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O B I T E R

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THE CABO DELGADO INSURGENCY AND MOZAMBIQUE'S OBLIGATION TO PROVIDE FOREIGN INVESTORS WITH FULL PROTECTION AND SECURITY

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SUMMARY

Mozambique is currently facing a violent and rapidly escalating insurgency within its Cabo Delgado province. The province is rich in mineral resources and has attracted substantial foreign investment. In terms of most of its bilateral investment treaties, Mozambique has agreed to provide foreign investors with full protection and security (FPS) within its territory. This article explores the extent of a state's obligations to foreign investors under the FPS standard in international investment law. It finds that tribunals have adopted diverging interpretations of the standard, and critiques several of these approaches. In particular, it expresses concern over the extent to which investment law forces a state to choose between protecting its people and protecting investors' assets. It also reflects on what these diverging interpretations mean for Mozambique and the extent to which it may be liable to compensate investors for harm caused to their property by the insurgents. It is argued that investment tribunals should be alive to the various demands on state resources and not simply base liability on the foreseeability of harm. It also concludes by suggesting that Mozambique should seek an agreement with its treaty partners to restrict temporarily the extent of its liability under the FPS standard.

1 INTRODUCTION

The Cabo Delgado province is one of the poorest provinces in Mozambique.[1] A growing insurgency within the province and the subsequent withdrawal of French multinational oil company Total has recently made international headlines.[2] Total's gas investment in the province was the biggest foreign direct investment (FDI) project on the African continent.[3] The

1 World Bank *Strong but not Broadly Shared Growth: Mozambique Poverty Assessment* (2018) 52.

2 Halasz "French Energy Giant Total Suspends Huge Mozambique Project Because of Insecurity" (26 April 2021) https://edition.cnn.com/2021/04/26/africa/total-suspends-mozambique-project-intl/index.html (accessed 2021-05-15).

3 African Development Bank "African Development Bank Set to Join Landmark $20 Billion Mozambique LNG Financing" (21 July 2020) https://www.afdb.org/en/news-and-events/press-releases/african-development-bank-set-join-landmark-20-billion-mozambique-lng-financing-36929 (accessed 2021-05-15).

project has been controversial since local communities have expressed feelings of being sidelined in this and other mineral projects in the province.[4] Extremist elements have capitalised on these feelings of discontent and recruited many into a violent and growing insurgency.[5]

The insurgency culminated in the siege of Palma, resulting in the deaths of dozens of people and the displacement of more than 9 000 persons.[6] It has been reported that during the siege, there "was no security protecting the town, although 800 soldiers were inside the walls at Afungi protecting Total workers".[7] These reports give rise to important questions surrounding business and human rights and the extent to which the Mozambican government has prioritised foreign investors' assets over the lives of its people. From a legal perspective, one might ponder if international investment law played a role in the Mozambican government's decision to prioritise the protection of Total over the residents of Palma.

International investment treaties generally require states to provide investors with full protection and security (FPS).[8] Investment tribunals have adopted diverging interpretations of the FPS standard, ranging from a standard due-diligence obligation to a stringent duty to ensure that foreign investors suffer no harm at the hands of non-state actors.[9] This article explores these diverging interpretations of this principle and reflects on what this means for Mozambique. In particular, it reflects on whether Mozambique could potentially be exposed to substantial liability in international investment law if Total, or any other large multinational enterprise in the region, needs to withdraw permanently owing to the security situation.

2 FOREIGN INVESTORS AND THE INSURGENCY IN CABO DELGADO

The Cabo Delgado region of Mozambique is rich in mineral resources.[10] This has attracted various foreign investors to the area. These foreign investors include several large multinational corporations (MNCs) such as Total, the American oil giant ExxonMobil,[11] and UK-based companies BP and

4 Faria "The Rise and Root Causes of Islamic Insurgency in Mozambique and its Security Implication to the Region" 2021 15(4) *IPPS PolicyBrief* 1 5.

5 *Ibid*.

6 Save the Children "Children as Young as 11 Brutally Murdered in Cabo Delgado, Mozambique" 2021 https://www.savethechildren.net/news/children-young-11-brutally-murdered-cabo-delgado-mozambique (accessed 2021-05-15).

7 Hanlon "Frelimo Gambled Everything on Gas – And Lost" (8 April 2021) https://mg.co.za/africa/2021-04-08-frelimo-gambled-everything-on-gas-and-lost/ (accessed 2021-05-16).

8 Dolzer and Schreuer *Principles of International Investment Law* (2008) 149.

9 See *American Manufacturing & Trading, Inc v Republic of Zaire* International Centre for the Settlement of Investment Disputes (ICSID) Case No ARB/93/1 Award (21 February 1997) and *Pantechniki SA Contractors & Engineers v Republic of Albania* ICSID Case No ARB/07/21 Award (30 July 2009).

10 Faria 2021 *IPPS PolicyBrief* 7.

11 Rawoot "Gas-Rich Mozambique May Be Headed For a Disaster" (24 February 2020) https://www.aljazeera.com/opinions/2020/2/24/gas-rich-mozambique-may-be-headed-for-a-disaster (accessed 2021-05-16).

Gemfields.[12] Several of these investments have given rise to substantial controversy as allegations of widespread human rights violations by MNCs have become commonplace in the region. In 2018, for example, Gemfields paid GBP 5.8 million to settle a series of claims brought by human rights defenders against it over its actions at the Montepuez mine in the Cabo Delgado province.[13] The claimants alleged that between 2011 and 2018, more than 200 people had been subject to beatings, torture, and sexual abuse at the hands of mine security and the Mozambican police.[14] The claimants also alleged that the mine had instigated repeated burnings and attacks on the Namucho-Ntoro village.[15]

Concerning the Afungi gas plant, the African Development Bank (ADB) had anticipated that more than 2 000 people would be physically displaced.[16] The project would in fact economically displace more than 4 000 people.[17] There was a complete resettlement plan in place in this instance, and many people reported obtaining better houses as a result of the resettlement. However, many still lost the means of sustaining their livelihoods as the community, predominantly fishermen and women, was relocated several kilometres inland.[18]

There have long been concerns that the violent militant group, known locally as al-Shabaab, would use the people's discontent as a recruitment tool.[19] It has become abundantly clear that the insurgents have become substantially better organised and now possess much more advanced weaponry than in the initial stages of the insurgency.[20] Hanlon already warned in 2019 that foreign investors would not be able to isolate themselves from the violence in the region indefinitely as "al-Shabaab is at the gates".[21] Mozambique started providing Total and the Afungi gas plant with increased protection with the deterioration of security conditions.[22]

These events together showcase the complex legacy of foreign investment in a volatile and predominantly poor region. Several MNCs were

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12 Gemfields "Acquisition of 75% Interest in Mozambican Ruby Project" (08 June 2011) https://www.gemfieldsgroup.com/2011/06/ (accessed 2021-05-16).

13 Gemfields "Gemfields Press Statement" (29 January 2019) https://mining.com/wp-content/uploads/2019/01/gemfields-press-announcement-jan29-2019.pdf (accessed 2021-05-19).

14 Jamasmie "Gemfields to Pay $7.8m to Settle Human Rights Abuses Claims in Mozambique" (29 January 2019) https://www.mining.com/gemfields-pay-7-8m-settle-claim-human-rights-abuses-mozambique/ (accessed 2021-05-19).

15 *Ibid*.

16 African Development Bank *Mozambique LNG- Resettlement Action Plan (RAP)* (2019) 3.

17 *Ibid*.

18 Ewi and Louw-Vaudran "Insurgents Change Tactics as Mozambique Seeks Help" (1 April 2020) https://issafrica.org/iss-today/insurgents-change-tactics-as-mozambique-seeks-help (accessed 2021-05-20).

19 Hanlon "Ruby Miner Gemfields to Pay $8.3 Mn to Settle Montepuez Torture & Murder Claims" (29 January 2019) *Mozambique News Reports & Clippings* 4.

20 Ewi and Louw-Vaudran https://issafrica.org/iss-today/insurgents-change-tactics-as-mozambique-seeks-help.

21 Hanlon (29 January 2019) *Mozambique News Reports & Clippings* 4.

22 Nhamire and Hill "Soldiers Guard Mozambican Project From Islamist Insurgents" (5 July 2020) https://www.businesslive.co.za/bd/world/africa/2020-07-05-soldiers-guard-mozambican-project-from-islamist-insurgents/ (accessed 2021-05-20).

aware of the volatility in the region well before investing. Gemfields has, for example, noted that "instances of violence have occurred on and around the MRM licence area, both before and after Gemfields' arrival in Montepuez".[23] Understanding this background is vital, as it is not the function of law to provide an unqualified shield to protect investors against business risks they have voluntarily assumed.[24]

3 MOZAMBICAN BILATERAL INVESTMENT TREATIES AND INVESTOR-STATE ARBITRATION

Investor-state arbitration gradually developed as a mechanism for the enforcement of international investment law as the international community rejected "gunboat diplomacy".[25] It has been developed principally through bilateral investment treaties (BITs), with more than 2 200 BITs now having entered into force globally.[26] Mozambique has concluded 28 BITs, of which 19 agreements are in force.[27] The Mozambican BITs most commonly consent to arbitration at the International Centre for the Settlement of Investment Disputes (ICSID).[28] Several treaties also consent to arbitration

[23] Gemfields https://mining.com/wp-content/uploads/2019/01/gemfields-press-announcement-jan29-2019.pdf 1.

[24] *Waste Management Inc v United Mexican States II* ICSID Case No ARB(AF)/00/3 Award (30 April 2004) par 177 (the *Waste Management* case).

[25] Ashgarian "The Relationship Between International Investment Arbitration and Environmental Protection: Charting the Inherent Shortcomings" 2020 27(2) *Eastern and Central European Journal on Environmental Law* 5 18. The concept of gun-boat diplomacy refers to the use of military force by developed countries to enforce investment and commercial obligations undertaken by developing countries.

[26] *Ibid*.

[27] UNCTAD "International Investment Agreements Navigator: Mozambique" (undated) https://investmentpolicy.unctad.org/international-investment-agreements/countries/143/mozambique (accessed 2021-05-16).

[28] Art 9(2)(l) of the Agreement Between the Government of the Socialist Republic of Vietnam and the Government of the Republic of Mozambique on the Protection and Promotion of Investments (Vietnam-Mozambique BIT); art 10(2)(i) Agreement Between the Belgium-Luxembourg Economic Union and the Government of the Republic of Mozambique on the Reciprocal Promotion and Protection of Investments (BLEU-Mozambique BIT); art 9(2)(b) and (c) of the Agreement Between the Government of the Republic of Finland and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection Of Investments (Finland-Mozambique BIT); art 8 of the Agreement Between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Mozambique for the Promotion and Protection of Investments (UK-Mozambique BIT); art 9(2)(a) of the Switzerland-Mozambique BIT; Art 9(2)(a) and (b) of the Agreement Between the Government of the Kingdom of Denmark and the Government of the Republic of Mozambique on the Promotion and Mutual Protection of Investments (Denmark-Mozambique BIT); art 9 of the Agreement Between the Government of the Republic of Mozambique and the Government of the Kingdom of the Netherlands Concerning the Encouragement and the Reciprocal Protection of Investments (Mozambique-Netherlands BIT); art 9(2)(i) and (ii) of the Agreement between the Government of the Kingdom of Sweden and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments (Sweden-Mozambique BIT); art 7(3)(a) of the Agreement Between the Government of the People's Republic of China and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments (China-Mozambique BIT); art VII(3)(a) of the Agreement Between the Government of the Republic of Indonesia and the Government of the Republic of Mozambique for the Promotion and Protection of Investments (Indonesia-Mozambique BIT).

under the arbitral rules of the United Nations Commission on International Trade Law (UNCITRAL).[29]

Substantively, it matters little if a matter is heard under the ICSID Convention or the UNCITRAL rules. This applies equally to a number of other arbitral institutions that engage in investor-state dispute settlement, such as the International Chamber of Commerce (ICC) or the Permanent Court of Arbitration (PCA).[30] These various arbitral institutions ultimately only provide the procedural rules, while the substantive issues are decided under international law and the host state's law.[31] This contribution is principally concerned with the substantive obligations arising from the FPS standard. Therefore, it does not offer a detailed analysis of the nuanced differences in the procedural rules applicable to different arbitral institutions.

The majority of Mozambican BITs provide for investments to be accorded "full protection and security" or "full and constant protection and security" within its territory.[32] The Italy-Mozambique and the Mauritius-Mozambique BITs are the only BITs to which Mozambique is a party that do not contain any express provisions on the FPS standard.[33] The inclusion of the word "constant" in some BITs does not necessarily indicate a higher standard being owed to such investors. Investment tribunals have long held that slight differences in the wording of BITs do not generally change the nature of the obligations arising from the FPS standard.[34] The Mozambique-Netherlands BIT also clarifies that the FPS standard in that treaty applies to physical security.[35]

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29 Art 9(2)(Iii) of the Vietnam-Mozambique BIT; art 10(2)(iii) of the BLEU-Mozambique BIT; art 10(2)(d) of the Finland-Mozambique BIT; art 9(2)(c) of the Switzerland-Mozambique BIT; art 9(2)(c) of the Denmark-Mozambique BIT; art 9(2)(iii) of the Sweden-Mozambique BIT; art VII(3)(b) of the Indonesia-Mozambique BIT.

30 Art 9(2)(d) of the Denmark-Mozambique BIT provides consent to ICC arbitration.

31 Douglas, Pauwelyn and Viñuales *The Foundations of International Investment Law: Bringing Theory Into Practice* (2014) 14.

32 Art 4(1) of the Agreement Between the Government of Japan and the Government of the Republic of Mozambique on the Reciprocal Liberalisation, Promotion and Protection of Investment (Japan-Mozambique BIT); art 2(6) of the Vietnam-Mozambique BIT; art 2(7) of the BLEU-Mozambique BIT; art 2(2) of the Finland-Mozambique BIT; art 2(2) of the UK-Mozambique BIT; art 4(1) of the Switzerland-Mozambique BIT; art 5(1) of the Agreement Between the Government of the French Republic and the Government of the Republic of Mozambique on the Reciprocal Encouragement and Protection of Investments (France-Mozambique BIT); art 2(2) of the Denmark-Mozambique BIT; art 2(2) of the Agreement between the Federal Republic of Germany and the Republic of Mozambique on the Reciprocal Protection of Investment (Germany-Mozambique BIT); art 2(7) of the Sweden-Mozambique BIT; art 2(2) of the China-Mozambique BIT; art II(2) of the Indonesia-Mozambique BIT; art II(3) of the Treaty Between the United States of America and the Republic of Mozambique Concerning the Encouragement and Reciprocal Protection of Investment; art 2(2) of the Portugal-Mozambique BIT.

33 Here the author is only referring to those treaties that are in force. The author did not examine all of the treaties signed by Mozambique that have not entered into force.

34 *Cengiz Insaat Sanayi ve Ticaret AS v Libya*, ICC Case No 21537/ZF/AYZ Award (7 November 2018) (the *Cengiz* case).

35 Art 2(2) of the Mozambique-Netherlands BIT. This clarification was probably inserted because some tribunals, such as the tribunal in *Biwater Gauff (Tanzania) Limited v United Republic of Tanzania* ICSID Case No ARB/05/22 Award (24 July 2008) par 729, have interpreted the FPS standard as extending beyond physical security. However, this

The majority of the Mozambican BITs also contain special provisions on compensation for damages that an investor suffers as a result of war or insurrection. The BITs all provide, in virtually identical terms, that where any "restitution, indemnification, compensation or other settlement" is given concerning such damages, investors who are nationals of the treaty counterparty will be afforded national treatment and most-favoured-nation (MFN) treatment.[36] This obligation to pay compensation should not be conflated with the FPS standard. Unlike the FPS standard, this obligation is not an objective standard, and its scope and effect are entirely contingent upon the treatment provided to other investors.[37]

4 DIVERGING INTERPRETATIONS OF THE FULL PROTECTION AND SECURITY STANDARD

It is generally accepted that the FPS standard is an objective standard.[38] The nature of the obligations imposed by the FPS standard is not contingent upon the treatment provided to other investors or investments.[39] This is a crucial feature distinguishing FPS from other standards in investment law, such as national treatment. A breach of FPS lies in (i) damage caused to an investor's property by a state and its organs, or (ii) in the breach of a duty of due diligence to prevent a foreign investor's property from being damaged by non-state actors.[40] However, as noted earlier in this contribution, some diverging interpretations of the precise nature of the obligations imposed by the FPS standard exist.

Some tribunals have, perhaps unintentionally, interpreted the FPS standard as a duty of results rather than a duty of due diligence.[41] Other tribunals seem to conflate the FPS standard with other obligations in investment law, such as national treatment;[42] in this way, the tribunal

contribution is ultimately concerned with physical security. Therefore, the extent to which the FPS standard applies beyond physical security falls outside of its scope.

36 Art 5(1) of the Vietnam-Mozambique BIT; art 5(1) of the BLEU-Mozambique BIT; art 6(1) of the Finland-Mozambique BIT; art 4(1) of the UK-Mozambique BIT; art 7 of the Switzerland-Mozambique BIT; art 5(3) of the France-Mozambique BIT; art 6(1) of the Denmark-Mozambique BIT; art 4(3) of the Germany-Mozambique BIT; art 5(1) of the Sweden-Mozambique BIT; art 5(1) of the China-Mozambique BIT; art V(I) of the Indonesia-Mozambique BIT; art 4 of the Agreement Between the Government of the Italian Republic and the Government of the Republic of Mozambique on the Promotion and Reciprocal Protection of Investments (Italy-Mozambique BIT); art IV of the USA-Mozambique BIT; art 5 of the Portugal-Mozambique BIT; art 5(1) of the Agreement Between the Government of the Republic of Mozambique and the Government of the Republic of Mauritius for the Promotion and Reciprocal Protection of Investments (Mozambique-Mauritius BIT).

37 The differences between these two standards are expanded upon under heading 5 of this contribution.

38 De Brabandere "Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties Between Generality and Contextual Specificity" 2017 *Journal of World Investment & Trade* 531 533.

39 *Ibid*.

40 *Cengiz* case *supra* par 405–406.

41 *Ampal-American Israel Corporation v Arab Republic of Egypt* ICSID Case No ARB/12/11, Decision on Liability and Heads of Loss, (21 February 2017) (the *Ampal* case).

42 *LESI, S.p.A. and Astaldi, S.p.A. v People's Democratic Republic of Algeria* ICSID Case No ARB/05/3 Award (12 November 2008).

transforms an otherwise objective standard into a contingent subjective standard. Different interpretations attached to the standard could see vastly different conclusions being reached on liability on the same set of facts. In this section, the article charts varying interpretations provided by four different tribunals. It then reflects on what these diverging interpretations mean for Mozambique.

4 1 *Pantechniki v Albania*

In *Pantechniki S.A. Contractors & Engineers v Republic of Albania* (the *Pantechniki* case),[43] the tribunal was confronted with a claim by a contractor whose site had been destroyed by looters during a period of civil unrest in Albania.[44] The case was partially based on an alleged breach of the FPS standard in international investment law.[45] In resolving the dispute, the tribunal undertook an extensive analysis of customary international law concerning the FPS standard. The tribunal distinguished between what would be expected of a developed country and a developing country.[46] The tribunal explains that the differentiated approach does not render the FPS standard devoid of meaning as it does not mean that there is no standard. Ultimately, the differentiated approach still requires a state to provide an investor with the level of security reasonably expected from a state at its level of development.[47]

The tribunal supported Newcombe and Paradell's explanation that

> "[a]lthough the host state is required to exercise an objective minimum standard of due diligence, the standard of due diligence is that of a host state in the circumstances and with the resources of the state in question. This suggests that due diligence is a modified objective standard – the host state must exercise the level of due diligence of a host state in its particular circumstances. In practice, tribunals will likely consider the state's level of development and stability as [a] relevant circumstance in determining whether there has been due diligence. An investor investing in an area with endemic civil strife and poor governance cannot have the same expectation of physical security as one investing in London, New York or Tokyo."[48]

Therefore, the FPS standard does not demand that a developing country with limited resources guarantee foreign investors that no harm will come to their investment from unexpected civil unrest.[49] Investors who invest in poorer countries are not entitled to demand a high standard of police protection.[50] In such instances, a state would only be liable for a breach of the FPS standard if it can respond to the crisis but refuses to do so.[51] In the case at hand, the Albanian authorities had been completely overwhelmed,

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43 ICSID Case No ARB/07/21 Award (30 July 2009).
44 *Pantechniki* case *supra* par 1.
45 *Pantechniki* case *supra* par 71.
46 *Pantechniki* case *supra* par 77.
47 *Pantechniki* case *supra* par 81.
48 *Pantechniki* case *supra* par 81 citing Newcombe and Paradell *Law and Practice of Investment Treaties* (2009) 310.
49 *Pantechniki* case *supra* par 81.
50 *Pantechniki* case *supra* par 82.
51 *Ibid*.

and they could not within their available resources respond to the threat to the investor's property.[52] Consequently, Albania did not breach the FPS standard.[53]

4 2 *Lesi v Algeria*

The case of *LESI S.p.A. and Astaldi, S.p.A. v People's Democratic Republic of Algeria*[54] concerned a contract granted for the construction of a dam that delays had beset as a result of security issues arising from the armed struggle between the government of Algeria and "Islamist extremists" at the time.[55] The claimants alleged that Algeria had failed to provide it with sufficient security to complete the project.[56] The claimants raised this complaint under fair and equitable treatment rather than the more traditional FPS standard.[57] The tribunal, however, assessed the claim under the general principles applied to FPS. In particular, it noted that the obligation to create a safe environment for investments is an obligation of means and not an obligation of results.[58]

In assessing the claim, the tribunal importantly pointed out that there had been a general state of unrest in the area and that the investor was aware thereof at the time of its investment.[59] The tribunal found that the investor's knowledge of the turmoil served as a factor to be weighed against finding a breach of FPS.[60] The tribunal also found that the level of security provided to the investor by Algeria was comparable to that offered to all other investments in the region.[61] It repeatedly emphasised this equality in treatment in finding that Algeria had not breached the expected standard of treatment.[62]

4 3 *Ampal-American Israel v Egypt*

The case of *Ampal-American Israel v Egypt*[63] was concerned, in part, with an alleged breach of the FPS standard arising from attacks on gas pipelines during the Arab Spring in Egypt.[64] The pipelines in question were not owned by the claimant but by the Egyptian Natural Gas Holding Company (EGAS), an entity wholly owned by the Egyptian government.[65] The claimant depended on this system of pipelines to deliver gas to its facilities for export

52 *Pantechniki* case *supra* par 82.
53 *Pantechniki* case *supra* par 84.
54 ICSID Case No ARB/05/3 Award (12 November 2008) (the *Lesi* case) par 11.
55 *Lesi* case *supra* par 11.
56 *Lesi* case *supra* par 153.
57 *Ibid*.
58 *Ibid*.
59 *Lesi* case *supra* par 154.
60 *Ibid*.
61 *Ibid*.
62 *Ibid*.
63 ICSID Case No ARB/12/11 (21 February 2017).
64 *Ampal* case *supra* par 67.
65 *Ampal* case *supra* par 27.

to Israel.[66] Between February 2011 and April 2012, armed groups attacked the pipeline in question 14 times.[67] The interruptions in the gas supply caused the claimant to suffer substantial losses. The tribunal had to determine whether Egypt's failure to prevent the attacks amounted to a breach of the FPS standard.[68]

The tribunal, in this case, accepted another arbitral tribunal's factual findings, concerning a contractual claim based on the same factual background, as *res judicata*.[69] However, the claims before the tribunals were legally distinguishable. Therefore, the tribunal in the *Ampal* case only considered the factual material as *res judicata*. The substantive application, which involved the alleged breach of a BIT rather than a contractual claim, was consequently not *res judicata*.[70] In assessing the alleged treaty breach of the FPS standard, the tribunal started by correctly noting that FPS is a standard of due diligence rather than strict liability.[71] It referred to the *Pantechniki* case in noting that the adequacy of a state's response must be determined with reference to its available resources.[72]

The tribunal acknowledged that "the circumstances in the North Sinai Egypt were difficult in the wake of the Arab Spring Revolution".[73] However, it indicated that Egypt remained obligated to respond to attacks on the pipeline.[74] The tribunal found that four attacks had taken place on the pipeline between February and June 2011 and indicated that it ought to have been apparent from these attacks that future attacks may be directed at the pipeline.[75] The obligation to exercise due diligence in providing investors with FPS required Egypt to foresee this risk and implement appropriate security measures.[76] Egypt's failure to do so amounted to a breach of the FPS standard.[77]

4 4 *Cengiz v Libya*

In *Cengiz v Libya*,[78] the tribunal was confronted with a claim for the breach of various provisions in the Turkey/Libya BIT, including an alleged violation of the FPS standards. Starting from 2008, Cengiz had obtained a series of infrastructure contracts, including for the "installation and construction of wastewater and rainwater networks, fresh water supply network, pump stations, water tanks, urban roads, street lighting, electric distribution networks and telecommunication networks".[79] The claim arose in light of the

66 *Ibid*.
67 *Ampal* case *supra* par 59.
68 *Ampal* case *supra* par 67.
69 *Ampal* case *supra* par 270.
70 *Ampal* case *supra* par 281.
71 *Ampal* case *supra* par 244.
72 *Ibid*.
73 *Ampal* case *supra* par 284.
74 *Ampal* case *supra* par 289.
75 *Ibid*.
76 *Ibid*.
77 *Ampal* case *supra* par 290.
78 ICC Case No 21537/ZF/AYZ Award (7 November 2018).
79 *Cengiz* case *supra* par 100.

damage caused to Cengiz's property in the course of the Arab Spring.[80] Cengiz started a gradual withdrawal of its staff as the security situation rapidly deteriorated in the region.[81] It completely withdrew all its staff in the wake of a direct attack upon one of its sites in August 2011.[82] The site was subsequently destroyed entirely by armed groups.[83] The tribunal had to determine whether Libya's failure to protect Cengiz's property during a civil war amounted to a breach of the FPS standard.

Libya argued that compensation for any damages arising from war or insurrection would be governed strictly by article 5 of the Turkey/Libya BIT.[84] Article 5 requires Libya to accord Turkish investors no less favourable treatment than it affords its own nationals or the nationals of any other state when providing any compensation for damages arising from war or insurrection. Libya argued that this provision is *lex specialis* when addressing any damages arising as a result of the listed events and, consequently, the claimant could not rely on the FPS standard.[85]

The tribunal rejected Libya's arguments in this respect.[86] The tribunal reiterated that the principle of *lex specialis* will only permit derogation from the general provision when there is a more specific obligation that deals with the same subject matter.[87] The tribunal found that article 5 of the Turkey/Libya BIT does no more than extend the ordinary most-favoured-nation (MFN) treatment to situations of war or insurrection.[88] According to the tribunal, the effect of this finding is that article 5 addresses matters of MFN treatment rather than the FPS standard.[89] Article 5 does not, therefore, derogate from the FPS standard provided for in the treaty.

Libya argued further that it would have been illogical to insert article 5 if an investor enjoyed independent protection under the FPS standard during an armed conflict.[90] The tribunal also rejected this contention.[91] It explained that the FPS standard is restricted to harm caused by a state or by a failure on its part to exercise due diligence in preventing damage to a foreign investor's property.[92] It interpreted article 5 as imposing an MFN obligation on a state if it decides to provide protection over and above that required by the FPS standard.[93] The tribunal concluded that article 5 provides a minimum level of compensation but does not allow departure from other obligations such as providing FPS.[94]

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80 *Ibid*.
81 *Cengiz* case *supra* par 101.
82 *Ibid*.
83 *Cengiz* case *supra* par 102.
84 *Cengiz* case *supra* par 351.
85 *Ibid*.
86 *Cengiz* case *supra* par 353.
87 *Cengiz* case *supra* par 356.
88 *Cengiz* case *supra* par 357.
89 *Ibid*.
90 *Cengiz* case *supra* par 359.
91 *Cengiz* case *supra* par 360.
92 *Cengiz* case *supra* par 361.
93 *Ibid*.
94 *Cengiz* case *supra* par 362.

In assessing whether Libya violated the FPS standard, the tribunal started by noting that the obligation of due diligence requires a state to take reasonable measures to prevent the investor from suffering harm. It referred to the *Pantechniki* case to explain that reasonable measures are to be assessed with reference to a state's available resources.[95] It correctly noted that the "positive obligation which the FPS standard places on the State is an obligation of means – not of the result".[96] However, the tribunal found that Libya failed to provide any security to the investor by completely failing to dispatch any police or army units to protect Cengiz's property.[97] The tribunal considered that Libya failed to deploy these forces despite being aware of the heightened security risk in the region. Because of this failure, private mobs could raid Cengiz's property regularly, stealing supplies and damaging facilities.[98] Consequently, Libya violated the FPS standard.

Libya also argued that it is not reasonable to expect a government to protect "ancillary projects" amid an armed conflict when the government has limited resources at its disposal.[99] The tribunal indicated that it would find this persuasive only if Cengiz had claimed that the government was required to guarantee its "ability to perform its construction activities".[100] The tribunal accepted that the construction sites were scattered over a wide area, and protecting all of these sites would have been impractical.[101] Instead, Libya was required to provide "basic static protection" to the two main camps to prevent violent mobs from stealing and plundering Cengiz's property.[102] It was this failure that amounts to a breach of the FPS standard. It also found that Libya had provided 30 soldiers to protect at least one other investor's site in the region. It found that Libya's ability to provide such support to the other investor indicated that it would have been within Libya's available resources to extend static protection to Cengiz.[103]

5 DISCUSSION OF THE CASES AND THEIR IMPLICATIONS FOR MOZAMBIQUE

In the author's view, the tribunals in both the *Cengiz* case and the *Ampal* case paid mere lip service to the need to consider a state's available resources. The *Ampal* tribunal, although acknowledging the challenges in the Sinai region, not once considered whether Egypt had the resources to implement security measures. It found the absence of effective security measures to amount to a breach of the FPS standard without any further consideration.[104] Its complete failure to take into account Egypt's limited resources at that stage is particularly problematic. By its reasoning, a state's limited resources would effectively only preclude a breach of the FPS

95 *Cengiz* case *supra* par 406.
96 *Cengiz* case *supra* par 437.
97 *Cengiz* case *supra* par 438.
98 *Cengiz* case *supra* par 442.
99 *Cengiz* case *supra* par 443.
100 *Cengiz* case *supra* par 445.
101 *Cengiz* case *supra* par 447.
102 *Cengiz* case *supra* par 448.
103 *Cengiz* case *supra* par 450.
104 *Ampal* case *supra* par 289–290.

standard if an attack is unexpected; if the possibility of armed attacks on an investor's property becomes reasonably foreseeable, the duty to implement adequate security measures arises automatically irrespective of a state's resources.

Applying the *Ampal* case to Mozambique makes it apparent that where Mozambique reasonably foresees harm to a foreign investor's property, it must implement adequate security measures. This may well require Mozambique to deploy its limited military resources to protect foreign investors' property and thereby neglect the interests of its own people. It is submitted that a more reasonable interpretation of a state's due diligence obligations would take into account a state's limited resources in respect of both reasonably foreseeable and unexpected attacks. The mere fact that a state foresees the possibility of harm does not automatically mean that it has unlimited resources to respond to it. Mozambique is well aware of the risk in Cabo Delgado, yet its ability to respond remains subject to resource constraints.[105] Considering a state's limited available resources in both instances also does not entitle a state to do nothing. It merely limits the extent of a state's obligations to what a state could reasonably achieve within its available resources. This would also be better aligned with the *Pantechniki* case, which did not limit the relevance of a state's resources to unexpected attacks.[106]

In the *Cengiz* case, the tribunal found Libya's ability to provide protection to one other investor to be determinative of whether it had the resources to provide protection to Cengiz as well.[107] This fails to consider that a state may have rational reasons for providing more protection to one investment than another. The United Nations Security Council has urged states "to protect civilian infrastructure which is critical to the delivery of humanitarian aid including for the provision of essential services concerning vaccinations and related medical care and other essential services to the civilian population".[108] However, the approach in the *Cengiz* case does not allow a state to distinguish assets of strategic importance from others, such as differentiating between critical infrastructure and assets that may be strategically less important. In terms of the FPS standard, as interpreted in the *Cengiz* case, a state would therefore only be able to implement special measures to protect critical infrastructure – as described by the Security Council – if it offers all foreign investors the same level of protection.

The tribunal also clearly stated that the FPS standard is separate from the non-discrimination standards such as MFN and national treatment.[109] Yet, by relying exclusively on protection offered to one other investor to prove that Libya had the resources to respond, the tribunal effectively applied non-

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105 Faria 2021 *IPPS PolicyBrief* 5.

106 See heading 4 1 above. The quote by Newcombe and Paradell, cited with approval by the tribunal, in particular indicates resources as a relevant consideration wherever it needs to be determined if a state acted with due diligence. The entire FPS obligation is an obligation of due diligence, and therefore a state's resources ought to be considered in the case of foreseeable risks as well. This contribution aligns itself with the *Pantechniki* case, which both the *Ampa*l case and the *Cengiz* case also purported to apply.

107 See heading 4 4 above; *Cengiz* case *supra* par 450.

108 UN Security Council Resolution 2573 (2021) Adopted: 27 April 2021.

109 See heading 4 4 above; *Cengiz* case *supra* par 357.

discrimination standards as constituent elements of the FPS standard. The provision of security to another investor should more appropriately be considered under a claim for a breach of national treatment or MFN treatment and not a breach of FPS. It is, however, acknowledged that it might be permissible to consider the protection offered to other investors as a factor when analysing a state's available resources.[110] Nevertheless, this consideration must be only one of several factors taken into account, lest the FPS standard become MFN or national treatment cloaked in a different garb.

This contribution welcomes the attempt in the *Cengiz* case to limit the extent to which a state is required to provide an investor with security. The FPS obligation needs to be rooted in what is practically possible. Had the *Cengiz* case's approach to limiting protection to static protection been used in the *Ampal* case,[111] Egypt could not have been expected to place a pipeline running for hundreds of kilometres under permanent guard. However, future tribunals should also exercise caution not to elevate the obligation to provide static protection to a general duty arising from the FPS standard. Despite its flawed approach to the question of Libya's available resources, the *Cengiz* case still recognises that the provision of static protection remains subject to a state's ability to provide such protection within its available resources.[112]

Applying the *Cengiz* case's approach to Mozambique, it becomes apparent that by stationing soldiers at the Afungi gas plant, it may be presumed that Mozambique has the resources to provide countless other foreign investors in the region with the same protection. If any other investors suffered harm and Mozambique had not similarly stationed soldiers at their premises, it could breach the FPS standard. The obligation to provide FPS is, however, limited to the provision of static protection. The *Cengiz* case further limits the extent of the obligation to protection of the site and not a guarantee that works could be completed.[113] In terms of this interpretation, Total would, for example, not be able to claim a breach of the FPS standard merely because it is unable to complete the construction and development of the Afungi gas plant.

Although the approach in the *Lesi* case may seem to balance the competing interests reasonably, this contribution takes issue with it for converting the FPS standard from an objective standard into a standard that is contingent upon the treatment of other investors.[114] This contribution, therefore, also disagrees with the criticism levied at the *Ampal* tribunal for

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[110] In this statement, the author acknowledges that the question of whether a state had the resources will always be largely a subjective inquiry. One should, nevertheless, conduct a full inquiry and not simply accept the provision of security to another investor as automatic proof that a state could respond. It is submitted that the provision of security to one investor and not to another may result in an *ipso facto* breach of MFN and national treatment, but more is required when assessing a state's available resources under the FPS standard.

[111] See heading 4 4 above with respect to the *Cengiz* case limiting protection to static protection.

[112] See heading 4 4 above.

[113] *Ibid*.

[114] It is again worth emphasising that the FPS standard has always been regarded as an absolute or objective standard. See *inter alia* International Law Association *ILA Study Group on Due Diligence in International Law First Report* (2014) 7.

not following the *Lesi* case more closely.[115] The approach in the *Lesi* case is problematic because it excludes the obligation to pay compensation for a breach of the FPS standard if foreign and domestic investors were treated the same.[116] This approach could effectively reward a state for failing to take security measures provided that it failed equally to discharge its obligations to both foreign and domestic investors.

The *Lesi* case also determines that an investor's knowledge of widespread unrest in the region is a relevant factor in determining if there has been a breach of FPS.[117] This contribution partially agrees with this finding, for, as previously indicated, it is not the function of international investment law to absolve investors from risks they have voluntarily assumed.[118] However, the investor's knowledge of unrest is relevant to the question of damages rather than to one concerning a breach of FPS.[119] International investment law has long recognised that investors also have a duty to take measures to reduce the risk of loss.[120] Where an investor has failed to implement reasonable measures to prevent harm, the extent to which damages arose as a result of its contributory fault needs to be determined.[121] Damages awarded may then be proportionately reduced relative to the investor's contributory fault.[122] Similarly, investors in Cabo Delgado ought to foresee the risk of harm and should take appropriate steps to mitigate such risks.[123]

In terms of the *Lesi* case, Mozambique could not be held liable for a breach of the FPS standard if it did not provide its nationals with better treatment than foreign investors. However, as noted above, the *Lesi* case conflates the FPS and national treatment standards. The majority of investment tribunals have rejected the approach that liability for a breach of FPS is automatically excluded based on equality in treatment.[124] The author could also not find any cases on the FPS standard that have cited and

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115 Yacoub "The Case of *Ampal v Egypt*: What Are the Parameters of the Due Diligence Standard?" (16 November 2018) http://cilj.co.uk/2018/11/16/the-case-of-ampal-v-egypt-what-are-the-parameters-of-the-due-diligence-standard/ (accessed 2021-05-19).

116 See heading 4 2 above.

117 See heading 4 2 above; *Lesi* case *supra* par 153.

118 See heading 2 above; *Waste Management* case *supra* par 177.

119 See *Copper Mesa Mining Corporation v Republic of Ecuador* Permanent Court of Arbitration (PCA) Case No 2012-2 Award (15 March 2016) par 6.102 (*Copper Mesa Mining* case) and *MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile* ICSID Case No ARB/01/7 Award (25 May 2004) par 242–243 as some examples where contributory fault is treated as a consideration in the determination of damages rather than in the question of breach.

120 Marcoux and Bjorklund "Foreign Investors' Responsibilities and Contributory Fault in Investment Arbitration" 2020 69 *International and Comparative Law Quarterly* 877 878.

121 *Yukos Universal Limited (Isle of Man) v Russia* PCA Case No 2005-04/AA227 Final Award (18 July 2014) par 1637.

122 *Copper Mesa Mining* case *supra* par 6.102.

123 As discussed in heading 2, many investors were aware of the volatility in the Cabo Delgado region before investing. At present, the violence has also become very widespread throughout the province. It is accordingly submitted that no prudent investor would be able to assert that the risk of harm was not reasonably foreseeable.

124 See *inter alia CMS Gas Transmission Company v The Republic of Argentina* ICSID Case No ARB/01/8 Award (12 May 2005) par 375; *Suez, Sociedad General de Aguas de Barcelona SA and Vivendi Universal SA v Argentine Republic* ICSID Case No ARB/03/19 Decision on Liability, (30 July 2010) par 270–271.

followed the *Lesi* case.[125] It is accordingly submitted that Mozambique would be ill advised to consider the extent of its FPS obligations solely with reference to the interpretation in the *Lesi* case.

6 CONCLUSION

From the preceding discussion, it becomes apparent that the diverging interpretations of the FPS standard may provide vastly different outcomes for Mozambique. However, it is also clear that several tribunals have conflated non-discrimination provisions with the FPS standard.[126] Although it has been argued that these decisions were incorrect insofar as they conflated these different standards, there is no guarantee that future tribunals will not apply the standard in the same way. At the very least, this ought to serve as a cautionary note for Mozambique that in providing Total with extensive protection, it may be opening itself up to an effective obligation to provide all foreign investors in Cabo Delgado with such protection.

In conducting a cost-benefit analysis, the Mozambican government may well decide that it is worth risking liability to smaller investors for a breach of FPS rather than to large investors such as Total. If Mozambique were to be liable to Total, the extent of its liability could exceed its entire GDP.[127] An approach that involves states making a conscious decision to breach their obligations towards smaller investors is anathema to the rule of law. However, as long as investment tribunals fail to consider a state's available resources properly, such decisions will almost inevitably arise. This is so, particularly, where some tribunals effectively interpret the FPS standard as a duty of results.

Mozambique is also under an obligation in terms of international human rights law to take measures to safeguard the lives of its people.[128] In addition, Security Council Resolution 2573 obliges it to take steps to

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[125] The author is, however, aware of one other case where the respondent state attempted to rely on the *Lesi* case in order to escape liability. In that case, *EDF International SA, SAUR International SA and León Participaciones Argentinas SA v Argentine Republic* ICSID Case No ARB/03/23 Award (11 June 2012), the tribunal rejected the respondent state's argument and did not follow the *Lesi* case. The *Cengiz* case similarly referenced the *Lesi* case at par 369 but noted that it is not in line with most arbitral tribunals and appears to suggest that the *Lesi* case had been wrongly decided.

[126] See the discussion under heading 5 of the *Lesi* case and the *Cengiz* case.

[127] Investment tribunals follow two approaches to determining the quantum of damages: *damnum emergens* and *lucrum cessans*. If the tribunal follows the *damnum emergens* approach, liability will be restricted to actual losses incurred. If, hypothetically speaking, the Afungi plant was entirely destroyed liability could run into several billions of dollars as Total has already incurred substantial costs in its construction. If the tribunal followed the *lucrum cessans* approach, Mozambique would be liable to compensate Total for gains prevented. Considering that Total values the project at more than USD 20 billion, liability could well exceed Mozambique's entire GDP. See Collins "Reliance Remedies at the International Center for the Settlement of Investment Disputes" 2009 *Northwestern Journal of International Law & Business* 195 199.

