

**TRANSFORMATIVE CONSTITUTIONALISM AND
THE VALUE OF HUMAN DIGNITY IN
INTERPRETING LEGISLATION TO PROMOTE
WORKERS' RIGHT TO SOCIAL SECURITY:**

***Knoetze v Rand Mutual Assurance*
[2022] ZAGPJHC 4**

1 Introduction

South Africa is still a country in transition and this is affirmed by the Preamble of the Constitution of South Africa, 1996 (the Constitution), which “recognises the injustices of our past” and makes a commitment to establishing “a society based on democratic values, social justice and fundamental rights” (*Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* [2004] ZACC 15; 2004 (4) SA 490 (CC); 2004 (7) BCLR 687 (CC) par 73). This constitutional commitment enjoins the courts to apply transformative principles to resolve legal problems by taking into account the values of the Constitution to achieve a just, democratic and egalitarian social order (Davis and Klare “Transformative Constitutionalism and the Common and Customary Law” 2010 26(3) *South African Journal on Human Rights* 412). This constitutional aspiration is evident in different parts of the Constitution, including the part that deals with interpretation of legislation in conformity with the spirit, purport and object of the Bill of Rights as in section 39(2) of the Constitution. The following case extract is instructive in this regard:

“This means that all statutes must be interpreted through the prism of the Bill of Rights ... The Constitution is located in a history which involves a transition from a society based on division, injustice and exclusion from the democratic process to one which respects the dignity of all citizens.” (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors (Pty) Ltd In re: Hyundai Motor Distributors (Pty) Ltd v Smit NO* [2000] ZACC 12; 2000 (10) BCLR 1079; 2001 (1) SA 545 (CC) par 21; see also *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 72; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC) par 181)

This extract is also indicative of the fact that the achievement of transformative constitutionalism when interpreting legislation in line with the Constitution is partly dependent on the promotion of the value of human dignity. This legal position has recently been given effect to by the Constitutional Court in the case of *Mahlangu v Minister of Labour* ([2020] ZACC 24; 2021 (1) BCLR 1 (CC); [2021] 2 BLLR 123 (CC); (2021) 42 *ILJ* 269 (CC); 2021 (2) SA 54 (CC)). In this case, the Constitutional Court

reiterated the importance of transformative constitutionalism (*Mahlangu v Minister of Labour supra* par 55) and the value of human dignity (*Mahlangu v Minister of Labour supra* par 56) when it found, among other things, that section 1 of the Compensation for Occupational Injuries and Diseases Act (130 of 1993) (COIDA) was unconstitutional for violating workers' right to social security. (This finding was based on the fact that s 1 of COIDA excluded domestic workers from the "employee" definition for the purposes of claiming compensation emanating from occupational injuries).

It is against this background that this note analyses the extent to which transformative constitutionalism and the value of human dignity also serves as the basis for the court's judgment in the case of *Knoetze v Rand Mutual Assurance* ([2022] ZAGPJHC 4) (*Knoetze*), despite the fact that the court did not acknowledge these constitutional features in its judgment. This case note does not intend to analyse the manner in which the court interpreted COIDA to promote workers' right to social security. Instead, it investigates the extent to which transformative constitutionalism and the value of human dignity could also serve as a rationale for the judgment of the court. The first part of this note analyses transformative constitutionalism and the value of human dignity when interpreting legislation to promote the right to social security. The second part dissects the case of *Knoetze v Rand Mutual Assurance*, and the third and last part analyses the extent to which transformative constitutionalism and the value of human dignity could serve as a basis for the judgment of the court, even though the court did not refer to them in its judgment.

2 Transformative constitutionalism and the value of human dignity in interpreting legislation to promote workers' right to social security

