Section 327(1) applies after the appeal processes are spent and permanently closed. The section 327 procedure is also not a substitute for an appeal. It is a process beyond the appeal stage that is meant to be the final net in order to avoid a grave injustice."[76]

This is also the spirit of article 14(6) of the ICCPR. It only comes into effect once the appeal window has been closed.[77] It has been argued that section 327 has many weaknesses.[78] However, for the purpose of this article, two observations should be made. First, the section is silent on the issue of compensation. All that the President is empowered to do under the section is to grant the person in question a free pardon. Secondly, a person who has been pardoned is also barred from instituting a civil suit against the government for compensation for the wrongful conviction. This can be inferred from section 327(7)(*b*). This means that even if the court's advice to the President is based on the fact that the new evidence shows that the person in question did not commit the offence, such a person is barred from instituting a civil claim against the government. Whether or not section 327 can pass constitutional scrutiny for ousting the jurisdiction of any court to scrutinise the decision made by the President or the Minister is highly doubtful. This is because it has the effect of putting the President or the Minister above the law. Section 327(7) also violates the right of access to courts under section 34 of the Constitution.[79] The above discussion illustrates that the legal position in South Africa is that a person who has been wrongfully convicted has one of two options: the delict route or the route using section 327 of the CPA. The weaknesses inherent in each of them have been highlighted. It is now imperative to discuss these remedies in light of South Africa's obligation under article 14(6) of the ICCPR.

4 SOUTH AFRICA'S OBLIGATION UNDER ARTICLE 14(6) OF THE ICCPR

As mentioned earlier, article 14(6) of the ICCPR provides:

> "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

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76 *Ibid*.

77 Nowak *UN Covenant on Civil and Political Rights: Commentary* (1993) 269–273; Bossuyt *Guide to the "Travaux Préparatoires" of the International Covenant on Civil and Political Rights* (1987) 311 314.

78 For a detailed discussion of these weaknesses and also the fact that the section has never been triggered by the Minister (despite the numerous applications reportedly submitted to him/her), see Shumba "Litigating Innocence: The Problem of Wrongful Convictions and Absence of Effective Post-Conviction Remedies in South Africa" 2017 *South African Journal of Criminal Justice* 179–197.

79 S 34 of the Constitution of South Africa provides that "[e]veryone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum".

For a person to qualify for compensation under article 14(6), the following requirements have to be satisfied: the decision must be final; the person's conviction must have been reversed or they must have been pardoned on the basis of a new or newly discovered fact showing that there was a miscarriage of justice; and the person must have suffered punishment. The Human Rights Committee has developed rich jurisprudence on article 14(6) but it is beyond the scope of this article to discuss that jurisprudence, which has been discussed by other scholars.[80] However, what is important for the purpose of this article is that under article 14(6) of the ICCPR, a person whose conviction has been reversed or who has been pardoned on the ground of a miscarriage of justice has a right to be compensated. As contemplated in article 14(6), compensation should be automatic once a conviction has been reversed or a person has been pardoned on the basis of a miscarriage of justice. The law in question (as contemplated in article 14(6)) should provide, for example, for the procedure to be followed for a person to be compensated, the government body or organ responsible for the compensation (this could be a court, a commission or an official) and the amount to be compensated depending on the particular circumstances of each case.[81] The law should not require the victim of a miscarriage of justice to institute a civil claim and prove, for example, causation on the part of any government official. The drafting history of article 14(6) shows that the delegates rejected the argument that the victim of a miscarriage of justice should be required to prove their innocence before compensation. They also never contemplated that such a victim should prove causation on the part of the government before compensation becomes payable. The condition that the victim of a miscarriage of justice should be required to prove their innocence has also been rejected by the Human Rights Committee (the enforcement body of the ICCPR).[82] The European Court of Human Rights has also held that the right to compensation is a civil right within the meaning of article 6 of the European Convention of Human Rights and can only be derogated from in clear circumstances under the Convention.[83] As the discussion below illustrates, in some jurisdictions where the right to compensation under article 14(6) has been included in domestic law, compensation is automatic once a conviction has been reversed and a victim meets the requirements set by domestic law. However, if the law of delict approach is followed, as is the case in South Africa today, such a person has the right to seek compensation. This means that such a person has to institute a civil claim and prove all the required elements of delict as explained by the Supreme Court of Appeal for them to qualify for compensation. In effect, the right to seek compensation can only be realised by those who have the resources to institute civil claims. This is against the

80 For a detailed and recent discussion of this jurisprudence, see Mujuzi 2019 *International Human Rights Law Review* 215–244.