[128] Siatsitsa and Titberidze *Human Rights in Armed Conflict From the Perspective of the Contemporary State Practice in the United Nations: Factual Answers to Certain Hypothetical Challenges* (2011) 22.

safeguard infrastructure critical to the delivery of humanitarian aid.[129] Mozambique cannot simply ignore these obligations in favour of providing extensive protection to foreign investors. Investment tribunals ought to be alive to the various demands on a state's resources. Investment tribunals should also not shy away from analysing investors' contributory fault where such investors have knowingly invested in conflict zones without taking measures to restrict their risk of damages.[130] Furthermore, states prone to armed conflict may be well served by seeking to clarify the extent of their obligations arising from the FPS standard amidst an armed conflict in future treaties.[131]

Mozambique could also seek an agreement with its BIT partner states to restrict temporarily the extent of its FPS obligations in the Cabo Delgado region. The broad international support that Mozambique currently enjoys in its efforts to combat the insurgency may well present an opportune time to seek such accommodation. Ultimately, a BIT is a treaty, and it is undisputed that as a matter of treaty law, states are, by agreement, generally free to alter the extent of obligations arising from a bilateral treaty.[132] Such agreement could provide for a cap on compensation that applies to all standards in the treaty during an armed conflict or parties could agree to a binding interpretation of the FPS standard.

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[129] See heading 5 above.

[130] See heading 5 and the various authorities cited on contributory fault in international investment law.

[131] See Ashgarian 2020 27(2) *Eastern and Central European Journal on Environmental Law* 20–22 for a more detailed discussion of the current reform efforts in international investment law.

[132] The International Court of Justice has in the *North Sea Continental Shelf Cases (Federal Republic of Germany v Denmark; Federal Republic of Germany v The Netherlands)* ICJ Reports 1969 par 72, for example, held that "it is well understood that, in practice, rules of international law can, by agreement, be derogated from in particular cases or as between particular parties".

TRAINING FOR LEGAL PRACTICE – TOWARDS EFFECTIVE TEACHING METHODOLOGIES FOR PROCEDURAL LAW MODULES

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SUMMARY

Procedural laws play an important role in legal practice through their use in the enforcement of the substantive rights of members of the public. Civil procedure, criminal procedure, and the law of evidence are the building blocks whereby matters are presented in court. Legal representatives, representing members of the public, should therefore be skilled and professionally trained in procedural laws. Due to their importance, students should not only have a thorough and foundational theoretical knowledge of procedural laws, but also the necessary practical skills in applying their knowledge to practical scenarios, which should be instilled as part of the teaching of procedural modules. The inherent methodological content of conventional teaching methodologies applied when teaching procedural law modules, i.e., the Socratic and case dialogue methodologies, however, prove to be inadequate in transferring the required skills and practical training. Several constituent parties in the legal profession, including academics, legal practitioners, and presiding officers, have remarked that law students, upon graduation, lack the necessary skills, ingenuity, and practical knowledge to make a good start in legal practice. It furthermore appears that university law faculties are generally not willing to train law students for practice. There is also the necessity for the development of identified essential skills required of competent legal practitioners. The continuous development of these skills in the teaching and practical application of procedural laws afford students the ability to advance future client representation professionally and confidently. Cultural, social and human elements should form part of the teaching and learning of procedural law modules, which will create an important awareness among students that, when working with clients in legal practice, they are attending to the rights and interests of human beings who may be of different races and cultures. This will further develop students' identities and values as professionals which include not only being responsible to individual clients, but also contributing services to the community. In developing the required identified skills, students will not only be able to apply technical legal procedures, but also learn how to assist clients more cost-effectively. By employing the Clinical Legal Education methodology in tandem with conventional

lecture methodologies, students are introduced to the practical application of procedural laws, honing both their practical and intellectual skills. Application suggestions include tutorial sessions, mock trials, and reflective assignments. This article evaluates the efficacy of the current teaching methodologies applied in teaching procedural laws toward imparting students with the required practical skills. It recommends the development of procedural law modules by introducing applied practical skills to enable students to enter legal practice after graduation as more rounded and skilled future legal practitioners.

1 INTRODUCTION

Procedural law modules aim to present students with the required knowledge of how to enforce rights such as rights forming part of the substantive law.[1] Procedural laws, as advanced building blocks in the study of law, should therefore be central to the legal education of students. The laws of civil procedure, criminal procedure, and evidence are described in context as the law in action,[2] indicating the necessity of these laws to breathe life into the law curricula.[3]

Current methods by which law schools present procedural laws, namely the Socratic and case dialogue methodologies, are probed. The needs of the primary constituencies of law graduates are considered in reviewing the effectiveness of these methodologies in the teaching of procedural laws.

It is indicated that legal education neglects the teaching and application of practical skills in procedural courses. These deficiencies are contemplated towards finding a remedy to prepare law students for the practice of law as members of a client-centred public profession.[4]

2 THE LAWS OF CIVIL PROCEDURE, CRIMINAL PROCEDURE, AND EVIDENCE

Procedural law modules aim to present students with the required knowledge of how to enforce rights, which rights form part of substantive law.[5] These rights include the right of one individual to institute legal action against another individual, or the right of the State to prosecute an individual for a crime allegedly committed by such individual. A group, or class, of individuals may also institute legal action against another individual or group

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1 See Van Loggerenberg "Civil Justice in South Africa" 2016 3(4) *BRICS Law Journal* 125 126 in this regard.

2 McQuoid-Mason "Methods of Teaching Civil Procedure" 1982 *Journal for Juridical Science* 160 160. It is, however, doubtful whether students, in Civil Procedure, are taught the ability to handle and analyse these facts – McQuoid-Mason 1982 *Journal for Juridical Science* 161.

3 Pete, Hulme, Du Plessis, Palmer, Sibanda and Palmer *Civil Procedure – A Practical Guide* (2017) 2.

4 Stuckey, Barry, Dinerstein, Dubin, Engler, Elson, Hammer, Hertz, Joy, Kaas, Merton, Munro, Ogilvy, Scarnecchia and Schwartz *Best Practices for Legal Education: A Vision and a Road Map* (2007) 8.

5 See Van Loggerenberg 2016 *BRICS Law Journal* 126 in this regard.

of individuals – the so-called "class action".[6] Substantive rights, therefore, stem from both private and criminal law. Adjectival law, the procedures by way of which substantive legal principles are enforced in a court of law,[7] include the rules relating to the admissibility of evidence to be applied when substantive rights are enforced.

Procedural laws are advanced building blocks in the study of law. For students to understand and appreciate procedural laws, they should have a fundamental understanding of the substantive laws they studied in the preceding years. Building on that, they should know the substantive aspects of the procedural laws, which, when applied, will serve as vehicles to give effect to their rights as they pertain to the applicable substantive law. Procedural law modules should therefore be central to the legal education of students.

Civil procedure concerns the enforcement of private law claims.[8] In, for example, a damages claim, students should know and apply the specific principles of substantive law relating to damages, namely the law of delict.[9] The law of civil procedure will be the legal mechanism to give effect to the damages claim.[10] McQuoid-Mason correctly states, "[c]ivil procedure breathes life into substantive law – it is the law in action. The teaching of civil procedure should likewise breathe life into the law curricula."[11] It was indicated that civil procedure lies at the heart of the law, and it is clear why: it is a procedure that can yield reasonably reliable conclusions by analysing frequently confusing sets of facts.[12]

Criminal procedural rules commence after the commission of a crime when the report of the same has been made to the SAPS.[13] It is important for students to be familiar with both the substantive and adjectival law principles applicable to criminal procedure.[14]

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6 Pete *et al Civil Procedure* 36; s 38(*c*) of the Constitution of the Republic of South Africa, 1996.

7 US Legal "Adjective Law and Legal Definition" (undated) https://definitions.uslegal.com/a/adjective-law/ (accessed 2019-11-25). Adjectival law can be defined as the section of the law that deals with the rules governing evidence, procedure and practice. Procedural law is however a term that is used by most jurists nowadays.

8 Pete *et al Civil Procedure* 2; McQuoid-Mason 1982 *Journal for Juridical Science* 160; Van Loggerenberg 2016 *BRICS Law Journal* 126.

9 Pete *et al Civil Procedure* 2; Neethling, Potgieter and Visser *Law of Delict* 2ed (1994) 21.

10 See Pete *et al Civil Procedure* 2 in this regard.

11 *Ibid.*

12 McQuoid-Mason 1982 *Journal for Juridical Science* 160 160. It is, however, doubtful whether students, in Civil Procedure, are taught the ability to handle and analyse these facts – McQuoid-Mason 1982 *Journal for Juridical Science* 161.

13 See Joubert (ed) *Criminal Procedure Handbook* 11ed (2014) 5, 6 and 65 for the duties and powers of criminal courts, prosecuting authorities and the South African Police Service. Also, regarding the regulation of the rights of suspects and arrested persons, pre-trial procedures, bail, charge sheets and indictments, pleading, trial rights of the prosecution and the accused, the verdict, sentencing appeal or review proceedings, as well as mercy, indemnification and free pardon. Also see Pete *et al Civil Procedure* 1.

14 See Bekker, Geldenhuys, Joubert, Swanepoel, Terblanche, Van der Merwe and Van Rooyen *Criminal Procedure Handbook* (1998) 5 in this regard. These include the basic principles of criminal law in order to be familiar with the various types of crimes. The fundamental principles of criminal procedure are important in order for them to know which

The Law of Evidence concerns evidence, which concept can be defined as "[a]ny information that a court has formally admitted in civil or criminal proceedings, or at administrative or quasi-judicial hearings."[15] The South African legal system, relating to evidence, contains legal principles relating to evidence and how it should be applied.[16] In every legal matter, the law of evidence plays an important role. In South Africa, an adversarial or accusatorial litigation system is followed. In terms of this system, the parties engage with each other,[17] attempting to discharge or rebut a burden of proof by way of adducing evidence to the court in support of their respective arguments. The law of evidence involves the consideration of both substantive law principles and procedural law principles.[18] Substantive law principles are relevant to determine the rights, duties, and liabilities in a particular branch of the law.[19] Procedural law principles determine the way in which evidence relating to such elements must be presented to a court.[20] The interrelatedness between the law of evidence and criminal procedure is particularly significant in determining whether the evidence, obtained under certain conditions, is admissible in court.[21] Criminal procedure prescribes the guidelines as to how evidence must be obtained in certain situations.[22]

3 HOW DO WE TEACH PROCEDURAL LAWS?

3 1 Introduction

The teaching of the law of evidence, for example, is particularly important. At university, students study the law of evidence as far as basic substantive principles are concerned, but nothing more. There is no practical application of the principles to actual exhibits as they would manifest in a courtroom. Students, therefore, enter legal practice without any experience in interpreting evidence, the actual procedures used to gather and preserve such evidence, as well as how to consider all evidence in a particular case from a holistic perspective instead of piecemeal.[23] They risk developing into

procedures are available to both the State and to accused persons in case of commission of crimes.

15 Bellengere, Palmer, Theophilopoulos, Whitcher, Roberts, Melville, Picarra, Illsley, Nkutha, Naude, Van der Merwe and Reddy *The Law of Evidence in South Africa – Basic Principles* (2016) 3.

16 Zeffertt and Paizes *The South African Law of Evidence* (2017) 31; Schmidt *Bewysreg* (1993) 1; *Tregea v Godart* 1939 AD 16 30–31.

17 These parties refer to the Plaintiff and Defendant, Applicant and Respondent and State and Accused.

18 Schwikkard, Van der Merwe, Collier, De Vos, Skeen and Van der Berg *Principles of Evidence* (2005) 1.

19 *Ibid*.

20 *Ibid.*

21 Bekker *et al Criminal Procedure Handbook* 6.

22 For example, during identification parades and suspect interrogation sessions. See Bekker *et al Criminal Procedure Handbook* 6. For a comprehensive discussion on whether or not evidence had been obtained in accordance with the provisions of the Constitution, see Steytler *Constitutional Criminal Procedure* (1998) 35–40, Bellengere *et al The Law of Evidence* 234–245 and Zeffertt *et al The South African Law of Evidence* 16–28.

23 See Uphoff, Clark and Monahan "Preparing the New Law Graduate to Practice Law: A View from the Trenches" 1997 65 *University of Cincinnati Law Review* 381 392 in this regard.

legal practitioners, even presiding officers, who struggle to apply the rules of evidence.[24] This unfortunate situation has another side effect: legal practitioners, who attempt to learn the principles of evidence and application thereof while practising, may blindly follow the application methods of the aforementioned practitioners and presiding officers.[25] Consequently, they do not know when certain pieces of evidence should be permitted or excluded, as they do not understand the principles of the law of evidence adequately.[26]

When teaching procedural laws, including the law of evidence, dedicated practical application of the substantive rules is largely absent. The courses are generally taught in a classroom setup by employing the Socratic teaching method, the case dialogue method, or a combination of both. Consequently, students only study the theory, where discussion forms the foundation of a lecture, relating to the substantive and procedural law principles, with very little or no application to simulated-, or real-life scenarios. This approach implies that these modules are not presently taught in a practical way that involves sufficient practical elements. Students should learn these procedural laws in a way that ensures that they will be able to apply the legal procedures involved in legal practice.

Despite a plea in this article for a more practical upbringing of law students as far as procedural law modules are concerned, the teaching of theory is also important. Krieger states that the "[b]asic knowledge of substantive legal doctrine is a necessary prerequisite to learning effective legal practice."[27] Therefore, apart from students having to have a firm knowledge of the substantive law principles, it is desirable that they need to practise these application routes.

It is submitted that there are certain limitations to what can be required from universities in respect of student training. With the teaching of procedural law modules, the focus should be to equip students with a strong foundation upon which they can build confidently and professionally when entering practice as candidate legal practitioners. Such a focus will also assist students in performing practical work at a university law clinic in the final academic year, where they will be exposed to legal practice for the first time as far as their academic legal studies are concerned. To suggest appropriate teaching methods, the current methods used need to be reviewed.

Law graduates have described the theoretical study of the law of evidence to be "cold" and "abstract", not knowing where such rules must be applied. Hands-on experience would be of significant assistance, and it would make the learning and understanding of the principles of evidence easier.

24 Uphoff *et al* 1997 *University of Cincinnati Law Review* 392.

25 *Ibid.*

26 *Ibid.*

27 Krieger "Domain Knowledge and the Teaching of Creative Legal Problem Solving" 2004 11 *Clinical Law Review* 149 149; Hall and Kerrigan "Clinic and the Wider Law Curriculum" 2011 *International Journal of Clinical Legal Education* 25 27.

3 2 Socratic teaching methodology

Although it was said that the Socratic method may be effective for the training of attorneys,[28] it is submitted that this would ring true as far as learning the basic rules or the substantive aspects of procedural laws. Since the second half of the 19th century,[29] universities globally apply the Socratic method as an inexpensive form of professional education,[30] particularly where it pertains to courses with high student numbers.[31] The focus is on classroom lectures, involving very little or no practical training at all. Students are referred to a textbook, legislation, and, on occasion, actual legal documents, or extracts thereof, in order to make some of the theory more concrete. Lectures also involve questions, answers, and discussions of topics that are being dealt with at a specific stage of a course.[32] The Carnegie Foundation for the Advancement of Teaching[33] views the Socratic method as the signature pedagogy for law.[34] The method requires lecturers to formulate and structure questions and their responses to students' questions, as a guide to students towards the solution, by enabling them to eliminate all unjustified possibilities and intuitions that have no bases.[35] This is viewed as a process by which students arrive at the answer to the questions themselves,[36] as guided by lecturers' responses. Although proponents of a purely theoretical and traditional Socratic pedagogy may view this methodology as participatory,[37] opining that it enables students to think critically and to effectively present ideas and answers to the applicable

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28 Cambridge Dictionary "Socratic" (undated) https://dictionary.cambridge.org/dictionary/english/socratic?q=Socratic (accessed 2018-08-01). Also see Sullivan, Colby, Wegner, Bond and Shulman *Educating Lawyers – Preparation for the Profession of Law: Summary* (2007) The Carnegie Foundation for the Advancement of Teaching 4 in this regard.

29 Regassa "Legal Education in the New Ethiopian Millennium: Towards a Law Teacher's Wish List" 2009 2(2) *Ethiopian Journal of Legal Education* 53 56.

30 Regassa 2009 *Ethiopian Journal of Legal Education* 56.

31 Barnhizer "The Clinical Method of Legal Instruction: Its Theory and Implementation" 1979 30 *Journal of Legal Education* 67 96; Wizner "The Law School Clinic: Legal Education in the Interests of Justice" 2002 70(5) *Fordham Law Review* 1929 1931.

32 Regassa 2009 *Ethiopian Journal of Legal Education* 56; Wizner 2002 *Fordham Law Review* 1931.

33 See Silverthorn "Carnegie Report 10 Years Later: Live Like a Lawyer" (26 August 2016) https://www.2civility.org/carnegie-report-live-like-lawyer/ (accessed 2019-01-23) with regards to the Carnegie Report and its importance, which is summarised as follows: "Almost ten years ago, a group of non-profit educators released what's come to be known as the law school 'Carnegie Report'. The report, actually titled 'Educating Lawyers Preparation for the Profession of Law', was part of a series of professional education reform reports produced by the Carnegie Foundation for the Advancement of Teaching. In all its reports, Carnegie broke down professional education into three apprenticeships – cognitive …, practical … and identity … A successfully integrated curriculum combines all three apprenticeships, intellectual, practical and professional. And that last, the professional identity part, is crucial."

34 Dickinson "Understanding the Socratic Teaching Method in Law School After the Carnegie Foundation's Educating Lawyers" 2009 31(1) *Western New England Law Review* 99.

35 Dickinson 2009 *Western New England Law Review* 105.

36 McQuoid-Mason 1982 *Journal for Juridical Science* 162.

37 *Ibid.*

question,[38] this method deprives students of valuable practical training in procedural courses.

The Socratic teaching method has also been criticised as having a destructive psychological effect on students, in that students develop a feeling of inferiority to lecturers as far as skills and abilities are concerned.[39] This may result in students doubting their own intelligence and personal worth.[40] Post-Carnegie, there were proposals for the inclusion of practical skills training.[41] It is submitted that procedural law modules serve as optimum vehicles for the practical application of theory and skills development.

3 3 Case dialogue teaching methodology

The case dialogue method,[42] also referred to as the Langdellian method,[43] is student-centred, focusing on critical thinking, communication, and interpersonal skills.[44] This methodology combines two elements, namely the studying and discussion of appellate court decisions and legislative rules,[45] affording students the opportunity to engage with complex real-world problems, necessitating them to take action by applying their theoretical knowledge to the problem at hand as featured in the particular case.[46]

In studying cases, students must identify and evaluate the best option(s) in the circumstances of the case, as well as predict the outcome of the application of such option(s).[47] Students develop a sense of how legal arguments lead to an acceptable solution to the problem at hand and how to defend certain ideas and choices.[48] This method, described as "learning-by-doing", facilitates students to "think like lawyers",[49] appreciating the lawyer's

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38 *Ibid.*

39 McQuoid-Mason 1982 *Journal for Juridical Science* 164.

40 *Ibid*.

41 Dickinson 2009 *Western New England Law Review* 97 98.

42 Also see McQuoid-Mason 1982 *Journal for Juridical Science* 161 164–165 in this regard.

43 The method was developed in the previous century by Professor Christopher Columbus Langdell of the Harvard Law School faculty with the goal of revolutionising American legal education. Wizner 2002 *Fordham Law Review* 1930.

44 Schwartz "Teaching Methods for Case Studies" (2014) https://www.ryerson.ca/content/dam/learning-teaching/teaching-resources/teach-a-course/case-method.pdf (accessed 2019-07-08).

45 Pedagogy in Action "What is Teaching with the Case Method?" https://serc.carleton.edu/sp/library/cases/what.html (accessed 2019-07-08).

46 Dickinson 2009 *Western New England Law Review* 99; Pedagogy in Action https://serc.carleton.edu/sp/library/cases/what.html; University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method. Students get the opportunity to apply the law to factual scenarios, although such scenarios have been edited to some extent.

47 Pedagogy in Action https://serc.carleton.edu/sp/library/cases/what.html.

48 Dickinson 2009 *Western New England Law Review* 106.

49 See Dickinson 2009 *Western New England Law Review* 102, more specifically the response of a student, Ann Marie Pedersen, with regards to the Socratic teaching method, in this regard; University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method; Silverthorn https://www.2civility.org/carnegie-report-live-like-lawyer/.

role in a dialogue-based setting and learning to understand the law.[50] In applying this method, research is required in sourcing adequate information towards problem solving.[51] These student assignments generally involve collaboration, time management, communication, and writing skills.[52] As is indicated later, these are some of the skills that practising lawyers are looking for in the context of client representation.[53] This method may serve as an attempt to bridge the gap between theory and practice.[54] The case dialogue method, therefore, appears to be an improvement on the Socratic teaching method, as it encourages active participation by the students,[55] thus removing the notion of inferiority and self-doubt by students *vis-à-vis* their lecturers.

However, since the case method can be time-consuming,[56] as well as leave students with a big responsibility to study the majority of the work on their own,[57] the methodology is seldom applied appropriately. Lecturers may, in referring students to a particular case, highlight how relevant legal principles were applied, relieving students of their responsibilities to find and apply the law. By merely allowing for questions by students in clarification, lecturers decrease the risks that some important topics will go untaught,[58] furthermore ensuring that the maximum amount of time is directed towards covering a large amount of content in the respective modules.

To ensure the successful application of the case method, there must be a true dialogue between the lecturer and students in the sense that discussions and conversations take place.[59] Students must come to realise that they have a role in the process of and conversation about the law.[60] With this method, however, rather than applying legal principles to hypothetical factual scenarios, there are no practical exercises that form part of this teaching methodology.

3 4 Application of a combination of these methods

The Socratic teaching method can sometimes appear to be integrated with the case dialogue method. In applying the case dialogue method, a lecturer may direct certain questions to the students based on their analysis and research concerning a particular court case. The answer from the students may be met with further questions and answers, which, in effect, reflect the

50 Dickinson 2009 *Western New England Law Review* 111.
51 Dickinson 2009 *Western New England Law Review* 99.
52 Dickinson 2009 *Western New England Law Review* 99; Pedagogy in Action https://serc.carleton.edu/sp/library/cases/what.html.
53 Dickinson 2009 *Western New England Law Review* 100.
54 Schwartz https://www.ryerson.ca/content/dam/learning-teaching/teaching-resources/teach-a-course/case-method.pdf; Dickinson 2009 *Western New England Law Review* 99.
55 McQuoid-Mason 1982 *Journal for Juridical Science* 165; University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method.
56 Pedagogy in Action https://serc.carleton.edu/sp/library/cases/what.html.
57 *Ibid.*
58 *Ibid.*
59 Dickinson 2009 *Western New England Law Review* 109–110.
60 Dickinson 2009 *Western New England Law Review* 112.

Socratic methodology.[61] The significance hereof is that there is a constant exchange of information between lecturer and student. Theoretically speaking,[62] the Socratic and case dialogue methods however remain two different phenomena. As is indicated below, despite using a combination of these two methods, they remain ineffective in providing students with skills training in procedural law modules. In pursuing the appropriate method of teaching procedural laws, it is important to explore the needs of the constituencies of law graduates.

4 WHAT DO CONSTITUENCIES WANT?

Greenbaum calls for collaboration between the legal profession, which regulates the post-degree vocational training phase, and the academy, which controls the foundational education phase.[63] Before the effectiveness of teaching procedural modules to law students according to the Socratic and case dialogue methods can thus be evaluated, one needs to appraise the needs of the primary constituencies of law graduates.[64]

Not all law students will pursue a career in litigation after the completion of their LLB studies. The mere fact that they are legally trained may nonetheless place most of them in careers where they will be associated with litigious practices, such as legal advisers or corporate lawyers who will serve as their employers' point of contact with practising attorneys or advocates. Training in civil and criminal litigation processes and the production and admissibility of evidence are therefore required.

Schultz indicates that an educator's primary obligation is to consider what lawyers, as members of a privileged profession, should know.[65] The legal practice called for improvement in law graduates' procedural skills.[66] Chaskalson states that

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61 McQuoid-Mason 1982 *Journal for Juridical Science* 164.

62 University of Denver https://www.law.du.edu/index.php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method.

63 Greenbaum "Current Issues in Legal Education: A Comparative Review" 2012 23(1) *South African Law Journal* 16 26.

64 Potential constituencies identified during a study include the public served, students, employers of law graduates, law schools, applicants for admission, taxpayers, alumni, courts, all the role players in the legal profession and the university. See Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* (2016) 17.

65 He theorises this as more important than heeding the demands of legal practice councils. Schultz "Teaching 'Lawyering' to First-Year Law Students: An Experiment in Constructing Legal Competence" 1996 52(5) *Washington and Lee Law Review* 1643 1662.

66 In this regard, see Vukowich "Comment: The Lack of Practical Training in Law Schools: Criticisms, Causes and Programs for Change" 1971 23 *Case Western Reserve Law Review* 140 140; Redding "The Counterintuitive Costs and Benefits of Clinical Legal Education" 2016 55 *Wisconsin Law Review Forward* 55 55; Holmquist "Challenging Carnegie" 2012 61(3) *Journal of Legal Education* 353 353; Du Plessis "Designing an Appropriate and Assessable Curriculum for Clinical Legal Education" 2016 49(1) *De Jure* 1 1; Greenbaum "Re-Visioning Legal Education in South Africa: Harmonizing the Aspirations of Transformative Constitutionalism with the Challenges of our Educational Legacy" (undated) http://www.nylslawreview.com/wp-content/uploads/sites/16/2014/11/Greenbaum.pdf (accessed 2019-05-28) 10; Biggs and Hurter "Rethinking Legal Skills Education in an LLB Curriculum" 2014 39(1) *Journal for Juridical Science* 1 2, 3; Engler "The MacCrate Report Turns 10: Assessing its Impact and Identifying Gaps We Should Seek to Narrow" 2001 8 *Clinical Law Review* 109 115. This is not only a concern as far as the legal profession is

> "[l]aw graduates emerge from the university with a theoretical training, but without any basic knowledge of, or practical training directed specifically to, the practice of law."[67]

At the LLB Summit of 2013,[68] it was indicated that law faculties are not producing law graduates who can further a justice and rights culture.[69] Members of the bench, practitioners, and some educators noted that newly graduated law students lack the necessary practical knowledge, skill, and ingenuity required of a practising attorney.[70] Inadequate cross-examination skills, lamented by the court as disturbing,[71] troubling and the rendering of questionable legal services, further informs the need for meticulous training. The court criticised the legal representative for conducting the trial "[w]ith no

concerned, but also in other fields and professions – see Griesel and Parker "Graduate Attributes: A Baseline Study on South African Graduates from the Perspective of Employers" 2009 *Higher Education South Africa & The South African Qualifications Authority* 1 in this regard.

67 Chaskalson "Responsibility for Practical Legal Training" 1985 (March) *De Rebus* 116 116.

68 Whitear-Nel and Freedman "A Historical Review of the Development of the Post-Apartheid South African LLB Degree – With Particular Reference to Legal Ethics" 2015 21(2) *Fundamina* 237. Also see 239 in this regard, where the role of higher education, with regards to societal development and transformation, is discussed. It is stated that, at a 2010 summit, held by the Department of Higher Education and Training, it was agreed that it was the duty of higher education to produce socially responsible graduates who are well aware of their roles in society. They must further be made aware that they are leaders of economic development and social transformation. It was further agreed that the curricula of universities should therefore endorse social relevance, as well as enable and motivate students to become socially engaged leaders and citizens. It is submitted that experiential learning, especially at law clinics, can significantly enhance the teaching and learning of law students in this regard.

69 It must be made clear that the aim of this article is not to discredit the competency of law schools in any way. In this regard, also see Kennedy "How the Law School Fails: A Polemic" 1971 1(1) *Yale Review of Law and Social Action* 71 71. He states the following: "Let me begin with a brief statement of the values to which I appeal. First, I am very glad to be a member of the community of the Law School; my motives in writing are anything but destructive. I would like to do something to improve our lives as people living together; if the critique is at times bitter, it is with that hope. It would not have occurred to me to write this paper if I did not think I could appeal to the sense of moral obligation which underlies the concepts of 'teacher' and 'lawyer,' and to the urge for craftsmanlike 'effectiveness' combined with social responsibility which brings most students here."

70 Vukowich 1971 *Case Western Reserve Law Review* 140; Snyman-Van Deventer and Swanepoel "The Need for a Legal-Writing Course in the South African LLB Curriculum" 2012 33(1) *Obiter* 121 121; Manyathi "South African LLB Degree Under Investigation" 2010 (April) *De Rebus* 8 8; Chamorro-Premuzic and Frankiewicz "Does Higher Education Still Prepare People for Jobs?" (7 January 2019, revised 14 January 2019) https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs (accessed 2020-02-13); SASSETA Research Department "SASSETA Research Report: Assessment of Learning Conditions of Candidate Attorneys During a Transformation Attempt" (March 2019) https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf (accessed 2020-01-14) 30–31. SASSETA specifically commented on the "very sloppy" work and initiative of some candidate attorneys. In this regard, it must be kept in mind that most candidate attorneys just came from university law school training and therefore, this may reflect on the training received while at university.

71 *Motsagki v S* (2013/ A5043) [2014] ZAGPJHC 260 (14 October 2014) http://www.saflii.org/za/cases/ ZAGPJHC/2014/260.html (accessed 2019-11-27).

plan or objective and was either blind to or inattentive to several material or potentially material details."[72]

It is submitted that these inadequacies can be addressed by inculcating with students the core values that every competent lawyer must embrace, which include the following:

(a) the provision of competent representation;
(b) striving to promote justice, fairness, and morality;
(c) striving to improve the profession;
(d) professional and self-development;
(e) judgment;
(f) professionalism;
(g) civility; and
(h) conservation of the resources of the justice system.[73]

Holmquist,[74] in response to the Carnegie Report,[75] conducted a survey among legal practitioners, judges, and mediators in the USA, questioning "[w]hat lawyering skills don't law schools teach that we should?"[76] The following were in main suggested by the participants:

(a) law students must learn to recognise the complexity and desired outcomes of their clients' stories;[77]
(b) law students must have a broad historical and contemporary knowledge about the roles of legal practitioners in relation to their clients, different institutions, and society;[78] and
(c) law students must develop the necessary confidence and judgment emanating from experience.[79]

In law school, students are taught to "think like lawyers",[80] but are not necessarily instilled with the competency to execute their knowledge in practical situations. Wizner observes

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72 Par 65.

73 See Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 38, who conducted research across multiple jurisdictions to identify core values for application in South Africa.

74 Holmquist 2012 *Journal of Legal Education* 353 353.

75 See Silverthorn https://www.2civility.org/carnegie-report-live-like-lawyer/ with regards to the Carnegie Report and its importance, which is summarised as follows: "Almost ten years ago, a group of non-profit educators released what's come to be known as the law school 'Carnegie Report'. The report, actually titled 'Educating Lawyers Preparation for the Profession of Law', was part of a series of professional education reform reports produced by the Carnegie Foundation for the Advancement of Teaching. In all its reports, Carnegie broke down professional education into three apprenticeships – cognitive …, practical … and identity … A successfully integrated curriculum combines all three apprenticeships, intellectual, practical and professional. And that last, the professional identity part, is crucial."

76 Holmquist 2012 *Journal of Legal Education* 353.

77 *Ibid*.

78 Holmquist 2012 *Journal of Legal Education* 354.

79 *Ibid.*

80 Boon "Ethics in Legal Education and Training: Four Reports, Three Jurisdictions and a Prospectus" 2002 5(1 & 2) *Legal Ethics* 34; Sullivan *et al Educating Lawyers* 5. Sullivan *et al Educating Lawyers* 6, states that "[m]ost law schools give only casual attention to

> "[l]earning to think like a lawyer is only part of what a law student needs to learn in order to be a well-educated lawyer."[81]

Boon refers to a Law Society proposal that

> "ethics, together with knowledge and skills, should form the core elements of the legal education and training of solicitors 'from the cradle to the grave'".[82]

Legal practitioners have remarked that law students, upon exiting law school, lack the basic practical skills that would enable them to make a good start in practice. In the South African landscape, O'Regan stated that the lives of law graduates

> "[a]re determined in a real sense by the skills and habits that they have acquired at law school"

and that

> "much of the test of what constitutes a competent lawyer is skills-based rather than content-based".[83]

Legal education may become aimless, in furthering the legal profession as a whole, when law schools neglect to introduce students to practical skills, particularly concerning procedural modules.[84] Some practical aspects, such as drafting and consultation, are occasionally employed in selected doctrinal courses, generally as stand-alone courses at most universities.[85] There is thus no general integration of practical aspects into all doctrinal modules and consequently no opportunity for the students to observe and experience the law in action during the greatest part of their legal studies. Law faculties, therefore, produce law graduates who lack the required practical skills in order to practise as competent legal practitioners.[86]

As it was indicated that law faculties are generally not committed to preparing law students for legal practice,[87] the LLB curriculum needs to be developed in order to accommodate the more adequate and professional preparation of law students for legal practice. The procedural law modules

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teaching students how to use legal thinking in the complexity of actual law practice. Unlike other professional education, most notably medical school, legal education typically pays relatively little attention to direct training in professional practice. The result is to prolong and reinforce the habits of thinking like a student rather than an apprentice practitioner, conveying the impression that lawyers are more like competitive scholars than attorneys engaged with the problems of clients." In the same context, it is stated that "[l]aw school's typically unbalanced emphasis on the one perspective can create problems as the students move into practice." The case dialogue method also contributes to the students' abilities to "think like lawyers" – see University of Denver https://www.law.du.edu/index. php/law-school-learning-aids/the-classroom-experience/methods/socratic-case-method.

81 Wizner 2002 *Fordham Law Review* 1931.

82 Boon 2002 *Legal Ethics* 34 34.

83 O'Regan 2002 "Producing Competent Graduates: The Primary Social Responsibility of Law Schools" 2002 *South African Law Journal* 242 247.

84 Stuckey *et al Best Practices for Legal Education* vii.

85 Holmquist 2012 *Journal of Legal Education* 356.

86 Vukowich 1971 *Case Western Reserve Law Review* 141; Holmquist 2012 *Journal of Legal Education* 356.

87 *Ibid.*

are at the heart of legal practice and should be the focus of such development.[88] After evaluating the effectiveness of the Socratic and case dialogue teaching methodologies, it is indicated below that the curricular development will be effected by the introduction of required practical skills in procedural courses.

5 EFFECTIVENESS OF THE SOCRATIC AND CASE DIALOGUE TEACHING METHODOLOGIES RELATING TO PROCEDURAL LAW MODULES

The discussion above clearly indicates that legal education neglects the teaching and application of practical skills in procedural courses. The question is whether law schools, by using the Socratic and/or case dialogue methodologies, are training law graduates in such a manner that will enable them to enter the legal profession with the required legal knowledge, professional mindset, and appropriate practical skills?

An academic, who remains anonymous, has commented that the current law curriculum, where these methodologies are mainly utilised, is producing "legal barbarians" who might be trained in law, but who are not equipped to appreciate the true functioning of a lawyer with regards to society and the existing power dynamics.[89] Wade agrees, stating that emphasis on these teaching methodologies results in the

> "[o]ld Langdellian model of a law school – segregated physically, lost in rarefied appellate casebooks, with little knowledge, skill, resources or desires to achieve multiple levels of competency in students."[90]

Wizner correctly states that reliance cannot be placed on the case dialogue methodology, as students are constantly referred to past cases in order to predict what may happen in the future, instead of being taught the underlying methods and principles of legal thought that bring about legal decisions.[91] This is especially important because the law does not remain static but is constantly changing and evolving in ways that cannot be predicted by studying appellate decisions of the past.[92] Graduates are, as a result, left without proper practical knowledge of how to communicate with clients,[93]

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88 In this regard, see McQuoid-Mason 1982 *Journal for Juridical Science* 160, where he states that "[c]ivil procedure is said to lie at the heart of the law." The same can be said about Criminal Procedure and the Law of Evidence. In any litigious case, procedure and evidence play a central role.

89 Du Plessis 2016 *De Jure* 2.

90 Wade "Legal Skills Training: Some Thoughts on Terminology and Ongoing Challenges" 1994 5(2) *Legal Education Review* 173 182. The term "Langdellian" refers to Professor Christopher Columbus Langdell.

91 Wizner 2002 *Fordham Law Review* 1931.

92 *Ibid.*

93 Stuckey states that most law graduates are not competent to provide legal services or to perform work expected of them in law firms. These legal services would include communication and drafting. See Stuckey *et al Best Practices for Legal Education* 26, stating "[t]oday there is much less tolerance for a lack of client and communications skills; …"

how to draft, or even what to draft, as well as when to draft it.[94] Drafting is an important part of client representation, as it is a form of communication between the legal representatives of clients.

From the above discussion, it is clear that although real and complex problems are used in the case dialogue method, and although lecturers discuss topics with students during classroom sessions by way of the Socratic method, these methods of teaching remain mainly theoretical. It is submitted that the answer to the question posed above is negative. By primarily utilising these methodologies, the needs of constituencies remain unmet. The Carnegie Foundation also proposed significant curricular and pedagogical changes to American legal education, for this reason, aiming primarily at more real-world training, skills training, and more effective teaching methodologies.[95]

6 CONTEMPLATING DEFICIENCIES TOWARDS A REMEDY

In order to remedy the shortcomings identified in law schools' teaching methods by way of the Socratic and case dialogue teaching methodologies, specifically pertaining to the presentation of the procedural law modules, what is taught and especially how it is taught requires some reflection.[96]

It is submitted that law schools cannot teach students everything that they need to know about the law and legal practice.[97] However, law schools can lay a proper foundation on which legal practice can build after the student's exit from university, which should include having a broader insight of what it would mean to represent clients. Stuckey identifies this foundation as including "[a]n integrated combination of substantive law, skills, and market knowledge …",[98] further remarking that "[l]egal education is to prepare law students for the practice of law as members of a client-centered public profession."[99] In this context, law schools should consider the following approach:

> "A more adequate and properly formative legal education requires a better balance among the cognitive, practical and ethical-social apprenticeships. To achieve this balance, legal education will have to do more than shuffle the existing pieces. It demands their careful rethinking of both the existing curriculum and the pedagogies law schools employ to produce a more coherent and integrated initiation into a life in the law."[100]

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94 See Vukowich 1971 *Case Western Reserve Law Review* 140 152, as well as Stuckey *et al Best Practices for Legal Education* 26 in this regard. Vukowich states that, if law graduates do not get practical experience, such graduates will be "[i]ll-equipped to artistically skillfully represent … clients."

95 Klaasen "From Theoretician to Practician: Can Clinical Legal Education Equip Students with the Essential Professional Skills Needed in Practice?" 2012 2(19) *International Journal of Humanities and Social Science* 306.

96 Also see Boon 2002 *Legal Ethics* 35 in this regard.

97 Also see Stuckey *et al Best Practices for Legal Education* 7.

98 Stuckey *et al Best Practices for Legal Education* viii. Also see Sullivan *et al Educating Lawyers* 8 in this regard.

99 *Ibid.*

100 Stuckey *et al Best Practices for Legal Education* 4.

The law, as well as procedure, should not be taught in a vacuum consisting only of substantive rules, but in close connection to human experience in everyday life.[101] Hyams opines that law schools have not been very successful in integrating knowledge of substantive law, as well as skills, with subsequent stages of a practitioner's professional career.[102] Kennedy highlights this much-needed social contextual tuition when he states:[103]

> "I would like to improve our lives as people living together; if critique is at times bitter, it is with that hope. It would not have occurred to me to write this paper if I did not think I could appeal to the sense of moral obligation which underlies the concepts of "teacher" and "lawyer", and to the urge for craftsmanlike "effectiveness" combined with social responsibility which brings most students here."

It, however, appears that the desired outcomes of legal education, at the university level, are not fully appreciated. There could be many reasons for this, including the following:

(a) law schools do not have staff members who are experienced in training students for legal practice;[104]

(b) law schools do not include skills training, legal ethics, and legal professionalism in their curricula, but focus solely on instilling substantive law with the students;[105] and

(c) law schools have practical programmes, which include basic elements of skills training, ethics, and legal professionalism, in their curricula, but these programmes are presented too late during the years of study and only for a short duration.[106]

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101 See Hyams "On Teaching Students to 'Act Like Lawyer': What Sort of a Lawyer?" 2008 *Journal of Clinical Legal Education* 22 in this regard. CLE excels in this regard, as students have the opportunity to experience interactions with clients, their emotions and their perceptions of their own matters, as well as the outcomes they would want to see in such matters. This is in sharp contradiction with the case dialogue method, that is discussed in 3 3, as the facts of clients' cases are almost never neatly arranged and presented as such to students.

102 Hyams 2008 *Journal of Clinical Legal Education* 25.

103 Kennedy 1971 *Yale Review of Law and Social Action* 71 71. At the time of writing this article, Duncan Kennedy was a student at the Yale Law School.

104 In this regard, see Vukowich 1971 *Case Western Reserve Law Review* 143, where it is stated that "[l]egal educators are persons who – though they possess the credentials to practice law – have decided that law practice is not their "cup of tea." One could thus assume that they see more merit in the intellectual than in the practical. Among most law school faculties, professional experience ranks relatively low among the qualifications for faculty employment. Consequently, many legal educators have little practical experience themselves and are unable or disinclined to teach practical matters. Since the materials which are emphasised in any curriculum are those which the educators are best able or most eager to teach, the faculty's paucity of interest and experience in practice is a prime cause for the lack of any meaningful practical training in law school." Also see Marson, Wilson and Van Hoorebeek "The Necessity of Clinical Legal Education in University Law Schools: A UK Perspective" 2005 *Journal for Clinical Legal Education* 29 30 in this regard.

105 Kruse "Legal Education and Professional Skills: Myths and Misconceptions About Theory and Practice" 2013 45 *McGeorge Law Review* 8.