The interpretation of legislation to promote workers' right to social security requires consideration of transformative constitutionalism and the value of human dignity. After all, section 39(2) of the Constitution requires the courts to interpret legislation in conformity with the spirit, purport and object of the Bill of Rights, taking into account transformative constitutionalism and the value of human dignity (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* par 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 72; *Du Plessis v De Klerk supra* par 181; *Mahlangu v Minister of Labour supra* par 49). This legal obligation remains relevant despite the fact that there is no universal definition of the terms "transformative constitutionalism" (Kibet and Fombad "Transformative Constitutionalism and the Adjudication of Constitutional Rights in Africa" 2017 17(2) *African Human Rights Law Journal* 354) and "human dignity" (Steinmann "The Core Meaning of Human Dignity" 2016 19 *PER/PELJ* 2, citing the case of *Harksen v Lane* 1998 (1) SA 300 (CC) par 50), and despite the fact that transformative constitutionalism is not immune to criticism (Kibet and Fombad 2017 *African Human Rights Law Journal* 353; Roux "Transformative Constitutionalism and the Best Interpretation of the South African Constitution: Distinction Without a Difference?" 2009 2 *Stellenbosch Law Review* 260; Van Marle "Transformative Constitutionalism

as/and Critique” 2009 *Stell LR* 293). For instance, when finding section 1 of COIDA unconstitutional for excluding domestic workers from the “employee” definition for the purposes of claiming compensation emanating from occupational injuries, the Constitutional Court considered transformative constitutionalism and the value of human dignity in *Mahlangu v Minister of Labour* (*supra* par 55 and 56). Taking these constitutional features into account, among other things, the Constitutional Court found that section 1 of COIDA violated workers’ right to social security by excluding domestic workers from the “employee” definition for the purposes of claiming compensation emanating from occupational injuries. (Workers’ right to social security is guaranteed by section 27(1)(c) and (2) of the Constitution, which provides:

“(1) Everyone has the right to have access to ... (c) social security, including, if they are unable to support themselves and their dependants, appropriate social assistance. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights.”)

Consideration of transformative constitutionalism when interpreting COIDA to promote workers’ right to social security can be deduced from the following extracts:

“So, when determining the scope of socio-economic rights, it is important to recall the transformative purpose of the Constitution which seeks to heal the injustices of the past.” (*Mahlangu v Minister of Labour supra* par 55)

“[T]his right covers social security assistance for those in need of support and sustenance due to an injury or disease that is work-related or the death of a breadwinner as a result of such injury or disease.” (*Mahlangu v Minister of Labour supra* par 48 and 52)

“Domestic workers are the unsung heroines in this country and globally. They are a powerful group of women whose profession enables all economically active members of society to prosper and pursue their careers... domestic work as a profession is undervalued and unrecognised; even though they play a central role in our society.” (*Mahlangu v Minister of Labour supra* par 1 and 2)

For one thing, these extracts are consistent with the essential aspects of transformative constitutionalism as described by Klare, who argues that transformative constitutionalism is a

“long-term project of constitutional enactment, interpretation, and enforcement committed (not in isolation, of course, but in a historical context of conducive political developments) to transforming a country’s political and social institutions and power relationships in a democratic, participatory, and egalitarian direction.” (Klare “Legal Culture and Transformative Constitutionalism” 1998 *South African Journal on Human Rights* 150)

(Davis and Klare (2010 *SAJHR* 412) acknowledge this assertion when they argue that transformative constitutionalism employs a legal methodology informed by the values and aspirations of the Bill of Rights and specifically by the constitutional aspiration to lay the legal foundations of a just, democratic, and egalitarian social order). These extracts represent not only the consideration of a historical context of women employees that had to be

transformed, but they also give effect to the transformative-constitutionalism obligation to apply the law in a manner that achieves social justice (Langa “Transformative Constitutionalism” 2006 17 *Stellenbosch Law Review* 351; Kibet and Fombad 2017 *African Human Rights Law Journal* 353).

Consideration of the value of human dignity when interpreting COIDA to promote workers’ right to social security can be deduced from the following extract:

“The approach to interpreting the rights in the Bill of Rights and the Constitution as a whole is purposive and generous and gives effect to constitutional values.” (*Mahlangu v Minister of Labour supra* par 55)

The judgment cites section 1 of the Constitution, which sets out our founding values: “The Republic of South Africa is one sovereign, democratic state founded on the following values: (a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.” The court goes on to state:

“[A]rising from the founding values, one of the aims of the Constitution is to heal the divisions of the past, improve the quality of life of all citizens and free the potential of each person.” (*Mahlangu v Minister of Labour supra* par 4 and 5)

“It is unassailable that the inability to work and sustain oneself ... subjects the worker to a life of untold indignity. The interpretative injunction in section 39(1)(a) of the Constitution demands that this indignity and destitution be averted.” (*Mahlangu v Minister of Labour supra* par 56)