81 A similar approach is followed in some European countries. See, for e.g., *Ryan, Re Application for Judicial Review* [2021] NICA 42 par 34–46.

82 Human Rights Committee *Concluding Observations on the Seventh Periodic Report of the United Kingdom of Great Britain and Northern Ireland* CCPR/C/GBR/CO/7 (17 August 2015).

83 *Georgiadis v Greece* (1997) 24 EHRR 606; *Humen v Poland* (2001) 31 EHRR 53. For a contrary view, see *Kay (on the application of) v Secretary of State for Justice supra* par 54–63.

letter and spirit of article 14(6) of the ICCPR, especially in light of the fact that once a person's conviction has been reversed, that person ceases to have a criminal record. As the Constitutional Court held in *Maswanganyi v Minister of Defence and Military Veterans*:[84]

> "The effect of a conviction and sentence being overturned is distinguishable from a pardon, in that once the conviction and sentence have been set aside, the fact of the conviction and sentence are wiped out. They are treated as never having occurred. On the other hand, a pardon … does not confer on the perpetrator immunity from untrammelled discussion of the deeds that led to his/her conviction and from the moral opprobrium that some continue to attach to those deeds. Importantly, a pardon does not render untrue the fact that the perpetrator was convicted or expunge the deed that led to his or her conviction. Those remain historically true."[85]

This finding, on the issue of a pardon, should be understood to be applicable to a pardon granted by the President to a person whose conviction was valid.[86] In other words, it should not apply to a pardon granted to a person on the basis of a wrongful conviction as contemplated in article 14(6) of the ICCPR (the free pardon) and section 327 of the CPA. The obvious weakness with the section 327 procedure is that even if the person is pardoned, he or she does not have the right to be compensated. This then raises the question of what South Africa has to do to comply with article 14(6) of the ICCPR. It is to this issue that we turn.

5 COMPLYING WITH ARTICLE 14(6) OF THE ICCPR

Research shows that in order to give effect to article 14(6) of the ICCPR, countries have adopted three different approaches. The first is to include such a right in the Constitution. The second approach is to include it in a piece of legislation, and the third is to include it in a policy manual or document (guidelines/directives).[87] On the issue of compensation, in some countries, for a person to be compensated, they must prove that they are innocent whereas, in others, once a conviction has been set aside, compensation will follow.[88] In some countries, the issue of compensation is determined by a relevant government ministry or body, whereas in others compensation is ordered by the court.[89] The fact that a country has included article 14(6) of the ICCPR in its constitution does not mean that in practice everyone who has been wrongfully convicted has a right to be compensated. For example, in Hong Kong, the Constitution provides for the right to compensation for wrongful conviction (for those who are innocent).[90]

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84 2020 (4) SA 1 (CC); 2020 (6) BCLR 657 (CC).

85 Par 42.

86 The powers and functions of the President of South Africa under s 84(2) of the Constitution include "pardoning or reprieving offenders and remitting any fines, penalties or forfeitures".

87 Mujuzi 2019 *International Human Rights Law Review* 225.

88 Mujuzi 2019 *International Human Rights Law Review* 237–247.

89 *Ibid*.