106 These "practical programs" refer mainly to CLE. At NMU, North-West University, University of Johannesburg and the University of Pretoria, CLE is presented in the final academic year and involves *inter alia* practical sessions at the university law clinic. See Nelson Mandela

Accordingly, the end result of a successfully completed LLB degree is a graduate who does not possess a proper understanding of real-life factual situations or how to interact with them.[107] Although law lecturers are good at utilising the casebook method and conventional doctrinal lecture methods, they do not teach students how to engage with the daily activities of a legal practitioner,[108] including engagement with civil procedure, criminal procedure, and aspects of evidence in a practical way. The case dialogue methodology emphasises neatly edited cases but excludes complicated and confusing human facts that legal practitioners so often have to deal with.[109] The work is therefore compartmentalised into "neat and artificial categories" for students.[110] This is very different from practice, where facts must be collected, collated, analysed, verified, and expressed in various forms, including by way of correspondence and as part of arguments during litigation.[111]

These deficiencies affect students significantly when pursuing their careers after graduation.

7 STUDENT PERSPECTIVE

Civil procedure has been described by students as being tough,[112] as well as "[t]he most mystifying, frustrating, and difficult course …"[113] At university, students study procedural laws as far as basic substantive principles are concerned, but nothing more. In the teaching of the law of evidence, for example, there is no practical application of the principles to actual exhibits, as it would pertain to actual courtroom scenarios. Students, therefore, enter legal practice without any experience in interpreting evidence, the actual procedures used to gather and preserve such evidence, as well as how to consider all evidence in a particular case from a holistic perspective, instead of piecemeal.[114] The risk in neglecting the practical application during teaching is that students may develop into legal practitioners, and even presiding officers, who struggle to apply the rules of evidence.[115] This unfortunate situation has another side effect: legal practitioners, who attempt

University LLB curriculum (2019) https://www.mandela.ac.za/academic/Courses-on-offer/Qualification-Details.aspx?appqual=LL&qual=54100&faculty=1500&ot=A1&cid=72 (accessed 2019-01-22), North West University LLB curriculum (undated) http://law.nwu.ac.za/sites/law.nwu.ac.za/files/files/Law/The%20LLB%20curriculum.pdf (accessed 2019-01-22); University of Pretoria LLB-curriculum "Undergraduate Faculty Brochure 2019/2020" (2019) https://www.up.ac.za/media/shared/10/ZP_Files/fb-law-2019-2020.zp165426.pdf (accessed 2019-01-22) in this regard. Some programmes may only be for a semester, but even where it is for a year, it does not present sufficient time in which students can acquire sufficient practical skills.

107 Vukowich 1971 *Case Western Reserve Law Review* 140–141.

108 Holmquist 2012 *Journal of Legal Education* 355.

109 Holmquist 2012 *Journal of Legal Education* 357.

110 McQuoid-Mason 1982 *Journal for Juridical Science* 161.

111 *Ibid.*

112 Oppenheimer "Using a Simulated Case File to Teach Civil Procedure: The Ninety-Percent Solution" 2016 6(1) *Journal of Legal Education* 817 817.

113 *Ibid.*

114 See Uphoff *et al* 1997 *University of Cincinnati Law Review* 381 392 in this regard.

115 Uphoff *et al University of Cincinnati Law Review* 392.

to learn the principles of evidence and application thereof whilst practising, may blindly follow the application thereof by the mentioned practitioners and presiding officers.[116] Consequently, they do not know when certain pieces of evidence should be permitted or excluded, as they do not adequately understand the principles of the law of evidence.[117]

It is therefore critical to consider appropriate skills training in procedural courses.

8 SKILLS TRAINING

How should law graduates be trained to enter legal practice with adequate knowledge and practical skills? A possible point of departure is the realisation that the skills and values of competent legal practitioners are developed continuously. It commences before entry into law school[118] and continues for the duration of the legal practitioner's professional career, with its most critical and formative stage in the course of the law school years.[119] Therefore, the training provided at the university level should be of such a nature that it shapes the student into a competent and professional thinking legal practitioner who can render quality legal services to the public.[120] Kruse shares this point of view, stating that "[t]he basic program of legal education needs to be restructured to move students in an orderly way through the acquisition of basic legal knowledge, essential lawyering skills, and underlying professional values."[121] This aligns with Stuckey's question:

> "Have we really tried in law school to determine what skills, what attitudes, what character traits, what quality of mind are required of lawyers? Are we adequately educating students through the content and methodology of our present law school curriculums to perform effectively as lawyers after graduation?"[122]

It is submitted that the substantive part of procedural courses can be presented by using a combination of the Socratic and case dialogue methodologies. These must, however, be combined with practical applications where students will develop the required practical application skills.

In most instances, the basic skills of procedural law in practice are only instilled with prospective legal practitioners when they enter legal practice

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116 *Ibid.*

117 *Ibid.*

118 Wizner 2002 *Fordham Law Review* 1929 1931. In this regard, the author probably refers to whether or not a particular person possesses traits of professionalism in very early stages of his or her life. Such traits are then developed during his or years of legal studies and during the years of legal practice.

119 Stuckey *et al Best Practices for Legal Education* vii.

120 See Lamparello "The Integrated Law School Curriculum" 2015 *SSRN Electronic Journal* 1 4. He suggests that "[t]he curriculum should effectively integrate doctrinal, practical skills, and clinical instruction to create a competency-based curriculum in which students practice like lawyers."

121 Kruse 2013 45 *McGeorge Law Review* 8.

122 Stuckey *et al Best Practices for Legal Education* vii.

after graduating from university.[123] This means that a newly registered candidate legal professional will not have any experience in executing even the most basic courtroom procedures when required to do so. The principal of a candidate legal practitioner, as well as other staff members at the firm where the candidate legal practitioner is employed, or staff of the particular court, will have to provide guidance throughout such proceedings. Skills training should therefore be presented throughout the course of legal studies at the tertiary level.

A research study across multiple international jurisdictions identified essential skills that law graduates should have or would need when entering the legal profession.[124] The study further details the skills that are, or should be, taught in South African CLE programmes.[125] Skills required, integral to litigation practice,[126] will include language, communication, writing, and legal reasoning.[127]

Without skills training, it is questionable as to whether universities are contributing toward producing graduates who are reasonably fit for practice and litigation. In this regard, Gravett states that "[i]f university law schools fail to contribute to establishing a substantial body of competent trial lawyers, our failure will ultimately take its toll on our system of justice."[128]

Identified skills, as they can be developed through the teaching of procedural laws, will be discussed below. The importance of cultural, social,

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123 It is acknowledged that some such skills may be acquired when students are trained in clinical courses by observing their clinicians. However, due to the students' lack of rights of court appearance, these will only be by way of observation, which may be limited, as students' university timetables may prevent them from attending court appearances in cases that they worked on in the clinic – see Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 23.

124 Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 44–53*.* These are ethics; practice management; case management; interviewing skills; the capacity to deal sensitively and effectively with clients, colleagues and others from a range of social, economic and ethnic backgrounds and disabilities; effective communication techniques; recognition of clients' financial, commercial and personal constraints and priorities; effective problem-solving; to be able to use current technologies; legal research; time management and billing; to manage risk; to recognise personal strengths and weaknesses and to develop strategies to enhance personal performance; to manage personal workload and the number of client matters (clinicians must set the example – if you are a teacher, then limit client intake to teach efficiently); work as part of a team (pairing of students or to do some activities in a group in the clinic are therefore valuable); problem solving; legal analysis and reasoning; factual investigation; counselling (to establish a counselling relationship with a client); negotiation; and the skills applicable to litigation and alternative dispute resolution procedure, i.e., trial advocacy.

125 These skills can be summarised as: professional and ethical conduct, consultation skills, file and case management, numeracy skills, practice management, legal research, alternative dispute resolution and trial advocacy. The following drafting skills are included – letters, pleadings, notices and applications, wills and contracts. For full details of the summary provided here, see Du Plessis *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools.*

126 The so-called "vocational skills".

127 Whitear-Nel and Freedman 2015 *Fundamina* 234 243. For a more circumspective discussion of thinking and logical reasoning, see Palmer and Crocker *Becoming a Lawyer – Fundamental Skills for Law Students* 2ed (2007) 9–18.

128 Gravett "Pericles Should Learn to Fix a Leaky Pipe – Why Trial Advocacy Should Become Part of the LLB Curriculum (Part 2) 2017 21 *Potchefstroom Electronic Law Journal* 1 1.

and human elements is however of the utmost importance throughout the application of the various skills.

9 THE IMPORTANCE OF CULTURAL, SOCIAL, AND HUMAN ELEMENTS IN THE CONTEXT OF PROCEDURAL LAW MODULES

Students study countless legal doctrines and legislation by reading textbooks and other relevant material. However, the law does not exist in the abstract and should be understood in its relationship with individual people, as well as society.[129] Van Marle and Modiri state the following:[130]

> "South African law schools need a decidedly dynamic and radically different curriculum which does not lock students into a teaching style based on traditional modes of analysis and ill-defined learning outcomes, but rather opens them up to a diversity of approaches and places an emphasis on certain social and ethical commitments that underlie any democratic legal system."

Students must come to realise that lawyers are human beings with human identities and that their life experiences, including their values and sense of ethics in their private lives, inform their actions.[131] This may cause personal tension when a lawyer argues the law on behalf of a client where his/her personal values contrast with the position (s)he is arguing.[132] Students, in appreciating the importance of social and human elements in legal practice, are faced with a theoretical debate where they must choose "whether the best question to ask is 'what, as lawyers, are we morally required to do', or 'what kind of lawyer should we be?'"[133]

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[129] Bon "Examining the Crossroads of Law, Ethics, And Education Leadership" 2012 22 *Journal of School Leadership* 285 293; Kahn "Freedom, Autonomy, and the Cultural Study of Law" 2001 13 *Yale Journal of Law and the Humanities* 141 141. Kahn states that "[t]he rule of law … is not just a set of rules to be applied to an otherwise independent social order. Rather, law is, in part, constitutive of the self-understanding of individuals and communities."

[130] Van Marle and Modiri 2012 *South African Law Journal* 212. Also see Modiri "The Crises in Legal Education" 46(3) 2014 *Acta Academica* 1 1 in this regard, where it is stated that "[t]he value of legal education should not be indexed by how well it serves the needs and expectations of the legal profession and judiciary, but rather how it contributes to a new jurisprudence suited to the legal, *social* [own emphasis] and political transformation of South Africa." Although the author's point of view relating to the legal profession and judiciary is not acceptable for purposes of this treatise, it is submitted that he is correct as far as social transformation is concerned.

[131] Webb "Conduct, Ethics and Experience in Vocational Legal Education" in *Ethical Challenges to Legal Education and Conduct* (1990) quoted in Kerrigan "'How Do You Feel About This Client?' A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students" 2007 *International Journal of Clinical Legal Education* 136; Mnyongani "Whose Morality? Towards A Legal Profession with An Ethical Content That Is African" 2009 *SA Public Law* 131, indicates "the code of professional ethics regulates the life of a lawyer only in his or her professional life", but does not equate to cultural norms, turning lawyers into moral schizophrenics attempting to integrate the ethics in their professional and private lives.

[132] For a full discussion, see Parker and Evans *Inside Lawyers Ethics* 3ed (2018).

[133] Webb in Kerrigan "'How Do You Feel About This Client?' A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students" 2007 *International Journal of Clinical Legal Education* 130. Also see 141–142 for a discussion on what it means to be an

Western philosophy compartmentalises knowledge,[134] distinguishing between a lawyer's professional and private life. In practice, lawyers follow the guidelines of their professional codes, but they follow their cultural ethos in their private lives.[135] Mnyongani suggests that Western philosophy embraces individual autonomy, whereas African philosophy focuses on reality overall.[136] These two different views have an effect on students entering the profession, as all may not easily embrace Western norms.[137] As culture is not immutable, but rather dynamic and flexible,[138] language and culture play a large role in preparing students to enter the profession.[139] Acknowledging the role of culture in informing someone's sense of morality and ethics,[140] Mnyongani suggests that the profession "embark on a journey of 'decolonising' their minds", by debating what it means to be African in a profession with a Western approach, ethos, and orientation.[141] Such a journey should already start during the study of procedural laws.

Webb correctly calls the treatment of everyone as "universally the same" a travesty of responsibility.[142] An authentic ethic of responsibility means that a lawyer must be primarily sensitive to the needs and situations of a specific person.[143] In agreement with the Carnegie Report's discussion on "professional formation toward a moral core of service to and responsibility for others",[144] Cody holds that a lawyer's professional identity includes not only being responsible to individual clients, but to also contribute services to the community.[145] The inclusion of responsibility to the community means

ethical human being, suggesting three connected commitments, namely authenticity, responsibility and choice. He further indicates that an authentic ethic of responsibility requires us to be fully responsible for the entirety of our representation, not just to our clients, but also others who may be affected by the representation.

134 Menkel-Meadow "Excluded Voices: New Voices in the Legal Profession Making New Voices in the Law" 1987 42(1) *University of Miami Law Review* 29 31.

135 Menkel-Meadow 1987 *University of Miami Law Review* 31.

136 Mnyongani 2009 *SA Public Law* 125.

137 *Ibid*.

138 Smith and Tivaringe "From Afro-Centrism to Decolonial Humanism and Afro-Plurality. A Response to Simphiwe Sesanti" 2018 62 *New Agenda* 41 42.

139 Mnyongani 2009 *SA Public Law* 125.

140 Fataar "Decolonising Education in South Africa: Perspectives and Debates" 2018 7 (Special edition June) *Educational Research for Social Change* i vii.

141 Mnyongani 2009 *SA Public Law* 133–134. Indigenous law was relegated to a subordinate role with the imposition of Roman Law, Roman-Dutch Law and English Law into South African Law. See Van Niekerk "The Status of Indigenous Law in the South African Legal Order: A New Paradigm for the Common Law?" 2002 *Codicillus* 5–6.

142 Webb in Kerrigan "'How Do You Feel About This Client?' A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students" 2007 *International Journal of Clinical Legal Education* 148.

143 *Ibid.*

144 The Carnegie Foundation for the Advancement of Teaching. See Hamilton and Monson "Legal Education's Ethical Challenge: Empirical Research on How Most Effectively to Foster Each Student's Professional Formation (Professionalism)" 2012 *University of St Thomas Law Journal* 332.

145 Cody "What Does Legal Ethics Teaching Gain, If Anything, From Including a Clinical Component?" 2015 *International Journal of Clinical Legal Education* 4; Hyams 2008 *International Journal of Clinical Legal Education* 21 confirms this understanding that all professionals have an obligation to contribute to the community in some form. In South Africa duties towards the poor in the form of access to justice, forms part of the

that lawyers' sense of who they are, and what it means to them to be a lawyer, will form part of their professional values.[146]

Studies on legal education identify embedding cultural literacy in students as a core skill,[147] where different perspectives can also serve to reduce feelings of marginalisation among students with diverse backgrounds.[148]

Holmquist summarises this section accurately when she states the following:

> "If, as these literatures assert, law is a manifestation of more general social and cultural forces, and lawyering is but a version of human problem solving and persuasion, then thinking like a lawyer is far more multi-faceted and content-laden than the doctrinal analysis and application most first-year law students master …"

The concepts of Africanisation and decolonisation of the law of procedure and evidence do not form part of the conventional curriculum.[149] As these may affect cases, leading to potential changes to the law, a study of these concepts should be included in procedural curricula.[150]

A plea for social elements, to be introduced in the law curriculum was advanced by Kahn-Freund during the 1960s,[151] criticising the inherent educational dangers of employing the case method where students will read cases that are typically about very serious issues, but where very little is stated about the economic, social, and cultural life of the parties involved.[152] Students may view the reality of the law in a "distorted mirror",[153] expected to know the intricacies of the law without appreciating the basic principles of

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requirements of professional and ethical conduct – see De Klerk (ed) *Clinical Law in South Africa* (2006) 50–52.

146 Cody 2015 *International Journal of Clinical Legal Education* 9. For a full discussion see Webb in Kerrigan "'How Do You Feel About This Client?' A Commentary on the Clinical Model as a Vehicle for Teaching Ethics to Law Students" 2007 *International Journal of Clinical Legal Education*; also see Klein, Wortham and Blaustone "Autonomy-Mastery-Purpose: Structuring Clinical Courses to Enhance These Critical Educational Goals" 2012 *International Journal of Clinical Legal Education* 105 105–147.

147 Polistina "Cultural Literacy. Understanding and Respect for the Cultural Aspects of Sustainability" (2009) http://arts.brighton.ac.uk/__data/assets/pdf_file/0006/5982/Cultural-Literacy.pdf (accessed 2022-06-25) 1–6. Polistina identifies four key cultural literacy skills namely: (1) cross-cultural awareness which includes the ability to examine other cultures critically; (2) local cultural awareness, the ability to accept and respect knowledge within local cultures and communities; and (3) critical reflective thinking, a dialogue between students and clinicians on aspects of cultural or social discourse, where the experiences of the group as a whole are considered. For a discussion on cultural literacy in view of globalisation see Shliakhovchuk "After Cultural Literacy: New Models of Intercultural Competency for Life and Work in a VUCA World" 2019 *Educational Review* 1–33.

148 Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 126. Many clinical teachers have recognised the importance of teaching diversity issues in the clinic.

149 Also see McQuoid-Mason 1982 *Journal for Juridical Science* 160 161 in this regard.

150 For a discussion on how cross-cultural skills can be introduced, see Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 125–128.

151 Kahn-Freund "Reflections on legal education" 1966 29(2) *The Modern Law Review* 121 127–128.

152 *Ibid.*

153 *Ibid.*

human life and existence, which have the potential to lead to solutions to simple legal problems.[154]

Identified skills, as they can be developed through the teaching of procedural laws, will be discussed.

10 IDENTIFIED ESSENTIAL SKILLS FOR DEVELOPMENT IN PROCEDURAL LAW MODULES

10 1 General

Although law schools invest effort in teaching students logic, analytical skills as well as reasoning in an attempt to chisel their intellectual skills,[155] such training remains unconvincing.[156] Essential skills should be developed for practical application within the procedural laws' curricula.

It is submitted that the following essential skills can be developed through the teaching of procedural laws: professionalism and ethical conduct; social justice; legal principles, and legal research; analytical argument; legal interviewing and counselling; cultural, social, and human awareness; settlement negotiations and mediation; counselling; legal drafting; reflection; communication; and the administration of justice. Students will develop the ability to recognise their clients' financial, commercial, and personal constraints in order to effectively advocate a case on behalf of a client, and recognise the effects of their actions on society at large, as well as the general performance and reputation of the legal profession.

The development of these skills will be illustrated by way of application in context, as indicated below.

10 2 The importance of the identified essential skills illustrated

Skills training in professionalism and ethical conduct were indicated as minimum practice requirements,[157] as is the duty of lawyers to become

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154 *Ibid.*

155 Hyams 2008 *Journal of Clinical Legal Education* 22; Stuckey *et al Best Practices for Legal Education* 79.

156 Hyams 2008 *Journal of Clinical Legal Education* 22. Also see Stuckey *et al Best Practices for Legal Education* 79 in this regard. Students, graduating from law schools, have not always been exposed to basic important skills relating to legal practice. Also see Kennedy "Legal Education As Training For Hierarchy" (2014) https://duncankennedy.net/documents/Legal%20Education%20as%20Training%20for%20HierarchyPolitics%20of%20Law.pdf (accessed 2019-01-23) where it is stated that "[l]aw schools are intensely political places despite the fact that they seem intellectually unpretentious, *barren of ambition or practical vision of what social life might be* [own emphasis]."

157 Hyams 2008 *Journal of Clinical Legal Education* 22, in referring to Noone and Dickson describing a professionally responsible person as *inter alia* someone who is competent to perform the work that they should, as well as someone who does not encourage the use of the law to bring about injustice, oppression or discrimination.

involved in social justice issues in society,[158] skills, and values that can be incorporated into the teaching of substantive and procedural law.[159] However, Schneider states that the traditional way of teaching procedural courses neglects the social and human contexts.[160] It is submitted that these skills can be inculcated effectively as part of the teaching of procedural law modules.

Legal principles governing human interaction must be instilled in students.[161] Interviewing and consultation skills form the basis of all clients' cases.[162] It was indicated that

> "In synergy [with interviewing skills], are the identified skills of ethics, the capacity to deal sensitively and effectively with clients from a range of social, economic and ethnic backgrounds and disabilities, effective communication techniques, recognition of clients' financial, commercial and personal constraints and priorities, effective problem-solving, legal research, time and risk management, to recognise personal strengths and weaknesses, legal analysis and reasoning, factual investigation and counseling skills".[163]

Students must therefore be taught to be mindful of their prospective clients' interests in order to ensure that proper legal advice and guidance are given in accordance with what the client really wants.[164] Generally, the assumption would probably be that a practitioner should consult with a client, listen closely to his or her account of events, and thereafter suggest legal remedies in order to solve the client's dilemma. However, such an assumption requires thoroughly honed skills in legal interviewing and counselling. There must be no assumptions about a client's knowledge or the emotional impact the case may have, that the client will be willing to accept certain risks, or even that the case is capable of a legal resolution. Possible stereotypical views such as the effects of race, class, and gender must be heeded.[165] By applying a client-centred approach, treating clients as persons and not just as legal problems, by showing empathy, will reflect a lawyer's social justice values and clients' rights to dignity.[166] Once the interviewing process is completed, appropriate steps toward resolving the case can be taken. In advising clients, counselling skills are honed when a lawyer talks to clients about their concerns, goals, and values, remembering that the legal work impacts other people, organisations, and companies. The process of advising will include the skills of legal analysis and strategy,[167]

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158 McQuoid-Mason "The Four-Year LLB Programme and the Expectations of Law Students at the University of KwaZulu-Natal and Nelson Mandela Metropolitan University: Some Preliminary Results from a Survey" 2006 27(1) *Obiter* 166 169.

159 McQuoid-Mason 2006 *Obiter* 169.

160 Schneider "Rethinking the Teaching of Civil Procedure" 1987 37(1) *Journal of Legal Education* 42.

161 Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 355–356.

162 Du Plessis "Clinical Legal Education: Interviewing Skills" 2018 *De Jure* 140 140–162.

163 Du Plessis 2018 *De Jure* 143.

164 For a full discussion on interviewing and counselling, see Du Plessis *Effective Legal Interviewing and Counselling* (2019).

165 Du Plessis 2018 *De Jure* 147.

166 Du Plessis 2018 *De Jure* 154.

167 Du Plessis 2018 *De Jure* 157.

and the sourcing of potential solutions, which may include legal and non-legal options.[168] This will further develop the skill of analytical argument.[169]

When these instructions do not form part of the teaching of procedural law modules, the implication is that students are brought under the impression that lawyers are only involved in litigation, whereas there is a lot more involved, such as settlement negotiations and mediation.[170]

Students should be instructed that when a divorce summons is served on a client, the practitioner should discuss the possibility of a settlement, honing consultation skills, before immediately defending the matter and proceeding with the usual subsequent pleadings, namely a Plea and Counterclaim. If so, settlement negotiations can be entered into with the other party or his legal representative, honing negotiation skills. Drafting skills become relevant when the deed of settlement is drafted. This process may result in stress and emotional relief, as well as cost-saving for the client, thereby addressing human elements directly. Settlement negotiations may also lead to a mediation process, a further practical skill that can be instilled with students.

Proper training in this regard will inculcate ethical professionalism in students, involving an altruistic commitment toward helping people in need, as well as treating them in an engaged, sensitive, and empathetic manner.[171] This directly involves legal ethics and professionalism in the teaching and practical upbringing of the students.

Active and experiential learning can yield positive results in this regard.[172] Simulations will enable students to view the crises of clients from their respective sides and may develop empathy with the situation in which a client may find himself.[173]

Civil procedure should therefore not be restricted to technical questions relating to the most effective way of dealing with and solving disputes, but should also include considerations of what a party wants to achieve in society.[174] Students must therefore be taught that, although the law provides for it, litigation is not the only route that a client may want to follow in a particular case. The rules of civil procedure will, however, play an important role in respect of how the case must be brought to court, should the client instruct a legal practitioner to proceed with litigation.

Seeking alternative routes to litigation in addressing clients' problems will equip students with, *inter alia*, the skills to communicate more effectively with clients and other interested parties; recognise their clients' financial, commercial, and personal constraints and priorities; and effectively advocate

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168 Du Plessis 2018 *De Jure* 158.

169 Langa "Transformative Constitutionalism" 2006 3 *Stellenbosch Law Review* 351 355–356.

170 *Ibid.*

171 Nicholson "Education, Education, Education: Legal, Moral and Clinical" 2008 42(2) *Law Teacher* 145 146.

172 Nicholson 2008 *Law Teacher* 160.

173 *Ibid.*

174 Hurter 2011 *Comparative and International Law Journal of Southern Africa* 409.

a case on behalf of a client.[175] Students are subsequently placed in a position where they are able to consider the effects of their actions on society at large, the administration of justice, as well as the general performance and reputation of the legal profession.[176] Thus, they should be taught not only how to conduct trials, but also why they need to do so, as well as what the result of such an action would be.[177]

Appropriate interviewing and consultation skills are key in the application of criminal procedure, where a client (who was arrested for a criminal offence) consults with a legal practitioner. For example, in a case where a plea in terms of section 112(2) of the Criminal Procedure Act[178] is suggested, students must know that a legal practitioner will have to interview his client in order to be fully informed with regards to the facts of the case. There must be no ambiguities or uncertainties between the practitioner and the client. In addition to this, the practitioner needs to be clear about the legal basis of the case. In other words, in terms of the law relating to the specific crime, do the facts of the case point in the direction of the guilt or innocence of the client?

It is also desirable that graduates should have adequate knowledge about how to read police dockets, as well as evaluate the evidence therein as far as the relevance and admissibility thereof is concerned.[179] Legal research will often be required.

The need to inculcate students with drafting skills becomes apparent during the teaching of procedural law modules. In litigation practice, there is a sequence of documentary procedural steps that need to be completed before court proceedings can be embarked upon. With civil proceedings, practitioners must draft processes and pleadings. These are issued by the clerk or registrar of the court, served by the sheriff of the court, and ultimately filed at court on the court file.[180]

Criminal proceedings do not require such exhaustive pleadings, but often require the drafting of pleas of guilty[181] or not guilty,[182] affidavits, and heads of argument. The drafting of letters is generally required such as to the clerk or registrar to obtain copies of the content of a police docket to prepare for a trial, or to a detention facility to arrange for a consultation with a detained person. These drafting skills however remain neglected during the teaching

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175 See Stuckey *et al Best Practices for Legal Education* 77 in this regard. It is submitted that creating an awareness among students regarding social and human elements in the context of the law will equip them with professional skills required by legal practice.

176 Stuckey *et al Best Practices for Legal Education* 77; Silverthorn https://www.2civility.org/carnegie-report-live-like-lawyer/.

177 Gravett 2017 *Potchefstroom Electronic Law Journal* 1; Silverthorn https://www.2civility.org/carnegie-report-live-like-lawyer/. Students should never be brought under the impression that these aspects fall outside the legal sphere of a matter, as they can conclude that these aspects are "[s]econdary to what really counts for success in law school – and in legal practice."

178 51 of 1977.

179 Klaasen 2012 *International Journal of Humanities and Social Science* 303.

180 Pete *et al Civil Procedure* 132, 133; Rule 5 of the Magistrates' Court Act 32 of 1944; Rule 17 of the Superior Courts Act 10 of 2013.

181 In terms of s 112(2) of the Criminal Procedure Act 51 of 1977 (CPA).

182 In terms of s 115 of the CPA.

of procedural law modules at the university level.[183] Although graduates will acquire these skills during their articles, procedural courses are positioned to impart a foundation.

11 SUGGESTIONS FOR PRACTICAL APPLICATION

11 1 General

Students indicated that they find procedural courses to be tough and voiced their frustration, as they do not have sufficient opportunities to view course material in a context that makes it appear to be real. Furthermore, course presenters do not engage with students by way of active learning when presenting the course.[184]

The theoretical and practical components should not be separated when teaching procedural courses, as both the theoretical and practical components, in tandem, contribute to the students' knowledge and understanding of the principles and application thereof.

University law clinics do require students to draft certain pleadings and other documents to afford them an opportunity to practise these skills.[185] The CLE curriculum generally also provides trial advocacy exercises. However, the CLE methodology does not permeate throughout the LLB curriculum. Clinical courses are limited to a year, or a semester, depending on the particular university.[186] Schneider posits that the CLE methodology influences the way legal scholars think about and teach civil procedure.[187] De Klerk strongly motivates for the introduction of the CLE methodology earlier in the LLB curriculum.[188] Professional drafting and practical legal procedures however remain peripheral in law schools, leaving graduates unprepared when entering practice.[189] Lecturers in procedural courses

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183 See Kruse 2013 *McGeorge Law Review* 7 10. In this regard, she states that law schools "views the traditional case method of instruction in legal education as teaching 'doctrine' and lumps together all other kinds of instruction – legal writing, simulations, clinics, and externships – as teaching 'skills'. It aligns the teaching of doctrine with theory and the teaching of skills with practice."

184 Oppenheimer 2016 *Journal of Legal Education* 817.

185 See Schneider 1987 *Journal of Legal Education* 41 41 in this regard. She states "[a] variety of movement within legal education, clinical legal education … is both directly and subtly influencing the way legal scholars think about and teach civil procedure." This substantiates the important role of law clinics and CLE in teaching procedural modules.

186 Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 40–44.

187 Schneider 1987 *Journal of Legal Education* 41 41.

188 See De Klerk "Integrating Clinical Education into the Law Degree: Thoughts on an Alternative Model" 2006 39(2) *De Jure* 244–251 in this regard.

189 See Vukowich 1971 *Case Western Reserve Law Review* 140 152, as well as Stuckey *et al Best Practices for Legal Education* 26 in this regard. Although the learned authors refer to practical legal experience in general, it is submitted that communication and drafting is included herewith. Vukowich states that, if law graduates do not get practical experience, such graduates will be "[i]ll-equipped to artistically skillfully represent … clients." Drafting is of course an important part of client representation, as it is a form of communication between the legal representatives of clients. Stuckey states that most law graduates are not competent to provide legal services or to perform work expected of them in law firms. Again, although he refers to legal services in general, communication and drafting are undoubtedly

therefore need to apply the CLE methodology in innovative ways in their respective courses in order to ensure that students gain some practical foundation.

11 2 Tutorial sessions

The CLE methodology provides structured tutorial sessions. Tutorial sessions are well suited to accommodate simulations and drafting exercises.[190] Students can be required to draft pleadings and other legal documents in simulated scenarios, such as a simulated client interview, which incorporates the required skills discussed above.[191] These may be assessed, as an assignment, towards a percentage of students' year marks for the course, as a prescribed assessment method.[192]

11 3 Mock trials

The CLE methodology provides for mock trials or trial advocacy exercises.[193] Mock trials are also well suited to incorporate the case dialogue method with practical application. Research of previous cases is required to argue precedent during the mock trials. Dedicated time within the lecturing schedule may be devoted to mock trials, verbal arguments, and the production of evidence.[194] Mock trials may take the form of quick class exercises, or during a dedicated time, with reference to a particular scenario pertaining to a civil case. Different roles can be allocated to students, which can be rotated for multiple class exercises. The application of civil procedure rules will require students to prepare in advance.

As is the case with civil procedure, it will be beneficial to students to undergo practical training with regard to some of the principles and procedures in criminal cases. These may include identifying proper arrest procedures, conducting simple bail applications, drafting pleas in terms of sections 112(2) and 115 of the Criminal Procedure Act,[195] and evaluating the admissibility of evidence procured by way of a search and seizure conducted in a particular way. All of these exercises can be done by way of simulations during mock trials.

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included therein. He also specifically states that, as far as hiring legal practitioners are concerned, "[t]oday there is much less tolerance for a lack of client and communications skills; …"

190 See McQuoid-Mason 1982 *Journal for Juridical Science* 161, 163 in this regard.

191 It will be ideal if students can participate in law clinic-activities, where they can be involved with the perusing and drafting of actual pleadings and other legal documents. The reality however often shows that, mainly due to having already accommodating large student numbers enrolled in clinical courses, clinics are generally unable to accommodate additional students – see Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 109.

192 Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 65–91.

193 Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 87–90.

194 *Ibid*, for examples of how such mock trials can be structured.

195 See Taslitz *Strategies and Techniques for Teaching Criminal Law* 29–31 with regards to the importance of drafting documents.

During exercises focusing on both civil procedure and criminal procedure respectively, the law of evidence will be applicable. Knowing the substantive rules of evidence, and applying such rules to a practical scenario, differ from one another; therefore, students should be learning these rules by applying them.[196] Hearsay evidence serves as an example in this regard: the concept can be easily defined, but the proper application is not always clear to students.[197] A more practical way of teaching the concept of evidence will enhance the true significance and meaning thereof in the context of a trial.[198]

For example, use two students as role-players: student A will "testify" during a "trial" about what student B has "stated" or "done" on a previous occasion. For the sake of completeness, student B can say or do something to concretise this action. This demonstration will make it clear to students that if A testifies about B's words and/or acts or omissions, it will generally constitute inadmissible hearsay evidence if B will not later confirm such testimony under oath at the same "trial".[199] This may appear to be a simple exercise, but it is submitted that it will go a long way in ensuring a better comprehension by students regarding the concept of hearsay evidence. If students correctly understand this foundation of hearsay evidence, it is further submitted that they will have a better appreciation for the inherent dangers in allowing hearsay evidence, as well as the various statutory criteria that should be considered before allowing it.[200] Consequently, what is required is a teaching method that can enable students to analyse facts and evaluate an entire case by applying the various rules of evidence.[201]

The above discussions show that a more practical teaching methodology will prepare students better for entering practice, as they will be able to practise interviewing, drafting, and verbal skills. Students will further be presented with the opportunity to become aware of human and social elements integral in every client's case and that they must be sensitive to the needs of clients.

11 4 Assignments

Reflection was indicated as an essential skill.[202] Students may be required to reflect on mock trials. This reflection may take the form of an assignment,[203] which may be assessed toward a percentage of students' year marks for the course.

196 Gravett 2017 *Potchefstroom Electronic Law Journal* 8.

197 *Ibid.*

198 *Ibid.*

199 Bellengere *et al The Law of Evidence* 293, 295, 297.

200 The concept of hearsay evidence is governed by s 3 of the Law of Evidence Amendment Act 45 of 1988.

201 Murphy 2001 *Journal of Legal Education* 571.

202 Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 74–77.

203 Du Plessis 2016 *Clinical Legal Education: Law Clinic Curriculum Design and Assessment Tools* 69–70.

12 CONCLUSION

Procedural law modules, as advanced building blocks in the study of law, present students with the required knowledge of how to enforce rights. The primary constituencies of law graduates however indicated that students lack the necessary practical knowledge, skill, and ingenuity required to enter practice.[204] It was shown that teaching according to the Socratic and case dialogue teaching methodologies does not allow for dedicated practical application of the substantive rules, leaving students ill-prepared for the practice of law as members of a client-centred public profession, which includes a much-needed social contextual tuition.[205] These deficiencies affect students significantly when pursuing their careers after graduation. Procedural law modules should be developed within the LLB curriculum to accommodate the adequate and professional preparation of law students for legal practice. The introduction of the required practical skills is therefore critical.

This article also illustrated the application of essential skills required for law graduates as identified across multiple international jurisdictions, by employing the CLE methodology in tandem with conventional lecture methodologies. Culture literacy, as a core skill,[206] accentuated the importance of cultural, social, and human elements in the application of the various skills in order to further develop the students' identities and values as professionals which include not only being responsible to individual clients, but to also contribute services to the community.[207] Suggestions for practical application through the CLE methodology included tutorial sessions, mock trials, and reflective assignments. It is submitted that continued focus on the development of skills and values in the teaching of procedural law modules will add significant value to educating students towards budding competent legal practitioners.

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[204] Vukowich 1971 *Case Western Reserve Law Review* 140; Snyman-Van Deventer and Swanepoel 2012 *Obiter* 121 121; Manyathi 2010 *De Rebus* 8 8; Chamorro-Premuzic and Frankiewicz https://hbr.org/2019/01/does-higher-education-still-prepare-people-for-jobs; SASSETA Research Department https://www.sasseta.org.za/download/91/candidate-attorneys-study/7474/candidate-attorneys-study-research-report-final-revised-25-03-2019-1-1.pdf 30–31.

[205] Kennedy 1971 *Yale Review of Law and Social Action* 71 71. At the time of writing this article, Duncan Kennedy was a student at the Yale Law School.

[206] Polistina http://arts.brighton.ac.uk/__data/assets/pdf_file/0006/5982/Cultural-Literacy.pdf 1-6. Polistina identifies four key cultural literacy skills namely: 1) cross-cultural awareness which includes the ability to examine other cultures critically; 2) local cultural awareness, the ability to accept and respect knowledge within local cultures and communities; 3) critical reflective thinking, a dialogue between students and clinicians on aspects of cultural or social discourse, where the experiences of the group as a whole is considered. For a discussion on cultural literacy in view of globalisation see Shliakhovchuk https://www.researchgate.net/publication/331453186_After_cultural_literacy_newmodels_of_intercultural_competency_for_life_and_work_in_a_VUCA_world.

[207] Cody 2015 *International Journal of Clinical Legal Education* 4; Hyams 2008 *International Journal of Clinical Legal Education* 21 confirms this understanding that all professionals have an obligation to contribute to the community in some form. In South Africa duties towards the poor in the form of access to justice, forms part of the requirements of professional and ethical conduct – see De Klerk *et al Clinical Law in South Africa* 50–52.

"LEGAL STANDING" AND "THE DEMAND" IN SECTION 165 OF THE COMPANIES ACT 71 OF 2008: A COMPARATIVE DISCUSSION*

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SUMMARY

Section 165 of the Companies Act 71 of 2008 provides that applicants with *locus standi* who are aware of a wrong perpetrated against the company and who wish to pursue a derivative action against the company must have served a demand on the company requiring it to commence or continue legal proceedings to protect its own legal interests. Thereafter, the company must have filed a notice indicating that the company refuses to comply with the demand, or alternatively, the company must have failed to comply at all or failed to comply properly with its obligations relating to the investigation of the demand and its response to the demand. This article explores the concepts of legal standing and the demand that must be served on the company requiring it to commence or continue legal proceedings to protect its own legal interests as contemplated in section 165(2) of the 2008 Act, with the aim of identifying the commendable aspects of these concepts as well as the possible shortfalls.

1 INTRODUCTION

Section 165 of the Companies Act 71 of 2008 (2008 Act) abolished the rule in *Foss v Harbottle*[1] (the common-law derivative action) that a person other than the company can in certain limited cases bring legal proceedings on behalf of the company, and replaces that rule with the statutory provisions that are contained in section 165 of the 2008 Act.[2] This approach is similar to the provisions in Canadian company law legislation that revoked the common-law derivative action and introduced the statutory derivative action.[3]

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* This article is based on sections of the author's PhD thesis.

1 (1843) 2 Hare 461.

2 S 165(1) of the Companies Act 71 of 2008.

3 Griggs "The Statutory Derivative Action: Lessons That May Be Learnt from the Past!" 2002 4 *University of Western Sydney Law Review* par 1.2; Coetzee "A Comparative Analysis of the Derivative Litigation Proceedings Under the Companies Act 61 of 1973 and the

Section 165 therefore provides for a statutory derivative action to enforce the rights of the company on its behalf because, although it is the proper plaintiff, the wrongdoers are in control of the company and therefore will not seek to enforce the rights of the company against themselves.[4]

The statutory derivative action that was contained in section 266 of the Companies Act 61 of 1973 (1973 Act) was not limited to so-called "unratifiable wrongs" and could be used even if the wrong complained of was capable of ratification or could have been condoned by the company.[5] Section 266 of the 1973 Act was limited in that it could only be used where the company suffered a loss as a result of a wrong, breach of trust or breach of faith committed by a director or officer of the company.[6] The common-law derivative action was not abolished by section 266 of the 1973 Act while section 165 of the 2008 Act abolishes any common-law right of a person other than a company to bring or prosecute any legal proceedings on behalf of that company.

This article discusses the concepts and principles relating to legal standing and the demand that must be served on a company requiring it to commence or continue legal proceedings to protect its own legal interests as contemplated in section 165(2) of the 2008 Act.

The United Kingdom (UK) is used as a comparator. The main reason to compare the relevant provisions in the UK Companies 2006 Act (2006 Act) is that investigating a foreign legal system that has heavily influenced South African (SA) company law (such as the UK) provides a greater understanding of section 165 in the 2008 Act. Investigating the comparable provisions in the 2006 Act may be useful in providing solutions, guidelines and warnings to supplement any gaps or defects in our own statutory regime. Therefore, the relevant provisions in the 2006 Act are discussed to identify lessons that SA can learn from the UK derivative action system while finding ways for effective use of the derivative action system in SA. The article concludes with a series of recommendations in the form of proposed amendments with the aim of providing further clarity and effectiveness to section 165 of the 2008 Act.

Companies Act 71 of 2008" 2010 *Acta Juridica* 298.

4 Delport *Henochsberg on the Companies Act 2008* (2018) 593; *Mbethe v United Manganese of Kalahari (Pty) Ltd* [2016] JOL 35242 (GJ), 2016 (5) SA 414 (GJ) (High Court judgment) par 64 ff; confirmed on appeal: *Mbethe v United Manganese of Kalahari* (Pty) Ltd 2017 (6) SA 409 (SCA) (SCA judgment) expressly abolishes any right at common law of a person other than a company to bring or prosecute any legal proceedings on behalf of the company, as it existed under the rule in *Foss v Harbottle*; *Remgro Limited v Unilever South Africa Holdings (Pty) Limited* [2015] ZAKZPHC 54 par 26.

5 Coetzee 2010 *Acta Juridica* 298; Cilliers, Benade, Henning and Du Plessis *Corporate Law* 3ed (2000) 307; s 266(1) of the Companies Act 61 of 1973.