The foregoing extracts are representative of the contention that human dignity “is a value that informs the interpretation of many, possibly all, other rights” (*Khosa v Minister of Social Development, Mahlaule v Minister of Social Development* [2004] ZACC 11; 2004 (6) SA 505 (CC); 2004 (6) BCLR 569 (CC) par 41), and that the realisation of the social transformation objectives of the Constitution that include human dignity cannot be underestimated (Fuo “The Significance of the Constitutional Values of Human Dignity, Equality and Freedom in the Realisation of the Right to Social Protection in South Africa” Paper presented to session of the ANCL Working Group on Social and Economic Rights in Africa at ANCL Annual Conference, Rabat, Morocco 2–5 February 2011), even though there is uncertainty about the definition of the concept of human dignity. (According to, Steinmann 2016 *PER/PELJ* 2, citing the case of *Harksen v Lane supra* par 50, uncertainty about the definition of the concept of human dignity poses some difficulties for the courts because of its lack of precision and elaboration). These extracts also reflect the following elements of human dignity emanating from South African and German courts: First, they represent the ontological claim that a person, having inherent dignity, has unique qualities that are priceless and cannot be replaced (Steinmann 2016 *PER/PELJ* 6, citing *S v Lawrence* 1997 (4) SA 1176 (CC) par 168). Secondly, treatment that goes against not only the individual expectations but also the perceptions of a person’s community is inconsistent with human dignity (Steinmann 2016 *PER/PELJ* 6, citing McCrudden “Human Dignity and Judicial Interpretation of Human Rights” 2008 19 *EJIL* 679). Thirdly,

human dignity includes the provision of minimum living conditions embodied in social and economic human rights (Steinmann 2016 *PER/PELJ* 6, citing McCrudden “Human Dignity and Judicial Interpretation of Human Rights” 2008 19 *EJIL* 679). This includes the importance of coming to the aid of the needy and vulnerable by taking into account their dignity and ensuring that the basic necessities of life are accessible to all to enable a life of dignity (*Khosa v Minister of Social Development*, *Mahlaule v Minister of Social Development supra* par 52; *Mahlangu v Minister of Labour supra* par 63).

Having thoroughly analysed the relevance of transformative constitutionalism and the value of human dignity when interpreting COIDA to promote workers’ right to social security, it is now opportune to analyse the case of *Knoetze*.

3 *Knoetze v Rand Mutual Assurance*

3 1 Background of the case

The case concerned Mr Knoetze (appellant), who had spent a period of 39 years working on the gold mines in the Orange Free State and who had launched a claim for compensation against the respondent, Rand Mutual Assurance (an entity licensed in terms of section 30 of COIDA for the purposes of assessing and making payment of claims for compensation in relation to occupational injuries or diseases arising out of employment in the mining sector).

Section 30 of COIDA provides:

“(1) The Minister may, for such period and subject to such conditions as he may determine, issue a licence to carry on the business of insurance of employers against their liabilities to employees in terms of this Act to a mutual association which was licensed on the date of commencement of this Act in terms of section 95(1) of the Workmen’s Compensation Act: Provided that the Minister may, from time to time, order that, in addition to any securities deposited in terms of the Insurance Act, 1943 (Act No. 27 of 1943), and the Workmen’s Compensation Act, securities considered by the commissioner to be sufficient to cover the liabilities of the mutual association in terms of this Act be deposited with the commissioner.

(2) Subject to the provisions of subsection (4), a security so deposited shall be used solely for making good the default of the association concerned in respect of any liability of an employer in terms of this Act, and for payment of any expenses lawfully incurred in connection with such making good or the enforcement of such liability.

(3) The Minister may from time to time determine the conditions upon which, the way and the period within which any such security shall be made available to a person entitled to payment therefrom.

(4) If the Minister is satisfied that the whole or any portion of such security is no longer necessary and that the association concerned is not in a position to incur a liability payable therefrom, he shall cause such security, or portion thereof, to be returned to such association.

(5) If an association has deposited with the commissioner any such security and thereafter fails to meet in full any of its liabilities in terms of this Act, or is

placed in liquidation, then, notwithstanding the provisions of any other law, such security shall vest in the commissioner for the purpose of the liabilities of the association in terms of this Act.