90 Article 11(5) of the Hong Kong Bill of Rights Ordinance (Cap 383) provides: "When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person

However, in cases where the conviction was wrongful because, for example, the trial was unfair, the compensation is made *ex gratia*.[91]

The above discussion shows that to give effect to article 14(6) of the ICCPR, South Africa has three different options to consider: one, amend the Constitution to include this right; two, include it in a piece of legislation, for example, the CPA; and three, develop guidelines to the same effect. In the author's view, including this right in a piece of legislation is the most feasible alternative. This is because amending the Constitution is a long process;[92] and including such a right in guidelines would raise the issues of the binding nature of such guidelines. In other words, it should be made a statutory right. This will not be the first time a statutory right is provided for in South Africa.

The South African Constitution provides for four categories of rights: (1) rights provided for in the Bill of Rights; (2) common-law rights; (3) customary law rights; and (4) statutory rights.[93] The Supreme Court of Appeal has emphasised the importance of statutory rights[94] and has explained that there is no "rule that a statutory right is stronger than a common-law right".[95] South Africa has also passed legislation to give effect to international human rights obligations and these pieces of legislation include rights that are protected in such treaties.[96] South African legislation shows that rights have been provided for in different pieces of legislation – for example, the right to a survivor's lump sum benefit,[97] consumer rights,[98] the right to benefits,[99] the right to be demobilised,[100] employees' right to leave a dangerous working place,[101] and the right of hot pursuit by sea.[102] There are also rights in the CPA – for example, third-party rights in property ordered to be forfeited to the State,[103] the right to be tried before another judicial officer should the prosecutor and accused withdraw from the plea and sentence agreement,[104] the right to legal representation,[105] the right of

who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him."

91 *HKSAR v Chan Shu Hung* [2011] HKCFI 1853; [2012] 2 HKLRD 424; HCMA 425/2011 (20 December 2011) par 53–55.

92 See s 74 of the Constitution.

93 S 39(3) of the Constitution provides: "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

94 *Agri South Africa v Minister for Minerals and Energy (Afriforum and others as amici curiae)* 2013 (7) BCLR 727 (CC); *Xstrata South Africa (Pty) Ltd v SFF Association* 2012 (5) SA 60 (SCA) par 10.

95 *Lester v Ndlambe Municipality* 2015 (6) SA 283 (SCA) par 23.

96 See for e.g., the Children Act 38 of 2005.

97 S 2 of the Special Pensions Act 69 of 1996.

98 Ss 13–22 of the Consumer Protection Act 68 of 2008; see also ss 60–63 of the National Credit Act 34 of 2005.

99 Ss 12–18 of the Unemployment Insurance Act 63 of 2001.

100 S 5 of the Demobilisation Act 99 of 1996.

101 S 23 of the Mine Health and Safety Act 29 of 1996.

102 S 747 of the Customs Control Act 31 of 2014.

103 S 35 of the CPA.

104 S 150A(9)(*d*) of the CPA.

105 S 73(2A) of the CPA.

statutory bodies to institute private prosecution,[106] the right to institute bail proceedings,[107] the right of complainants to make representations in some cases where an offender is being considered for parole,[108] and the right to prosecute.[109]

However, the pressing question of who qualifies for compensation still has to be addressed in such legislation. As mentioned above, case law from the United Kingdom shows that there are generally four categories of people that come into the picture where the issue of compensation for wrongful conviction is raised.[110]

Based on the above four categories, the Supreme Court of the United Kingdom held that for a person to qualify for compensation on the basis of a miscarriage of justice/wrongful conviction, they had to fall into one of the following two categories: either being innocent of the offence of which they had been convicted or "cases where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it".[111] As mentioned above, article 14(6) of the ICCPR does not require that a person be innocent of the offence of which they were convicted before they can be compensated.

Although the above guidelines had been part of the UK case law for many years,[112] the Human Rights Committee did not take issue with them. In 2015, the Human Rights Committee raised concern over the UK's amendment to legislation to provide that a person qualified for compensation where there was a miscarriage of justice "if and only if the new or newly discovered fact shows beyond reasonable doubt that the person did not commit the offence" – in effect, providing for compensation only under category one above. In its Concluding Observation on the UK's Periodic Report, the Human Rights Committee stated that it was "concerned that the new test for miscarriage of justice, introduced in 2014, may not be in compliance with article 14(6) of the Covenant".[113] Against that background, the Committee recommended that the UK government should "[r]eview the new test for miscarriage of justice

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106 S 8 of the CPA.