6 S 266(1) of the 1973 Act.

2 THE APPROACH IN SOUTH AFRICA

2 1 Legal standing

Section 266 of the 1973 Act was only available to members of the company whereas section 165 of the 2008 Act extends the right to sue to:[7]

a) a shareholder or a person entitled to be registered as a shareholder of the company or of a related company;[8]
b) a director or prescribed officer;[9]
c) a representative trade union of the employees of the company or any other representative of employees of the company;[10] and
d) a person who has been granted leave by a court to initiate proceedings.[11]

It is not only registered shareholders that have legal standing but also persons who are entitled to be registered as shareholders.[12] Section 1 of the 2008 Act defines a shareholder as the "holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register as the case may be". Cassim opines that, on the basis of this definition, it appears that a registered shareholder will qualify under the 2008 Act as a shareholder as will those persons entitled to be registered shareholders and persons to whom shares have been transferred without the share transfer having been entered in the securities register.[13] According to Cassim, this includes persons to whom shares have been transferred or transmitted by operation of the law – for instance, where the applicant has inherited shares but has not registered the shares formally, or where the shares have been transferred to the applicant by insolvency.[14]

Locus standi or legal standing is granted to shareholders, directors and prescribed officers of the company in question as well as to "related companies". The term "related companies" includes holding and subsidiary company relationships as well as the direct or indirect control by one company over the other or the business of the other.[15] This extension to the shareholder, directors and prescribed officers of related companies is a commendable addition. The inclusion recognises the reality that shareholders or directors of a holding company may, in certain circumstances, have a legitimate interest in initiating a derivative action to

7 S 165(2) of the 2008 Act.
8 *Ibid*.
9 *Ibid*.
10 *Ibid*.
11 *Ibid*.
12 A "shareholder" refers to a person to whom the rights attached to a share have been transferred, without the registration of the transfer necessarily being completed; included is the executor of a deceased estate (*New Heights Developers (Pty) Ltd v Bogatsu* [2017] ZAGPJHC 353.
13 Cassim *The New Derivative Action under the Companies Act* (2016) 14; see also Cassim "Shareholder Remedies and Minority Protection" in FHI Cassim, MF Cassim, R Cassim, Jooste, Shev and Yeats *Contemporary Company Law* 2ed (2012) 779.
14 Cassim *The New Derivative Action under the Companies Act* 14.
15 Cassim *The New Derivative Action under the Companies Act* 15.

prevent harm to a subsidiary company by those in control of the company.[16] Section 165 is unique in that it also grants legal standing to a third category of applicant – namely, trade unions representing employees of the company and other employee representatives.[17] The remedy is thus available to a much wider audience than in section 266 of the 1973 Act. According to Coetzee, the broadening of the categories of possible litigant is in line with the principles of good corporate governance.[18]

As stated above, the category of person that can apply to court for leave to bring the proceedings in the name of the company is significantly wider under section 165 of the 2008 Act than it was under section 266 of the 1973 Act.

2 2 The demand

Section 165(2) states that a person "may serve a demand on the company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company".[19]

The use of the word "may" when referring to the service of the demand could be criticised for its lack of clarity and certainty. The uncertainty arises as to whether the service of the demand is compulsory or discretionary. However, the use of the word "may" in the section is nonetheless considered to indicate a mandatory precondition of service of the demand as a precondition for a derivative action.[20] This was confirmed by the court in *Mouritzen v Greystone Enterprises (Pty) Ltd (Mouritzen)*.[21]

In *Mouritzen*, Ndlovu J handed down the first judgment in South Africa in relation to the new statutory derivative action. The matter was brought in terms of section 165(5) of the 2008 Act. In *Mouritzen,* K Mouritzen and D Mouritzen were brothers and were the only directors of Greystone Enterprises (Pty) Ltd (the Company). The Mouritzen Family Trust (the beneficiaries of which are the families of both K and D Mouritzen) held 98 shares in the capital of the Company and D Mouritzen and his wife held 49 shares each. K and D Mouritzen were paid equal monthly salaries by the Company and were issued with credit cards in their names, on the basis that transactions on those credit cards were debited to and paid by the Company.[22] K Mouritzen alleged that D Mouritzen was abusing his credit card to the detriment of the Company and the shareholders.[23] On 23 May 2011, K Mouritzen, through his attorneys, sent a letter (which constituted a s 165(2) demand) to the Company's postal address, the Company's attorneys (by email) and to D Mouritzen (by email) in terms of which he

16 *Ibid.*
17 *Ibid.*
18 Coetzee 2010 *Acta Juridica* 299.
19 S 165(2) of the 2008 Act.
20 Cassim *The New Derivative Action under the Companies Act* 16; Cassim in FHI Cassim *et al Contemporary Company Law* 779.
21 *Mouritzen v Greystone Enterprises (Pty) Ltd* 2012 (5) SA 74 (KZD) par 24.
22 *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 2.
23 *Ibid.*

demanded that the Company institute legal action against D Mouritzen to compel him to produce records of his credit card transactions and necessary supporting documents to enable the Company to determine whether or not those expenses were properly charged against the Company. In response, D Mouritzen sent an email to K Mouritzen's attorneys disputing the allegations against him.[24] K Mouritzen then approached the court for an order granting him leave to institute a derivative action in the name of the Company against D Mouritzen for delivery by D Mouritzen to K Mouritzen of the full account of his credit card expenditure, the assessment of expenses in the said account and payment to K Mouritzen (as a representative of the Company) of any amount that appears to be due to K Mouritzen (as a representative of the Company).[25] D Mouritzen argued that (i) the letter sent to the Company's postal address (the section 165(2) demand) was improperly served and (ii) K Mouritzen's derivative action was in bad faith and that K Mouritzen was driven by personal animosity that existed between the Mouritzen brothers. Ndlovu J observed that the use of the word "may" in relation to the service of a section 165(2) demand may obscure the legislative intent that the service of a section 65(2) demand is a prerequisite for the institution of a section 165(5) derivative action.[26]

As far as the issue as to whether the demand was properly served, Ndlovu J stated:[27]

> "[I] observe that the service of the demand on the company is an essential prerequisite for the institution of an application under section 165(5) and without which such person is obviously barred from launching the application. Given this observation, it is imperative and compulsory that a prospective applicant must comply with the service requirement before proceeding in terms of section 165(5). On this basis, the section ought, in my view, to be understood in the context that an applicant 'must' serve the demand on the company. It is a peremptory provision."

Ndlovu J noted that there was nothing in section 165(2) of the 2008 Act to suggest that a section 165(2) demand must be served by delivering it to the registered office of a company. Ndlovu J stated further:

> "I find that the purposive interpretation of section 165(2) does not require that a demand referred to in that section must necessarily be served on a company by delivering it at its registered office or its principal place of business".[28]

In the author's view, any legally recognisable manner of service of any court process or document initiating application proceedings shall be adequate, provided that the court considering the matter, in the exercise of its discretion, is satisfied that the demand was duly served on the company for which it was intended.[29] In *Mouritzen*'s case, the court held that the postage of a letter by ordinary mail to the company's postal address and the emailing of a copy of the letter to the company's attorneys had constituted a proper

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24 *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 9.
25 *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 3.
26 *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 13–16.
27 *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 24.
28 *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 33.
29 *Ibid.*

and valid service of the demand.

The demand can be served by a shareholder, or by a person entitled to be registered as a shareholder of the company.[30] The demand may also be served by a director or prescribed officer of the company or a related company.[31] Cassim submits that a person serving a demand should have been a shareholder when the "wrong" was committed and that there is no requirement as to the extent of the shareholding of the relevant shareholder.[32] In terms of section 165, a registered trade union representing employees or another representative body that has been appointed to represent employees of the company may also serve the demand upon the company.[33] Furthermore, any person who has been granted leave by the court may serve a demand on the company if the court is satisfied that it is necessary or expedient to protect the legal interest or rights of a person.[34]

It is not clear what would qualify as necessary and expedient or what criteria a court would use in this regard to protect the legal right of a person. However, what must be borne in mind is that section 165 is not a personal action but a derivative one. Delport submits that this would involve a person who, owing to their relationship with the company, has an interest in initiating the action.[35] The demand may provide for the commencement or the continuation of legal proceedings or related steps to protect the company's legal interests.[36] The demand may call upon the company to initiate or defend derivative proceedings on behalf of the company in the event that the company has failed to do so, or it may permit a person to intervene in proceedings in which the company is a party and continue with the proceedings on behalf of the company. Section 165(2) also permits a person to take related steps to protect the company's legal interests, which may involve the settling or compromising of legal proceedings on behalf of the company.[37]

According to Delport, the courts should not take too legalistic an approach to the terms of the demand and the test should be based on the evidence available and whether the company might conceivably succeed on the envisaged action.[38] In *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies*,[39] the court concluded that the threshold that the applicant has to overcome is a low one compared to the onus that the company bears for relief in terms of section 165(3).[40] Subsection 3 provides that when a

30 S 165(2)(*a*) of the 2008 Act.
31 S 165(2)(*b*) of the 2008 Act.
32 See generally, Cassim "The Doctrine of Contemporaneous Share Ownership and Aspects of *Locus Standi* in the New Derivative Action" 2018 135 *South African Law Journal* 101–120; Delport *Henochsberg on the Companies Act 2008* 594.
33 S 165(2)(*c*) of the 2008 Act.
34 S 165(2)(*d*) of the 2008 Act.
35 Delport *Henochsberg on the Companies Act 2008* 595.
36 S 165(2) of the 2008 Act.
37 Cassim *The New Derivative Action under the Companies Act* 17.
38 Delport *Henochsberg on the Companies Act 2008* 593.
39 *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd* 2014 (5) SA 532 (GJ) par 17.
40 See also *Mbethe v United Manganese of Kalahari (Pty) Ltd* (High Court judgment) *supra* par

demand is served on the company, the company has 15 business days to apply to court to have the demand set aside on the basis that the demand is frivolous, vexatious or without merit.

In *Lewis Group Ltd v Woollam,*[41] the court indicated that the nature of the onus should be what ordinarily applies in civil litigation and there is no "heaviness" in the equation. The court stated that[42]

> "there is no presumption in favour of the complainant that its demand is not frivolous, vexatious or without merit, any more than there is one in favour of the company that it is. The statutory provisions do not give rise to any inherent probability one way or the other. … Similarly, there is no special dispensation in favour of complainants as the reference to 'a low threshold' might suggest when it comes to considering the cogency of a demand in terms of section 165(2)."

This has now been confirmed by the Supreme Court of Appeal (SCA) in *Mbethe v United Manganese of Kalahari (Pty) Ltd* (*Mbethe*).[43]

Section 165 does provide guidelines on the content of the mandatory demand. The Companies Regulations[44] require a standard prescribed form to be used for these purposes. The form in question requires the person making the demand to "attach a statement of particulars, setting out the legal action [he/she] require[s] the company to take".[45] The court will have to determine whether the applicant has complied with section 165.

Section 6(8) of the 2008 Act provides:

> "If a form of document, record, statement or notice is prescribed in terms of this Act for any purpose – (*a*) it is sufficient if the person required to prepare or complete such a document, record, statement or notice does so in a form that satisfies all of the substantive requirements of the prescribed form."

Section 266 of the 1973 Act did not specifically require the amount to be claimed or to give a precise description of the circumstances giving rise to the loss in a derivative claim. However, the notice under section 266 did have to be specific enough to enable the company to know what proceedings it was being called upon to institute. According to Stoop, this principle could be applied to the demand under the 2008 Act.[46]

It is important to note that the notice in terms of the 1973 Act gave rise to a different consequence and purpose. Once the notice was served on the company, the company was called upon to institute proceedings. Whether

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162; confirmed on appeal in the SCA judgment.

41 [2017] 1 All SA 192 (WCC).

42 *Lewis Group Ltd v Woollam* [2017] 1 All SA 192 (WCC) par 55–56.

43 See *Lewis Group Ltd v Woollam supra* par 56; *Mbethe v United Manganese of Kalahari (Pty) Ltd* (SCA judgment) *supra* par 12 and 16; see also Du Plessis "The South African Statutory Derivative Action: Background, Comparisons and Application" in Hugo and Kelly-Brown (eds) *Essays on the Law of Banking, Companies and Suretyship* (2017) 276.

44 GN R351 in *GG* 34239 of 26 April 2011.

45 Regulation 36(1) requires a Form CoR 36.1 to be used for this purpose. This is a standard form used to notify the company of matters in terms of other sections of the Act as well – namely, ss 37, 39 and 115 of the 2008 Act.

46 Stoop "The Derivative Provisions in the Companies Act 2008" 2012 129 *South African Law Journal* 537–538.

there were grounds to institute proceedings was only determined once the curator had been appointed and only if there were *prima facie* grounds to institute a derivative action. Under section 165(4)(*a*) of the 2008 Act, an individual or committee must be appointed to investigate the merits of instituting derivative proceedings.[47]

Serving a demand on the company thus sets the framework for a potentially costly independent investigation. The purpose of the investigation is not intended to ascertain whether a case might be found but it is to investigate the merits of the case and the viability of the company pursuing that case and not possible incidental bases for other claims.[48]

It is submitted that section 165(2) of the 2008 Act must always be read with section 165(6). Section 165(6) provides that a person contemplated in section 165(2) of the 2008 Act (such as a shareholder, director or prescribed officer) may, in exceptional circumstances, apply to court for leave to bring a derivative action without serving a section 165(2) demand. In terms of section 165(2), in order to commence with a derivative action, a person would need to serve a demand on the company to bring or continue legal proceedings to protect the legal interests of the company.

2 3 Prescription

In terms of the principles laid down in *Foss v Harbottle*, when a wrong has been committed against a company, it is the company that has to initiate the action. In terms of section 165, action maybe initiated by the shareholders or other persons listed above. In this instance, the ordinary principles of prescription would apply. However, section 13(1) of the Prescription Act[49] provides:

> "If ... (*e*) the creditor is a juristic person and the debtor is a member of the governing body of such juristic person; ... the period of prescription shall not be completed before a year has elapsed after the day referred to in paragraph (*i*)."

Section 13(1)(*i*) refers to the situation where:

> "the relevant period of prescription would, but for the provisions of this subsection, be completed before or on, or within one year after, the day on which the relevant impediment referred to in paragraph ... (*e*) ... has ceased to exist."

Therefore, an action in terms of section 165 can be brought after such time. In instances where the wrongdoer is in control of the company, it will not be possible to institute action against the wrongdoer, as the latter may frustrate the commencement of the action. If the debt has prescribed in terms of section 13 of the Prescription Act, this will in effect, terminate the right to bring an action in terms of section 165, not because the latter has prescribed

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47 *Ibid.*

48 *Lewis Group Ltd v Woollam supra* par 56; Delport *Henochsberg on the Companies Act 2008* 594.

49 68 of 1969.

as section 165 on its own does not create a "liability" in respect of the wrongdoer, but because the liability that formed the basis of the section 165 claim has prescribed.[50]

In cases where a section 165 action is initiated and section 13(1)(*e*) of the Prescription Act is not applicable and if a curator is appointed, the prescription period will commence on the date of the appointment of the curator, as liability in respect of the wrongdoer is then created by the appointment by the court.[51] Delport states that the dictum expressed by Maja ADJ in *OffBeat Holiday Club v Sanbonani Holiday Spa Share Block Ltd* may not be correct. According to the author, if the action belongs to the company, and a shareholder merely executes it for the company, the appointment of, and institution of, the action by the shareholder cannot be the "inception" of the debt/obligation.[52]

In *OffBeat Holiday Club v Sanbonani Holiday Spa Share Block Ltd*,[53] Cachalia AJ stated that a shareholder's entitlement or right to use section 266 to protect the company, and indirectly itself, from delinquent directors and officers cannot prescribe where the "debt" to the company itself has not prescribed as this entitlement (to act for the company) does not have a correlative debt, whereas the right of a company does.[54] The shareholder's "right" to bring an action therefore remains intact and alive so long as the company is capable of enforcing its rights. The company will always remain the creditor and section 266 of the 1973 Act, or section 165 of the 2008 Act, merely allows the shareholder to bring the claim on behalf of the company. Either the shareholder (under section 266 of the 1973 Act or section 165 of the 2008 Act) or the company may enforce the claim as long as the claim exists and therefore it is not necessary to determine if prescription only commences when a curator is appointed.[55]

2 4 Setting aside the demand

A company that has been served with a demand may within 15 business days apply to court to set aside the demand only on the grounds that the demand is frivolous, vexatious and without merit.[56] In *S v Cooper*,[57] the court stated that the word "frivolous" in its ordinary and natural meaning connotes an action or legal proceeding characterised by lack of seriousness because it is manifestly insufficient. In *Argus Printing & Publishing Co Ltd v*

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50 Delport *Henochsberg on the Companies Act 2008* 595; see also *OffBeat Holiday Club v Sanbonani Holiday Spa Share Block Ltd* [2016] 2 All SA 704 (SCA) par 57.

51 Delport *Henochsberg on the Companies Act 2008* 596; see also *OffBeat Holiday Club v Sanbonani Holiday Spa Share Block Ltd supra* par 41.

52 *Offbeat Holiday Club v Sanbonani Holiday Spa Share Block Ltd supra;* Delport *Henochsberg on the Companies Act 2008* 595.

53 *Supra.*

54 Delport *Henochsberg on the Companies Act 2008* 595; *OffBeat Holiday Club v Sanbonani Holiday Spa supra* par 52.

55 Delport *Henochsberg on the Companies Act 2008* 595; *OffBeat Holiday Club v Sanbonani Holiday Spa supra* par 58 and 61.

56 S 165(3) of the 2008 Act.

57 1977(3) SA 475 (T) 476D.

Anastassiades,[58] the court stated that an action would be "frivolous" or "vexatious" if it was so unfounded that it could not possibly be sustained. "Vexatious" would mean that the action is obviously unsustainable as a matter of certainty.[59] An application brought in terms of section 165 will not be sustained if it can be demonstrated that it is brought without merit in the sense that it cannot succeed.[60] The onus rests on the company to prove that the demand was misdirected. This can be achieved by demonstrating that the demand was misdirected because it was either bad in law or not in keeping with the facts. Although an application that is vexatious or frivolous would demonstrate the absence of good faith (or existence of bad faith), there is no onus on the respondent to disprove good faith.[61]

In *Lewis Group Ltd v Woollam*, the court stated that a complainant who is unable to put forth a cogent and competent demand, albeit not necessarily with the precision required for pleading it, regardless of the outcome of a derivative action, would be acting vexatiously.[62]

In *Lewis Group Ltd v Woollam*, the court said that the provisions of subsection 3, which expressly and emphatically limit the bases upon which a company can have a demand set aside, appear to have been inspired by the jurisprudence in respect of section 266(3) of the 1973 Act. The court then held that an application for the appointment of a provisional curator *ad litem* to investigate a demand made in terms of section 266(2) would be refused if the company showed that the demand was without merit, or frivolous and vexatious.[63]

Section 165 does not indicate how detailed the demand should be or the extent of the information it should contain. Cassim submits that because the demand is to afford the company the opportunity to reconsider the conduct complained of and the opportunity to take proper remedial action, the demand should be specific enough to enlighten the company of the legal proceedings contemplated against it and the grounds for such proceedings. This will enable the company properly to consider the conduct complained of and what action to take.[64] It is submitted that this is the correct approach as it would be too onerous to expect the complainant to draft a demand in detail and with many technicalities as such persons are often already faced with the prospect of lack of information, resources and evidence. It must also be

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58 1954 (1) SA 72 (W) 74.

59 See *Bisset v Boland Bank Ltd* 1991 (4) SA 603 (D); *LD v Technology Corporate Management (Pty) Ltd*; *SD v LD* [2018] ZAGPJHC 69 par 29 (in respect of s 163); *S v Cooper supra; Argus Printing & Publishing Co Ltd v Anastassiades* 1954 (1) SA 72 (W) 74.

60 S 165(3) of the 2008 Act.

61 *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies supra* par 14 and 15; *Mbethe v United Manganese of Kalahari (Pty) Ltd* (High Court judgment) *supra* par 161; confirmed on appeal: *Mbethe v United Manganese of Kalahari (Pty)* (SCA judgment) *supra*.

62 *Lewis Group Ltd v Woollam supra* par 47–52; Delport *Henochsberg on the Companies Act 2008* 595.

63 *Lewis Group Ltd v Woollam supra* par 92; see also *Van Zyl v Loucol (Pty) Ltd* [1985] 1 All SA 263 (T), 1985 (2) SA 680 (NC) 685GI and *Thurgood v Dirk Kruger Traders (Pty) Ltd* [1990] 3 All SA 668 (E), 1990 (2) SA 44 (E) 49–50; Delport *Henochsberg on the Companies Act 2008* 595.

64 Cassim *The New Derivative Action under the Companies Act* 17.

borne in mind that information relating to the affairs of the company may be within the control of the wrongdoers of the company and may not be accessible by the complainant.

2 5 The company's response/reaction to the demand

The relevant section provides that if the company does not make an application to set aside the demand or if the court itself does not set aside the demand, or if the demand is not subsequently withdrawn, the company is obliged to appoint an independent and impartial person or committee to investigate the demand.[65] The investigator is obliged to report to the board of directors on any facts or circumstances that may lead to a cause of action as contemplated in the demand or that may relate to proceedings contemplated in the demand.[66]

The position was different under section 266 of the 1973 Act, in terms of which the complainant would serve a notice on the company to initiate proceedings[67] and if the company did not do so within a month, the complainant would bring an application for the appointment of a (provisional) curator *ad litem* to institute proceedings on behalf of the company. The court, in terms of section 266 and subject to certain requirements, was able to authorise an investigation into the grounds of the application and the desirability of the institution of proceedings. The court was empowered to appoint a curator *ad litem* to investigate the grounds of the application and report to the court on the return date. The investigation that the provisional curator *ad litem* may be called upon to undertake is an investigation solely of the grounds described by the applicant in its application, not those in the notice under section 266(2)(*a*).[68]

The powers given to a curator under section 266 were advanced in the application itself that set out the basis for a *prima facie* case for the appointment of a curator and therefore the ambit of the mandate given to the curator by the court was confined to those grounds. The investigation by the curator was not a general investigation of the company's affairs but an enquiry to assist an aggrieved shareholder by means that supplement the shareholder's common-law rights.[69]

In *Ghersi v Tiber Developments* (*Pty*) *Ltd*, the court held that although the order appointing the provisional curator must be interpreted as being limited to this purpose,

> "form should not be allowed to defeat the purpose of the section. It is conceivable that a court might be satisfied that the company would not

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65 S 165(4)(*a*) of the 2008 Act; see *Caxton and CTP Publishers and Printers Limited v Novus Holdings Limited* (Case no 219/2021) [2022] ZASCA 24 (09 March 2022) par 60.

66 S 165(4)(*a*)(i) of the 2008 Act.

67 S 266(2)(*a*) of the 1973 Act.

68 *Ghersi v Tiber Developments (Pty) Ltd* [2007] 4 All SA 847 (SCA), 2007 (4) SA 536 (SCA) par 4.

69 *Loeve v Loeve Building and Civil Engineering Contractors (Pty) Ltd* 1987 (2) SA 92 (D) 102 per Booysen J; see also *Brown v Nanco (Pty) Ltd* [1976] 1 All SA 548 (W), 1976 (3) SA 832 (W) 834; *Thurgood v Dirk Kruger Traders (Pty) Ltd supra* 52–53; Delport *Henochsberg on the Companies Act 2008* 595.

> institute proceedings even if given the statutory notice, that the new grounds not specified in the order appointing the provisional curator had been adequately investigated and that the institution of proceedings on those grounds would be desirable. In such a case a court could, at the instance of a shareholder, legitimately confirm the appointment of the provisional curator to enable the latter to institute action based on such grounds. The alternative would be for the court to require formal compliance with the requirements of section 266 (2) and (3) – a hollow exercise if the resultant confirmation would be a foregone conclusion."[70]

Delport in *Henochsberg* submits that based on these principles, if an investigator or committee's investigation reveals other instances where the company's legal interests must be protected, this must also be addressed in the report to the board of directors and should not be limited to those contemplated in the demand.[71] It is respectfully submitted that this is the correct position; the most important aspect is to protect the company's interests and, if there are grounds that exist where the company has suffered wrongful actions, then this must be investigated and pursued. Simply limiting the report to issues raised in the demand, it is submitted, is not in keeping with the overriding purpose of the provision.

It is the responsibility of the impartial person or committee to report to the board on the probable costs[72] involved and whether it appears in the company's best interests to bring or to continue any action or proceedings.[73] The inclusion of the word "appears" in the section seems to convey that the impartial person or committee need only put forward a *prima facie* case and that a definitive or concrete finding on whether the initiation or continuation of the proceedings will be in the best interests of the company is not necessary. The major difference between section 165 and its predecessor is that under section 266 the court becomes involved at an earlier stage in terms of the provision for an application to be made for the court to appoint a provisional curator *ad litem* to conduct the investigation. The provisional curator was appointed by the court, and therefore was obliged to report back to the court. Under section 266, it was the curator who had the responsibility for conducting the derivative proceedings on behalf of the company, whereas, under section 165, there is an effort to ease the burden on the courts. The involvement by a court occurs at a later stage, only after the investigation of the demand. Under section 165, the investigator is appointed by the company and his or her report is presented to the board of directors. Presenting the report to the board of directors and not to the court is problematic and is addressed at a later stage in this article. The derivative proceedings under section 165 are conducted by the minority shareholder or other applicants who have been granted permission by the court to do so.[74]

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70 *Ghersi v Tiber Developments (Pty) Ltd supra* par 4.

71 S 165(4)(*a*)(i) of the 2008 Act.

72 S 165(4) (*a)*(ii) of the 2008 Act.

73 S 165(4) (a)(iii) of the 2008 Act.

74 Cassim *The New Derivative Action under the Companies Act* 20; see Coetzee 2010 *Acta Juridica* 299*;* Mongalo (ed) *Modern Company Law Reform for a Competitive South African Economy* (2010) 290, 303. See generally Du Plessis "Revisiting the Judge-Made Rule of Non-Interference in Internal Company Matters" 2010 127 *South African Law Journal* 304, especially 319ff; Du Plessis "Open Sea or Safe Harbour? American, Australian and South

2 6 Application to court to bring or continue proceedings

Within 60 business days after being served with the demand, or within a longer time as the court (on application by the company) may allow, the company must either initiate or continue legal proceedings[75] or take related legal steps to protect the legal interests of the company, or serve a notice on the person who made the demand, refusing to comply with it – a so-called "refusal notice".[76] According to Delport, the issuing of the "refusal notice" could have the effect that subsection 4(*b*) can be bypassed by this action, thereby also making subsection 3 superfluous.[77] But it is respectfully submitted that the use of the conjunctive "and" between subsections 4(*a*) and 4(*b*), and both prefaced by "must", would tend to indicate the opposite.[78] In *Mouritzen*, an email by a director in a representative capacity for the company was also found, *inter alia* owing to the context and tone of the response, to be a notice of refusal by the company to comply with the demand in terms of subsection 4(*b*)(ii).[79]

The demand may also be withdrawn by the person who initially served the demand. The effect of the withdrawal of a demand would render the institution or continuance of proceedings unnecessary, thereby saving the company unnecessary costs, and would render the procurement or continuance of an independent investigation in terms of subsection 4 unnecessary.[80]

The person who has made a demand may apply to the court for leave to bring or continue proceedings in the name and on behalf of the company if the company has failed to take any particular step required[81] – for example: if it has appointed an investigator or committee who was not independent and impartial; if the company accepted a report that was clearly inadequate in its preparation; if the report was irrational or unreasonable in its conclusions or recommendations; if the company acted in a manner that was wholly inconsistent with the reasonable report of an independent, impartial investigator or committee; or if the company has served a refusal notice.[82]

These procedural requirements are disjunctive, and failure to comply with any of them will give the person who made the demand the right to apply to court.[83] Binns-Ward J stated in *Lewis Group Ltd v Woollam* that the anomaly

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African Business Judgment Rules Compared" Part 1 2011 32 *Company Lawyer* 347–352; and Part 2 2011 32 *Company Lawyer* 377–383.

75 S 165(4)(*b*)(ii) of the 2008 Act.

76 *Ibid*.

77 *Amdocs SA Joint Enterprise (Pty) Ltd v Kwezi Technologies (Pty) Ltd supra* par 6; see also *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 25.

78 Delport *Henochsberg on the Companies Act 2008* 595.

79 *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 34.

80 In terms of s 165(3) and (4) of the 2008 Act; see also *Lewis Group Ltd v Woollam supra* par 9.

81 S 165(4) of the 2008 Act.

82 S 165(5)(*a*) of the 2008 Act.

83 See s 165(5) of the 2008 Act; see also *Mbethe v United Manganese of Kalahari (Pty) Ltd* (High Court judgment) *supra* par 45; confirmed on appeal: *Mbethe v United Manganese of*

that a company will often be unable in an application in terms of section 165(3) to see off derivative proceedings on the basis that the complainant will not be able to satisfy the requirements of section 165(5) appears to be the result of an "awkward cobbling together in section 165 of the 2008 Act of various concepts and procedures lifted from quite disparate preceding local and foreign legislation", and may it be said, from the common law.[84]

According to Cassim, the requirement that no derivative action should be permitted unless the board of directors is made aware of the complaint, and they have either refused to protect the company's interests or are unlikely to properly and diligently protect the interests of the company, is included to ensure that the power and authority of the board of directors to manage the affairs of the company is not flouted and undermined.[85]

3 THE APPROACH UNDER THE COMPANIES ACT 2006 IN THE UNITED KINGDOM

In the UK, the section dealing with the new statutory derivative action was implemented in October 2007. According to the 2006 Act, the procedure for all derivative claims is regulated in terms of Part 11, Chapter 1 of the Act or in terms of an order of court under section 996(2)(*c*) of the 2006 Act. Section 996(2)(*c*) deals specifically with unfair prejudice claims. Although reference is made to section 996(2)(*c*) and unfair prejudice claims during the discussion that follows, the cases and principles dealing with unfair prejudice claims are beyond the scope of this article.

3 1 Legal standing

Section 260(1) of the 2006 Act provides *locus standi* to initiate derivative proceedings only to members of the company. A former member (shareholder) of the company cannot initiate such an action even if the issue complained of occurred during his or her membership.[86] A "member" is defined as including a person who is not a member but to whom shares in the company have been transferred or transmitted by operation of law[87] – that is, a personal representative of a deceased member or the trustee of an insolvent member.[88] According to section 260 of the 2006 Act, a member of the company could bring a derivative action where the alleged wrongdoing

Kalahari (Pty) Ltd (SCA judgment) *supra*; see also *Remgro Limited v Unilever South Africa Holdings (Pty) Limited supra* par 30.

84 *Lewis Group Ltd v Woollam supra* par 92.

85 Cassim *The New Derivative Action under the Companies Act* 21.

86 S 260 of the 2006 Act; see also Chen *A Comparative Study of Funding Shareholder Litigation* (2017) 32–33.

87 S 260(5)(*c*) of the 2006 Act.

88 Kay, Sime and French (eds) *Blackstone's Civil Practice* 6ed (2017) 269; Safari *Reconsidering the Role of the Derivative Claim in the United Kingdom: A Comparative Study with the United States and New Zealand* (unpublished doctoral thesis, University of London) 2018 http://openaccess.city.ac.uk/20130/ 77; see also Davies *Gower & Davies, Principles of Modern Company Law* 8ed (2008) 655.

arose before he enters into the company.[89]

Sealy has described the UK courts' approach to minority shareholders' litigation as hostile. Sealy opined that the UK courts were too quick to deny a shareholder legal standing to sue on the basis that the wrong that gave rise to the cause of action was a wrong to the company rather than a wrong to the shareholder personally.[90] According to Keay, more recent case law does not demonstrate a similar approach to that described by Sealy and Sealy's criticism applies to the courts' approach to shareholders' personal actions rather than derivative claims.[91] According to Boyle, the hostility of UK courts towards shareholder applicants did exist but the attitude of the court depends on the nature and size of the company. Boyle acknowledges that derivative claims are used in private companies but that the courts in the UK are less favourably disposed towards applicants who are shareholders in public companies.[92]

The 2006 Act limits the institution of a derivative claim only to shareholders of the company. It is submitted that it would have been more appropriate for the 2006 Act to provide for a much broader range of persons who would be able to institute derivative proceedings. Dean opines:

> "There seems to be no a *priori* reason why others [besides shareholders] should not enjoy similar access to the courts to protect the company from harm, under a regime of judicial supervision similar to that envisaged to 'manage' shareholder actions."[93]

Furthermore, the argument that the 2006 Act should provide for a wider range of applicants is enhanced by the fact that shareholders are often regarded as not being the most competent observers of the company's affairs. If this be the case, the Act ought to permit other interested parties to initiate derivative proceedings. Shareholders are more likely to act when a matter involves their own personal interests and are always wary of the potential risks or benefits that may result from their actions. This preservation of self-interest and lack of awareness of company affairs decreases the likelihood of the interests of the company being adequately protected.[94] A serious effort to protect the interests of the company would entail the 2006 Act permitting any person who has a legitimate interest in the financial affairs of the company to institute derivative proceedings. This would enable a wider range of applicants to institute derivative proceedings to protect the company's interests. Persons other than shareholders may be

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89 S 260(4) of the 2006 Act.

90 Sealy "The Rule in *Foss v Harbottle*: The Australian Experience" 1989 10 *Company Law* 54; Sealy "Problems of Standing, Pleading and Proof in Corporate Litigation" in Pettet (ed) *Company Law in Change, Current Legal Problems* (1987) 12.

91 Keay and Loughrey "Something Old, Something New, Something Borrowed: An Analysis of the New Derivative Action Under the Companies Act 2006" 2008 124 *Law Quarterly Review* 473.

92 Boyle *Minority Shareholders' Remedies* (2002) 24; Keay and Loughrey 2008 *Law Quarterly Review* 474.

93 Dean *Directing Company Law & The Stakeholder Society: Company Law and the Stakeholder Society Public Companies* (2001) 155; Keay "Assessing and Rethinking the Statutory Scheme for Derivative Actions Under the Companies Act 2006" 2016 16 *Journal of Corporate Law Studies* 39.

94 Keay 2016 *Journal of Corporate Law Studies* 11.

privy to certain information or conduct that allows the individual or individuals to institute a meaningful derivative claim.[95] There has been concern that expanding the range of applicants who could institute a derivative claim would result in uncertainty as well as potentially open the floodgates to derivative litigation.[96] It is respectfully submitted that widening the range of applicants to institute a derivative action does not create uncertainty but rather provides more credibility to the derivative action, as there is a greater emphasis on the protection of company interests. Wrongdoers will be less likely to commit wrongful actions against the company if they are aware that there are a variety of applicants who may be able to step in to protect the company's interests. The possibility of uncertainty does not arise, as all applicants will be subjected to the same requirements and provisions of the Act, which are intended to prevent frivolous or vexatious claims. It is submitted that widening the range of applicants does create the possibility of an increase in derivative claims, but this should be seen in a positive light, as jurisprudence in the area will be enhanced, which allows the court to provide more certainty and clarity in interpreting the provisions in the Act. The experience in other jurisdictions such as Canada[97] and Singapore[98] provides for a much broader range of applicants and shows that the floodgates argument has been exaggerated in that the procedure for granting permission to bring proceedings has successfully prevented frivolous claims.[99]

The 2006 Act in its current form does not cater for what has been referred to as "multiple derivative actions" (sometimes referred to as "double derivative actions").[100] A multiple derivative action is a derivative action that can be brought by minority shareholders of a holding company for a breach of duty or wrongful conduct that has been perpetrated in the subsidiary company.[101] Multiple derivative claims have been recognised in the common

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95 *Ibid.*

96 Keay 2016 *Journal of Corporate Law Studies* 10–11.

97 S 238 of the Canada Business Corporations Act 1985 includes members, certain creditors, and directors, and also applications may be made by "any other person who, in the discretion of a court, is a proper person to make an application".

98 S 216A(1)(*c*) of the Singaporean Companies Act provides that the range of persons who can apply for a derivative action includes "any other person who, in the discretion of the Court, is a proper person".

99 Keay 2016 *Journal of Corporate Law Studies* 12; see also Ramsay and Saunders "Litigation by Shareholders and Directors: An Empirical Study of the Statutory Derivative Action" 2006 6 *Journal of Corporate Law Studies* 397; Leung "The Inadequacy of Shareholder Primacy: A Proposed Corporate Regime That Recognizes Non-Shareholder Interests" 1997 30 *Columbia Journal of Law and Social Problems* 589 and 625.

100 Goo "Multiple Derivative Action and Common Law Derivative Action Revisited: A Tale of Two Jurisdictions" 2010 10 *Journal of Corporate Law Studies* 255; Mascarenhas "Multiple Derivative Actions Under English Law" 2013 24 *International Company and Commercial Law Review* 336; Keay *Directors' Duties* (2014) 465–468. See the judgment of Lord Millett in the Hong Kong case of *Waddington Ltd v Chan Chun Hoo Thomas* [2008] HKCFA 63; (2008) 11 HKCFAR 370; [2009] 4 HKC 381; [2009] 2 BCLC 82.

101 Keay 2016 *Journal of Corporate Law Studies* 13; Goo 2010 *Journal of Corporate Law Studies* 255; Mascarenhas 2013 *International Company and Commercial Law Review* 336.

law but are not catered for in the 2006 Act.[102] It is submitted that the 2006 Act should be amended to permit multiple derivative claims under the statutory derivative procedure. This will broaden the range of applicants who are able to institute derivative claims by permitting shareholders in a holding company (who clearly have an interest in the subsidiary) to bring derivative claims to protect the interests of the subsidiary company and *vice versa*.[103]

The UK approach to legal standing is far more limited than the position in South Africa. Besides shareholders, section 165(2) of the 2008 Act allows directors, prescribed officers, trade unions representing employees as well as other employee representatives to institute derivative proceedings on behalf of the company.[104] The section also grants legal standing to shareholders, directors and prescribed officers in "related companies". The phrase "related companies" includes holding and subsidiary company relationships as well as the direct or indirect control by one company over the other or the business of the other.[105]

3 2 Cause of action

The 2006 Act has broadened the cause of action upon which a derivative claim can be instituted.[106] The institution of a derivative claim is no longer limited by a requirement to show that there is proof of fraud on the minority or that the wrongdoers are in control of the company. Currently, under the 2006 Act, a derivative claim may be instituted in response to actions of the directors such as an act or omission that involves negligence, default, breach of duty or breach of trust by a director, former director or shadow director of the company.[107]

According to Safari, the intention behind the extension of the derivative claims to include negligence was the protection of investors who, while willingly taking the risk of investing in companies, are not obliged to accept the wrongful conduct of those who manage the affairs of the company – that is, directors failing to act in accordance with their directors' duties.[108] The cause of action could be the conduct of a director or another person or both,[109] and could have arisen before the claimant became a member of the company.[110]

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102 *Wilton UK Ltd v Shuttleworth* [2017] EWHC 2195 (Ch) 28; see also *Universal Project Management Services Ltd v Fort Gilkicker Ltd* [2013] EWHC 348 (Ch); [2013] Ch 551; *Abouraya v Sigmund* [2014] EWHC 277 (Ch); [2015] BCC 503.

103 Keay 2016 *Journal of Corporate Law Studies* 13.

104 Cassim *The New Derivative Action Under the Companies Act* 15; s 165(2) of the 2008 Act.

105 *Ibid.*

106 At common law an action for negligence could only be brought where the negligence involved bad faith or was self-serving. See *Pavlides v Jensen* [1965] Ch 565; *Daniels v Daniels* [1978] Ch 406.

107 S 260(3) and (5)(*a*) and (*b*); see also *Lesini v Westrip Holdings Ltd* [2009] EWHC 2526 (Ch); [2010] BCC 420 75; Keay 2016 *Journal of Corporate Law Studies* 14.

108 S 260(3) and 5(*a*) and (*b*) of the 2006 Act; Safari *Reconsidering the Role of the Derivative Claim in the United Kingdom. A Comparative Study with the United States and New Zealand* http://openaccess.city.ac.uk/20130/ 77.

109 S 260(3) of the 2006 Act.

110 S 260(4) of the 2006 Act.

Despite this broadening of the cause of action for a derivative action, it is submitted that the current regime still leaves much to be desired. The 2006 Act fails to take into account that applicants will not be able to act against wrongful conduct that is independent of the actions of directors. Furthermore, the 2006 Act fails to consider the possibility that any act of negligence on the part of a director may go unpunished because the court will be reluctant to question business decisions taken by directors. There is also the potential for the board of directors to scupper any potential derivative claim from proceeding against a third party in instances where the third party has close ties with the board or any individual director in the company.

South African legislation does not provide any limit and does not specify the causes of action that may be the subject of derivative proceedings. Section 165 provides that the statutory derivative action may be initiated to protect the legal interests of a company. The derivative provisions contained in section 165 are wider than those in the 2006 Act and therefore provide greater scope for applicants to institute a derivative claim.[111]

4 CONCLUSION AND RECOMMENDATIONS

Under the 2008 Act, *locus standi* or legal standing is granted to shareholders, directors and prescribed officers of the company in question as well as to "related companies".[112] Section 165 of the 2008 Act also grants legal standing to a third category of applicants, namely trade unions representing employees of the company and other employee representatives.[113] The derivative action under the 2008 Act is available to a much wider range of applicants when compared to its predecessor, section 266 of the 1973 Act. Under section 266, only shareholders were able to initiate a derivative action. In the UK, the 2006 Act restricts derivative claims in that they may be brought only by members (shareholders) directly concerned. The approach to legal standing under section 266 of the 1973 Act and under the 2006 Act is thus far more limited than under the 2008 Act. Section 165(2) of the 2008 Act, in broadening the scope of legal standing to persons other than shareholders, recognises the reality that a shareholder may not always be the most suitable person to institute derivative proceedings. Shareholders may not have access to all the relevant information that relates to the wrongdoing in question. Furthermore, shareholders often act in their own personal interests and will be reluctant to institute action to protect the interests of the company. The inclusion in the 2008 Act of a wider range of applicants is commendable, not only because it would allow for a greater scope of derivative claims to be brought to the courts, thereby increasing the jurisprudence in the area, but it also recognises that persons other than shareholders may be privy to information that places them in the best position to institute derivative proceedings to protect the interests of the company. The wider range of applicants provided

111 Coetzee 2010 *Acta Juridica* 299.

112 S 165(2) of the 2008 Act.

113 *Ibid.*

for in the 2008 Act allows the courts to provide greater clarity and certainty regarding the provisions in section 165; and it provides more credibility to the derivative proceedings, which are aimed at protecting the interests of the company and simultaneously at ensuring high-quality corporate governance. The 2008 Act, in widening the scope of applicants, also serves as a deterrent factor to potential wrongdoers as there are a number of different applicants in various spheres in the company who are able to institute derivative proceedings.