(6) If at any time the Minister is satisfied that a mutual association has failed to comply with any of the conditions imposed by him under subsection (1), he may suspend or withdraw the licence issued to that association under the said subsection, and no appeal shall lie against his decision.”

The appellant’s claim was based on a hearing impairment that he sustained while working in and on the gold mines. Essentially, the basis for his claim was that sections 65 and 66 of COIDA empower him to institute a claim for compensation for sustaining a hearing impairment without (as per a rebuttable presumption that his hearing impairment arose from or in the course of the scope of employment) having to prove that he contracted a disease while performing his duties.

Section 65 provides:

“(1) Subject to the provisions of this Chapter, an employee shall be entitled to the compensation provided for and prescribed in this Act if it is proved to the satisfaction of the Director-General—
(a) that an employee has contracted an occupational disease.”

Section 66 provides:

“If an employee who has contracted an occupational disease was employed in any work mentioned in Schedule 3 in respect of that disease, it shall be presumed, unless the contrary is proved, that such disease arose out of and in the course of his employment.”

According to the appellant, he sustained a hearing impairment as a result of his exposure to very loud, excessive noise on a daily basis when maintaining and repairing heavy-duty machinery that generated high volumes of noise (par 14). The appellant’s evidence was corroborated, respectively, by the mine-safety inspector and two medical experts (specialist ear, nose and throat surgeons), who indicated that various machines had labels indicating their noise level to be above 85 decibels and that the appellant’s symptoms were consistent with noise-induced hearing loss (NIHL) as a result of his exposure to loud noise throughout his working career on the mines (par 14 and par 16). However, the respondent disputed the appellant’s submission on the basis that the appellant had to show that excessive noise caused the hearing loss.

According to the respondent, “requiring the employee to prove, with evidence, that his work involved exposure to excessive noise does not eviscerate the section 66 presumption” (par 41). The respondent then rejected the claim, and the appellant lodged a notice of objection in terms of section 91(1) of COIDA.

Section 91(1) provides:

“Any person affected by a decision of the Director-General or trade union or employers’ organization of which that person was a member at the relevant time may, within 180 days after such decision, lodge an objection against that decision with the Commissioner in the prescribed manner.”

The appellant's objection was heard by a tribunal consisting of a presiding officer assisted by two assessors. Having gone through the evidence, the tribunal dismissed the appellant's objection on the basis that he had not provided the panel with evidence of how the disease was contracted while working in the mines (par 39).

The appellant, as a result, launched an appeal in the High Court in terms of section 91(5)(a) of COIDA against the decision of the tribunal dismissing his objection to the rejection of his claim for compensation by the respondent. (S 91(5)(a) provides: "Any person affected by a decision referred to in subsection (3)(a) may appeal to any provincial or local division of the Supreme Court having jurisdiction against a decision regarding– (i) the interpretation of this Act or any other law.")

3 2 Legal issue on appeal

The legal issue was whether the tribunal had misinterpreted and thus misapplied the provisions of section 65(1)(a), read with section 66 of COIDA, in dismissing the appellant's objection.

3 3 Decision of the court

The court held that the tribunal had misinterpreted and thus misapplied the provisions of section 65(1)(a), read with section 66 of COIDA. This judgment was based on the fact that the tribunal ignored relevant factual evidence (supported by medical opinion) that the appellant's hearing loss, despite presenting as atypical in certain years, was compatible with NIHL. According to the court, this factual evidence was sufficient to trigger the presumption in section 66 of COIDA, which required the respondent to prove that the appellant's hearing loss did not arise out of and in the course of his employment (par 45). As a result, the court set aside the decision of the tribunal dismissing the appellant's objection to the respondent's rejection of his claim, and ruled that the appellant was entitled to compensation in terms of COIDA (par 60). This decision was based partly on the following factors: a) the respondent did not prove that the appellant's hearing loss did not arise out of and in the course of his employment; b) statutory provisions must be interpreted in a manner that gives effect to the spirit, purport and object of the Bill of Rights; c) in *Mahlangu's* case, the Constitutional Court confirmed that COIDA must now be read and understood within the constitutional framework of section 27 and its objective to achieve substantive equality; and d) the court's interpretation promotes the employee's constitutional right to social security. This is evident in the court's contention:

"It also effectively alleviates the imbalance of power between large employer organisations and individual employees who more often than not lack the resources or the knowledge to prove that their occupational disease was caused by their employment at a particular time and place. This would generally require further costly expert testimony and specific information in the hands of the employer, who may not always willingly part therewith." (par 51)

Having dissected *Knoetze*, it is now appropriate to analyse the extent to which transformative constitutionalism and the value of human dignity could also have served as a basis for the judgment of the court.