107 S 50(1)(*b*) of the CPA.

108 S 299A of the CPA. Cases in which this section has been invoked include *Madonsela v S* [2014] ZAGPPHC 1013; *Derby-Lewis v Minister of Correctional Services* 2009 (6) SA 205 (GNP), 2009 (2) SACR 522 (GNP), [2009] 3 All SA 55 (GNP).

109 S 18 of the CPA.

110 *Hallam, R (on the application of) v Secretary of State for Justice supra* par 18.

111 See generally, *R (Adams) v Secretary of State for Justice (JUSTICE intervening)* [2011] UKSC 18. However, the UK law was amended later to water down the Supreme Court's judgment. In terms of the law as it stands now, a person has to prove his innocence before they can be compensated. In *Hallam, R (on the application of) v Secretary of State for Justice supra*, the United Kingdom Supreme Court held that requiring a person to prove their innocence before they can be compensated for wrongful conviction does not violate the right to be presumed innocent under article 6 of the European Convention on Human Rights.

112 At least since the decision in *R (Adams) v Secretary of State* [2012] 1 AC 48. See also *Nkiwane, R (on the application of) v The Secretary of State for Justice* [2015] EWHC 2899 (Admin).

113 Human Rights Committee *Concluding Observations on the Seventh Periodic Report of the UK* 6.

with a view to ensuring its compatibility with article 14(6) of the Covenant".[114] This means that South Africa could adapt and modify the criteria suggested by the UK Supreme Court in determining the classes of people who qualify for compensation.

Case law from African countries in which the right to be compensated for wrongful conviction shows that courts have held that only those innocent of the offences for which they were convicted should be compensated. However, as discussed above, this is not what was contemplated by the drafters of article 14(6) of the ICCPR. For example, article 19(13) of the Constitution of Seychelles provides:

> "Every person convicted of an offence and who has suffered punishment as a result of the conviction shall, if it is subsequently shown that there has been a serious miscarriage of justice, be entitled to be compensated by the State according to law."

In *Sagwe v R*,[115] the Seychelles Court of Appeal, the highest court in the country, held that for a person to qualify for compensation under article 19(13), they had to be innocent of the offence of which they had been convicted. In dismissing the appellant's application for compensation, the court held:

> "The doubts expressed by the [lower] Court did not … mean that the Appellant was innocent, rather that the prosecution had not proved that he was guilty, and the court could not have therefore convicted him."[116]

Likewise, article 14(7) of the Constitution of Ghana[117] provides:

> "Where a person who has served the whole or a part of his sentence is acquitted on appeal by a court, other than the Supreme Court, the court may certify to the Supreme Court that the person acquitted be paid compensation; and the Supreme Court may, upon examination of all the facts and the certificate of the court concerned, award such compensation as it may think fit; or, where the acquittal is by the Supreme Court, it may order compensation to be paid to the person acquitted."

The Supreme Court of Ghana has held in numerous decisions that for a person to qualify for compensation under article 14(7), they should have been innocent of the offence of which they were convicted.[118] For example, in *Russel v Republic*,[119] the appellant who had been convicted and sentenced to prison for dealing in drugs approached the Supreme Court for compensation under article 14(7) of the Constitution. The court held that because his acquittal had been "upon a pure technicality", he did not qualify for compensation.