The term "related company" includes a holding and subsidiary company relationship as well as the direct or indirect control by one company over the other or the business of the other.[114] The inclusion of the term "related company" recognises the reality that shareholders or directors of a holding company may, in certain circumstances, have a legitimate interest in initiating a derivative action to prevent harm to the subsidiary company perpetrated by those in control of the subsidiary company.[115] The 2006 Act does not grant legal standing to persons in "related companies" and does not provide for multiple derivative actions.[116] The failure of the 2006 Act to grant legal standing to shareholders in holding companies for the institution of a derivative action in relation to subsidiary companies is a failure to recognise the financial interests as well as associated reputational interests that shareholders in a holding company have in a subsidiary company or *vice versa*. Under section 165 of the 2008 Act, only current shareholders and directors are included as potential applicants. This is a major shortfall under the 2008 Act. By preventing former shareholders from instituting a derivative action in instances where they were in the company when the wrongful actions were perpetrated fails to recognise the harm that these former shareholders may have suffered indirectly (such as a decrease in the value of their shares) when the wrongful actions were perpetrated against the company. It is submitted that these former shareholders should be able to recover any loss they have suffered. Section 1 of the 2008 Act defines a shareholder as the "holder of a share issued by a company and who is entered as such in the certificated or uncertificated securities register, as the case may be". In light of this definition, a registered shareholder will qualify under the 2008 Act as a shareholder, as will those persons entitled to be registered shareholders and persons to whom shares have been transferred without the share transfer having been entered in the securities register.[117] The implication is that new shareholders who were not in the company when the wrongful actions were perpetrated will be able to institute a derivative claim and may therefore benefit indirectly from any award recovered by the company. A similar approach is adopted in the UK. Section 260 of the 2006 Act includes only current shareholders in the pool of potential applicants.

It is therefore recommended that section 165(2) of the 2008 Act be

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114 Cassim *The New Derivative Action Under the Companies Act* 15; see also Cassim in FHI Cassim *et al Contemporary Company Law* 779.

115 *Ibid.*

116 *Wilton UK Ltd v Shuttleworth supra* 28; see also *Universal Project Management Services Ltd v Fort Gilkicker Ltd supra*; *Abouraya v Sigmund supra*; see also Keay 2016 *Journal of Corporate Law Studies* 12–13.

117 Cassim *The New Derivative Action Under the Companies Act* 14; Cassim in FHI Cassim *et al Contemporary Company Law* 779.

amended such that former shareholders are granted legal standing to institute a derivative action to ensure that these shareholders can recover any indirect benefit that they had lost while they were shareholders in the company. Although any award in a successful derivative action will be made to the company, it is submitted that these former shareholders should be entitled to an amount that constitutes the difference in the value of their shares when the wrongful actions were committed and the value of the shares once an award is made to the company. The current shareholders therefore would be liable to the former shareholders for this amount. The failure of the current shareholders to compensate the former shareholders could make them liable to the former shareholders for a claim of unjustified enrichment.

The amended section 165(2) should read as follows:

> "A person must serve a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company if the person–
>
> a) is a shareholder, former shareholder or a person entitled to be registered as a shareholder, of the company or of a related company;
> b) is a director, or prescribed officer of the company or of a related company;
> c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or
> d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person."

Section 266 under the 1973 Act was limited in that it could only be used where the company suffered a loss as a result of any wrong, breach of trust or breach of faith committed by a director or officer of the company.[118] Section 260 under the 2006 Act in the UK has broadened the grounds upon which a derivative claim may be instituted.[119] In the UK, the institution of a derivative claim is no longer limited by the need to prove that fraud on the minority was perpetrated or that the wrongdoers are in control of the company. The 2006 Act provides that a derivative claim may be instituted in response to actions of the directors such as an act or omission that involves negligence, default, breach of duty or breach of trust by a director, former director or shadow director of the company.[120] However, the 2006 Act fails to take into account that applicants will not be able to take action against wrongful conduct that is independent of the actions of directors. Furthermore, the 2006 Act fails to consider the possibility that any act of negligence on the part of a director may go unpunished because a court

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118 S 266(1) of the 1973 Act.

119 At common law, an action for negligence could only be brought where the negligence involved bad faith or was self-serving. See *Pavlides v Jensen supra*; *Daniels v Daniels supra*.

120 S 260(3) and (5)(*a*) and (*b*) of the 2006 Act; see also *Lesini v Westrip Holdings Ltd supra* 75; see Keay 2008 *Law Quarterly Review* 469.

may be reluctant to question business decisions taken by directors. There is also the possibility that the board of directors may sabotage any potential derivative claim from proceeding against a third party in instances where the third party has a close relationship with the board or any individual director in the company. Section 165 provides that the statutory derivative action may be used to protect the interests of the company. The 2008 Act does not specify the causes of action for which the derivative action is suitable, but provides a wide description that allows use of the action to protect the legal interests of the company.[121] The protection of the company's interests as the ground for instituting a derivative action is a wider ground than was provided for under section 266 of the 1973 Act, which limited the causes of action to instances of delict, breach of trust or breach of faith by a director or officer of the company;[122] it is also a wider ground than allowed for under section 260 of the UK Act, which is more restrictive in that it only allows breaches of directors' duties to form the basis for an application.[123]

The protection of the interests of the company as a ground to institute derivative proceedings is commendable and a positive innovation under section 165. The term "legal interest" is not defined in the 2008 Act and therefore the term may be given a wide interpretation and it extends further than the protection of the company's legal rights. Therefore, the institution of derivative proceedings under section 165 is not limited to a specific type of legal interest or any specific cause of action. In this way, the Act has created further scope for the institution of derivative proceedings for wrongdoing perpetrated against the company. Wrongdoers will be less likely to evade responsibility, as the cause of action is not based solely on instances where a wrongdoing, breach of trust or breach of faith is committed by directors or officers in the company.[124]

It is submitted that section 165 under the 2008 Act does not provide clear requirements and guidance as to the content of the mandatory demand. In terms of the Companies Regulations, the demand must comply with a standard prescribed form to be used for the purposes of the derivative action. The form in question requires the person making the demand to "attach a statement of particulars, setting out the legal action [he/she] require[s] the company to take".[125] The failure of the section to clearly provide what details the applicant is required to set out in the demand could lead to lengthy mini-trials in which the applicant attempts to convince the court that the demand has merit and is not frivolous or vexatious. A lack of adequate details in the prescribed form may lead to the demand being set aside for being vague and lacking in clarity. It is submitted that section 165

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121 Coetzee 2010 *Acta Juridica* 299.

122 *Ibid.*

123 S 260(5) of the 2006 Act.

124 Cassim in FHI Cassim *et al Contemporary Company Law* 781.

125 Regulation 36(1) requires a Form CoR 36.1 to be used for this purpose. This is a standard form used to notify the company of matters in terms of other sections of the Act as well – namely, ss 37, 39 and 115 of the 2008 Act. See also s 6(8) of the 2008 Act, which provides: "If a form of document, record, statement or notice is prescribed in terms of this Act for any purpose, - (*a*) it is sufficient if the person required to prepare or complete such a document, record, statement or notice does so in a form that satisfies all of the substantive requirements of the prescribed form."

should have set out further guidelines and requirements as to what should be included in the demand.

Section 266 of the 1973 Act did not specifically require the notice to give the amount to be claimed or a precise description of the circumstances giving rise to the loss in a derivative claim. The notice under section 266 did, however, specify enough to enable the company to know what proceedings it was being called upon to institute. It is submitted that a similar principle be applied under section 165 to provide further clarity regarding a description of the alleged wrongdoing, the potential risk facing the company because of the alleged wrongdoing and the potential costs involved in the derivative proceedings.

The UK's 2006 Act does not require a demand to be made by the applicant. Section 261 of the 2006 Act does require the court to apply a *prima facie* test during the first stage of the proceedings to determine whether to grant the applicant permission to institute derivative proceedings.[126] Only once the court is satisfied that the applicant has made a *prima facie* case in terms of section 261(2) will the company be called upon to provide evidence in terms of section 261(3)(*a*). However, the application of the *prima facie* test in the UK courts has been less than decisive and has resulted in uncertainty. It is submitted that the lack of clarity and certainty by the courts in the interpretation of the *prima facie* requirement is a serious disadvantage to prospective applicants who wish to institute derivative proceedings. It would therefore be unwise for SA courts to seek guidance from the UK application of the *prima facie* test under section 261 in deciding how an applicant under section 165 should go about drafting the demand and the necessary details therein.

It is submitted that the requirement of a demand coupled with the other substantive procedures under section 165 does have the potential of prolonging the derivative proceedings and thereby increasing costs for the company and the applicant. It is submitted further that the requirement that a demand be made by the applicant also has the potential for an increase in negative publicity for the company and could have the effect of destabilising the business affairs of the company. The UK model may be seen to be a better approach in this respect; although there has been a lack of clarity by the courts in interpreting the *prima facie* case, there is no requirement that a demand be made by the applicant and therefore this reduces the potential for time-consuming and costly derivative proceedings.

The 2008 Act allows for an applicant to be excused from making a demand in exceptional circumstances.[127] However, the applicant is required to apply to court to be excused from making the demand. It is submitted that this process also has the potential to increase costs and cause further delays – not only for the company, but for the applicant as well. In order to provide for an effective procedure for applicants to institute derivative proceedings, it is submitted that demand procedures may have to be done away with. But in the absence of such a severe excision, it is submitted that

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[126] Civil Procedure Rules 1998 (SI 1998/3132) R.19.9; s 261 of the 2006 Act.

[127] S 165(6) of the 2008 Act.

an amendment to the section is necessary in order to provide for an effective derivative action procedure that protects the interests of the company and does not frustrate potential applicants.

It is accordingly submitted that section 165 should prescribe further requirements and guidelines for the wording of a demand. An amendment to the section may be necessary to provide that the applicant sets out fairly and clearly who the wrongdoers are, what the facts are that gave rise to the wrongdoing and what harm the company could potentially suffer. The demand should set the framework for a potentially costly independent investigation. The purpose of the investigation is not to ascertain whether a case might be found, but is to investigate the merits of the case and the viability of the company pursuing that case, and not possible incidental bases for other claims.[128] Such an amendment will provide further guidance to the potential applicant as to whether the derivative action is worth pursuing and will also provide the court with greater insight into whether there is enough scope to grant leave to institute derivative proceedings. It is submitted that such an amendment will reduce the costs and time involved in the initial stage of the derivative action and may have the effect of preventing frivolous and vexatious claims.

It is submitted further that the use of the word "may" in section 165(2) when referring to the service of the demand creates a lack of certainty as to whether the service of the demand is compulsory or discretionary. The court in *Mouritzen* indicated that the use of the word "may" in the section is considered to indicate a mandatory precondition of service of the demand as a precondition for a derivative action.[129] This decision, in the author's view, is correct. However, it is submitted that an amendment to the section indicating that service of the demand is compulsory would provide greater clarity and certainty to potential applicants.

It is therefore recommended that section 165(2) should be amended to ensure that applicants be given further guidance as to what information may be set out in a demand and further that the section should indicate that the service of the demand is compulsory. The amended section 165 should read as follows:

> "(2) Prior to an application in terms of subsection (5), the applicant must have served a demand upon a company to commence or continue legal proceedings, or take related steps, to protect the legal interests of the company provided that a person shall not serve such demand unless the person–
>
> a) is a shareholder, <u>former shareholder</u>, or a person entitled to be registered as a shareholder, of the company or of a related company;
>
> b) is a director or prescribed officer of the company or of a related company;

[128] *Lewis Group Ltd v Woollam supra* par 56; Delport *Henochsberg on the Companies Act 2008* 594.

[129] Cassim *The New Derivative Action Under the Companies Act* 156; see also Cassim in FHI Cassim *et al Contemporary Company Law* 779; *Mouritzen v Greystone Enterprises (Pty) Ltd supra* par 24.

c) is a registered trade union that represents employees of the company, or another representative of employees of the company; or

d) has been granted leave of the court to do so, which may be granted only if the court is satisfied that it is necessary or expedient to do so to protect a legal right of that other person.

(2A) The demand contemplated in subsection (2) above should set out the following–

(i) who the alleged wrongdoers are;

(ii) the facts that gave rise to the wrongdoing;

(iii) the potential harm that the company could suffer if the demand is not granted; and

(iv) the potential costs in the derivative litigation proceedings."

Section 165(3) of the 2008 Act provides that a company that has been served with a demand may apply to a court within 15 business days to set aside the demand claiming it is frivolous, vexatious or without merit. In cases where the company does not make an application to have the letter of demand set aside or where the court does not set it aside, the company must appoint an independent and impartial person or committee to investigate the demand.[130] The independent or impartial person is obliged to report to the board of directors on any facts or circumstances that may lead to a cause of action as contemplated in the demand or that may relate to proceedings contemplated in the demand.[131] In addition, the company must within 60 business days after being served with the demand either initiate or continue legal proceedings,[132] or take related legal steps[133] to protect the legal interests of the company, or serve a refusal notice.[134] The inclusion of these time frames in the 2008 Act is commendable as it prevents unreasonable delays on the part of the company. The company and those in control of the company are forced to take steps either to set aside the demand or to take steps to protect the company. The demand issued by the applicant cannot simply be ignored, as the time frames require a reaction by the company; in this way, the alleged wrongdoing does not go unnoticed.

Under section 266 of the 1973 Act, the complainant was required to serve a notice on the company to initiate proceedings[135] and if the company did not do so within a month, the complainant would bring an application for the appointment of a (provisional) curator *ad litem* to institute proceedings on behalf of the company.[136] The court was empowered under section 266 to authorise an investigation into the grounds of the application and the

130 S 165(4)(*a*) of the 2008 Act.

131 S 165(4)(*a*)(i) of the 2008 Act.

132 S 165(4)(*b*)(i) of the 2008 Act.

133 *Ibid*.

134 S 165(4)(*b*)(ii) of the 2008 Act.

135 S 266(2)(*a*) of the 1973 Act.

136 S 266(2)(*a*) of the 1973 Act; see also *Loeve v Loeve Building and Civil Engineering Contractors (Pty) Ltd supra* 101; *Thurgood v Dirk Kruger Traders (Pty) Ltd supra* 53B; Beck "The Shareholders' Derivative Action" 1974 52 *Canadian Bar Review* 159 202–205.

desirability of the institution of proceedings. Under the section, the court was empowered to appoint a curator *ad litem* to investigate the grounds of the application and the curator *ad litem* was required to report back to the court on the return date. A wide discretion was given to the court to appoint a curator if the court was satisfied that the company had not instituted proceedings,[137] that there were *prima facie* grounds for proceedings to be instituted,[138] and that an investigation into the grounds and desirability of the institution of proceedings would be justified.[139]

It is submitted that a major flaw in the provisions under section 165(4) is that the independent person or board is not given the same investigatory powers as those afforded the curator under section 266. The investigator appointed under section 165 is appointed by the board of directors and must report back to that board. It is submitted that this creates the possibility that the powers of the investigator will be curtailed or limited, as the terms of reference will be set out by the board of directors. It is unlikely that the board of directors will sanction an investigation into their own wrongdoing and even less likely that action will be taken where there is wrongdoing on the part of the board. It is submitted that the position under section 266 is preferable. The curator in that instance was appointed by the court and was obliged to report back to the court. This ensured a neutral and independent investigation into any alleged wrongdoing. It is submitted that a similar approach under section 165 will provide greater authenticity and credibility to the investigation and subsequent report. Furthermore, section 165(4) creates no obligation for the report it describes to be made available to the applicant. The applicant shareholder has a right under section 165(5)(*a*)(iii) to challenge the report on the grounds that it may be unreasonable or inadequate, but the section does not provide an automatic right of access to the report. It is submitted that the applicant should have automatic access to the finalised report to ensure that the alleged wrongdoing and infringement of the interests of the company have been adequately investigated and that all related sources and information have been properly ventilated. An effort towards greater transparency in relation to the finalised report will go a long way to restoring confidence in the manner in which the affairs of the company are managed, and issues dealt with. A move towards greater transparency and accessibility is in keeping with good corporate governance and the objectives of the 2008 Act. Considering the above, it is submitted that the provisions in section 165(4) and section 165(5)(*a*) as they relate to the appointment of the independent investigator require amendment and a new subsection (4A) is proposed to provide for accessibility of the report.

The amended section 165(4)(*a*) should read as follows:

> "(4) If a company does not make an application contemplated in subsection (3), or the court does not set aside the demand in terms of that subsection, the court must intervene to–
>
> (a) appoint an independent and impartial person or committee to investigate the demand, and report to the court on–

[137] S 266(3)(*a*) of the 1973 Act.
[138] S 266(3)(*b*) of the 1973 Act.
[139] S 266(3)(*c*) of the 1973 Act.

(i) any facts or circumstances–

(*aa*) that may give rise to a cause of action contemplated in the demand; or

(*bb*) that may relate to any proceedings contemplated in the demand;

(ii) the probable costs that would be incurred if the company pursued any such cause of action or continued any such proceedings; and

(iii) whether it appears to be in the best interests of the company to pursue any such cause of action or continue any such proceedings.

(4A) A person who has made a demand in terms of subsection (2) is entitled, on giving reasonable notice to the court, to inspect the report contemplated in subsection (4)."

RE-THINKING FORFEITURE OF PATRIMONIAL BENEFITS WHEN A MARRIAGE DISSOLVES THROUGH DEATH*

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SUMMARY

People marry for different reasons; some marry for love, companionship, the desire to procreate or social security; others just marry for money. The law should provide spouses that are innocent of any marital misconduct with financial protection at the end of the marriage. At the same time, the law ought to make sure that nobody benefits from a marriage that he or she has wrecked through marital misconduct at the expense of another. Section 9 of the Divorce Act 70 of 1979 seeks to achieve this by providing for forfeiture of patrimonial benefits. Over the years, our courts have clarified the application of this provision. However, some questions remain. Is it sufficient only to have regard to the duration of the marriage, the circumstances that gave rise to the breakdown of the marriage and substantial misconduct? Should our courts not look to other factors? Should section 9 not apply when a marriage ends through death under questionable circumstances? This article seeks to address these questions.

1 INTRODUCTION

The purpose of this article is to analyse the forfeiture of patrimonial benefits provisions in South Africa as provided for in section 9 of the Divorce Act (DA).[1] While a significant portion of this article is an analysis of section 9, it also considers the question of forfeiture when a marriage ends through death under circumstances that public policy would view as rendering the surviving spouse unworthy to take any benefit. When the provision for forfeiture of patrimonial benefits was codified in the DA in 1979,[2] there were various aspects about it that were unclear. For instance, section 9 lists three factors for the courts to consider when dealing with forfeiture matters – namely, the duration of the marriage, the reason for the irretrievable

* The author is indebted to the constructive criticism and brilliant suggestions made by the anonymous reviewer. The feedback provided has greatly assisted in revising this article. However, all errors in this article are that of the author and not the reviewer.

1 70 of 1979.

2 1979 is the year in which the DA came into operation. Before this, forfeiture of patrimonial benefits provisions was part of the common law.

breakdown of the marriage and any substantial misconduct. There was a question on whether all these factors needed to be present before a court granted an order of forfeiture. As will be seen below, this question was answered in the negative, it is not mandatory to plead and prove all three factors. However, the interpretation of these factors, and section 9 in general, is still open to discussions such as the present one.

This article begins with a general overview of divorce and forfeiture. This overview is intended to facilitate a general understanding and to stimulate the debate that follows. This general overview also encompasses a peregrination through the common-law history of forfeiture in South Africa. It then looks at the law as stated in section 9 of the DA. This is done by analysing section 9 and referring to case law. It is clear that a handful of cases dealing with forfeiture inevitably find themselves dealing with the interpretation of section 9. A discussion on the question of forfeiture when a marriage ends through death follows and the article ends with a conclusion.

2 DIVORCE AND FORFEITURE: A BRIEF OVERVIEW

Section 9 of the DA provides for forfeiture. The purpose of forfeiture is to ensure that a person does not benefit from a marriage that he or she has wrecked or actively broken down.[3] A spouse will forfeit a benefit if, in relation to the other spouse, he or she will unduly benefit if an order of forfeiture is not made.[4] In its basic form, the section presents an exception to the general rules governing matrimonial property in relation to divorce in South Africa. In South Africa, there are three matrimonial property systems as stipulated by the Matrimonial Property Act[5] (MPA): marriage in community of property,[6] marriage out of community of property with accrual,[7] and marriage out of community of property without accrual.[8]

Briefly, the general rules are that where a marriage is in community of property, the spouses share equally in the joint estate. In the accrual system, the spouse whose estate shows a smaller accrual or growth acquires a right to claim from the spouse whose estate shows the most accrual.[9] If the parties exclude the accrual system, the general rule is that they are not entitled to a share in the estate of the other. However, despite the exclusion of the accrual, parties may still voluntarily benefit each other in the form of a spousal donation in the antenuptial contract or in a will. A spouse may also benefit through intestate succession if the deceased spouse died without a will. While the law was suspicious of spousal donations, section 22 of the MPA now specifically allows them.

Section 9 of the DA, if applicable, negates the general rules above. Parties who are married in community of property may not necessarily share

3 *Murison v Murison* 1930 AD 157.
4 See wording of s 9 of the DA.
5 88 of 1984.
6 Ch 3 of 88 of 1984.
7 Ch 1 of 88 of 1984.
8 S 2 of 88 of 1984.
9 *C v C* 2016 (2) SA 227 (GP) par 20 (also referred to as *MC v JC*).

equally in the joint estate.[10] The court may order that a blameworthy spouse forfeit the patrimonial benefit to which he or she may be entitled by virtue of the chosen matrimonial property system.[11] A party may also forfeit an accrual[12] claim, as well as a benefit provided for in the antenuptial contract[13] – including uncompleted antenuptial gifts.[14] The meaning of patrimonial benefit is discussed below.

Regardless of the chosen matrimonial property system, no marriage is eternal; all marriages eventually dissolve through either an annulment, death or divorce. Every dissolution of a marriage has consequences. Although most marriages end in death, the divorce rate is alarmingly high in South Africa. For instance, in 2019, 23 710 divorces were finalised (or 17,6 per cent of marriages in 2019);[15] 43,1 per cent of these marriages had lasted for less than 10 years.[16] It is hereby argued that the cause of this high divorce rate is the no-fault divorce system introduced by the DA.[17] For this reason, South Africa is informally referred to as an easy divorce jurisdiction.[18] For the purposes of a divorce, all that a party has to show is that the marriage has irretrievably broken down.[19] This means that the marriage has reached such a stage of disintegration that no reasonable person will conclude that the marriage may still be revived to a normal marriage relationship.[20]

A comparison with the English system indicates that the latter system has restrictions against a divorce petition. Prior to the amendment of the incumbent Matrimonial Causes Act of 1973 (MCA), no divorce proceedings could be initiated within three years of the date of marriage.[21] This was the case unless a party could show there was exceptional hardship. The major problem with this exception is that it was difficult for the courts to define what constituted exceptional hardship.[22]

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10 Barratt, Domingo, Amien, Denson, Mahler-Coetzee, Olivier, Osman, Schoeman and Singh *Law of Persons and the Family* 2ed (2017) 347.

11 In this case, the spouse will keep whatever benefit they brought into the joint estate. See Heaton and Kruger *South African Family Law* 4ed (2016) 136.

12 Barratt *et al Law of Persons* 347.

13 *Swil v Swil* 1978 (1) SA 790 (W) 793. It appears that a party who had been ordered to forfeit a benefit in terms of the antenuptial contract was required to make restitution. See Evans *The Law of Divorce in South Africa* (1920) 126; *Allen v Allen* 1951 (3) SA 320 (AD) and Hahlo *The South African Law of Husband and Wife* 2ed (1963) 426.

14 Evans *The Law of Divorce* 129.

15 StatsSA *Statistical Release PO307: Marriage and Divorce* (2019) http://www.statssa.gov.za/publications/P0307/P03072019.pdf (accessed 2022-02-09) 6. The report does not reflect the divorce rate as a percentage; however, a calculation by *Moneyweb* works out the 2019 divorce rate as 17,6 per cent of existing marriages. See generally https://www.moneyweb.co.za/financial-advisor-views/changing-marriage-patterns-and-their-impact-on-financial-planning/ (accessed 2022-02-09).

16 StatsSA *Statistical Release PO307: Marriage and Divorce* 7.

17 S 3 of the DA.

18 Sinclair "The Financial Consequences of Divorce in South Africa: Judicial Determination or Private Ordering?" 1983 *The International and Comparative Law Quarterly* 785.

19 See s 3 of the DA on grounds of divorce that do not require fault.

20 S 4(1) of the DA.

21 Cretney and Masson *Principles of Family Law* (1990) 95.

22 Cretney and Masson *Principles of Family Law* 95.

The three-year ban referred to above was finally lifted by the promulgation of the Matrimonial and Family Proceedings Act of 1984 on the recommendations of the English Law Commission. Section 1 of the latter Act amended section 3 of the MCA. Section 3 now provides that no divorce petition may be brought within one year of marriage. This prohibition is absolute.[23] A summary of England and Wales divorce statistics shows that in 2019, there were 107 599 divorces; this is a rate of 8,9 per cent of existing marriages. The average duration of the marriages was just above four years.[24]

While English law also relies on the irretrievable breakdown of a marriage as a ground for divorce, it is the sole ground for divorce. A maximum of five facts or guidelines may be used to substantiate a claim for the irretrievable breakdown of a marriage. These are adultery, the respondent's intolerable behaviour, desertion, living apart for at least two years before the divorce and living apart for at least five years before the divorce.[25] Of particular importance, where the spouses have lived apart for five years before the divorce, is that the court may refuse to grant the petition for a divorce if it will cause grave financial or other hardships for the respondent.[26]

In South Africa, in addition to the irretrievable breakdown of a marriage, a party may also rely on mental illness and continuous unconsciousness as grounds for divorce.[27] However, an application for the forfeiture of benefits is not available in instances where these grounds are used. Section 9(2) specifically excludes mental illness and continuous unconsciousness as divorce grounds to which forfeiture provisions may attach. It is obvious that the purpose of section 9(2) is to alleviate unfairness that may result if forfeiture proceedings are brought against a defendant who is not present to defend him- or herself. It is worth noting that the presence of mental illness and continuous unconsciousness as grounds for a divorce has received academic criticism. There are academics who argue that having irretrievable breakdown of a marriage as the only ground for a divorce is sufficient.[28]

Should the legislature discard the additional grounds for a divorce, and thus mirror the English system? It is submitted that this should be the case. Section 3 of the Divorce Act should be amended so that the irretrievable breakdown of a marriage is the only ground for a divorce. It should be sufficient for a spouse wishing to bring divorce proceedings against a mentally ill spouse simply to allege that as a result of the mental illness the marriage has irretrievably broken down. However, to emphasise the protection of mentally ill and continuously unconscious spouses, section 9(2) of the DA should be retained. The retention of section 9(2) would also address decisions such as *Dickinson v Dickinson*,[29] *Smit v Smit*[30] and *Ott v*

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23 Cretney and Masson *Principles of Family Law* 96.

24 Office for National Statistics https://www.ons.gov.uk/peoplepopulationandcommunity/birthsdeathsandmarriages/divorce/bulletins/divorcesinenglandandwales/2019 (accessed 2022-02-09).

25 S 1 of the MCA.

26 S 5 of the MCA.

27 See s 3, read with s 5(1) and (2) of the DA.

28 Skelton and Carnelley *Family Law in South Africa* (2010) 125; Heaton and Kruger *South African Family Law* 123 and Barratt *et al Law of Persons* 339.

29 1981 (3) SA 856 (W).

Raubenheimer[31] that seem to suggest the permissibility of bringing a forfeiture suit against such spouses.

While the purpose of section 9 appears clear and unambiguous on paper, in practice it has raised important questions. Some of the questions have, to a certain extent, been answered over the years but others remain. Initially, some questions related to the textual interpretation of the section, especially in relation to the three factors. The issue was whether a plaintiff was required to prove all the factors before an order of forfeiture could be made. Another issue was whether these factors ranked on the same footing or if one was more important than the others. Arguably, these issues have been put to rest in *Wijker v Wijker*.[32] However, this case was decided in a different era and since then, South Africa has committed to a constitutional mandate based on human rights and dignity. For the purpose of this article, it is important to ask whether the interpretation of section 9 of the DA allows forfeiture to be invoked in circumstances where the marriage ends through death.

3 FORFEITURE UNDER COMMON LAW

Forfeiture, though it developed under Roman-Dutch law, originates in Roman law.[33] A forfeiture order could only be made if it was ancillary to a separation or divorce order.[34] In *Vergottini v Vergottini*,[35] the court refused to grant forfeiture relief because the spouse had sought it in conjunction with neither a divorce nor a separation order. In this case, the wife had approached the court for an order declaring that the husband had forfeited all the benefits and for suspending the community of property.[36] Owing to the then-applicable fault system, the wife could not file for a divorce as she was leading an adulterous life.[37]

Under Roman law, the grounds upon which forfeiture could be made were malicious desertion, adultery, incurable mental illness, and imprisonment of at least five years.[38] Like divorce, forfeiture was, and still is (to a certain degree) based on fault.[39] However, under Roman-Dutch law, only malicious desertion and adultery could be relied upon. In cases where the petitioner relied on malicious desertion, a court was required to issue a rule *nisi* calling upon the delinquent spouse to restore conjugal rights. The purpose of this rule *nisi* was to give the guilty spouse an opportunity to restore conjugal rights. If the guilty spouse failed to restore conjugal rights before the return date, the court was duty-bound to order forfeiture.[40] The purpose was to

30 1982 (4) SA 34 (O).
31 1985 (2) SA 851 (O).
32 1993 (4) SA 720 (A).
33 *Swil v Swil supra* 792H.
34 *Ex parte Meyer NO: In Re Meyer v Meyer* 1962 (2) SA 688 (N) 690H.
35 1951 (2) SA 484 (W).
36 *Vergottini v Vergottini supra* 484G.
37 *Vergottini v Vergottini supra* 485C.
38 *Swil v Swil supra* 793A and *C v C supra* par 28.
39 *Singh v Singh* 1983 (1) SA 781 (C) 786E.
40 *Ex parte Boshoff NO: In re Boshoff v Boshoff* 1953 (3) SA 237 (W) 238B.

prevent a party who is responsible for the breakdown of the marriage from benefiting financially.[41] In other words, the purpose was to ensure that a person does not benefit from a marriage that he or she has wrecked[42] as a result of marital delinquency.[43] Viewed this way, forfeiture was (and still is) punitive in nature.

The idea that a forfeiture order could only be made where there was fault was not cast in stone; at Roman law, the order could be made even in cases of incurable mental illness where the question of fault or blameworthiness did not arise. This position later changed under Roman-Dutch law. An order of forfeiture could no longer be made against a mentally ill spouse solely based on the mental illness.[44] Section 9(2) of the DA upholds this position as it expressly excludes mental illness as a ground upon which an order of forfeiture may be made. Notwithstanding such exclusion, it is shown below that an order of forfeiture may still be made in the absence of fault – for instance, where the marriage has been of short duration.

Under the common law, a guilty spouse could forfeit everything, including what he or she contributed to the marriage.[45] Bonthuys also shows that at common law the court had the power to order complete forfeiture in favour of the innocent spouse.[46] To this end, Bonthuys relied on the decision in *Mulder v Mulder*[47] as authority for the assertion that a spouse could forfeit assets that he or she brought into the marriage.[48] Writing many years before Bonthuys, Hahlo acknowledged that our courts have not rejected the rule that a spouse could forfeit what he or she brought into the marriage. However, he argues that it has fallen into disuse.[49] This legal position seems to have been followed by various jurisdictions around the globe. However, in 1994, the state of Mississippi overturned it in *Ferguson v Ferguson*.[50] In South Africa, cases such as *JW v SW*[51] and *M v M*[52] suggest that the legal position is that a spouse cannot forfeit what he or she brought into the marriage.

Under common law, a party seeking forfeiture was expected to allege and prove any of the jurisdictional grounds highlighted above. Once a party had proved a jurisdictional ground, the court had no discretion but to grant an order of forfeiture.[53] The DA has brought about a fundamental change. While a party seeking a forfeiture order is still expected to plead and prove a

41 *Swil v Swil supra* 792J and *Mulder v Mulder* (1885–1888) 2 SAR TS 238.
42 *Murison v Murison supra* 157; Cronje and Heaton *South African Family Law* (1991) 150.
43 Hahlo *The South African Law of Husband and Wife* (1963) 418.
44 Marumoagae "The Regime of Forfeiture of Patrimonial Benefits in South Africa and a Critical Analysis of the Concept of Unduly Benefited" 2014 *De Jure* 85 91.
45 *Mulder v Mulder supra* 238.
46 See, generally, Bonthuys "The Rule That a Spouse Cannot Forfeit at Divorce What He or She Has Contributed to the Marriage: An Argument for Change" 2014 *SALJ* 439.
47 *Supra.*
48 Bonthuys 2014 *SALJ* 445.
49 Hahlo *The South African Law of Husband and Wife* (1963) 419.
50 639 So. 2d 921 (1994).
51 2011 (1) SA 545 (GNP).
52 LP (unreported) 2017-06-19 case no 1070/2014.
53 *Swil v Swil supra* 794A.

jurisdictional ground, the decision whether to grant a forfeiture order now rests entirely within the court's discretion.[54]

Also under common law, an order of forfeiture could take one of two forms. It could either be a restorative or a declaratory order. The court could order a spouse to restore a past benefit that was due and given during the subsistence of the marriage. This was similar to a vindicatory claim. Alternatively, a declarator simply declared that a spouse forfeited any benefits that were due to him or her at the dissolution of the marriage.[55] The difficulty with a restoring order is that the plaintiff was required to plead exactly the benefit that he or she had given. This is something that proved difficult, especially if a marriage had been of a long duration. On the other hand, it was unnecessary for a plaintiff seeking a declarator to specify what property the guilty spouse forfeited. In other words, a blanket declaration was permissible.[56]

The different orders stated above still exist, although courts no longer classify them as such. Sometimes a court must specify the item that is forfeited – for example, a claim or order to the effect that "the immovable property" is forfeited can prove difficult to implement in instances where there is more than one immovable property. To eliminate any potential confusion, the claim or order must be specific. However, in some cases, a blanket declarator may be an appropriate order when dealing with smaller estates. The guiding principle is that each case must be treated based on its own circumstances.

4 SECTION 9 OF THE DIVORCE ACT

4 1 The wording

Section 9(1) of the DA provides:

> "When a decree of divorce is granted on the ground of the irretrievable break-down of a marriage the court may make an order that the patrimonial benefits of the marriage be forfeited by one party in favour of the other, either wholly or in part, if the court, having regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof and any substantial misconduct on the part of either of the parties, is satisfied that, if the order for forfeiture is not made, the one party will in relation to the other be unduly benefited."

4 2 A brief analysis of the section

The language of section 9 makes it clear that what is forfeited is a patrimonial or marital benefit. A patrimonial benefit is one that accrues to a party because of the marriage, thus excluding what a party has contributed to the marriage. Therefore, in line with the American decision in *Ferguson v Ferguson*,[57] a person cannot forfeit what he or she contributed to the

54 Hahlo *The South African Law of Husband and Wife* 5ed (1985) 373.

55 See, generally, *Swil v Swil supra* 793D–F.

56 *Swil v Swil supra* 793D–F.

57 *Supra.*

marriage.[58] Further, the reference to "patrimonial benefits" in section 9 lends itself to a suggestion that it is a rejection of the idea that a spouse may forfeit assets that he or she brought into the marriage – as espoused in *Mulder v Mulder*[59] and advocated by Bonthuys. Furthermore, as noted above, recent judicial authority also supports the rejection.[60]

A court is empowered to order partial or complete forfeiture. In light of the rejection of the common-law position that a spouse could forfeit what he or she brought into the marriage, complete forfeiture refers to a situation where the guilty spouse with a lesser estate does not get anything from the estate of the other. In other words, the guilty spouse only gets to keep what he or she brought into the marriage. An order of complete forfeiture usually does not present any practical problems. The problem lies with partial forfeiture. Partial forfeiture is awarded as a percentage of the joint estate, accrual or benefit in terms of the antenuptial contract. Ideally, before making an award of partial forfeiture, a court must be provided with sufficient information regarding the value of the estate as well as the respective contributions of each of the spouses.[61] Otherwise, the court is called to make a blanket or a blind order (a declarator as mentioned above). This is undesirable as it opens the gate to subsequent litigation in order to enforce the very broad (if not vague) order.[62]

Whether a court grants forfeiture depends solely on whether a party will, as against the other, be unduly benefited.[63] The meaning of undue benefit is unclear. The DA also does not define the concept.[64] However, in *Wijker v Wijker*,[65] it was decided that whether a person will unduly benefit is a two-stage inquiry. The first leg is whether a person will "benefit", which is a question of fact; while the second leg is whether the benefit is "undue", and this is a value judgement taking into account the facts and the three factors.[66] An attempt is made below to define "undue benefit".

4 3 The meaning of undue benefit

Marumoagae submits that an undue benefit is "a benefit (being property subject to the joint estate) accruing to a person whose conduct does not justify such a person receiving such a benefit".[67] In *Molapo v Molapo*, the

58 See, generally, *JW v SW supra* and *C v C supra*.

59 *Supra.*

60 *JW v SW supra* and *M v M supra*.

61 *Koza v Koza* 1982 (3) SA 462 (T) 465E–466C. In the *Koza* case, the parties were married in terms of the Black Administration Act 38 of 1927 and no declaration was made by the parties as envisaged in s 22(6) of the said Act. Consequently, their marriage was, by default, out of community of property. There was no antenuptial contract. This being the case, there were no patrimonial benefits, and the court could not make a forfeiture order. A forfeiture order can only be made where there is a patrimonial benefit. See, also, Hahlo *The South African Law of Husband and Wife* (1985) 376.

62 See *Swil v Swil supra* 794A–C and *Molapo v Molapo* FSB (unreported) 2013-03-14 case no 4411/10 par 17 and 22.

63 Cronje and Heaton *South African Family Law* 152.

64 Marumoagae 2014 *De Jure* 98.

65 *Supra.*

66 *Wijker v Wijker supra* 727E–F.

67 Marumoagae 2014 *De Jure* 98.

court held that "undue" could be described as "disturbingly unfair".[68] It is submitted that "undue benefits" refers to something that one acquires in the absence of a legal or moral entitlement. An unfaithful spouse is not morally entitled to any benefit of the marriage. Equally, a spouse who kills another ought not to benefit from the estate. Otherwise, such will constitute an undue benefit. A spouse who fails to contribute to the estate in circumstances where he or she can contribute should also not benefit. The concept of a contribution must be interpreted to include both monetary and non-monetary contribution – as envisaged in *Beaumont v Beaumont*.[69] In order for a court to make a proper determination of whether a benefit is undue, the nature and extent of the benefit must be proved before it.[70]

4 4 The three factors

Despite the absence of clarity on what is meant by undue benefit, it is clear that the question of whether a person has unduly benefited must be determined having regard to these three factors: the duration of the marriage, the circumstances that gave rise to the break-down, and any substantial misconduct on the part of either of the spouses.[71] In *Singh v Singh*, the court noted (with authority) that two of the three factors show the "lingering influence" of the guilt or fault principle.[72] These three factors need not all be present[73] and none of these factors should be considered as ranking above others.[74] In *T v R,*[75] the court awarded partial forfeiture – relying solely on the short duration of the marriage. The marriage had only lasted for 20 months.

A court may not look beyond these three factors. In *Wijker v Wijker,*[76] the trial court had regard to fairness. The Appellate Division disagreed with this approach and held that section 9(1) could not be used to depart from the consequences of the parties' chosen matrimonial property system just because the court considers it fair and just to do so.[77] In *Botha v Botha*,[78] the court *a quo* misdirected itself by considering the strained relationship between the appellant and the defendant.[79] In *Molapo v Molapo*,[80] the court

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68 *Molapo v Molapo supra* par 22.13.

69 *Beaumont v Beaumont* 1987 (1) SA 967 (A).

70 *Engelbrecht v Engelbrecht* 1989 (1) SA 597 (C). Note that this judgment is written in Afrikaans. See flynote and headnote for a brief English translation.

71 See *Klerck v Klerck* 1991 (1) SA 265 (W) 266A–B. Note that this judgment is written in Afrikaans, but the headnote is very helpful. See, also, Barratt *et al Law of Persons* 349.

72 *Singh v Singh supra* 788F.

73 See headnote in *Klerck v Klerck supra* 265J and *Binda v Binda* 1993 (2) SA 123 (W).

74 See *Wijker v Wijker supra* 728–729. In this appeal decision, counsel for the appellant argued that the court could not make an order of forfeiture without a finding of "substantial misconduct". By so doing, counsel had sought to put "substantial misconduct" above other factors. The court rejected this argument.

75 *T v R* 2017 (1) SA 97 (GP); [2016] 4 All SA 251 (GP) par 20.18.

76 *Supra.*

77 *Wijker v Wijker supra* 727. See, also, Heaton "Striving for Substantive Gender Equality in Family Law: Selected Issues" 2005 *SAJHR* 547 557.