4 Transformative constitutionalism and the value of human dignity as a basis for the judgment of the court

This part of the article, as already stated, does not intend to analyse the way that the court interpreted section 65, read together with section 66 of COIDA, to promote the appellant's right to social security. However, it seeks to analyse the extent to which transformative constitutionalism and the value of human dignity could also serve as a basis for the judgment of the court that interpreted COIDA in a manner that promotes the appellant's right to social security. It is submitted that this contention emanates from section 39(2) of the Constitution, which requires the courts to interpret legislation (or sections 65 and 66 of COIDA, in this case) in a manner that promotes the employee's right to social security.

4 1 Transformative constitutionalism

Transformative constitutionalism could serve as a basis for the judgment of the court in *Knoetze* since the court is obliged to interpret legislation to promote the spirit, purport and object of the Bill of Rights in terms of section 39(2) of the Constitution (*Investigating Directorate: Serious Economic Offences v Hyundai Motor Distributors supra* par 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism (supra)* par 72; *Du Plessis v De Klerk supra* par 181). This obligation, in essence, requires the courts to interpret sections 65 and 66 of COIDA in a manner that promotes the appellant's right to social security, irrespective of the fact that COIDA predates the Constitution (this is based on item 2 of Schedule 6 of the Constitution, which makes it clear that "old-order legislation" continues in force subject to its consistency with the Constitution, as enforced by the Constitutional Court in the case of *Mahlangu v Minister of Labour supra* par 49).

The essential elements to consider when interpreting the above-mentioned relevant sections of COIDA to promote the appellant's right to social security in line with transformative constitutionalism include, first, the need for South African courts to transform inadequate social security, which is still being experienced. (In *Soobramoney v Minister of Health (Kwazulu-Natal)* [1997] ZACC 17; 1998 (1) SA 765 (CC); 1997 (12) BCLR 1696 par 8, the court argued that inadequate social security partly determines the application of transformative constitutionalism when interpreting legislation). This sad reality, which requires to be transformed, is evident or has recently been exposed by the Constitutional Court in the case of *Mahlangu v Minister of Labour*, when it found section 1 of COIDA to be unconstitutional on the basis that it did not include domestic workers in the "employee" definition,

thereby denying domestic workers an opportunity to institute a claim for compensation under COIDA (*Mahlangu v Minister of Labour supra*).

Secondly, South African courts are obliged to consider that Mr Knoetze was 59 years old, unemployed and with no income, which rendered him worthy of being classified as needy and vulnerable, or in need of support and sustenance owing to a disease that is work-related (*Mahlangu v Minister of Labour supra* par 48, 51 and 52). (See also the case of *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 52, which held:

“The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational”).

This consideration underlines the importance of interpreting sections 65 and 66 of COIDA for the benefit of the appellant in order to achieve social change (Langa 2006 *Stell LR* 351), or social justice (Kibet and Fombad 2017 *African Human Rights Law Journal* 353).

Thirdly, the transformative nature of section 66 of COIDA must be enforced; the section provides for a rebuttable presumption that an appellant contracted an occupational disease (in this case, hearing loss) while acting within the scope of his employment (probably owing to a lack of resources on the part of an employee). In indirectly acknowledging this reality, the court in *Knoetze* reasoned as follows:

“It also effectively alleviates the imbalance of power between large employer organisations and individual employees who more often than not lack the resources or the knowledge to prove that their occupational disease was caused by their employment at a particular time and place. This would generally require further costly expert testimony and specific information in the hands of the employer, who may not always willingly part therewith.” (par 51)

It is submitted that this extract is an excellent example of a context-sensitive view of transformative constitutionalism in that it takes into account socio-economic considerations for the appellant (Davis and Klare 2010 *SAJHR* 412). In terms of this approach, the appellant would have to be provided with social-security assistance as he was in need of support and sustenance owing to a disease that is work-related (*Mahlangu v Minister of Labour supra* par 48, 51 and 52). In other words, this extract has the effect of considering social justice for the appellant as already initiated by section 66 of COIDA, which considers that the appellant was an unemployed retiree with no income that would enable him to hire experts to prove his case.