It is argued that in South Africa, the best approach would be to adapt the criteria suggested by the Supreme Court of the United Kingdom to the effect that a person should qualify for automatic compensation on the basis of a

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114 *Ibid.*
115 [2016] SCCA 15.
116 *Sagwe v R supra* par 30.
117 The Constitution of Ghana (1992).
118 *Sabbah v Republic* [2015] GHASC 10; *Russel v Republic* [2016] GHASC 41.
119 *Supra.*

miscarriage of justice if they fall into one of two categories – namely, either being innocent of the offence of which they have been convicted or "cases where the fresh evidence so undermines the evidence against the defendant that no conviction could possibly be based upon it". However, since the rights of those in categories three and four would also have been violated as a result of prosecution and punishment, the government should also consider compensating them for a violation of their rights. In other words, there could be two categories of compensation scheme: the "statutory scheme" for those under categories one and two above, and the "ex gratia scheme" for those in categories three and four (to the extent that both categories are applicable to the facts of a given case). This approach has been followed in jurisdictions such as Hong Kong.[120] The regulations could require those in categories three and four to motivate why they deserve to be compensated. If they fail to convince the relevant authorities, then they should not be compensated. However, they still retain their right to institute a civil claim for the violation of their rights.

It is also argued that in South Africa, for a person to be compensated for wrongful conviction, it should not be a requirement that their conviction be set aside, or that they have been pardoned after exhausting all the review and appeal avenues. Even if a conviction has been set aside on appeal or review on the ground that there was a wrongful conviction falling into one of the two categories mentioned above, the victim should be compensated for the wrongful conviction. The amount of money to be paid to the victim should depend on several factors developed in the regulations – for example, the number of years spent in prison and the income lost as a result of imprisonment.

Should the legislature or the executive not adopt one of the suggestions above, the judiciary could intervene by developing common law.[121] Section 173 of the Constitution provides:

> "The Constitutional Court, the Supreme Court of Appeal and the High Court of South Africa each has the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice".

Section 8(3) of the Constitution provides:

> "When applying a provision of the Bill of Rights to a natural or juristic person in terms of subsection (2), a court – (*a*) in order to give effect to a right in the Bill, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right; and (*b*) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)."

Section 39(2) of the Constitution states:

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120 Mujuzi 2019 *International Human Rights Law Review* 237–247.

121 In *Songo v Minister of Police* [2022] ZASCA 43 par 11, the court observed that "[t]he real issue in this matter is, seemingly, whether the appellant had a cause of action, and if not, whether the common law should be developed to accord him a cause of action to claim for damages for being convicted and incarcerated when he was innocent of the charges preferred against him … It is, of course, not yet known as to how a trial court will decide the real issue set out above".

> "When interpreting any legislation, and when developing the common law …, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

Section 39(3) provides:

> "The Bill of Rights does not deny the existence of any other rights or freedoms that are recognised or conferred by common law, customary law or legislation, to the extent that they are consistent with the Bill."

The following observations should be made about the combined reading of sections 8, 39 and 173 of the Constitution: (1) a court can develop the common law considering the interests of justice; (2) a court must develop the common law where necessary to give effect to a right in the Bill of Rights; and (3) the Bill of Rights does not deny the existence of common-law rights. The common law (the law of delict) provides for the right to compensation for wrongful conviction on condition that the applicant proves all the elements of delict. Thus, section 39(3) is applicable if compensation in a delictual claim is considered as a right. The Bill of Rights does not provide for the right to compensation for wrongful conviction. Therefore, section 8(3) is not applicable. Section 173 in terms of which courts can develop the common law "taking into account the interests of justice" is also applicable. It is in the interests of justice that a person who has been wrongfully convicted should be compensated, without needing to prove negligence or culpability on the part of any public official, as the conviction led to the violation of constitutional rights.[122] The courts' responsibility to develop the common law in terms of the Constitution is beyond dispute. The common law can only be developed if a court concludes that there is something "wrong with the current position".[123] In *Nkala v Harmony Gold Mining Company Limited*,[124] the court held that "courts have not evaded their responsibility to develop the common law"[125] and that courts have invoked their jurisdiction "to create new obligations, to create new rights, to remove penalties for certain conducts, to eliminate obstacles posed by old and dated practices and to fashion new remedies".[126] The Constitutional Court held:

> "When courts are required to develop the common law or promote access to courts, they must remember that their 'obligation to consider international law when interpreting the Bill of Rights is of pivotal importance'."[127]

The common law must be developed when public policy demands it.[128] Public policy demands that those who have suffered a miscarriage of justice should have a remedy. It is not good enough for them to be released from prison or to have their convictions expunged. They should also be compensated. The Constitutional Court held:

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122 These include the right to liberty (if he was incarcerated).