78 2006 (4) SA 144 (SCA).

79 *Botha v Botha supra* par 14–15.

80 *Supra.*

once again relied on fairness and this was criticised.[81] Therefore, the court is confined only to the factors listed in the section. Beyond that, the court has no competency.

4 4 1 Application of the factors

The manner in which the factors are to be applied is now settled law. Though not voluminous, the literature on these factors is rich. Initially it was thought that the factors were to be applied cumulatively.[82] In other words, the thinking was that in order to succeed in an application for an order of forfeiture, a spouse was required to allege and prove all the factors.[83] This was due to the wording of the section, particularly the use of commas (as opposed to the word "or") and the conjunction 'and' before the third factor.[84]

In *Wijker v Wijker*, the court settled the matter as follows:

> "Now the words 'and' and 'or' are sometimes inaccurately used; and there are many cases in which one of them has been held to be the equivalent of the other. Much depends on the context and the subject-matter. I cannot think that in this instance the Legislature intended to make these provisions cumulative."[85]

4 4 2 Duration of the marriage

The court may consider the duration of the marriage. In *Singh v Singh*, the court held that this is the only morally neutral factor that a court may have to consider.[86] Furthermore, this is the only factor that serves as a reminder that our divorce jurisprudence has, to a certain extent, moved away from the fault system. It is accepted that where a marriage has been of a long duration, a court is less likely to grant an order of forfeiture. The reason for this is because it is highly probable that both the spouses have made contributions to the joint estate or the growth of the estate of the other. A shorter marriage increases the chances of the court granting a forfeiture order.

That said, it must be asked: what constitutes a short or long marriage? In *T v R*, the court accepted that 20 months was a short duration.[87] It is submitted that this is correct. In *JW v SW*, 17 years was regarded as a long duration.[88] In an earlier decision in *Botha v Botha*,[89] the Supreme Court of

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81 See Marumoagae "Factors Justifying Forfeiture of Patrimonial Benefits Orders: *Molapo v Molapo* (2013) ZAFSHC 29 14 Mar 2013" 2015 *Obiter* 232.

82 *Matyila v Matyila* 1987 (3) SA 230 (W) 234G.

83 *Matyila v Matyila supra* 234G.

84 To illustrate (parts of s 9 of the DA): "[h]aving regard to the duration of the marriage, the circumstances which gave rise to the break-down thereof ***and*** any substantial misconduct on the part of either of the parties … (*author's own emphasis*)."

85 *Wijker v Wijker supra* 729G. This quotation was originally used by Innes CJ in *Barlin v Licensing Court of the Cape* 1924 AD 472 478. It was also used in *Binda v Binda supra*. In relying on this quote, the Appellate Division endorsed the decision in *Binda v Binda supra*.

86 *Singh v Singh supra* 788F–G.

87 *T v R supra* par 20.18.

88 *JW v SW supra* par 17.

89 2006 (4) SA 144 (SCA).

Appeal seems to have accepted[90] that 10 years was a short, but not "very short duration".[91] In arriving at this decision, the court took into consideration that the parties were in their twenties when they married and that had their marriage endured, they would have been married for a very long period.[92] This line of reasoning raises some interesting points. Where people decide to marry at a young age, how long do they have to be married before their marriage is regarded as being of a long duration? Is it the case that 10 years will be regarded as a long duration where the parties married at a younger age? Will something shorter than 10 years be regarded as a long duration if the parties married at an older age?

It is submitted that this line of reasoning is flawed. Ten years may not be very long but it is certainly not short. Many things may happen in 10 years. For instance, a child may be born of the marriage and that child may progress as far as the third or fourth grade of their school career. Perhaps the solution lies in ascertaining the average duration of marriages in South Africa. If a marriage reaches and exceeds the average duration, it should be regarded as a long marriage for the purposes of section 9.

4 4 3 The circumstances giving rise to the breakdown of the marriage

There are many reasons that marriages break down. In *Wijker v Wijker*, the breakdown was caused by the respondent's refusal to return shares to the appellant and the appellant's unrelenting demand thereof.[93] In *JW v SW*, the marriage broke down because of physical abuse by the husband.[94] In *Botha v Botha*, the cause of the breakdown was the meddling of the defendant's family in the marriage.[95] In *Molapo v Molapo*, the defendant attempted to burn down the family home, assaulted the plaintiff, and failed to take care of the family.[96] In *T v R*, the marriage broke down because the parties were constantly away from home on account of employment.[97]

Section 9(1) requires the courts to have regard to the reason for the breakdown of the marriage. Once the reason has been established, the court must decide whether that reason is sufficiently serious to justify an order of forfeiture. The court may not make an order of forfeiture citing the reason for the breakdown of the marriage if this reason does not establish blameworthiness on the part of the defendant. This approach was adopted in

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90 It must be pointed out that the SCA quoted the decision of the court *a quo* in this respect. It did not disagree with the findings of the court *a quo* that 10 years was a short, but not "very short duration". Neither did it disagree with the reasoning behind the finding.

91 *Botha v Botha supra* par 13.

92 *Ibid*.

93 *Wijker v Wijker supra* par 31–32. Essentially, the court's finding was that both the parties contributed to the breakdown of the marriage.

94 *JW v SW supra* par 28. It must be noted that in this case the plaintiff had been secretly receiving maintenance from the father of her son from a previous relationship. The court found that this did not cause the marriage to break down as alleged by the defendant. It was the assault on the plaintiff that brought the marriage to its knees.

95 *Botha v Botha supra* par 14–15.

96 *Molapo v Molapo supra* par 24.3.

97 *T v R supra* par 20.2–20.5.

Wijker v Wijker, *Botha v Botha* and *T v R*.[98] If the reason for the breakdown is so serious that it renders any benefit given to the defendant undue, then the court must make an order of forfeiture. This approach was followed in *JW v SW* and *Molapo v Molapo*.[99] The opposite is also true: if the reason for the breakdown is not so serious that it renders any benefit given to the defendant undue, the court may not make an order of forfeiture. The reason for the breakdown of the marriage is important and is central to the decision to award forfeiture. In this regard, the provision cannot be faulted.

4 4 4 Any substantial misconduct

While fault no longer plays a part in arriving at a decision about whether to grant a decree of divorce, remnants of the fault principle clearly lingered in section 9 of the DA. Misconduct in this context includes marital fault. Marital fault includes adultery, imprisonment and malicious desertion.[100] The concept of substantial misconduct is wider than marital fault. It goes on to include issues such as assault,[101] late-coming, socialising, lack of intimacy, burning of wedding photographs[102] and financial deprivation.[103] However, substantial misconduct does not include a single or isolated occasion.[104] Furthermore, the mere existence of substantial misconduct does not, on its own, justify an order of forfeiture.[105]

The above does not suggest that in addition to proving substantial misconduct, the plaintiff must prove any of the other factors in section 9. As has been pointed out above, it is trite in our law that the plaintiff does not have to prove all the factors in section 9. However, what must be proved is that as a result of the substantial misconduct, the defendant will be unduly benefited. In *JW v SW*, the plaintiff managed to prove substantial misconduct in the form of an assault.[106] However, the court held this did not justify an order of forfeiture, because the defendant had contributed more than the plaintiff.[107] As pointed out above, a person cannot forfeit what they brought into the marriage.

Misconduct still does and should continue to play an important role in forfeiture. Although fault is no longer a requirement for a divorce, it is difficult to think of the application of forfeiture provisions without the question of fault. In this regard, the provision also cannot be faulted.

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98 *Supra.*

99 *Supra.*

100 Barratt *et al Law of Persons* 334.

101 *JW v SW supra* 550G.

102 See *T v R supra* par 20.6.

103 See the facts of *Molapo v Molapo supra* where, in addition to prolonged financial neglect, the defendant (husband) assaulted the plaintiff and attempted to burn down the family home.

104 *T v R supra* par 20.6. In this case, the defendant (husband) had throttled the plaintiff on a single occasion. The court did not regard this as substantial misconduct. Nonetheless, the court used the opportunity to make its distaste over domestic violence known at par 20.7.

105 *JW v SW supra* 550H.

106 *JW v SW supra* 550G.

107 *JW v SW supra* 550I.

5 FORFEITURE AND DISSOLUTION OF A MARRIAGE THROUGH DEATH

By its nature, the forfeiture provision is controversial. It has been pointed out above that it only applies when a marriage ends through divorce. The reality is that some marriages end through death under suspicious circumstances; here one may find instances of infidelity, absence of spousal support when one spouse becomes sick (malicious desertion) or murder in the form of mariticide. It is submitted that the heirs of the deceased spouse should be able to invoke forfeiture of patrimonial benefit provisions. While it is important to acknowledge that there may be remedies under the law of succession,[108] those remedies relate to inheritance and not a patrimonial benefit. The rogue spouse may still be entitled to half of the deceased estate by virtue of a marriage in community of property. The same applies with respect to other marital regimes where a marital benefit is conferred by antenuptial contract. The heirs of the deceased ought to be afforded a remedy to protect the entire estate through forfeiture of patrimonial benefit provisions.

It is debatable whether forfeiture can be made when a marriage ends through death. At Roman law, there is authority for the notion that the action for forfeiture was available to the deceased's heirs against a delinquent spouse on the ground of adultery.[109] In such cases, the right to bring an action of forfeiture was transmitted to the heirs.[110]

It is unclear whether this position was received into South African law. However, no court has ever rejected this principle. In *Ex Parte Boshoff NO: In re Boshoff v Boshoff*,[111] the deceased husband had sued for restitution of the conjugal right, failing which an order for a divorce and forfeiture. Unfortunately, the husband died before close of pleadings. The executor of the deceased estate approached the court for an order substituting himself as plaintiff in the matter. The main object was to apply for an order of forfeiture against the delinquent wife.[112] The court refused this application. The basis for this refusal was that the court could not grant an order of forfeiture in the absence of a decree of divorce.[113] However, a divorce was no longer possible following the death of the husband. Furthermore, the main suit was for an order for restitution of conjugal rights. If such an order were to have been given, the respondent would have been given an opportunity to restore conjugal rights before a divorce decree could be

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[108] Examples of remedies under the law of succession are cases of unworthiness to inherit. These include instances where the deceased has unlawfully and intentionally caused the death of the deceased or the deceased's parent(s) or descendants (the *conjunctissimus*). See *Gafin v Kavin* 1980 (3) SA 1104 (W). Considerations of public policy may determine unworthiness to inherit. For instance, the behaviour of the beneficiary towards the deceased may disqualify them from inheriting from the deceased. See *Danielz v De Wet* 2009 (6) SA 42 (C).

[109] Hahlo *The Law of Husband and Wife* (1963) 419.

[110] *Ibid*.

[111] *Supra.*

[112] *Ex Parte Boshoff NO: In re Boshoff v Boshoff supra* 237H.

[113] *Ex Parte Boshoff NO: In re Boshoff v Boshoff supra* 238A.

ordered.[114] It is important to note that the court did not reject the idea of transmitting the action for forfeiture to the heirs: the basis of dismissing the executor's application was procedural, rather than substantive.

In *Ex Parte Meyer NO: In re Meyer v Meyer*,[115] the deceased husband had instituted an action for divorce and, *inter alia*, forfeiture, relying on the ground of adultery. Before the trial could start, however, the husband died. The executor of the deceased estate approached the court for an order substituting himself as the plaintiff and for an order of forfeiture in favour of the deceased estate.[116] In rejecting the matter, the court held that an order of forfeiture of benefits by reason of adultery could not be granted as a stand-alone order.[117] It could only be made subsequent to a divorce decree.[118] It is interesting that the court in this case also did not reject transmission of the action for forfeiture to the heir as a matter of substantive law. Instead, citing *Ex Parte Boshoff No: In re Boshoff v Boshoff*,[119] the court observed that in the latter case, the main application was for restoration of conjugal rights, and the application for an order of forfeiture was ancillary. In the present case, the executor had sought a stand-alone order. It is submitted that these are matters of procedure rather than substance and that the application of this possible order should be extended to instances where a marriage has been terminated by death.

More recently, in *Monyepao v Ledwaba*,[120] the Supreme Court of Appeal had to decide, *inter alia*, whether to make an order of forfeiture in favour of a deceased estate. In this case, the respondent had entered into an unregistered customary marriage with the deceased in 2007.[121] Approximately two years later and without dissolving the customary marriage to the deceased, the respondent entered into a civil marriage with another man.[122] Following this, the deceased also married the appellant in terms of customary law.[123] Following the death of the deceased, the respondent returned to claim from the deceased estate arguing that she was a spouse based on her customary marriage to the deceased, which was never dissolved through a divorce by a court. The appellant sought an order for, among others, forfeiture. The court *a quo* granted the order. However, in two subsequent appeals (before a full bench of the Limpopo Division of the High Court petitioned by the respondent and in the Supreme Court of Appeal petitioned by the appellant), the order was reversed. The appeal decisions were unanimous in that an order of forfeiture could only be made where a marriage ends in divorce and only a party to a marriage may seek it.[124]

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114 *Ex Parte Boshoff NO: In re Boshoff v Boshoff supra* 238B.

115 *Supra.*

116 *Ex Parte Meyer NO: In re Meyer v Meyer supra* 689A–E.

117 *Ex Parte Meyer NO: In re Meyer v Meyer supra* 689G.

118 *Ex Parte Meyer NO: In re Meyer v Meyer supra* 689H.

119 *Supra*.

120 SCA (unreported) 2020-05-27 case no 1368/2018 par 21.

121 *Ledwaba v Monyepao* LP (unreported) 2018-04-25 case no HCAA06-2017 par 7.

122 *Monyepao v Ledwaba supra* par 15.

123 *Monyepao v Ledwaba supra* par 14.

124 See par 23 of the decision of the full bench in *Ledwaba v Monyepao supra* and par 21 of the SCA decision.

It is hereby argued that both the appeal courts in *Monyepao v Ledwaba* adopted a literal approach in interpreting section 9. To borrow from the court:

> "It is clear from s 9(1) that the power of a court to order the forfeiture of benefits arises only as an adjunct to a decree of divorce. Moreover, a claim for the forfeiture of benefits can only be made by one party to a marriage against the other in divorce proceedings. It is not open to an outsider, such as Ms Monyepao, to claim that relief. As the proceedings in the court of first instance were not divorce proceedings, and Ms Monyepao had no standing, that court had no jurisdiction to order that Ms Ledwaba should forfeit the benefits of her marriage to Mr Phago in favour of his estate. Consequently, the full court correctly set aside the order of the court of first instance."[125]

Notwithstanding the above, *Monyepao v Ledwaba* must be distinguished on its facts. In this case, relief was sought by the wife (or second wife, since the court found that the first customary marriage to the respondent was still valid) of the deceased in terms of customary law against an estranged first wife who returned solely to lay a claim from the deceased estate. It is thus submitted that *Monyepao v Ledwaba* does not necessarily extinguish possible reliance on forfeiture provisions by the heirs. In fact, the decision of the court *a quo* may give much-needed credence to the claim for forfeiture by the heirs.

It is hereby submitted that the correct interpretation is one that takes into account the context of section 9(1). The reason that section 9(1) singles out the irretrievable breakdown of the marriage as a ground on which a forfeiture order may be made is not to imply that there are no other grounds upon which the order may be made. Instead, section 9(1) is an indication that mental illness and continuous unconsciousness are excluded from the ambit of section 9(1). To emphasise this point, and as noted above, section 9(2) specifically excludes mental illness and continuous unconsciousness. This interpretation is in line with the decisions cited above that seem to support the transmission of action for forfeiture to the heirs of the deceased.

There is no doubt that such a proposal for transmission of the action for an order of forfeiture to the heirs creates room for frivolous and baseless litigation. However, this behaviour may be deterred by the possibility of a costs order in favour of the innocent litigant. This way, only legitimate cases may land in court rolls.

6 CONCLUSION

Much may still be said about the forfeiture of patrimonial benefits, especially on the application of these provisions. This article has presented an analytical overview of divorce and forfeiture, including a comparison with English law. It has also drawn on the common-law legal position. The changes brought about by the DA have been highlighted as far as possible. The article has also contributed, to a certain extent, to an understanding of the wider interpretation and application of section 9. It has done this by elaborating on what the factors in section 9 entail. The discussion of the factors is done with reference to case law. The article has also discussed the

[125] *Monyepao v Ledwaba supra* par 21.

possibility of an action for forfeiture where a marriage ends through death. This has also been done with reference to case law. The article has not shied away from making recommendations. It has recommended that the DA be amended so that the irretrievable breakdown of a marriage is the only ground for a divorce. It has also recommended that section 9 be interpreted in a way that makes it possible to transmit an action for an order for forfeiture to the heirs, even in cases where a marriage ends through death.

THE FUNDAMENTAL PRINCIPLES OF RECUSAL OF A JUDGE AT COMMON LAW: RECENT DEVELOPMENTS

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SUMMARY

The common-law principle that no one should be a judge in his or her own cause is the basis upon which the rule against bias or apprehension of bias was founded. In constitutional parlance, this translates into the requirement that a judge or anyone under a duty to decide anything must be impartial, which is, in turn, the foundation for the recusal of a judge in adjudication. This cardinal principle of adjudication has produced an abundant case law indicating the circumstances in which a judge should, or ought to, recuse him- or herself on the ground of bias or reasonable apprehension of bias in common-law jurisdictions. This article focuses on the fundamental principles guiding the notion of recusal in the common-law courts. There is, first, a presumption of judicial impartiality, which is the preliminary but important hurdle an applicant for recusal of a judge must overcome. The inquiry proceeds no further if this presumption is not successfully rebutted early in the proceeding. The second hurdle is the test for recusal that the facts put forward in support of the allegation of bias or apparent bias must meet. This test is a two-dimensional reasonable standard test of a reasonably informed observer who would reasonably entertain an apprehension that the judge would (not might) be biased towards one party in the case. This test enables a court to determine whether the allegation of lack of judicial impartiality in any given case could lead to the recusal of the judge. The discussion that ensues is based on decided cases selected from specific Commonwealth jurisdictions where such matters have recently been dealt with. Indeed, these cases show that recusal of a judge in adjudication is, in practical terms, the application of the common-law principle of natural justice that a person cannot be a judge in his or her own cause. It is also a clear manifestation of the age-old adage that justice must not only be done, but must manifestly and undoubtedly be seen to be done.

1 INTRODUCTION

According to Black's Law Dictionary, "recusal" is the process "by which a judge is disqualified on objection of either party (or disqualifies himself or herself) from hearing a lawsuit because of self-interest, bias or prejudice".[1] This is a textbook articulation of the principles derived from the common law over the years to the effect that a person cannot be a judge in his or her own cause;[2] or that a judge cannot sit in a case where he or she has financial,[3] or other interests that may raise in the mind of a reasonable observer a reasonable apprehension of bias;[4] or where the conduct of the judge or his or her utterances in adjudication[5] raises an apprehension of bias.[6] It also represents the constitutional requirement that to be properly constituted to hear a case, and in order to accord a fair hearing or trial in the case, the court or tribunal must not only be independent but must also be seen to be impartial.[7] An impartial judge is a fundamental prerequisite for a fair trial;[8] hence, an allegation that a judge should recuse him- or herself is a serious allegation that strikes at the core of judicial impartiality and attacks judicial integrity.[9]

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1 Black and Nolan *Black's Law Dictionary* 6ed (1990) 1277.

2 *Dimes v Grand Junction Canal* [1852] 3 HL Cas 750; *R v Gough* [1993] AC 646 (HL) 661.

3 See the discussion by Okpaluba and Juma "Pecuniary Interests and the Rule Against Adjudicative Bias: The Automatic Disqualification or Objective Reasonable Approach?" 2011 36(2) *Journal for Juridical Science* 97–118.

4 See e.g., *BTR Industries SA (Pty) Ltd v MAWU* 1992 (3) SA 673 (A); *President of the RSA v South African Rugby Football Union* 1999 (4) SA 147 (CC) (*President of the RSA v SARFU 2*); *SACCAWU v Irvin & Johnson Ltd Seafoods Division Fish Processing* 2000 (3) SA 705 (CC); *R v Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No 2)* [1999] 1 All ER 577 (HL).

5 The Supreme Court of Namibia has held in *S v Ningisa* [2013] 2 NR 504 (SC) that while there was a great degree of latitude with regard to cross-examination, the judge's interference was warranted where the cross-examiner was belabouring irrelevant points. The court found nothing on the record to suggest that a reasonable person might suspect any bias on the part of the trial judge that would result in an unfair trial so as to warrant his recusing himself. See generally, Okpaluba and Juma "The Dialogue Between the Bench and the Bar: Implications for Adjudicative Impartiality" 2011 128(4) *SALJ* 659-685; Olivier "Anyone But You, M'Lord: The Test for Recusal of a Judicial Officer" 2006 27(3) *Obiter* 606–618.

6 The question in *De Sousa v Technology Corporate Management* 2017 (5) SA 577 (GJ) par 94–101 and 112 was whether the defendants' fair trial rights had in any way been compromised by the court's decision to limit cross-examination. It was held that while the right to cross-examine a witness was a fundamental procedural right, it was not an absolute one, and could be limited where continued cross-examination would waste time and add unnecessarily to costs. Whether the limitation infringed a litigant's fair trial rights depended on whether he or she had suffered prejudice as a result, given the circumstances of the case. In the present case, the court was, therefore, fully justified in imposing a time limit on the cross-examination, given the unduly protracted nature of the trial, the defendants' repeated failure to abide by the timetable, and their insistence on cross-examining witnesses on points that were not dispositive of the case. In any event, no prejudice was suffered by the defendants given that it was only the time allowed for questioning that was limited.

7 S 34 of the Constitution of the Republic of South Africa, 1996.

8 *President of the RSA v SARFU 2 supra* par 48.

9 Per Goulding PCJ, *Boalag v R* [2014] CanLII 1235 (NL PC) par 12.

2 SCOPE OF THIS INQUIRY

Despite the already-existing avalanche of case law on this important subject of contemporary constitutional jurisprudence that has been investigated in the course of this decade,[10] there is no slow-down in the frequency with which cases raising the issue of bias, apprehended bias or the requirement of judicial impartiality are canvassed in common-law courts. It is for this reason that the developments of the last six years cannot be accounted for in a single article. Thus, the fundamental principles are dealt with in the present context, whereas the applications of these principles on a case-to-case basis within the respective jurisdictions are covered in the research taken up in separate articles by these authors.[11] Meanwhile, the *dictum* of Ponnan JA in *S v Le Grange*[12] is a clear reminder of the subject matter of this discussion. The learned Justice of the SCA observed:[13]

> "It must not be forgotten that an impartial judge is a fundamental prerequisite for a fair trial.[14] The integrity of the justice system is anchored in the impartiality of the judiciary. As a matter of policy, it is important that the public should have confidence in the courts. Upon this – social order and security depend.[15] Fairness and impartiality must be both subjectively present and objectively demonstrated to the informed and reasonable observer. Impartiality can be described – perhaps somewhat inexactly – as a state of mind in which the adjudicator is disinterested in the outcome and is open to persuasion by the evidence and submissions. In contrast, bias denotes a state of mind that is in some way predisposed to a particular result, or that is closed with regard to particular issues.[16] Bias in the sense of judicial bias has been said to mean 'a departure from the standard of even-handed justice which the law requires from those who occupy judicial office'.[17] In common usage bias describes 'a leaning, inclination, bent or predisposition towards one side or another or a particular result'. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way that does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case."[18]

However, preliminary to discussion of the specifically selected case studies in subsequent articles in this series, it is important, first and foremost, to deal

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10 In addition to the articles on the subject of bias by Okpaluba and Juma 2011 *Journal for Juridical Science* 97–118, already mentioned, see also Okpaluba and Juma "The Problems of Proving Actual or Apparent Bias: Analysis of Contemporary Developments in South Africa" 2011 14(7) *PER/PELJ* 14–43; Okpaluba and Juma "Waiver of the Right to Judicial Impartiality: Comparative Analysis of South African and Commonwealth Case Law" 2013 28(1) *SAPL* 1–21 and Okpaluba and Juma "Apprehension of Bias and the Spectacle of the Fair-Minded Observer: A Survey of Recent Commonwealth and South African Decisions on Prejudgment" 2014 28(2) *Speculum Juris* 19–40.

11 See Okpaluba and Maloka "Recusal of a Judge in Adjudication: Recent Developments in South Africa and Botswana" forthcoming, and "Recusal of a Judge in Adjudication: An Analysis of Recent Developments in Lesotho, Namibia, Seychelles and Swaziland" forthcoming.

12 2009 (2) SA 434 (SCA).

13 *S v Le Grange supra* par 21.

14 *President of the RSA v SARFU 2 supra* par 48.

15 *BTR Industries SA (Pty) Ltd v MAWU supra* 694F.

16 *R v S (RD)* [1997] 3 SCR 484 par 104–105.

17 *S v Roberts* 1999 (4) SA 915 (SCA) par 25.

18 *R v S (RD) supra* par 106.

with some recent cases that have been delivered on the essential aspects of presumption of impartiality and the test to be applied in determining the impartiality of a judicial officer or a non-judicial decision-maker, both of which issues systematically and inevitably arise whenever the subject of recusal is mentioned. The cases selected for the illustration and application of these two interconnected principles are drawn essentially from recent decisions such as the Supreme Court of Canada judgments in *Cojocaru v BC Women's Hospital and Health Centre*[19] and *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General);*[20] and the High Court of Australia case of *Isbester v Knox City Council*.[21] Closely connected with the test is the need to discover the characteristics of the reasonable observer that distinguishes him or her from the ordinary person and enables the proper assessment, application and understanding of the double-reasonableness test. In this context, a number of recent Privy Council[22] and South African[23] cases dealing with the qualities of this gender-neutral and not unduly insensitive person are discussed. After all is said and done, the question sought to be answered in the present context is to what extent these tests have assisted the courts in achieving the primary objective of recusal – namely, for practical purposes, whether contemporary adjudication lives up to the common-law principle of natural justice that a person cannot be a judge in his or her own cause; and whether the result of contemporary adjudication is a clear manifestation of the old adage that justice must not only be done, but must, manifestly and undoubtedly, be seen to be done. In effect, the question is to what extent the constitutional concept of judicial impartiality has enhanced the concept of justice in the adjudication of cases.

3 THE FUNDAMENTAL RULES OF RECUSAL

As reiterated by Canadian courts, the law has been clear for many years that a motion for recusal shall be heard and determined by the judge who has been asked to recuse him- or herself;[24] that the onus of proving the ground for recusal is on the applicant;[25] that a judge must give careful consideration to any claim for his or her recusal on account of bias or reasonable apprehension of bias; that a judge is best advised to remove himself or herself if there is any air of reality to a bias claim; that judges do a disservice to the administration of justice by yielding too easily to a recusal application that is unreasonable and unsubstantiated; litigants are not to pick their judges of choice nor are they entitled to eliminate judges randomly assigned to their case by raising specious partiality claims against those judges; and

19 [2013] 2 SCR 357.

20 [2015] 2 SCR 282.

21 [2015] HCA 20 (10 June 2015).

22 *Yiacoub v The Queen* [2014] 1 WLR 2996 (PC); *Almazeedi v Penner* [2018] UKPC 3.

23 *Green Willows Properties v Rogalla Investment Co Ltd* [2015] ZASCA 133*; Mulaudzi v Old Mutual Insurance Co Ltd* 2017 (6) SA 90 (SCA)*; S v Longano* 2017 (1) SACR 380 (KZP); and *Sizani v Mpofu* [2017] ZAECGHC 127.

24 *Heffernan v Van Mechanical Contractors Inc* [2017] ONSC 2381 (CanLII) par 11. See also *Beard Winter LLP v Shekdar* [2016] ONCA 493 (CanLII); *Arsenault-Cameron v PEI* [1999] CanLII 641 (SCC).

25 *S v Lamseck* [2017] 3 NR 647 (SC) par 53; *S v Munuma* [2013] 4 NR 1156 (SC) par 15.

that to step aside in the face of a specious bias claim is to give credence to the most objectionable tactics.[26]

There are two very important guiding principles that often crop up when the subject of recusal is discussed. The first is the presumption of judicial impartiality – regarded in Canada as the "cornerstone" of "ancient and sturdy judicial structure"[27] and, in South Africa, as "a cornerstone of our legal system".[28] The second is the test to be applied in determining the circumstances in which the recusal application succeeds or fails. Speaking of these two requirements in *Bernert v ABSA Bank Ltd*,[29] Ngcobo CJ said:

> "What must be stressed here is that which this court has stressed before: the presumption of impartiality and the double requirement of reasonableness.[30] The presumption of impartiality is implicit, if not explicit, in the office of a judicial officer.[31] This presumption must be understood in the context of the oath of office that judicial officers are required to take, as well as the nature of the judicial function. Judicial officers are required by the Constitution to apply the Constitution and the law 'impartially and without fear, favour or prejudice'.[32] Their oath of office requires them to 'administer justice to all persons alike without fear, favour or prejudice, in accordance with the Constitution and the law'.[33] And the requirement of impartiality is also implicit, if not explicit, in section 34 of the Constitution which guarantees the right to have disputes decided 'in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum'. This presumption therefore flows directly from the Constitution."[34]

The then-Chief Justice held that it must be assumed that through their training and experience, judicial officers have the ability to carry out their oath of office and to disabuse their minds of any irrelevant personal beliefs and predispositions. The effect of this presumption of judicial impartiality is that a judicial officer will not lightly be presumed to be biased. Mere apprehension on the part of an applicant that the court is, or will be, biased, however strongly that feeling might be, will not suffice.[35] Furthermore:

> "The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because a judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting.[36] This flows from their duty to exercise their

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26 Per Doherty JA, *Beard Winter LLP v Shekdar supra* par 10; *Miracle v Maracle III* [2017] ONCA 195 (CanLII) par 7.

27 *Carbone v McMahon* [2017] ABCA 384 (CanLII) par 46–47 esp fn 12–15.

28 *S v Le Grange supra* par 14; *Mulaudzi v Old Mutual Insurance Co Ltd supra* par 47; *Sizani v Mpofu supra* par 11.

29 2011 (3) SA 92 (CC).

30 *SACCAWU v Irvin & Johnson Ltd Seafoods Division Fish Processing supra* par 12–17.

31 *President of the RSA v SARFU 2 supra* par 41–42.

32 S 165(2) of the Constitution of the Republic of South Africa, 1996.

33 See Item 6 Schedule 2 of the Constitution of the Republic of South Africa, 1996; s 9(2)(*a*) of the Magistrates' Courts Act 32 of 1944.

34 *Bernert v ABSA Bank Ltd supra* par 31.

35 *Bernert v ABSA Bank Ltd supra* par 32–34.

36 *President of the RSA v SARFU 2 supra* par 46.

> judicial functions. As has been rightly observed, 'judges do not choose their cases; and litigants do not choose their judges'.[37] An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias."[38]

Incidentally, these two guiding principles are related. But, that is not all: while the test to be applied in any given case of recusal is important, another question that often arises is whether the test for recusal applicable to the circumstances of a judicial officer should also apply to a quasi-judicial or purely administrative decision-making process. As in the case of an American judge in *Williams v Pennsylvania*,[39] whose impartiality was in question and who sat in a multi-member bench, the recent Australian High Court judgment in *Isbester v Knox City Council* (discussed in the present article) raises a similar question – that is, what effect would it have on the test used for a recusal assessment if the administrative decision-maker whose bias or apprehended bias is being impugned was part of a multi-member decision-making process?

3 1 Presumption of impartiality[40]

As has been pointed out elsewhere,[41] the courts adopt an approach when they are considering whether legislation is unconstitutional of assuming that the law being impugned was constitutionally enacted until the challenger can show otherwise; so also, in determining whether a judge was impartial or that there was a reasonable apprehension of bias, the courts approach the matter with a presumption of judicial impartiality.[42] In other words, where judicial bias is alleged, then that allegation must overcome the presumption of judicial impartiality and integrity.[43] This strong presumption of judicial impartiality and integrity[44] places a heavy burden on a party seeking to rebut the presumption.[45] Not only is the presumption not easily dislodged;[46] but it also requires cogent or convincing evidence or reason to rebut the

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37 *Ebner v Official Trustee in Bankruptcy* [2000] 205 CLR 337 par 19.

38 *Bernert v ABSA Bank Ltd supra* par 35.

39 579 US 1 (2016).

40 The US Supreme Court held in *Withrow v Larkin* 421 US 35 (1975) 45 that there is a presumption of honesty and integrity in those serving as adjudicators. Some decades ago, Frankfurter J, in *US v Morgan* 313 US 409 (1941) 421 said that judges are assumed to be men and women of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.

41 Okpaluba and Juma 2011 *PER/PELJ* 14–43 23.

42 *Mbana v Shepstone & Wylie* 2015 (6) BCLR 693 (CC) par 41; *Bernett v ABSA Bank Ltd supra* par 33 and 86; *S v Basson* 2007 (3) SA 582 (CC) par 42; *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) supra* par 12 and 49; *President of the RSA v SARFU 2 supra* par 41; *Abernethy v Ontario* [2017] ONCA 340 (CanLII) par 18–19; *Carbone v McMahon supra* par 61–63.

43 *Malton v Attia* [2016] ABCA 130 (CanLII) par 82; *R v GRS* [2018] ABQB 4 (CanLII) par 5.

44 *Hefferman v Van Mechanical Contractors Inc* [2017] ONSC 2381 (CanLII) par 14; *Morse Shannon LLP v Fancy Barristers LLP* [2016] ONSC 7574 (CanLII) par 19–21.

45 *SL v Marson* [2014] ONCA 510 (CanLII) par 24–29; *Lloyd v Bush* [2017] ONCA 252 (CanLII) par 113.

46 *Cojocaru v BC Women's Hospital and Health Centre* [2013] 2 SCR 357 par 22.

presumption of judicial impartiality.[47] It does not, however, relieve the judge from the sworn duty of impartiality.[48] Thus, the Ontario Court of Appeal held in *Abernethy v Ontario*[49] that the presumption cannot be rebutted by vague references to current controversies in the public realm, but must be determined in the context of the particular case. The court found absolutely nothing convincing in the appellant's allegations that the trial judge (in demeaning her claim for damages as "a conspiracy theory" rather than treating it as a claim for unlawful conspiracy as defined by law) would be seen by a reasonable and reasonably informed member of the public as biased in these circumstances, taking into account his "conspiracy theory" comment.[50]

The Canadian Supreme Court judgment in *Cojocaru v BC Women's Hospital and Health Centre*[51] clearly illustrates what one needs to know about the application of the presumption of judicial impartiality and integrity and the fact that it is rebuttable, but not lightly so. The question before the Supreme Court of Canada was whether the trial judge's decision should be set aside because his reasons for judgment incorporated large portions of the plaintiff's submissions even though the trial judge did not accept all the plaintiff's submissions.[52] The majority of the British Columbia Court of Appeal held that the trial court's decision should be set aside because of the extensive copying of plaintiff's submissions and ordered a new trial.[53] The judgment of the Supreme Court, which was delivered by McLachlin CJ, held that, as a general rule, it is good judicial practice for a judge to set out the contending positions of the parties on the facts and the law, and to explain in his or her own words his or her conclusions on the facts and the law. However, including the material of others is not prohibited. Judicial copying is a long-standing and accepted practice, although, if carried to excess, it may raise problems. But, the question is: when, if ever, does judicial copying displace the presumption of judicial integrity and impartially?[54] If the incorporation of the material of others is evidence that would lead a reasonable person to conclude, taking into account all relevant circumstances, that the decision-making process was fundamentally unfair, in the sense that the judge did not put his or her mind to the facts, the argument and the issues, and decide them impartially and independently, the judgment can be set aside.[55]

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47 *S v SSH* [2017] 3 NR 871 (SC) par 22. See also *R v S (RD) supra* par 34; *Wewaykum Indian Band v Canada* [2003] 231 DLR (4th) 1 par 59; *President of the RSA v SARFU 2 supra* par 41; *S v Basson supra* par 30; *Christian v Metropolitan Life Namibia Retirement Annuity Fund* [2008] 2 NR 753 (SC) par 32; *S v Munuma supra* par 17.

48 *R v Hnatyshyn et al* [2016] BCPC 452 (CanLII) par 15; *R v S (RD) supra* par 117.

49 *Supra*.

50 *Abernethy v Ontario supra* par 18–19.

51 See Roussy "Cut-and-Paste Justice: A Comment on *Cojocaru v British Columbia Women's Hospital and Health Centre*" 2015 52(3) *Alberta LR* 761–778.

52 *Cojocaru v BC Women's Hospital supra* par 1.

53 See *Cojocaru v BC Women's Hospital and Health Centre* [2011] BCCA 192 (CanLII) par 127.

54 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 30.

55 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 50.

A complaint that a judge's decision should be set aside because the reasons for judgment incorporated materials from other sources is essentially a procedural complaint. Judicial decisions benefit from a presumption of integrity and impartiality – a presumption that the judge has done his or her job as he or she is sworn to do.[56] The party seeking to set aside a judicial decision because the judge's reasons or decision incorporated the material of others bears the burden of showing that the presumption is rebutted.[57] The threshold for rebutting the presumption of integrity and impartiality is high, and it requires cogent evidence.[58] Procedural defects relating to reasons for judgment are many and varied. In all cases, the underlying question is whether the evidence presented by the party challenging the judgment convinces the reviewing court that a reasonable person would conclude that the judge did not perform his or her sworn duty to review and consider the evidence with an open mind.[59] The fact that a judge fails to attribute copied material to the author tells nothing about whether the judge's mind was applied to the issues addressed in that copying. Nor is lack of originality alone a flaw in judgment writing; on the contrary, it is part and parcel of the judicial process.[60] To set aside a judgment for failure to attribute sources or lack of originality alone would be to misunderstand the nature of the judge's task and the time-honoured traditions of judgment writing.[61] The concern about copying in the judicial context is not that the judge is taking credit for someone else's prose, but rather, that it may be evidence that the reasons for judgment do not reflect the judge's thinking. Extensive copying and failure to attribute outside sources are in most situations practices to be discouraged. But lack of originality and failure to attribute outside sources do not in themselves rebut the presumption of judicial impartiality and integrity.[62] This will occur only if the copying is of such a nature that a reasonable person apprised of the circumstances would conclude that the judge did not put his or her mind to the evidence and the issues, and did not render an impartial, independent decision.[63]

Having taken account of the complexities of this professional negligence case and accepting that it would have been preferable for the trial judge to discuss the facts and issues in his own words, it cannot be concluded that the trial judge failed to consider the issues and make an independent decision on them. The presumption of judicial impartiality and integrity has not been displaced.[64] On the contrary, the reasons demonstrate that the trial

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56 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 12 and 15; *R v Teskey* [2007] 2 SCR 267 par 19 and 29.

57 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 18; *R v Teskey supra* par 21 and 39.

58 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 20 and 27; *R v S (RD) supra* par 32; *Wewaykum Indian Band v Canada supra* par 59.

59 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 28.

60 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 31 and 36.

61 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 32.

62 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 35–36.

63 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 36.

64 The Federal Court of Appeal was not satisfied in *Apotex Inc v Sanofi-Aventis Inc* [2008] FCA 394 (CanLII) par 6, that the appellant had established "serious" or "substantial"

judge addressed his mind to the issues he had to decide. The fact that he rejected some of the plaintiff's key submissions demonstrates that he considered the issues independently and impartially. The absence in the reasons of an analysis of causation, and the alleged errors the reasons contain, strikes not at procedural unfairness, but to the substance of the reasons – whether the trial judge, having made his own decision, erred in law or made palpable and overriding errors of fact.[65] In order to rebut the presumption of judicial impartiality and integrity, the defendants failed to show that a reasonable person apprised of all the circumstances would conclude that the trial judge failed to consider and deal with the critical issues before him in an independent and impartial fashion.[66] Accordingly, the Chief Justice held that the judgment should not be set aside on the ground that the trial judge incorporated large parts of the plaintiff's submissions and reasons.[67]

3 2 The test to be applied

A judge has a duty to hear a case unless the test for recusal is met.[68] It is universally accepted[69] in modern parlance that the test for establishing judicial bias or apprehension of bias is the "double reasonableness test", which "translates into a two-stage requirement of reasonableness".[70] It is originally based on De Smith's "reasonable apprehensions of a reasonable man".[71] The prevailing test,[72] and under what circumstances it is applied,[73] is clearly brought out in the discussion of recent judgments. It is appropriate to specifically sketch out, albeit in a brief conspectus, the English and South African approaches to the problem.

3 2 1 The characteristics of the reasonable observer[74]

While delivering the judgment of a unanimous House of Lords in *Porter v Magill,*[75] it was Lord Hope who set out the modern test from the perspective of English law, which is entirely consistent with the approach of the European Court of Human Rights to the requirement that a court be impartial, not only in fact, but from an objective viewpoint.[76] Lord Hope stated the test thus: "The question is whether a fair-minded and informed observer, having considered the facts, would conclude that there was a real

grounds necessary to rebut the presumption where the request for recusal was based on the judge's previous encounter with a party, a witness or an issue in his or her judicial capacity.