Consideration of the foregoing essential elements of transformative constitutionalism is consistent with the court’s acknowledgment that the appellant’s hearing loss, despite presenting as atypical in certain years, was compatible with NIHL, and required the respondent to rebut the presumption that the appellant’s hearing loss arose out of and in the course of the appellant’s employment in terms of section 66 of COIDA (par 45). Thus,

transformative constitutionalism would compel the respondent to rebut this presumption; since the respondent had failed to do so, the appellant would have to be awarded compensation as a result of contracting a hearing loss while discharging his duties.

4 2 The value of human dignity

Apart from transformative constitutionalism, the basis for the court's acknowledgement – that the appellant's hearing loss, despite presenting as atypical in certain years, was compatible with NIHL, and required the respondent to rebut the presumption that the appellant's hearing loss arose out of and in the course of his employment in terms of section 66 of COIDA – was in conformity with the essential element of human dignity. (The basis for this assertion is that the effectiveness of transformative constitutionalism, as already mentioned, is dependent on consideration of constitutional values, which include the value of human dignity. See *Investigating Directorate: Serious Economic Offences v Hyundai Motor supra* par 21; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism supra* par 72; *Du Plessis v De Klerk supra* par 181; *Mahlangu v Minister of Labour supra* par 48.) Pursuant to the need to give specific content to the value of dignity for the appellant in this case (*Matiso v Commanding Officer, Port Elizabeth Prison* 1994 (4) SA 592 (SE) 597 and 598), such an essential element of human dignity, it is submitted, would include but not be limited to the need to ensure that the appellant had access to the basic necessities to live a life of dignity. Such access would translate to financial assistance or compensation for the appellant as a result of a failure by the respondent to rebut the presumption (in terms of section 66 of COIDA) that the appellant's hearing loss arose out of and in the course of his employment. In other words, an award to the appellant of financial assistance in this case would be based on the fact that he ended up not being able to work and sustain himself owing to an ear disease that he contracted while discharging his duties for the respondent (*Mahlangu v Minister of Labour supra* par 63, citing *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 52). Furthermore, it would be based on the respondent's failure to rebut the presumption (in terms of section 66 of COIDA) that the appellant's hearing loss arose out of and in the course of his employment.

This line of reasoning, it is submitted, gives effect to an obligation on the court to prefer a reasonable interpretation of the legislation that is consistent with international law (s 233 of the Constitution). Pursuant to the need to identify and interpret relevant international law (Tladi "Interpretation and International Law in South African Courts: The Supreme Court of Appeal and the Al Bashir Saga" 2016 16(2) *African Human Rights Law Journal* 335) in this regard, a reasonable interpretation of the legislation that is consistent with international law emanates from an interpretation of article 9 of the International Covenant on Economic Social and Cultural Rights (ICESCR) (United Nations General Assembly 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976, which South Africa signed on 3 October 1994 and ratified on 12 January 2015) and article 10 of the Charter of

Fundamental Social Rights in SADC, which guarantees the right to social security (Southern African Development Community *Charter of the Fundamental Social Rights in SADC* (2003) <https://www.sadc.int/document/Charter-Fundamental-Social-Rights-sadc> (accessed 2023-08-05)).

The right to social security in terms of article 9 of the ICESCR includes consideration of human dignity, which consists partly of an obligation to provide benefits to “cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment” (UN Committee on Economic, Social and Cultural Rights (CESCR) *General Comment No 19: The Right to Social Security (Art 9 of the Covenant)* (4 February 2008) E/C.12/GC/19 (2008) Adopted: 23/11/2007; EIF: 04/02/2008 <https://www.refworld.org/docid/47b17b5b39c.html> (accessed 2023-03-01) par 16. This obligation was indirectly reiterated by the Constitutional Court in the case of *Mahlangu v Minister of Labour*, when it argued that “[e]conomic, social and cultural rights, of which the right of access to social security is a part, are indispensable for human dignity and equality” (*Mahlangu v Minister of Labour supra* par 48). On the other hand, the right to social security in terms of article 10 of the Charter of Fundamental Social Rights in SADC incorporates human dignity, which includes the creation of an enabling environment for old people, through social assistance, social insurance or social allowances, to promote measures that would assist in maintaining human dignity and prevention of destitution (SADC *The Code on Social Security in the SADC* (2008) <https://www.sadc.int/document/Code-Social-Security-sadc> (accessed 2023-08-05)). The foregoing interpretation of the right to social security in terms of article 9 of the ICESCR, and article 10 of the Charter of Fundamental Social Rights in SADC, draws inspiration from article 22 of the Universal Declaration of Human Rights (UDHR), which categorically states that the right to social security is indispensable to the dignity of the person in the sense that it is relevant to the protection of a person’s dignity (Simpson, McKeever and Gray “Social Security Systems Based on Dignity and Respect” Equality and Human Rights Commission Report (7 August 2017)).