123 *Masiya v Director of Public Prosecutions Pretoria (The State)* 2007 (5) SA 30 (CC) par 77.

124 [2016] 3 All SA 233 (GJ).

125 Par 196.

126 *Ibid*.

127 *Government of the Republic of Zimbabwe v Fick* 2013 (5) SA 325 (CC) par 66.

128 *Paulsen v Slip Knot Investments 777 (Pty) Limited* 2015 (3) SA 479 (CC) par 55.

> "A development of the common law is necessary where there is a deficiency or a particular rule is inconsistent with the Constitution. The purpose of the development must be to bring the common law in line with our supreme law. Absent this inconsistency, the need to develop the common law does not arise."[129]

As discussed below, there is a deficiency in the law of delict should a victim of a wrongful conviction be required to meet all the requirements for an action for non-patrimonial damages before they can be compensated. In *De Klerk v Minister of Police*,[130] the Constitutional Court held:

> "A delict comprises wrongful, culpable conduct by one person that factually causes harm to another person that is not too remote. When the harm in question is a violation of a personality interest caused by intentional conduct, then the person who suffered the harm must institute the *actio iniuriarum* (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered. The harm that the applicant complains of in respect of his [or her] [wrongful] detention is the deprivation of his [or her] liberty – a significant personality interest."[131]

The court added:

> "A claim under the *actio iniuriarum* for unlawful arrest and detention has specific requirements: (a) the plaintiff must establish that their liberty has been interfered with; (b) the plaintiff must establish that this interference occurred intentionally. In claims for unlawful arrest, a plaintiff need only show that the defendant acted intentionally in depriving their liberty and not that the defendant knew that it was wrongful to do so; (c) the deprivation of liberty must be wrongful, with the onus falling on the defendant to show why it is not; and (d) the plaintiff must establish that the conduct of the defendant must have caused, both legally and factually, the harm for which compensation is sought."[132]

Although, in this case, the court was dealing with the issues of wrongful arrest and detention, the same principles apply for wrongful convictions because in both instances the right not to be deprived of liberty arbitrarily is applicable.[133] For the plaintiff to succeed in a claim, he or she must satisfy all four requirements outlined by the court above. In other words, to use the court's words, a person who has been wrongfully convicted "must institute the *actio iniuriarum* (action for non-patrimonial damages) to claim compensation for the non-patrimonial harm suffered". This is so because a wrongful conviction leads to the violation of a person's right to liberty if they were sentenced to prison. Even if they are not sentenced to prison, a wrongful conviction violates their right to dignity (they are considered a criminal at least until the conviction is expunged). The history of *actio iniuriarum* shows that one of its fundamental objectives is to protect a

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129 *Member of the Executive Council for Health and Social Development, Gauteng v DZ obo WZ* 2018 (1) SA 335 (CC) par 88.

130 2020 (1) SACR 1 (CC); 2021 (4) SA 585 (CC).

131 Par 13.

132 *De Klerk v Minister of Police supra* par 14.

133 See *De Klerk v Minister of Police supra* par 122, where it was held that the right to liberty as protected in the Constitution "enjoyed common-law protection under the *actio iniuriarum*".

person's honour (dignity).[134] As was observed in *De Klerk v Minister of Police*,[135]

> "[t]he *actio iniuriarum* is available where there has been harm to personality interests which cannot be given an economic value. It involves injury to one's *corpus* (person), *dignitas* (dignity) or *fama* (reputation)".[136]

Therefore, the *actio iniuriarum* is invoked for the protection of the rights to liberty and security of the person, privacy and human dignity.[137] It is argued that in cases of wrongful conviction, the common law should be developed so that a plaintiff does not have to prove requirements (b) and (d) above. In other words, the plaintiff should not be required to prove that the interference with their right "occurred intentionally" and that the conduct of the defendant caused his or her conviction factually and legally. This is so because these two requirements are not contemplated in article 14(6). All that article 14(6) requires is that the new or newly discovered fact shows that the conviction was wrongful, and that the person was punished (leading to a violation of rights). Article 14(6) does not even require a victim to adduce evidence of new facts showing that there was a miscarriage of justice. That fact can be discovered by the government itself.[138] As it was argued by one of the delegates during the drafting of the ICCPR, article 14(6):