65 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 74.
66 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 75.
67 *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 76.
68 *S v SSH supra* par 22.
69 See e.g., *Livesey v NSW Bar Association* [1983] 151 CLR 288 (HCA) 293–294.
70 Okpaluba and Juma 2011 *PER/PELJ* 14–43 27.
71 De Smith *Judicial Review of Administrative Action* (1973) 230.
72 [2002] 2 AC 357 (HL) par 102–103.
73 See e.g., *W Ltd v M Sdn Bhd* [2016] EWHC 422 (Comm) QBD (2 March 2016).
74 See, generally, Okpaluba and Juma 2014 *Speculum Juris* 19–40.
75 [2002] 2 AC 357 (HL) par 102–103.
76 *Findlay v UK* [1997] 24 EHRR 221 par 73.

possibility that the tribunal was biased." Lord Hope further clarified the use of the word "biased" when, in the subsequent case of *Millar v Procurator Fiscal (Scotland)*,[77] he said:

> "The appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality."[78]

Their Lordships of the Privy Council applied the foregoing test to the subsequent case of *Yiacoub v The Queen*[79] where the presiding judge found himself not simply appointing a judge to deal with a matter of general concern, but also nominating a judge to hear an appeal from himself. Although there was not the slightest suggestion that the presiding judge actually exercised any influence over the members of the Senior Court Judges (SCJ) who heard the appeal, any more than that there was any suggestion that the members of the appellate court were actually less than independent, the question was whether the presiding judge's administrative function under section 4(3) of the Courts (Constitution and Jurisdiction) Ordinance 2007 for the Sovereign Base Areas of Cyprus regulating the disposition and distribution of the duties of the various judges of the SCJ conflicted in this particular case with the fact that he had been a member of the trial court. Lord Hughes held that it is of the highest importance that courts should not only be actually independent and impartial but that they should also be free from any appearance of the absence of those qualities. Their Lordships were satisfied that, on the facts of this case, there was

> "an appearance of lack of independence and impartiality in relation to the process, viewed as a whole, which would impact on an objective informed observer. It is not difficult to imagine circumstances, under other regimes, in which such a process could be open to abuse of the kind not suggested here to have occurred in fact. The objective observer would, as it seems to [their Lordships], say of such a process 'That surely cannot be right'."[80]

The test enunciated in *Porter v Magill*[81] was applied in *Helow v Secretary of State for the Home Department,*[82] and more recently in *Yiacoub v The Queen*[83] and was subsequently reverted to by Knowles J when the learned Judge asked the question in *W Ltd v M Sdn Bhd*:[84] "[w]hat do the present facts amount to?" This was a case where an arbitrator was a partner in a law firm that earned substantial remuneration from providing legal services to a client company that had the same corporate parent as a company that was a party in the arbitration. The firm neither advised the parent company, nor the

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77 [2002] 1 WLR 1615 (PC).

78 *Millar v Procurator Fiscal (Scotland) supra* par 63.

79 *Supra* par 10–15.

80 *Yiacoub v The Queen supra* par 15.

81 [2001] UKHL 67; [2002] 2 AC 357 (HL).

82 [2008] 1 WLR 2416 (HL) par 39.

83 *Supra*.

84 *Supra* par 17–26 and 42.

party to the arbitration. There was no suggestion that the arbitrator did any work for the client company. Although the arbitrator was a partner, he operated effectively as a sole practitioner using the firm for secretarial and administrative assistance for his work as an arbitrator. The arbitrator made other disclosures where, after checking, he had knowledge of his firm's involvement with the parties and would have made a disclosure here if he had been alerted to the situation. Knowles J did not consider that a fair-minded and informed observer would, on the basis of these facts, conclude that there was a real possibility that the arbitrator was biased or lacked independence or impartiality.

The most recent judgment of the Privy Council in *Almazeedi v Penner*[85] not only applied the well-established test but also returned to the characteristics of the fair-minded and informed observer, which is another formulation of Lord Hope in the House of Lords in *Helow v Secretary of State for the Home Department.*[86] The question before the Privy Council in *Almazeedi* as crisply captured in the judgment of Lord Mance[87] was in the form of a challenge to the independence of a judge sitting in the Financial Services Division of the Grand Court of the Cayman Islands. The challenge was solely on the ground of an alleged lack of independence due to "apparent bias" – on the basis that "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".[88] Although there was no suggestion of actual bias, as the Cayman Islands Court of Appeal pointed out, if a judge of the utmost integrity lacks independence, "then there is a danger of the unconscious effect of that situation, which it is impossible to calibrate or evidence".[89] There was no doubt that the right of a litigant to an independent and impartial tribunal is fundamental to his right to a fair trial,[90] which is equally applicable to the litigant in the Cayman Islands. This is owing to the fact that the right to a fair trial is entrenched in section 17(1) of the Constitution of the Cayman Islands 2009 to the effect that:

> "Everyone has the right to a fair and public hearing in the determination of his or her rights and obligations by an independent and impartial court within a reasonable time."

Without necessarily getting entangled with the complex facts of this case, it is important to state that in the process of determining whether a fair-minded and informed observer would reasonably apprehend that a distinguished and retired English judge could probably have found himself consciously or unconsciously entangled in a situation where his independence or impartiality could be in doubt, there is the additional issue of the characteristics of the fair-minded and informed observer that their Lordships addressed in this case. In the opening paragraph of his judgment in *Helow v Secretary of State for the Home Department*, Lord Hope said:

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85 *Supra*.
86 *Supra.*
87 *Almazeedi v Penner supra* par 1.
88 *Porter v Magill supra* par 103; *Yiacoub v The Queen supra* par 11.
89 Quoted by Lord Mance, *Almazeedi v Penner supra* par 1.
90 *Millar v Procurator Fiscal (Scotland) supra* par 52.

> "The fair-minded and informed observer is a relative newcomer among the select group of personalities who inhabit our legal village and are available to be called upon when a problem arises that needs to be solved objectively. Like the reasonable man whose attributes have been explored so often in the context of the law of negligence, the fair-minded observer is a creature of fiction. Gender-neutral (as this is a case where the complainer and the person complained about are both women …), she has attributes which many of us might struggle to attain to."[91]

Following Lord Hope's description of this character of the law in *Helow,* Lord Mance said in *Almazeedi* that she or he:[92]

- is a person who reserves judgement until both sides of any argument are apparent;
- is not unduly sensitive or suspicious;[93]
- is not to be confused with the person raising the complaint of apparent bias – an important point in a case like *Almazeedi* where the appellant made some allegations which on any view appear extreme and improbable;
- is not, on the other hand, complacent;
- knows that justice must not only be, but must be seen to be, unbiased and knows that judges, like anybody else, have their weakness – an observation with perhaps particular relevance in relation to unconscious predisposition;
- "will not shrink from the conclusion, if it can be justified objectively, that things that they have done or said or associations that they have formed may make it difficult for them to judge the case before them impartially";[94] and
- will also take the trouble to inform themselves on all matters that are relevant, and see it in "its overall social, political and geographical context".[95]

Having so stated, their Lordships of the Privy Council, found themselves in the "invidious position" of having to decide whether the fair-minded and informed observer would see the possibility that the judgement of an experienced judge near the end of his career would be influenced, albeit sub-consciously, by his concurrent appointment, which was at the outset still awaiting its completion by swearing in. The fair-minded and informed observer is, in this context, a figure on the Cayman Islands legal scene, but she or he is a person who will see the whole in "its overall social, political and geographical context". She or he must be taken to be aware of the Qatari background, including the personalities involved, their important positions in Qatar and their relationship with each other as well as the opacity of the position relating to appointment and renewal of a member of

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91 *Helow v Secretary of State for the Home Department supra* par 1.

92 *Almazeedi v Penner supra* par 20.

93 Per Kirby J, *Johnson v Johnson* [2000] 201 CLR 488 (HCA) par 53.

94 *Helow v Secretary of State for the Home Department supra* par 2.

95 *Helow v Secretary of State for the Home Department supra* par 3. See also *Miracle v Maracle III supra* par 3.

the relatively recently created Civil and Commercial Court.[96] With some reluctance, their Lordships came to the conclusion that the Court of Appeal was right to regard it as inappropriate for the judge to sit without disclosure of his position in Qatar as regards the period after 26 June 2013 and that this represented a flaw in his apparent independence, but it also came to the conclusion that the Court of Appeal was wrong to treat the prior period differently. The judge ought to have disclosed his involvement with Qatar before determining the winding-up petition. According to Lord Mance, supported by the majority of their Lordships,[97] in the absence of any such disclosure, a fair-minded and informed observer would regard the judge as unsuitable to hear the proceedings from at least 25 January 2012 on. The fact of disclosure can itself serve as the sign of transparency that dispels concern, or an alternative might have been to ask the Chief Justice to deploy another member of the Grand Court, to which there would appear to be no obstacle.[98]

3 2 2 The test in South Africa since SARFU 2[99]

It is not in doubt that the prevailing test for determining bias or apprehended bias in modern South African constitutional adjudication was enunciated by the Constitutional Court two decades ago in *SARFU 2.* It is also not in doubt that the question is whether the reasonable objective and informed person would, on the correct facts, reasonably apprehend that the respondent has not brought, or will not bring an impartial mind – that is, a mind open to persuasion by evidence and the submissions of counsel – to bear on the adjudication of the case.[100] This test was considered and developed by the same court in *SACCAWU v Irvin & Johnson*[101] and applied subsequently in *Van Rooyen v S*[102] and *Barnert v Absa Bank Ltd*;[103] by the Supreme Court of

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96 *Almazeedi v Penner supra* par 32.

97 Lord Sumption, dissenting, held [par 36] that: "The common law rightly imposes high standards of independence on judges at every level. The present dispute, however, is not about the legal test, but about its application to the facts, and for my part I would have held that the test was not satisfied. In the ordinary course, I would have thought it right to dissent on such a question. But applications based on apparent bias are open to abuse, and the particular problem which arises in this case is uncommon. Retired judges from Commonwealth jurisdictions commonly sit on an occasional basis in other Commonwealth jurisdictions and in tribunals of international civil jurisdiction. The law is exacting in this area, but it is also realistic. The notional fair-minded and informed observer whose presumed reaction is the benchmark for apparent bias, has only to be satisfied that there is a real risk of bias. But where he reaches this conclusion, he does so with care, after ensuring that he has informed himself of all the relevant facts. He is not satisfied with a look-sniff impression. He is not credulous or naïve. But neither is he hyper-suspicious or apt to envisage the worst possible outcome. The main decisions in this field are generally characterized by robust common sense." Citing: *Helow v Secretary of State for the Home Department supra* par 23 per Lord Rodger; *R v S (RD) supra* par 117 per L'Heurex-Dube and McLahlin JJ.

98 *Almazeedi v Penner supra* par 34.

99 *President of the Republic of South Africa v South African Rugby Football Union* 1999 4 SA 147 (CC) (*President of the RSA v SARFU 2*).

100 *President of the RSA v SARFU 2 supra* par 48. See also Nwauche "Administrative Bias in South Africa" 2005 8(1) *PER/PELJ* 36–75.

101 *Supra*.

102 2002 (5) SA 246 (CC) 272B–273E.

103 *Supra.*

Appeal in *S v Satchwell*,[104] *S v Dube*,[105] *Green Willows Properties v Rogalla Investment Co Ltd*[106] and *Mulaudzi v Old Mutual Insurance Co Ltd.*[107] It was also extensively considered and applied in at least two recent judgments of the High Court, namely *S v Longano*[108] and *Sizani v Mpofu.*[109] In sum, the test involves a double-reasonableness approach, which entails that the apprehension must be reasonable and that the person apprehending the bias must also be reasonable.

Since the recent recusal cases emanating from the South African jurisdiction are discussed in detail elsewhere,[110] it suffices to illustrate the application of the test with three cases, as follows.[111] The recusal application in *Green Willows Properties v Rogalla Investment Company*[112] was based on the ground that the judge in refusing the application for absolution from the instance made conclusive findings before the end of the trial. It was held that it was true that the judge made certain findings in her judgment on the application for absolution from the instance, but during the debate with counsel, she explained that she could change her finding if evidence was led that could persuade her otherwise. The SCA held that this suggests that the judge was still open to persuasion despite expressing preliminary views on the issue. Accordingly, there was no basis to find that there was a reasonable apprehension of bias in the circumstances of the case. The Labour Court in *Premier Foods (Pty) Ltd (Nelspruit) v CCMA*[113] noted that after considering the recusal principles laid down in *SARFU 2* and *SACCAWU v Irvin and Johnson*, an earlier Labour Court judgment had emphasised that not only must the apprehension of bias be that of a reasonable person in the position of the person being judged who has an objective factual basis for the suspicion, but the apprehension of bias they must have, must be one that the law would recognise as raising a legitimate concern about the adjudicator's impartiality.[114] In light of the aforesaid settled test for recusal, the court in *Premier Foods* held that the second respondent never came close to deciding the issue of his recusal. He did not even allow the issue to be properly ventilated, which in itself could be added to the existence of the requisite apprehension to justify recusal. For a judicial officer deciding a CCMA matter, in the course of the dispute resolution proceedings, to say from the very beginning that a litigating party would lose, and in effect prevent the issue from being ventilated when the arbitration

104 2001 (2) SACR 185 (SCA) par 20.
105 2009 (2) SACR 99 (SCA) par 7
106 *Supra*.
107 [2017] ZASCA 88; 2017 (6) SA 90 (SCA).
108 *Supra* par 8–21.
109 *Supra* par 12–14 and 75.
110 See the forthcoming piece by Okpaluba and Maloka "Recusal of a Judge in Adjudication: Recent Developments in South Africa and Botswana" (2022) *JCLA* forthcoming.
111 See also *Ntuli v S* [2017] ZAGPJHC 294 par 7–23; *S v Bayat* [2013] ZAGPPHC 344 par 19 and 27 where the legality of the magistrate's decision to recuse herself was held to be certainly lawful.
112 [2015] ZASCA 133 par 24–28.
113 [2016] ZALCJHB 426.
114 *Raswiswi v CCMA* (2011) 32 *ILJ* 2186 (LC) par 19 cited in *Premier Foods v CCMA supra* par 23.

started, would surely satisfy the double reasonableness test.[115] Even in spite of the well-acknowledged less formalistic nature of labour arbitration,[116] the Commissioner cannot get involved in discussing the evidence with the parties to the extent of giving his opinion on what the outcome of the arbitration should be. He or she should specifically refrain from giving his or her views on the possible evaluation or determination of that evidence. It is not appropriate for the arbitrator in this case to have expressed any sentiments to the applicant as to the prospects of success of its case before the arbitration commenced and then proceed to the arbitration proceedings and make an award. By doing so, the arbitrator surely put himself in a situation where his impartiality and integrity could be called into question.[117] The arbitrator should have recused himself when the matter was raised, and his refusal to do so rendered the entire proceedings a nullity.[118] In *S v Longano*,[119] the recusal application was based on the fact that the trial's presiding judge should have recused herself from hearing the matter, since she was in possession of evidentiary material (the Willows report) in circumstances that established a reasonable apprehension of bias, and that impartiality was compromised by her being in possession of evidential material that would not form part of the evidence before court.[120] It was held that the integrity of the court was compromised when the State furnished the trial judge with the report, which should not have been given to her if the witnesses were not going to testify. Once the information was given to the judge, there had to be an apprehension that the court would not be able to disabuse its mind of the report.[121]

3 2 3 Isbester v Knox City Council[122]

Following a hearing before the Knox Animals Act Committee/Panel, a decision was made to destroy the appellant's dog, which had earlier been seized by the Council. Section 84P(*e*) of the Domestic Animals Act 1994 (Vic) empowers the Council to destroy a dog where its owner has been found guilty of an offence under section 29 of the Act. The appellant had been convicted of such an offence when her dog had attacked a person and caused "serious injury". The issue before the High Court of Australia in *Isbester v Knox City Council* was whether that decision should be quashed because of the substantial involvement of a member of the Committee/Panel both in the prosecution of the charges concerning the dog and in the decision of the Panel as to the fate of the dog. In other words, the issue in the appeal relates to the content and application of the requirement of absence of the appearance of disqualifying bias in the exercise of power

115 *Premier Foods (Pty) Ltd (Nelspruit) v CCMA supra* par 21–24.

116 On the so-called "reality testing", which has been held to be a proper component of conciliation, see e.g., *Anglo Platinum Ltd v CCMA* (2009) 30 *ILJ* 2396 (LC) par 32; *Kasipersad v CCMA* (2003) 24 *ILJ* 178 (LC) par 27–28 and 34.

117 *Premier Foods (Pty) Ltd (Nelspruit) v CCMA supra* par 29–30.

118 *Premier Foods (Pty) Ltd (Nelspruit) v CCMA supra* par 38.

119 *Supra* par 8–21.

120 *S v Longano supra* par 8.

121 *S v Longano supra* par 20.

122 [2015] HCA 20 (10 June 2015).

under section 84P(*e*) of the Act.[123] However, the discussion of the HCA's judgment in this case follows the discussion of the decisions of the Victoria Supreme Court and the Victoria Court of Appeal.

3 2 3 1 *Isbester* at the Victoria Supreme Court[124]

In an application to review the decision of the Panel on the ground of apprehension of possible bias on the part of Ms Hughes (the Knox Animals Panel member who acted more or less as prosecutor and judge in this matter), the primary judge identified the relevant principle for apprehended bias as that stated in *Ebner v Official Trustee in Bankruptcy*[125] to the effect that

> "a judge is disqualified if a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial mind to the resolution of the question the judge is required to decide."

In addition, the application of that principle will not be the same for a decision maker who is not a judicial officer.[126] What is required in relation to apprehended bias by prejudgment[127] depends on the circumstances of the case.[128] The primary judge, Emmerton J, held that the requirement of impartiality exists to the extent necessary to give persons affected by a decision under section 84P(*e*) of the Act a genuine hearing. Her Honour referred to the observations of Basten JA in *McGovern v Ku-ring-gai Council*[129] concerning the expectations of decision making by the local government council, where the Justice of Appeal had said:

> "The real question is what, with the appropriate level of appreciation of the institution, the fair-minded observer would expect of a councilor dealing with a development application. The institutional setting being quite different from that of a court, the fair-minded observer will expect little more than an absence of personal interest in the decision and a willingness to give genuine and appropriate consideration to the application, the matters required by law to be taken into account and any recommendation of council officers."[130]

3 2 3 2 *Isbester* at the Victoria Supreme Court of Appeal[131]

The Court of Appeal agreed with the primary judge as to the essential requirements of natural justice as identified by her Honour.[132] The Court of Appeal considered the question, whether there was the possibility that Ms Hughes could have pre-judged the decision under section 84P(*e*),

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123 *Isbester v Knox City Council supra* par 1–2 and 56.
124 *Isbester v Knox City Council* [2014] VSC 286.
125 *Supra* 337, 344.
126 *Minister for Immigration and Multicultural Affairs v Jia Legeng* [2001] 205 CLR 507 (HCA) 563.
127 See generally, Okpaluba and Juma 2014 *Speculum Juris* 19.
128 *Isbester v Knox City Council* [2014] VSC 286 par 85.
129 [2008] 72 NSWLR 504 (CA).
130 *McGovern v Ku-ring-gai Council supra* par 80.
131 *Isbester v Knox City Council* [2014] VSCA 214.
132 *Isbester v Knox City Council* [2014] VSCA 214 par 48, 65 and 69.

separately from the question whether her involvement in the prosecution of charges against the appellant could give rise to an apprehension of conflict of interest.[133] The Court of Appeal concluded[134] that the case did not involve a conflict of interest such as was evident in *Stollery v Greyhound Racing Control Board*[135] and *Dickason v Edwards*[136] where it was held that a person who was an accuser could not also hear and decide the charge in conjunction with other persons. Distinguishing *Stollery*, as the primary judge did, the Court of Appeal identified three grounds, all of which were found not to have involved Ms Hughes personally – that is, (a) the Panel hearing was not a quasi-judicial hearing equivalent to that of the Board in *Stollery*; (b) although Ms Hughes had been in the position of accuser in the Magistrates' Court, she was not in that position at the Panel's hearing; and (c) Ms Hughes had no special or personal interest in the matters in controversy, as had existed in *Stollery* and *Dickason.* And, as Kiefel, Bell, Keane and Nettle JJ put it:

> "Her Honour the primary judge[137] accepted that Ms Hughes participated in every aspect of the Panel decision and that, given her experience and knowledge of the relevant legislation, her views would carry considerable weight. However, her Honour found that the relevant decision to destroy the dog was made by Mr Kourambas, the delegate for this purpose, not the other members of the Panel. The Court of Appeal accepted[138] that the facts found by her Honour may be relevant to the question whether Mr Kourambas had prejudged the matter, but did not[139] base its decision as to the perceived conflict arising from Ms Hughes' involvement in the matter on the fact that she was not a designated decision-maker. It accepted that she had a material part in the decision-making process."[140]

3 2 3 3 *Isbester* at the HCA[141]

Before the High Court of Australia, the Council contended that, given the finding of the primary judge, the Court of Appeal should have found that a fair-minded observer would not reasonably apprehend bias on the part of Mr Kourambas. In their joint judgment, the majority of the HCA commenced by holding that

> "the question whether a fair-minded observer might reasonably apprehend a lack of impartiality with respect to the decision to be made is largely a factual one, albeit one which it is necessary to consider in the legal, statutory and factual contexts in which the decision is made."[142]

The court then proceeded to restate the applicable governing principle, starting with *Ebner*[143] where a two-step inquiry was established, requiring:

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133 Cf per Spigelman CJ in *McGovern v Ku-ring-gai Council supra* par 25–27.
134 *Isbestor* VSCA *supra* par 69, 78–80.
135 [1972] 128 CLR 509.
136 [1910] 10 CLR 243.
137 *Isbester v Knox City Council* [2014] VSC 286 par 103–105.
138 *Isbester v Knox City Council* [2014] VSCA 214 par 65.
139 *Isbester v Knox City Council* [2014] VSCA 214 par 68.
140 *Isbester v Knox City Council* [2015] HCA 20 par 19.
141 *Isbester v Knox City Council* [2015] HCA 20.
142 *Isbester v Knox City Council* [2015] HCA 20 par 20.
143 *Ebner v Official Trustee in Bankruptcy supra* par 8.

(a) the identification of what it is said might lead a decision maker to decide a case other than on the legal and factual merits and, where it is said that the decision maker has an "interest" in litigation, such an interest must be spelled out; and (b) the articulation of the logical connection between that interest and the feared deviation from the course of deciding the case on its merits.[144]

The *Ebner* governing principle has been applied not only to judicial officers but also to non-judicial decision makers and decision-making processes except that in applying the principle, the judge must bear in mind the difference between the two systems with regard to the content of the test for the decision in question.[145] How the principle should be applied would depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision maker. It is an aspect of the wider and ever flexible principles of natural justice, differing according to the circumstances in which a power is exercised.[146] The High Court in *Isbester* held:

> "The hypothetical fair-minded observer assessing possible bias is to be taken to be aware of the nature of the decision and the context in which it was made[147] as well as to have knowledge of the circumstances leading to the decision."[148]

The courts in Australia have, in both *Jia Legeng* and *McGovern,* dealt with the question of what a fair-minded observer may reasonably expect as to the level, or standard, of impartiality that should be brought to decision making by certain non-judicial decision makers. At issue in both cases was the possibility of bias in the nature of prejudgment[149] on the part of the decision makers, which is quite different from what was canvassed in the *Isbester* case, namely the incompatibility of roles.[150]

After an exhaustive review of some leading Australian cases on this subject,[151] the four justices of the HCA, held in their joint judgment:

> "It is true that Ms Hughes' role in this matter did not involve her at quite the same personal level as the manager in *Stollery,* who was subjected to, and affronted by, the alleged bribe; nor was she the target of abuse as in *Dickason*, which was directed to the District Chief Ranger. It may be accepted that these factors added another dimension to the level of involvement of those persons. It cannot, however, be said that this dimension accounted for the disqualification in those cases. The interest identified in *Dickason* and *Stollery* as necessitating disqualification was that of a prosecutor, accuser or

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144 *Isbester v Knox City Council* [2015] HCA 20 par 21; *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 183.

145 *Isbester v Knox City Council* [2015] HCA 20 par 22; *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 181; *Hot Holdings Pty Ltd v Creasy* [2002] 210 CLR 438 (HCA) par 70.

146 *Kioa v West* [1985] 159 CLR 550 612.

147 *Hot Holdings Pty Ltd v Creasy supra* par 68.

148 *Isbester v Knox City Council* [2015] HCA 20 par 23; *Stollery v Greyhound Racing Control Board supra* 519.

149 See generally, Okpaluba and Juma 2014 *Speculum Juris* 19.

150 *Isbester v Knox City Council* [2015] HCA 20 par 24–25 and 49.

151 *Isbester v Knox City Council* [2015] HCA 20 par 31–49.

> other moving party. An interest of that kind points to the possibility of a deviation from the true course of decision-making."[152]

In conclusion, therefore, it was held that a fair-minded observer might, in the circumstances of this case, reasonably apprehend that Ms Hughes might not have brought an impartial mind to the decision under section 84P(*e*) of the Act. This decision does not imply how Ms Hughes in fact approached the matter, nor does it imply that she acted otherwise than diligently, and in accordance with her duties, as the primary judge found,[153] or that she was not in fact impartial. In any event, natural justice requires that she should not participate in the decision and because that occurred, the decision must be quashed.[154]

Although agreeing with the plurality that the appeal should be allowed and the order of the primary judge set aside, and that the purported legal effect of the decision made by Mr Kourambas should be quashed by an order in the nature of *certiorari*,[155] Gageler J delivered a separate judgment in which the learned judge addressed the test for appearance of disqualifying bias in an administrative context, which has often been stated in terms drawn from the test for apprehended bias in a curial context.[156] The test is whether the hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the administrator might not bring an impartial mind to the resolution of the question to be decided.[157] Clearly emerging from the test is the acknowledgement that the application of this requirement of procedural fairness "must sometimes recognise and accommodate differences between court proceedings and other kinds of decision-making".[158] Gageler J further held that in order to accommodate a multi-stage decision-making process or a multi-member decision-making body, the test for appearance of disqualifying bias in an administrative context might sometimes more usefully be stated in a form that focuses on the overall integrity of the decision-making process.[159]

> "The test in that alternative form might be stated as whether the hypothetical fair-minded observer with knowledge of the statutory framework and factual context might reasonably apprehend that the question to be decided might not be resolved as the result of a neutral evaluation of the merits. Neutrality in the evaluation of the merits cannot for purpose of that or any other test be reduced to a monolithic standard; it necessarily refers to the 'kind or degree of neutrality' that the hypothetical fair-minded observer would expect in the making of the particular decision within the particular statutory framework."[160]

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152 *Isbester v Knox City Council* [2015] HCA 20 par 45.
153 *Isbester v Knox City Council* [2014] VSC 286 par 115.
154 *Isbester v Knox City Council* [2015] HCA 20 par 50.
155 *Isbester v Knox City Council* [2015] HCA 20 par 71.
156 *Isbester v Knox City Council* [2015] HCA 20 par 57.
157 *Re Refugee Tribunal; Ex parte H* [2001] ALJR 982 989–990; *McGovern v Ku-ring-gai Council supra* par 2 and 71–72.
158 *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 99; *Ebner v Official Trustee in Bankruptcy supra* par 4; *McGovern v Ku-ring-gai Council supra* par 6–13.
159 *Isbester v Knox City Council* [2015] HCA 20 par 58.
160 *Minister for Immigration and Multicultural Affairs v Jia Legeng supra* par 100, 187 and 192.

Applying the test to the case in hand, Gageler J held that Ms Hughes might have developed, as Ms Isbester's prosecutor, a frame of mind incompatible with the dispassionate evaluation of whether administrative action should be taken against Ms Isbester's in the light of her conviction. Ms Hughes's frame of mind might have affected the views she expressed as a member of the Panel, and the expression of those views might have influenced not only the recommendation made by the Panel, which included Mr Kourambas, but also the acceptance of that recommendation by Mr Kourambas in his capacity as a delegate of the Council. A hypothetical fair-minded observer with knowledge of all the circumstances would be quite reasonable to apprehend all these possibilities.[161] It was held that the reasonableness of the apprehension of these possibilities is not negatived by the circumstances, namely that: (a) Ms Hughes acted throughout in her professional capacity as a Council employee; (b) Ms Isbester pleaded guilty to the offence and that her conviction was on the basis of agreed facts; (c) the question for decision by the Council under section 84P*(e)* of the Act arose subsequently to, and was different from, the question for decision by the Magistrates' Court under section 29 of the Act; and (d) that the evidence as to the course of the Panel hearing did not demonstrate that Ms Hughes took the position of an accuser in that hearing.[162] Finally, and contrary to the decision of the Court of Appeal, Gageler J held that the proper conclusion, was that the involvement of Ms Hughes in the deliberative process, subsequent to the laying of charges and prosecution, resulted in a breach of the implied condition of procedural fairness so as to take the decision of Mr Kourambas beyond the power conferred by section 84P*(e)* of the Act. Gageler J concluded:

> "I would reject the contention that the decision of the Court of Appeal should be affirmed on the ground that a fair-minded observer would not reasonably apprehend bias on the part of Mr Kourambas."[163]

3 2 4 Yukon Francophone School Board[164]

Under Canadian law, the principles surrounding the test to be applied in determining whether a judge should recuse himself or herself were identified in the Supreme Court of Canada in *Committee for Justice and Liberty v National Energy Board*;[165] approved in *Valente v The Queen*;[166] and reiterated in *Wewaykum Indian Band.*[167] The principles were summarised by Donald JA in *Taylor Ventures Ltd (Trustees of) v Taylor*[168] as follows:

(a) A judge's impartiality is presumed.

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161 *Isbester v Knox City Council* [2015] HCA 20 par 68.
162 *Isbester v Knox City Council* [2015] HCA 20 par 69.
163 *Isbester v Knox City Council* [2015] HCA 20 par 70.
164 [2015] 2 SCR 282.
165 [1978] 1 SCR 369 394.
166 [1985] 2 SCR 673.
167 *Wewaykum Indian Band v Canada supra* par 60.
168 [2005] BCCA 350 (CanLII) par 7.

(b) A party arguing for disqualification must establish that the circumstances justify a finding that the judge must be disqualified.

(c) The criterion for disqualification is the reasonable apprehension of bias.

(d) The question is what would an informed, reasonable and right-minded person, viewing the matter realistically and practically, and having thought the matter through, conclude.

(e) The test for disqualification is not satisfied unless it is proved that the informed, reasonable and right-minded person would think that it is more likely than not that the judge, whether consciously or unconsciously, would not decide fairly.

(f) The test requires demonstration of serious grounds on which to base the apprehension.

(g) Each case must be examined contextually, and the inquiry is fact specific.[169]

Meanwhile, the Supreme Court judgment in *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General)*[170] provides a good illustration of the application of these identified principles.[171] The Yukon Francophone School Board is the first and only School Board in Yukon and has responsibility for one French-language school. In 2009, it brought an action against the Yukon government for what it claimed were deficiencies in the provision of minority language education. The trial judge ruled in favour of the Board on most issues. A number of incidents occurred during the trial, which set the stage for a bias argument at the Court of Appeal. They had raised these problems at trial, but the trial judge denied that any reasonable apprehension of bias could be entertained in the circumstances.[172] The Court of Appeal conceded that an apprehension of bias can arise either from what a judge says or does during a hearing, or from extrinsic evidence showing that the judge is likely to have a strong disposition preventing him or her from impartially considering the issues in the case. The Court of Appeal concluded that there was a reasonable apprehension of bias on the part of the trial judge based on a number of incidents during the trial as well as the

[169] In *Bossé v Lavigne* [2015] NBCA 54 (CanLII) par 7, the New Brunswick Court of Appeal has provided what Associate Chief Justice Rooke termed in *Rothweiler v Payette* [2018] ABQB 399 (CanLII) par 15 as "a useful digest of relevant principles that guide how a court evaluates allegations of judicial bias". The NBCA had held that the elements of this objective test are that: (i) the person considering the alleged bias must be a reasonable person, not one who is very sensitive or scrupulous, but rather one who is right-minded; (ii) the person must be a well-informed person, with knowledge of all the relevant circumstances; (iii) the apprehension of bias itself must be reasonable in the circumstances of the case: (iv) the situation must be fully examined, not just the face of it; and, the examination must be one that is both realistic and practical; (v) the enquiry begins with a strong presumption of judicial impartiality and looks to determine whether it has been displaced such that there is a real likelihood or probability of apprehension that the judge would not decide the case fairly on the merits.

[170] *Supra.*

[171] See also *Taylor Ventures Ltd (Trustees of) v Taylor supra* par 8–11; per Joyal CJ of the Manitoba Queen's Bench in *R v Amsel* [2016] MBQB 43 (CanLII) par 14–17.

[172] *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 1–3.

trial judge's involvement as a governor of a philanthropic francophone community organisation in Alberta.[173]

At the Supreme Court of Canada, the Court of Appeal's conclusion that there was a reasonable apprehension of bias requiring a new trial was set aside. It was held that the test for a reasonable apprehension of bias is what a reasonable, informed person thinks.[174] The objective is to protect public confidence in the legal system by ensuring not only the reality, but also the appearance of a fair adjudicative process. Impartiality and the absence of bias have developed as both legal and ethical requirements. Judges are required, and indeed, expected to approach every case with an impartial and open mind.[175] Because there is a presumption of judicial impartiality,[176] the test for a reasonable apprehension of bias requires a real likelihood or probability of bias.[177] The inquiry into whether the conduct of a decision maker creates a reasonable apprehension of bias is "inherently contextual and fact-specific", and there is a correspondingly high burden of proving the claim on the party alleging bias.[178] However, the Supreme Court of Canada has recognised that the conduct of a trial judge, and particularly his or her interventions, can rebut the presumption of impartiality.[179] The court did caution,[180] as did Denning LJ some six decades ago in *Jones v National Coal Board,*[181] and the Supreme Court of Appeal of South Africa in *Take and Save Trading CC v Standard Bank Ltd,*[182] that the times when judges were required to be as passive as a "sphinx" had long gone, and that "a balancing act by the judiciary is required because there is a thin line between managing a trial and getting involved in the fray".[183]

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173 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 5.

174 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 20–21. See also *Committee for Justice and Liberty v National Energy Board* [1976] 68 DLR (3d) 716 (SCC) 735; *R v Valente* [1985] 2 SCR 673, 684–685; *Therrien v Minister of Justice* [2001] 200 DLR (4th) 1 (SCC) par 102; *Baker v Canada (Minister of Citizenship and Immigration)* [1999] 2 SCR 817 par 46; *Wewaykum Indian Band v Canada supra* par 60; *CUPE v Ontario (Minister of Labour)* [2003] 1 SCR 539 par 199; *Miglin v Miglin* [2003] 1 SCR 303 par 26; *Miracle v Maracle III supra* par 2; *Bruzzese v Canada (Public Safety and Emergency Preparedness)* [2017] 3 FCR 272 par 28.

175 *R v Valente supra* 685; *R v S (RD) supra* par 49; *Wewaykum Indian Band v Canada supra* par 57–58.

176 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 25; *Cojocaru v BC Women's Hospital* [2013] 2 SCR 357 par 22.

177 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 25; *Arsenault-Cameron v Prince Edward Island* [1999] 3 SCR 851 par 2; *R v S (RD) supra* par 134; *Ontario (Attorney General) (Re)* [2017] CanLII 60867 (ON IPC) par 32–33.

178 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 26; *Wewaykum Indian Band v Canada supra* par 77; *R v S (RD) supra* par 114.

179 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 27; *Brouillard v The Queen* [1985] 1 SCR 39 44 per Lamer J.

180 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 28.

181 [1957] 2 All ER 155 (CA) 159.

182 2004 (4) SA 1 (SCA) par 4.

183 For more on this aspect of the problem, see Okpaluba and Juma 2011 *SALJ* 659–685, esp. 679.

Judicial impartiality and neutrality do not mean that a judge must have no prior conceptions, opinions or sensibilities. Rather, they require that the judge's identity and experiences do not close his or her mind to the evidence and issues.[184] The reasonable-apprehension-of-bias test recognises that while judges must strive for impartiality, they are not required to abandon who they are or what they know.[185] A judge's identity and experiences are an important part of who he or she is, and do not inherently compromise the judge's neutrality or impartiality. Judges should be encouraged to experience, learn and understand "life" – their own and those whose lives reflect different realities.[186] The ability to be open-minded is enhanced by such knowledge and understanding. Impartiality thus demands not that a judge discount or disregard his or her life experience or identity, but that he or she approach each case with an open mind, free of inappropriate and undue assumptions. It was held that the threshold for a finding of reasonable apprehension of bias was met in the present case.[187]

The judge's conduct during trial reveal that several incidents occurred which, when viewed in the circumstances of the entire trial, lead inexorably to this conclusion.[188] First is the trial judge's conduct when counsel for the Yukon attempted to cross-examine a witness based on confidential information contained in files belonging to students. After hearing some argument on the confidentiality issue, the trial judge told counsel he would entertain additional arguments on the matter the following day. However, he started the next day's proceedings with a ruling that was unfavourable to the Yukon and without giving the parties an opportunity to present further argument. While this by itself is unwise, the trial judge's refusal to hear the Yukon's argument after his ruling, and his reaction to counsel, are more disturbing. He both characterised the Yukon's behaviour as reprehensible and accused the Yukon's counsel of playing games. An overall assessment of the entire record reveals the trial judge's conduct as troubling and problematic.[189] Further improper treatment meted out on the Yukons by the trial judge was evident when they requested permission to submit affidavit evidence from a witness who had suffered a stroke. In response, the trial judge accused counsel of the Yukon of trying to delay the trial, criticised him for waiting half-way through the trial to make the application, suggested that the incident amounted to bad faith on the part of the government, and warned counsel for the Yukon that he could be ordered to pay costs personally if he brought the application. There was no basis for the accusations and criticism levelled at counsel and, viewed in the context of

184 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 33.

185 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 34; *R v S (RD) supra* par 29 and 119.

186 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 34–35, citing in support the SA Constitutional Court judgment in *SACCAWU v Irvin & Johnson Ltd (Seafoods Division Fish Processing) supra* par 13.

187 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 38.

188 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 39.

189 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 39–44.

the rest of the trial, this incident provides further support for a finding of reasonable apprehension of bias.[190] A final illustration of the trial judge's conduct is his refusal to allow the Yukon to file a reply on costs, which is even more difficult to comprehend. After the release of his reasons on the merits, the trial judge required each party to file their costs submissions on the same day. To the Yukon's surprise, the Board sought not only solicitor-client costs, but also punitive damages as well as solicitor-client costs retrospective to 2002. The trial judge's refusal to allow the Yukon to file a reply factum is questionable, particularly in light of the fact that the Yukon could not have known the quantum of costs sought by the Board at the time it filed its factum. The Supreme Court held that all these incidents taken together and viewed in their context would lead a reasonable and informed person to see the trial judge's conduct as giving rise to a reasonable apprehension of bias.[191]

4 CONCLUSION

It is submitted that the conclusion that emerges from this study is that the recusal of a judge in adjudication is, in practical terms, the application of that aspect of the common-law principle of natural justice that prohibits a person from being a judge in his or her own cause. It is indeed clear from the reading of the cases that the courts, in adjudicating recusal applications, bear in mind the old adage that justice must not only be done, but must manifestly and undoubtedly be seen to be done. These are the underlying reasons for the principle of judicial impartiality in constitutional parlance.

From the foregoing discussion, it is clear that the determination whether a judge should recuse, or be requested to recuse, him- or herself from sitting and hearing a case is based on the plaintiff's ability to rebut successfully the presumption of impartiality that operates in favour of the judge's duty to sit in a case duly and lawfully assigned to him or her. The requirement of impartiality on the part of a judge or anyone under a duty to decide anything is not only a common-law principle but also a constitutional obligation. Accordingly, removing a judge from adjudication cannot be an easy task. It is therefore an important principle that if recusal of a judge must take place, the first hurdle to scale is rebuttal of the presumption of impartiality, which in turn requires concrete facts, not flimsy allegations or mere suspicion, but cogent evidence that suggests that something the judge has done or said gives rise to a reasonable apprehension of bias. The totality of the circumstances must be considered.[192] The second hurdle is made up of two objective formulations rolled into one test: the requirement of a double-reasonableness test that asks how a reasonable person not necessarily involved in the case but whose perspective may differ from that of an

190 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 45–49.

191 *Yukon Francophone School Board, Education Area #23 v Yukon (Attorney General) supra* par 50–55.

192 *R v JCS* [2017] BCCA 87 (CanLII) par 44.

affected litigant[193] who is fully apprised of the facts would view the role of the judge in the particular case; and, viewed from the spectacle of this reasonable observer, whether the judge could be seen as one who has a vested interest in the outcome of the case. If so, would that reasonable observer be acting reasonably by viewing the proceeding in that court in that light? These are the questions to ask – whether the complainant is alleging actual bias on the part of the judge, or merely a reasonable apprehension of bias. In either case, the double-reasonableness test applies and the thresholds in both circumstances are high.

[193] *R v Millar* [2017] BCSC 323 (CanLII) par 24; *Stein v BC (Human Rights Tribunal)* [2018] ABQB 399 (CanLII) par 153.

THE LEGAL ISSUES REGARDING THE USE OF ARTIFICIAL INTELLIGENCE TO SCREEN SOCIAL MEDIA PROFILES FOR THE HIRING OF PROSPECTIVE EMPLOYEES

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SUMMARY

The fourth industrial revolution has introduced advancement in technologies that have affected many commercial sectors in South Africa, and the employment sector is no exception. One of these advancements is the creation of artificial intelligence technologies that can assist humans to make everyday tasks quicker and more efficient. It has become common for organisations to screen social media profiles in order to gain information about a prospective employee. With the aid of artificial intelligence, employers can use such systems to easily sift through social media profiles and access the data it needs. Although these technological creations have many successful outcomes, artificial intelligence systems can also have drawbacks, such as inadvertently discriminating against certain groups of people when data is collected, processed and stored. Issues surrounding privacy breaches are also raised where artificial intelligent systems seek to access personal information from social media profiles. Prospective employees will need to be informed that their social media profiles are being screened and the artificial intelligence system needs to be programmed properly to ensure that data is correctly and fairly processed and collected.