Apart from the cited international law, justification for the appellant’s access to financial assistance emanates from the following factors: the appellant was an unemployed 59-year-old person who lost an income owing to a disease that rendered him unemployable. It would be difficult if not impossible for the appellant, the court reasoned, to source funds to hire experts to prove his occupational disease was caused by his employment at a particular time and place (par 51). Thus, failure to grant compensation to the appellant would not only subject appellant to a life of untold indignity (*Mahlangu v Minister of Labour supra* par 56) but also amount to a failure by the court to avert the indignity and destitution that emanates from the appellant’s inability to work and sustain himself as a result of the ear disease he contracted while working for the respondent (*Mahlangu v Minister of Labour supra* par 56).

5 Conclusion

According to the Constitutional Court case of *Mahlangu v Minister of Labour* (*supra*), the right to social security includes the right of workers to receive compensation under COIDA. The promotion of workers' right to social security in line with section 39(2) of the Constitution includes consideration of transformative constitutionalism and the value of human dignity when interpreting sections 65 and 66 of COIDA. For this reason, it is submitted, in line with section 39(2) of the Constitution, that transformative constitutionalism and human dignity could serve as a justification for the judgment of the court in *Knoetze*, even though the court's judgment did not refer to these constitutional features.

It is submitted that consideration of transformative constitutionalism as a possible justification for the judgment in *Knoetze* is based on consideration of a context-sensitive view of transformative constitutionalism that takes into account socio-economic considerations (Davis and Klare 2010 *SAJHR* 412). This includes the fact that the appellant had to be provided with social-security assistance as he was in need of support and sustenance owing to a disease that was work-related (*Mahlangu v Minister of Labour supra* par 48 and 52); and that social justice, as already initiated by section 66 of COIDA, requires recognition that a vulnerable unemployed appellant with no income might not have financial resources to institute a successful claim for compensation under COIDA if he had to prove that he contracted a disease while acting within the scope of his employment, as required by section 65 of COIDA.

Consideration of the value of human dignity as a justification for the judgment in *Knoetze* should include ensuring access to financial assistance or compensation for the appellant because the ear disease he contracted while discharging his duties for the respondent meant he was unable to work and sustain himself (*Mahlangu v Minister of Labour supra* par 63, citing *Khosa v Minister of Social Development, Mahlaule v Minister of Social Development supra* par 52). It is submitted that relief would include giving effect to a reasonable interpretation of the legislation that is consistent with international law. Such an interpretation requires consideration of human dignity, which consists partly of the obligation to provide benefits to "cover the loss or lack of earnings due to the inability to obtain or maintain suitable employment" (CESCR *General Comment No 19* <https://www.refworld.org/docid/47b17b5b39c.html> (accessed 2023-03-01) par 16) as well as the creation of an enabling environment for old people, through social assistance, social insurance or social allowances, to promote measures that would assist in maintaining human dignity and prevention of destitution (SADC *Code on Social Security* <https://www.sadc.int/document/Code-Social-Security-sadc> (accessed 2023-08-05).

Consideration of human dignity in *Knoetze* includes considering that the appellant was an unemployed 59-year-old person who lost an income as a result of a disease that rendered him unemployable. The court also recognised it would be difficult, if not impossible, for the appellant to source

funds to hire experts to prove his occupational disease was caused by his employment at a particular time and place.

Dr T W Maseko
Department of Legal Science
Vaal University of Technology, Vanderbijlpark, South Africa
<https://orcid.org/0000-0002-0678-4817>

Adv P Makama
Public, Constitutional and International Law Department
University of South Africa, Pretoria, South Africa
<https://orcid.org/0000-0003-4242-2749>