> "merely stated the elementary principle that a person who had been unjustly sentenced and punished was automatically entitled to compensation, even though the trial had been properly conducted. There could be no objection on the grounds of expense, as the number of such cases was fortunately extremely small. If compensation was not paid in such cases, the public conscience would be revolted."[139]

The drafting history of the ICCPR shows that article 14(6) provides for an automatic right to compensation and that is the argument that article 14(6) 'would provide not for an automatic entitlement to compensation but for the right to make an application for compensation' was rejected.[140] The only ground on which such a person may be denied compensation is if "it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him". By developing the law of delict as suggested above, courts will be giving effect to South Africa's obligations under article 14(6) of the ICCPR and article 85(2) of the Rome Statute of the International Criminal

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134 See generally, Zimmermann *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996) 1050–1094.

135 *Supra*.

136 Par 128. See also *Mahlangu v Minister of Police* 2020 (2) SACR 136 (SCA) par 6.

137 *Mdhlovu v National Director of Public Prosecutions* [2022] ZAMPMBHC 36 par 19; *NM v Smith* 2007 (5) SA 250 (CC) (especially the right to privacy).

138 See for e.g., *Ryan, Re Application for Judicial Review supra* par 3 (the Criminal Cases Review Commission discovered, based on confidential information, that the appellants had been wrongfully convicted and invited them to apply for compensation for wrongful conviction); *Poghosyan and Baghdasaryan v Armenia* [2012] ECHR 980 par 11 (the fact was discovered by the prosecutor).

139 UN General Assembly, 14th Session, 3rd committee, 963rd meeting, (A/C.3/SR.963) (20 November 1959) par 4 (Iraqi delegate).

140 UN General Assembly, 14th Session, 3rd committee, 964th meeting, (A/C.3/SR.964) (23 November 1959) par 24 (French delegate).

Court.[141] Otherwise, South Africa would be invoking its domestic law to defeat its international obligations, which is contrary to article 27 of the Vienna Convention on the Law of Treaties, which provides:

> "A party may not invoke the provisions of its internal law as justification for its failure to perform a treaty."

6 CONCLUSION

In this article, the author has argued that article 14(6) of the ICCPR requires South Africa to enact legislation to provide for the right to compensation for people who have been convicted wrongfully. The drafting history of article 14(6) shows that the drafters were of the view that states parties have an obligation to compensate victims of wrongful convictions. It is because of this that the suggestion by some delegates that each state should have the discretion to decide whether or not to compensate victims of wrongful convictions was rejected.[142] This means that states have an obligation under article 14(6) to compensate such victims That is why the word 'shall' as opposed to "may" is used in Article 14(6). In other words, Article 14(6) is of "obligatory character."[143] It has been argued further that the current legal regime (the law of delict and section 327 of the CPA) do not meet the standard set by article 14(6) of the ICCPR. Relying on practice and jurisprudence from different countries, the author points out the options that South Africa could explore when enacting legislation to give effect to article 14(6) of the ICCPR. It has also been argued that courts will have to develop the common law for the right to compensation for wrongful conviction to be enjoyed by the victims.

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[141] The Constitutional Court has explained that South Africa is required to give effect to its obligations under an international treaty even if it has not yet domesticated that treaty. See *Glenister v President of the Republic of South Africa* 2011 (3) SA 347 (CC) (the majority decision).

[142] UN General Assembly, 14th Session, 3rd committee, 963rd meeting, (A/C.3/SR.963) (20 November 1959) par 1 and 15.

[143] UN General Assembly, 14th Session, 3rd committee, 966th meeting, (A/C.3/SR.966) (24 November 1959) par 7 (Jordan).