1 INTRODUCTION

The past few decades have seen an information revolution where electronic and Internet-connected devices have led to a social media revolution.[1] Although the law may have in some instances adapted to new technologies, the rapid advancements in technologies necessitate a response from policymakers.[2] The fourth industrial revolution may have the effect of blurring the distinction between the physical and digital world. This revolution is a

1 Potgieter *Social Media and Employment Law* (2014) 5.

2 Calo "Robotics and the Lessons of Cyberlaw" 2015 *California Law Review* 513 562. The author concludes that robotics will affect our lives in a profound way, and it is up to us to provide a legal reaction that is balanced and cognisant of the impact of these new technologies.

fast-emerging shift from the previous ones and involves smart systems and automated machines that include emerging technological breakthroughs such as artificial intelligence (AI), blockchain technology, advanced robotics, the Internet of Things, and autonomous vehicles that create a fusion of technologies across physical, digital and biological worlds.[3]

Calo argues that issues surrounding robotics and AI raise the question as to how the legal fraternity will deal with these new technological advancements because these developments will surely affect the law disciplines.[4] The fourth industrial revolution will no doubt require technological and legislative reform to address the changes it brings. The change in technology has created new risks such as safety issues, privacy concerns and data risks.[5] The aim of the law should be to encourage innovation and growth and to be wary of over-regulating the industry; at the same time, the law needs to protect other important rights of individuals from harm.

Although the fourth industrial revolution seeks to encourage innovations and ideas, it also poses certain risks to the employment sector. According to a report published by the World Economic Forum in 2018, the advancement of technology and issues impacting socio-economic factors have decreased the work-lifespan of many employees because their skills will be outdated and only those employees who can work with AI are likely to benefit from these advancements.[6] Forbes argues that as technology continues to advance, AI can revolutionise the way that companies hire and fire employees.[7] The legal issue is whether AI technologies should be used to gather data on individuals for the purposes of hiring employees. This is because a great concern with AI is that it can be biased in collecting and processing information, leading to a lack of fairness and accountability.[8] Hauser argues that machine-to-machine communications will bring about regulatory issues and it may be necessary for laws to be updated in order to adapt to these legal hurdles.[9] One of the main concerns with the monitoring, collection and processing of personal information of another is breach of privacy.

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3 Schwab *The Fourth Industrial Revolution* (2017) 1–17.

4 Calo 2015 *California Law Review* 513 550.

5 Tschider "Regulating the Internet of Things: Discrimination, Privacy and Cybersecurity in the Artificial Intelligence Age" 2018 *Denver Law Review* 87 89.

6 Schwab "Towards a Reskilling Revolution: A Future of Jobs for All" 2018 http://www3.weforum.org/docs/WEF_FOW_Reskilling_Revolution.pdf (accessed 2019-03-29) 3.

7 Rogers "The Key Role Evolving AI Will Play in Tech Hiring and Firing" (12 June 2018) https://www.forbes.com/sites/forbestechcouncil/2018/06/12/the-key-role-evolving-ai-will-play-in-tech-hiring-and-firing/#614fc4b4b32b (accessed 2019-03-29).

8 Katyal "Private Accountability in the Age of Artificial Intelligence" 2019 *University of California Law Review* 54 58.

9 Hauser "Industry 4.0: Digital Business, Autonomous Systems and the Legal Challenges" (2014) *Business Law Magazine* https://www.businesslaw-magazine.com/wp-content/uploads/sites/4/2015/04/BLM_Seite-26-29.pdf 26 28.

2 PRIVACY

At common law, Mcquoid-Mason argues that invasion of privacy is addressed through the *actio injuriarum* and depends on whether a reasonable person of ordinary sensibilities would regard the invasion of privacy as unlawful.[10] Privacy entails seclusion from the public by an individual and may be infringed by the unauthorised act of an outsider on the individual or her personal affairs.[11] Bilchitz avers that the right to privacy seeks to protect the freedom of the individual against the arbitrary exercise of coercive power by the State and further provides the individual with a sense of personal security.[12] This means that people have the right to be free from government intrusions in order to have a sense of safety from interference from outsiders.

Besides privacy being protected at common law, the right is also enshrined in section 14 of the Constitution:[13]

> "Everyone has the right to privacy, which includes the right not to have–
> (*a*) their person or home searched;
> (*b*) their property searched;
> (*c*) their possessions seized; or
> (*d*) the privacy of their communications infringed."

A contravention of section 14 of the Constitution may be regarded as an unlawful invasion of privacy, unless the breach is justified in terms of section 36[14] of the Constitution.[15] In *Berstein v Bester*,[16] the court took cognisance of the fact that privacy has its boundaries and is not absolute:

> "Privacy is acknowledged in the truly personal realm, but as a person moves into communal relations and activities such as business and social interaction, the scope of personal space shrinks accordingly."[17]

Burns supports this argument and provides that the scope of privacy will vary, depending on whether it is truly a personal space that has been infringed or whether it involves communal relations.[18]

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10 Mcquoid-Mason "Invasion of Privacy: Common Law v Constitutional Delict – Does it Make a Difference?" 2000 *Acta Juridica* 227 229–223.

11 Neethling, Potgieter and Visser *Law of Delict* (2014) 371.

12 Bilchitz "Privacy, Surveillance and the Duties of Corporations" 2016 *TSAR* 45.

13 The Constitution of the Republic of South Africa, 1996.

14 The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including–
(a) the nature of the right;
(b) the importance of the purpose of the limitation;
(c) the nature and extent of the limitation;
(d) the relation between the limitation and its purpose; and
(e) less restrictive means to achieve the purpose.

15 Mcquoid-Mason 2000 *Acta Juridica* 227 246.

16 1996 (2) SA 751 (CC).

17 Par 67.

As privacy is not absolute, it may be limited in certain circumstances. Privacy must be balanced with other competing interests and rights such as freedom of speech and access to information.[19] Burns argues that in South Africa, it is well established in our law that once information has entered the public domain, there can be no legitimate expectation of privacy in relation to such information.[20]

Bilchitz argues that technology has become a standard feature in our daily lives both socially and commercially and because of this continuous usage, such technology exists in both private and public spaces, which in turn may lead our communications to be monitored and tracked.[21] Although individuals may make use of the Internet and social media in their private homes where privacy is highly protected, the consequence of technology has allowed this intimate space to become potentially publicly accessible.[22] Thus despite privacy being highly protected in our private homes, this right may lose its protection once information has been published to the public.

Goddard opines that the use of social media raises the fundamental question as to what information uploaded onto these platforms is considered to fall within and outside the public domain.[23] The idea of protecting online privacy stems from the protection of personal or sensitive information, which if divulged to the public may cause harm to the user. This is why several websites have created privacy settings that allow users to control access to information and limit other users from viewing their posts.[24] It must be understood, therefore, that where a user reveals personal information to a limited group of people, the user has only consented to the publication of that information to that selected group and not to everyone on the Internet.[25] With this in mind, entities such as insurers may use different methods to obtain social media information, but are often limited in such access by privacy settings, including being blocked from viewing a policyholder's location, pictures and updates.[26]

In *Bernstein v Bester*,[27] the court stated that any information pertaining to participation in a public sphere cannot be subject to a reasonable expectation of privacy.[28] Bilchitz argues that with respect to privacy and the monitoring of personal communications, the key test is whether the

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18 Burns *Communications Law* (2015) 231.

19 Swales "Protection of Personal Information: South Africa's Answer to the Global Phenomenon in the Context of Unsolicited Electronic Messages (Spam)" 2016 *SA Merc LJ* 49 59.

20 Burns *Communications Law* 604.

21 Bilchitz 2016 *TSAR* 45.

22 Bilchitz 2016 *TSAR* 45 52.

23 Goddard "Sharing Privately: The Effect Publication on Social Media Has on Expectations of Privacy" 2017 *Journal of Media Law* 45 52.

24 McGuinness and Simon "Information Disclosure, Privacy Behaviours, and Attitudes Regarding Employer Surveillance of Social Networking Sites" 2018 *International Federation of Library Associations and Institutions* 203 205.

25 Roos "Privacy in the Facebook Era: A South African Legal Perspective" 2012 *SALJ* 375 399.

26 Cole and McCullogh "The Use of Social Media by Insurers and Potential Legal and Regulatory Concerns" 2012 *Journal of Insurance Regulation* 181 186.

27 *Supra*.

28 Par 85.

individual has a reasonable expectation of privacy.[29] Bilchitz further opines the following in determining an individual's reasonable expectation of privacy:

> "In testing the reasonableness of an expectation, however, I would suggest that some of the factors that are expressly contained within the general limitations clause could well be relevant, including – in particular – a proportionality enquiry. That would require determining whether there was any legitimate purpose for interfering with a subjective expectation of privacy, the relationship between the interfering means adopted and the purpose, whether there is an alternative that interferes less with the subjective expectation yet still achieves the purpose and a balancing of the interests of the individual in privacy and the company in question."[30]

On the basis of the above, one needs to determine whether a person has a reasonable expectation of privacy in respect of the information sought by another. A reasonable expectation of privacy may become a bit more difficult when information is readily available on social media. In the United States, most of the courts have ruled that users lose their reasonable expectation of privacy where they post communications on social media platforms.[31] Issues concerning social media receive a separate and further analysis below.

3 SOCIAL MEDIA

Social media has been in existence for some time now and is no longer considered a new innovation. It is common for employers and employees to use social media in their personal capacities, as well as for business purposes. It is not uncommon for employers to use social media as a means to do background checks on potential employees to decide whether a person would be suitable for the position. Facebook, Twitter, and Instagram are common social media sites used by recruiters and some studies have found that 70 per cent or more of recruiters search prospective employees' social media profiles to screen applicants.[32] Other sources have further indicated that three in five recruiters have turned down a candidate owing to content on social media and 57 per cent of recruiters say that they find content on social media that makes candidates unsuitable for the required job.[33] Social media is therefore a powerful tool that recruiters and employers can use to find prospective candidates.

Social media leaves behind a digital footprint that can be tracked and followed.[34] Mund argues that normal daily in-person conversations traditionally constituted private speech, but such conversations now

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29 Bilchitz 2016 *TSAR* 45 64.

30 Bilchitz 2016 *TSAR* 45 65.

31 Mund "Social Media Searches and the Reasonable Expectation of Privacy" 2017 *Yale Journal of Law & Technology* 238 249.

32 Zhang, Van Iddekinge, Arnold, Roth, Lievens, Lanivich and Jordan "What's on Job Seekers' Social Media Sites? A Content Analysis and Effects of Structure on Recruiter Judgments and Predictive Validity" 2020 *Journal of Applied Psychology* 1530.

33 Ranosa "How Recruiters Check for Red Flags on Social Media" (29 October 2019) https://www.hcamag.com/au/specialisation/hr-technology/how-recruiters-check-for-red-flags-on-social-media/189899 (accessed 2020-04-01).

34 See generally McPeak "The Facebook Digital Footprint: Paving Fair and Consistent Pathways to Civil Discovery of Social Media Data" 2013 *Wake Forest Law Review* 887.

transpire over social media, leaving digital footprints and evidence as to a person's behaviour, and that such information is not entirely private.[35] The problem is that people wish to share information on social media and at the same time are led to expect that this information may be shared privately because they are likely to share more if they know that their information will remain secure.[36] Authors have argued that social media users feel safe to share information on social networks because they feel it is a controlled environment where information is shared to a specific audience who they can sometimes choose through privacy settings. However, this privacy is sometimes misconceived owing to the visibility of their profiles to the general public.[37] The consequence is that online users may think their profiles and publications are only visible to their contact list, when in fact they may be visible to the public. Although privacy rights exist, these arguably diminish on an online public platform, and they also depend on the reasonable expectation of privacy. This is because private information is no longer a secret owing to the public effect of social media publications.[38] People sign up on different social media platforms and consent to the processing of their private data and personal information. Sharing information publicly on social networks is commonplace and one of the main reasons for its creation.[39]

Although the main purposes of social media are to facilitate communication and allow for the uploading of instant communications, this is done on a purely voluntary basis by a user.[40] This means that people may choose what to upload on their profiles and no one forces them do so. Grimmelmann argues that people tend to blame social media for private information uploaded onto these websites. Yet, social media does not compel its users to compromise their privacy; rather, it offers users a means to communicate, and exposing private information is a personal choice.[41] People may disclose personal information on their profiles and this act of disclosure is referred to as a user's "visibility" to others, which may be controlled through privacy settings on social networks.[42] A user's profile is therefore visible to everyone else on social media unless they have controlled their visibility through the privacy settings.[43]

One may argue that creating a profile on social media is similar to appearing in a public place because the Internet is regarded as such. However, the privacy settings will determine whether a person has chosen to

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35 Mund 2017 *Yale Journal of Law & Technology* 238 239.

36 Goddard 2017 *Journal of Media Law* 45 50.

37 McGuinness and Simon 2018 *International Federation of Library Associations and Institutions* 203 203–204. The authors argue that the failure to have adequate privacy settings on social media profiles exposes users to certain risks such as allowing unwanted viewers to obtain information that has been uploaded on their social media profiles.

38 Potgieter *Social Media and Employment Law* 36. The author argues that information, which was once a secret, can now be uploaded on social media and information regarding companies can become transparent to the world.

39 McGuinness and Simon 2018 *International Federation of Library Associations and Institutions* 203 205.

40 Goddard 2017 *Journal of Media Law* 45 46.

41 Grimmelmann "Saving Facebook" 2009 *Iowa Law Review* 1137 1140.

42 Roos 2012 *SALJ* 375 386.

43 *Isparta v Richter* 2013 (6) SA 529 (GNP) par 6.

disclose personal information to a specific group of people.[44] Roos argues that social media poses certain threats to the right to privacy:

(1) when users divulge personal information on their social media profiles;
(2) when the social network operators receive information from users or third parties and process this information; and
(3) when third parties gain access to a user's personal information.[45]

Although social media websites were created to foster communication and relationships between people across borders, it has also given rise to new legal issues that were not originally anticipated, especially in instances where users argue that their postings are private.[46]

The unintended consequence of social media platforms is that personal information is readily available, and this allows both private and public bodies to collect personal data with ease.[47] Social media postings have been argued to reflect people's intelligence and personality, including their dark-side traits. However, the relevant question is whether it is legal and ethical to process this data for hiring purposes.[48] Information in the public domain and particularly on the Internet may be obtained by anyone with Internet access. This is because social media profiles have readily available information in one place; a comprehensive profile will contain personal information pertaining to a person's name, birthday, political and religious views, contact information, gender, relationship status, educational and employment history, and pictures.[49]

Although companies do not have direct access to prospective employees' social media profiles, if their profile lacks privacy settings, the employer may be able to access that profile and all its contents. Where an employee's social media settings are private, there is no way an employer may lawfully access the employee's profile. The accessing of a user's social media will not be held to be an invasion of privacy where the person fails to make use of the privacy options on these sites. However, where a person does restrict access through privacy settings, comments published online may fall into a zone of privacy upon which another should not intrude.[50] In *Sedick v Krisray*,[51] it was held that because the Internet is generally part of the public domain, social media is by its nature also part of the public domain, but members are able to exercise options to restrict access to their personal pages and the content of those pages.[52]

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44 Roos 2012 *SALJ* 375 386.

45 *Ibid*.

46 Langan "Likes and Retweets Can't Save Your Job: Public Employee Privacy, Free Speech and Social Media" 2018 *University of St Thomas Law Journal* 228 229–230.

47 Mund 2017 *Yale Journal of Law & Technology* 238 241.

48 Dattner, Chamorro-Premuzic, Buchband and Schettler "The Legal and Ethical Implications of Using AI in Hiring" (25 April 2019) *Harvard Business Review* https://hbr.org/2019/04/the-legal-and-ethical-implications-of-using-ai-in-hiring (accessed 2020-04-01).

49 Grimmelmann 2009 *Iowa Law Review* 1137 1149.

50 *National Union of Food, Beverage, Wine, Spirits and Allied Workers Union obo Arendse* v *Consumer Brands Business Worcester, a Division of Pioneer Foods (Pty) Ltd* 2014 (7) BALR 716 (CCMA) par 16.

51 (2011) 8 BALR 879 (CCMA).

52 Par 50.

4 PROCESSING PERSONAL INFORMATION

Once an organisation is legally allowed to collect information about another individual, it must ensure that the collection of such information is done in the correct manner. When an employer enters data on a system pertaining to an individual, it must ensure it is collected, processed and stored in the correct manner in order to keep the integrity of the information and maintain its confidentiality.[53] It is submitted that employees will trust their employers when they know their data remains safe and is kept and used in a responsible manner. Where data is carelessly processed and leaked, employees may have legal recourse against employers for breaches of privacy. Data processing therefore has important legal ramifications in the employment arena and transgressions are unlikely to be taken lightly by employees, especially in a digital world where information can be transferred and communicated instantly. Sensitive and private information may be spread with ease and breaches of privacy occur more easily than in the past because of technology. As is mentioned later in this article, AI requires the collection of big data to function and the risk of disclosing sensitive or personal information is great.[54] The protection of personal information therefore becomes crucial.

The importance of protecting personal information cannot be overstated. Swales states that the "protection of personal information is becoming a basic necessity as more and more people conduct their lives in an ever-increasing digital manner".[55] Historically, privacy concerns centered on the State and its power to constrain the private lives of its citizens, but now there has been a shift that has led to other bodies collecting large amounts of personal information relating to individuals.[56] Roos aptly notes that privacy concerns were raised when technology advanced since computers were able to misuse personal information by storing vast amounts of personal information relatively easy, cheaply and for almost indefinite periods.[57] Etsebeth highlights legal considerations relating to information security in regard to:

(i) the way in which information is created, processed, stored, transmitted, used and communicated;
(ii) who has access to this information;
(iii) the reasons and purposes of collecting the information;
(iv) the duration of such access; and
(v) who has the authority to change access and how.[58]

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53 Tschider 2018 *Denver Law Review* 87 116.

54 Tschider 2018 *Denver Law Review* 87 117. The author submits that these data breaches may relate to sexual preferences, personal finances and health conditions – information that an individual may only want to share with a family member or friend and not anyone else.

55 Swales 2016 *SA Merc LJ* 49.

56 Bilchitz 2016 *TSAR* 45.

57 Roos 2012 *SALJ* 375 377.

58 Etsebeth "Governance in the Information Age: Implications for the Law" 2005 *TSAR* 274 276.

The collection of data by computers poses a threat to privacy in instances where there is unauthorised collection of personal data and the disclosure of such data.[59] As a result of privacy issues relating to the collection and storage of personal information, data protection principles should apply when personal information is processed, collected and stored by other bodies.[60] What these arguments indicate is that online personal information may be collected and processed, as long as certain steps have been taken and brought to the attention of the individual whose data is in issue. At the same time, however, an individual can only make a decision once he or she has been properly informed as to what information is being collected and the purpose for such collection.

Where persons give voluntary consent and lawful access to their personal and private information, they also voluntarily assume the risk attached to the exposure of that information.[61] This indicates that where a person voluntarily reveals information to another party, the former party impliedly waives his or her right to privacy and cannot reasonably expect to limit the recipient's usage of that information since permission has been granted.[62] It has been argued, however, that although an individual has the right to consent to information being released or monitored, the reality of such consent may be affected by certain power relations.[63] Prospective employees may thus have no choice but to accept the agreed terms of allowing employers to collect their information via social media because without acceptance, an employee may not be hired for the job. Roos argues that the social media user must have full knowledge and appreciation of the nature and extent of the possible harm that may arise when consent is granted because a person cannot validly consent to the disclosure of personal information if she or he is not informed of what it will be used for or who will have access to it.[64]

5 POPIA

The Protection of Personal Information Act[65] (POPIA) regulates the "processing" of "personal information" by certain bodies. The Act recognises the importance of the right to privacy and provides that it includes a right to protection against the unlawful collection, retention, dissemination and use of personal information; at the same time, it acknowledges that privacy is subject to justifiable limitations that are aimed at protecting other important interests and rights such as the access to information.[66]

The Act will apply to social media communications because of the type of information that is uploaded onto these websites. "Personal information" is given a broad meaning in the Act and includes the personal opinions, views

59 Burns *Communications Law* 235.
60 Roos 2012 *SALJ* 375 387.
61 Mund 2017 *Yale Journal of Law & Technology* 238 246.
62 Mund 2017 *Yale Journal of Law & Technology* 238 250.
63 Bilchitz 2016 *TSAR* 45 58.
64 Roos 2012 *SALJ* 375 399.
65 4 of 2013.
66 See the Preamble of the Act, read with ss 2(*a*)(i)–(ii).

or preferences of a person, which are often posted on social networks.[67] "Processing" is defined as:

> "any operation or activity or any set of operations, whether or not by automatic means, concerning personal information, including–
> (a) the collection, receipt, recording, organisation, collation, storage, updating or modification, retrieval, alteration, consultation or use;
> (b) dissemination by means of transmission, distribution or making available in any other form; or
> (c) merging, linking, as well as restriction, degradation, erasure or destruction of information."[68]

As a result of this wide definition, the use of any of a prospective employee's personal information from social media by an employer or recruiter will amount to information being processed, even if it is a once-off activity. The applicability of the Act to recruiters or employers also relies on other important definitions such as "private body",[69] "public body"[70] and a "responsible party".[71] Furthermore, section 3 of POPIA applies to the processing of personal information that is entered in a record by or for a

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67 See s 1 definitions, which defines "personal information" as information relating to an identifiable, living, natural person, and where it is applicable, an identifiable, existing juristic person, including, but not limited to–
(a) information relating to the race, gender, sex, pregnancy, marital status, national, ethnic or social origin, colour, sexual orientation, age, physical or mental health, well-being, disability, religion, conscience, belief, culture, language and birth of the person;
(b) information relating to the education or the medical, financial, criminal or employment history of the person;
(c) any identifying number, symbol, e-mail address, physical address, telephone number, location information, online identifier or other particular assignment to the person;
(d) the biometric information of the person;
(e) the personal opinions, views or preferences of the person;
(f) correspondence sent by the person that is implicitly or explicitly of a private or confidential nature or further correspondence that would reveal the contents of the original correspondence;
(g) the views or opinions of another individual about the person; and
(h) the name of the person if it appears with other personal information relating to the person or if the disclosure of the name itself would reveal information about the person.

68 S 1 of POPIA.

69 "Private body" means–
(a) a natural person who carries or has carried on any trade, business or profession, but only in such capacity;
(b) a partnership which carries or has carried on any trade, business or profession; or
(c) any former or existing juristic person, but excludes a public body.

70 "Public body" means–
(a) any department of state or administration in the national or provincial sphere of government or any municipality in the local sphere of government; or
(b) any other functionary or institution when–
(i) exercising a power or performing a duty in terms of the Constitution or a provincial constitution; or
(ii) exercising a public power or performing a public function in terms of any legislation.

71 "Responsible party" means a public or private body or any other person which, alone or in conjunction with others, determines the purpose of and means for processing personal information.

responsible party by making use of automated means[72] or non-automated means and where it is processed by non-automated means, it forms part of a filing system or is intended to form part thereof.[73]

The Act emphasises the lawful processing of information[74] and much relies on consent being given by the person whose information is being processed. Consent envisages any voluntary, specific and informed expression of will in terms of which permission is given for the processing of personal information.[75] Consent must be obtained from a person in order to process his or her information, although the processing may occur if it is necessary for pursuing the legitimate interests of the responsible party.[76]

Although personal information should be collected directly from a person, the Act allows a responsible party to dispense with this requirement where the information concerned is found in a public record or has deliberately been made public by the person.[77] This is where social media becomes so important. On social media platforms, public profiles contain information about an individual and may be used by the employer because it is in the public domain. As alluded to earlier, relaxed privacy settings therefore provide an opportunity in allowing employers to collect information from social media profiles of prospective employees. Although it has been established that employers can use social media information to consider hiring prospective employees, there may be some bias attached to these processes. This bias or discrimination may materialise where employers rely on technology to search and filter relevant candidates for the interview process.

6 ARTIFICIAL INTELLIGENCE AND SCREENING EMPLOYEES

Most current legislation was drafted before the fourth industrial revolution, and this may warrant significant legislative reform to enable the law to keep up with technological advancements. Prospective employees may not be aware of the amount of data that others possess about them and are also not aware of how such data is used by AI systems.[78] Organisations use AI

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72 S 3(4) of POPIA provides that "automated means", for the purposes of the section, means any equipment capable of operating automatically in response to instructions given for the purpose of processing information.

73 S 3(1)(*a*) of POPIA. S 3(1)(*b*) provides further that in order for the Act to apply, the responsible party should be:

(i) domiciled in the Republic; or

(ii) not domiciled in the Republic but makes use of automated or non-automated means in the Republic, unless those means are used only to forward personal information through the Republic.

74 S 4 of POPIA sets out certain conditions that need to be met by the responsible party for the lawful processing of information, read with s 9, which provides that personal information must be processed in a reasonable manner that does not infringe upon the right to privacy.

75 S 1 of POPIA. Also see s 11, which sets out when consent is necessary.

76 See s 11(1)(*a*)–(*f*) of POPIA.

77 S 12(2)(*a*) of POPIA.

78 Yanisky-Ravid and Hallisey "Equality and Privacy by Design: A New Model of Artificial Intelligence Data Transparency via Auditing, Certification, and Safe Harbour Regimes" 2019 *Fordham Urban Law Journal* 428 455.

systems and big data to decide which applicants to interview or hire in their companies, but this can raise certain concerns.[79]

Data has been described as the "lifeblood" of AI because it relies on a constant feed of data to analyse and process its systems.[80] Data and AI are able to determine personal attributes of people with accuracy based on their social media profiles, where personal information is accurate and identifiable.[81] Artificial intelligence relies on the processing of information or data given to its system, hardware or software and operates through codes or algorithms.[82] Katyal submits that big data and AI seek to fulfil the modern-day promises of ease, efficiency and optimisation.[83] It is true that AI can significantly reduce the legal costs and time of work and is therefore appealing to the commercial sector. Hauser proposes that one of the biggest issues with the fourth industrial revolution is the ability to generate, process and use large amounts of data for commercial purposes.[84]

This means that AI may provide accurate and high-end services in different fields without the need for human intervention. Although these "machines" may work at a greater speed of processing, there may always be a need for human supervision and guidance. There is no doubt that the fourth industrial revolution can positively change the world, but conversely it may also create certain negative legal consequences. Yu proposes that in order for an automated AI system to be fair, it should rely on translation (building legal rules and outcomes), approximation (approximating decisions and providing updates and feedback into the system) and self-determination (independent autonomous decisions in which the system will make decisions that, in its view, are correct).[85] Translation and approximation are created and rely on human decisions, whereas self-determination allows for autonomous determinations, which can occur without human involvement.[86]

AI has changed the way in which data is collected and processed by using and collecting large amounts of data, which has not previously been possible.[87] The scary possibility of AI is that it has the potential to anticipate our behaviour and predict our intentions.[88] This means that through algorithms coded on AI, the intelligence will use specific data to predict intentions and outcomes of employees in the workplace by analysing their

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79 Prince and Schwarcz "Proxy Discrimination in the Age of Artificial Intelligence and Big Data" 2020 *Iowa Law Review* 1257 1259.

80 Weaver "Artificial Intelligence and Governing the Life Cycle of Personal Data" 2018 *Richmond Journal of Law & Technology* 1 2.

81 Dattner *et al* 2019 *Harvard Business Review*.

82 Hildebrandt "Law as Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics" 2018 *University of Toronto Law Journal* 12 26.

83 Katyal 2019 *University of California Law Review* 54 56.

84 Hauser https://www.businesslaw-magazine.com/wp-content/uploads/sites/4/2015/04/BLM_Seite-26-29.pdf 26 27.

85 Yu "Artificial Intelligence, the Law-Machine Interface and Fair Use Automation" 2020 *Alabama Law Review* 188 206–213.

86 Yu 2020 *Alabama Law Review* 188 206.

87 Tschider 2018 *Denver Law Review* 87 96. The author submits that AI and machine learning allow for a variety of capabilities, ranging from self-driving cars to fully functional automated robots.

88 Hildebrandt 2018 *University of Toronto Law Journal* 12 27.

behavioural patterns. Although AI systems can predict outcomes, they also have the ability to create new content.[89] AI programs can find patterns or preferences that others did not perceive, including the data subject him- or herself.[90]

Machine learning will affect the legal field in new ways, especially where it relates to data processing and disclosure of information.[91] Machine learning involves algorithms that are trained to learn from a body of data based on past human behaviour and practices and which then develop for future use.[92] Machine learning is where AI is exposed to data and the system identifies patterns after performing different tasks; as long as it is fed enough data, the system will continue to develop and learn.[93] It is submitted that issues could arise from these practices, especially where employers may programme a system not to hire a particular person for one job function and the system thereafter learns that this particular person is unsuitable for any other job function.

An AI system that has been created to predict who will be a successful employee can only do so if it has been programmed and trained in a certain way, as well as by using historical hiring data; relying on such data may create the risks of historical disparities in employment.[94] This will create bias and discrimination against people in the same category as the individual who is now not considered for any future role in the company. Raub argues that a lack of responsibility and accountability in relation to artificial intelligence and algorithms may lead to certain pitfalls in employment relating to discrimination in terms of unequal opportunities.[95] Despite issues with using AI automated systems, this does not mean that one should refrain from using these systems; rather, one should properly make use of its operation and be active in providing updates or corrections when issues arise.[96]

Using AI, data, social media, and machine learning, employers have greater access to candidates' private lives and personal attributes.[97] It has been submitted that machine learning has the potential to measure and process certain characteristics from social media profiles and be more fruitful than the traditional limited human processing and bias.[98] A machine-learning system, however, may be inaccurate where the data it is given is too narrow and may therefore be unable to make accurate predictions.[99] Underrepresented data could lead to discrimination where under-inclusive information about certain groups of people has been collected and processed.[100] Similarly, data that is overrepresented to a machine-learning

89 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 441.
90 Weaver 2018 *Richmond Journal of Law & Technology* 1 47.
91 Hildebrandt 2018 *University of Toronto Law Journal* 12 27.
92 Katyal 2019 *University of California Law Review* 54 68–69.
93 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 440.
94 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 443.
95 Raub "Bots, Bias and Big Data Artificial Intelligence, Algorithmic Bias and Disparate Impact Liability in Hiring Practices" 2018 *Arkansas Law Review* 529 530.
96 Yu 2020 *Alabama Law Review* 188 203–204.
97 Dattner *et al* 2019 *Harvard Business Review*.
98 Zhang *et al* 2020 *Journal of Applied Psychology* 1530 1544.
99 Katyal 2019 *University of California Law Review* 54 70.
100 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 449.

algorithm may also unfairly scrutinise a particular group and create bias towards that group.[101] The potential effect is that an AI system distinguishes between "safe" people and those to avoid when filtering data and could place candidates in certain categories such as good or bad employees.[102] Hence, AI systems have become powerful filtering tools, sorting and categorising persons in many areas, and their influence and dominance will surely continue to grow in significant and unpredictable ways.

It is therefore imperative that accurate data be coded in these machines so that discrimination may be avoided. Other than biased processing of information, data that is generated and stored may relate to personal information (including owner identity, health and biometric data) and this information is susceptible to cyber-attacks or breaches of privacy.[103] Employers making use of AI systems will therefore need to take into consideration various legal implications if they fail to properly code their algorithms, as well as safeguard the interests of its data subjects.

Forbes argues that unemployment rates are high and there is a risk that employers cannot fill positions or that they fill positions with the wrong employees, both of which may drain the company of its resources. AI could empower recruiters and employers to make smarter hiring decisions.[104] Conversely, however, algorithms used by AI may lead to certain negative consequences, especially where it collects private data from social networks.[105] AI tools have given corporations an unprecedented power to make decisions based on data collected, thereby giving insights into candidates for job positions.[106]

Since the significant impact of AI on technology, companies have begun to use its services for hiring employees.[107] AI therefore has the potential to gather personal data about prospective employees and process this to an employer's satisfaction in screening a candidate for a specific job. As can be seen from earlier discussions, AI may generate thorough information relating to private details found on social networks and provide detailed feedback and backgrounds on employees for hiring purposes. The idea behind using AI technologies is that a large number of resumés may be uploaded to an employer's database and AI may quickly process these applications and forward top candidates to the employer.[108] AI tools have the ability to disrupt the recruitment and assessment process, which leads to issues regarding

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101 Katyal 2019 *University of California Law Review* 54 74.

102 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 445.

103 Tschider 2018 *Denver Law Review* 87 93–94.

104 Rogers https://www.forbes.com/sites/forbestechcouncil/2018/06/12/the-key-role-evolving-ai-will-play-in-tech-hiring-and-firing/#614fc4b4b32b. The author suggests that AI can generate detailed assessments on potential candidates by using a wide variety of data and linking the data received with the job specifications. This arguably makes AI more efficient and effective than human recruiters.

105 Raub 2018 *Arkansas Law Review* 529 530.

106 Dattner *et al* 2019 *Harvard Business Review*.

107 Raub 2018 *Arkansas Law Review* 529 537.

108 Dastin "Amazon Scraps Secret AI Recruiting Tool That Showed Bias Against Women" (10 October 2018) *Reuters* https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G (accessed 2020-04-01).

their accuracy, ethical, legal, and privacy implications.[109] Katyal importantly reveals that although AI may create the impression of autonomy, its actions are actually dependent upon the code that humans write for it.[110]

In traditional recruitment, one would usually advertise a job, receive applications, shortlist prospective candidates, arrange interviews, and finally employ the individual.[111] It is not uncommon for recruiters to use social media as a means to screen prospective employees because the information found on these networks gives companies an insight into the candidate that they would never find during an interview nor glean from a curriculum vitae.[112] Authors have submitted that recruiters use various platforms to screen prospective employees and using social media platforms in the recruitment process has increased in popularity.[113] In a recent online article, BusinessTech published details about South African employers screening social media posts of possible job candidates and explained what the employers were looking for.[114] The article explains that recruiters often face the danger and difficulty that candidates misrepresent their professional, criminal and academic backgrounds in order to get an available employment position and this undermines the recruitment process. Employers therefore seek to use social media to check certain posts and it has been revealed that many social media users were found to have posted "negative content" that would be seen as unprofessional, as these posts involve discriminatory comments, defamatory content, sexual images or potential drug abuse. Employers therefore engage in these background checks to ensure responsible hiring decisions that will mitigate financial and reputational harm to their organisations.

LinkedIn is an example of a social media website. It is considered a social network site where professionals may connect in the workplace and recruiters may find suitable candidates for employment positions.[115] These types of social media platforms allow users to upload information regarding their qualifications, work experience, and skills, which significantly increases the probability of employers finding a required match for a job opportunity.[116] Not all social media, however, is created for the professional purpose of employment opportunities.

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109 Dattner *et al* 2019 *Harvard Business Review*.

110 Katyal 2019 *University of California Law Review* 54 62.

111 Ruparel, Dhir, Tandon, Kaur and Islam "The Influence of Online Professional Social Media in Human Resource Management: A Systematic Literature Review" 2020 *Technology in Society* 1.

112 Potgieter *Social Media and Employment Law* 38.

113 Ruparel *et al* 2020 *Technology in Society* 1.

114 BusinessTech "South African Employers Are Screening Your Social Media Posts: Here's What They're Looking Out For" (23 March 2021) https://businesstech.co.za/news/internet/477804/south-african-employers-are-screening-your-social-media-posts-heres-what-theyre-looking-out-for/ (accessed 2021-03-24).

115 Potgieter *Social Media and Employment Law* 14. On LinkedIn, a user can create and upload a profile and a curriculum vitae, which others can view. Personal information is contained on the user's page, such as employment history, relevant skills, degrees and work experience.

116 Ruparel *et al* 2020 *Technology in Society* 2.

Social media gives AI a perfect platform from which to collect and process information regarding employees as all the information is already kept in one place. AI can use its algorithms to screen employees on LinkedIn and select suitable candidates for employers. AI thus replaces those recruiters who would normally search and sift through all the online profiles. There are risks attached to screening social media profiles, including bias or discrimination, because the information is intended on being private and may not be relevant to the workplace.[117] Two negative implications can arise from using AI algorithms; first, incorrect data could be collected in the processing of data, leading to inaccuracies when providing feedback; secondly, the AI could be programmed or coded in such a way that it discriminates or creates some form of bias when processing data (for example, it could process that men are more likely to get promoted than women and consequently exclude all females from the process).[118] In other words, although an AI system may be programmed in a particular way, it may fail to accomplish its set goals and prove to be affirmatively harmful towards others.[119] Arguably, a candidate's personal affairs should not affect his or her job qualifications, skills and ability to fill the position.[120]

In order to programme an AI system to find prospective employees, the system is given a database of the CVs of past candidates (both successful and unsuccessful) and this data allows machine learning to determine a formula to screen future candidates.[121] Scholars have argued that cognitive ability and intelligence testing are a reliable means of predicting job success in occupations, but these assessments may also be discriminatory if they adversely impact certain protected groups, such as those defined by gender, race, age, or national origin.[122] This is because AI systems are based on combining past data and providing their own definition of success, which may not be objective and may create bias or discrimination.[123] In order for employers to use AI tools successfully in recruiting or firing employees, the employer must prove that the assessment process is job-related and predictive of success for that specific job.[124] There have been occasions where AI algorithms and face-recognition systems have been found to be discriminatory or show bias towards others.[125] For example, Amazon's AI technology was found to be discriminatory because it had taught itself that male candidates were preferable to female ones; it was therefore not

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117 Potgieter *Social Media and Employment Law* 38. The author argues that the interview process should remain objective and the private and social information of a candidate may affect this process.

118 Katyal 2019 *University of California Law Review* 54 68.

119 Gravett "The Dark Side of Artificial Intelligence: Challenges for the Legal System" 2020 *Southern African Public Law* 1 17.

120 Potgieter *Social Media and Employment Law* 38.

121 Brownlie "Encoding Inequality: The Case for Greater Regulation of Artificial Intelligence and Automated Decision-Making in New Zealand" 2020 *Victoria University of Wellington Law Review* 1 3.

122 Dattner *et al* 2019 *Harvard Business Review*.

123 Brownlie 2020 *Victoria University of Wellington Law Review* 1 5.

124 Dattner *et al* 2019 *Harvard Business Review*.

125 Humble and Altun "Artificial Intelligence and the Threat to Human Rights" 2020 *Journal of Internet Law* 12 13.

gender-neutral in processing the data it received.[126] Depending on how AI systems are set up, they can discriminate against individuals and screen people they do not like or build lists of individuals based on unfair criteria; AI systems therefore need to be programmed in a proper and fair manner.[127]

7 RECOMMENDATIONS AND CONCLUSION

Artificial intelligence is only possible through human creation and development. It is therefore necessary to supplement AI with good training and human intelligence because this will define the parameters (both acceptable and unacceptable boundaries) of the AI as it performs its necessary functions.[128] Bad, incorrect or missing data can lead to wrong decisions and incorrect conclusions reached by the AI system.[129]

Trial or mock runs could also help identify issues within the system. It is clear that organisations wish to protect their images and reputations by searching and hiring the best suitable candidate for the job. While prospective employees also have their right to privacy online, this privacy may diminish online. It is imperative that there is a legal balance in the operation of AI to ensure that technology can enhance the commercial field while respecting and protecting the rights of individuals. Finding this balance, however, may prove difficult, as there will be arguments for and against the proper application of AI. The obvious way to regulate AI is to control the way it is programmed and coded, as this will set the parameters of its data processing and ultimately involve a fair and permissible collection of employees' information. Fairness, however, gives rise to technical challenges in creating decision-making algorithms for AI systems.[130] Programmers of AI systems should seek to create an interface that feeds data pertaining specifically to the job in question and which does not contain biased or irrelevant characteristics based on gender, race, or sexual orientation.[131]

Prospective candidates must also in any event be made aware of monitoring and processing or interception of their information in the workplace. This may be done during the pre-contractual stage or by updating employees on a regular basis through communication such as email.[132] This would ensure that employees are informed at all times and that consent has been given to the lawful processing of their information. In

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126 Dastin https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.

127 Gravett 2020 *Southern African Public Law* 1 16.

128 Hildebrandt 2018 *University of Toronto Law Journal* 12 33–34. The author believes that artificial intelligence may be successfully regulated through a disciplined public administration process so that it aligns with the rule of law. However, the author states that there is no exact procedure to follow to ensure that artificial intelligence embraces the rule of law.

129 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 449.

130 Tschider 2018 *Denver Law Review* 87 100.

131 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 445.

132 This can be done when applying for a position; for example, when the job is advertised it can be indicated in the advertisement that recruiters or organisations will screen social media profiles of those people being considered for an interview.

some instances, giving notice of privacy breaches is outdated, misleading or difficult to find and the individual is sometimes not given a choice to withhold consent.[133] Transparency requires those in charge of the design and process of an AI system to declare how such systems make a decision, so that the data subject can make an informed decision and understand how the decision was made by the AI system.[134]

The problem facing potential employees who are being considered for a position at a company is how will they be protected from unlawful processing of their data? Tschider submits that a personal data store may be the way forward to process an individual's data lawfully – a system where data is collected from a variety of devices and origins for an individual and allows the user or data subject to make decisions regarding their data.[135] This means the employee can divulge the relevant information and restrict access to other users and also set limitations as to what data may be accessed. The AI will then have all the information in this data store to process, making the process more accurate and individualistic because it has only collected data on that specific employee through that system. This hopes to resolve the issue of discriminatory or biased processing of information. Other authors have argued that a "transparency model" approach should be used in which data users up and down the data supply chain ensure that the data remains in compliance with existing laws.[136] This would mean that AI systems will have to comply with the provisions of POPIA, which it should have to do in any event, as a failure to comply with this legislation would render the collection and processing of data by a company unlawful.

AI needs to be supportive of employer and employee rights. A supportive role by AI will enhance the monitoring system and ultimately lead to fair practices in the workplace. In order to achieve this, the algorithms used in programming must be fair, which is not easy to achieve. Automating the hiring process and replacing human intervention must accordingly be done with caution.[137] Informed employees will have a better understanding of their rights and responsibilities in the workplace pertaining to the use of social media and the monitoring of their personal information. Trust between employer and employee is one of the most important factors influencing a successful employment relationship and the employer must therefore find a balance between monitoring employees and breaching their trust.[138] Although AI may enhance some administrative functions in the workplace, it must be used in the correct manner. Prospective employees should also be made aware of how their information is being collected and processed.

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133 Tschider 2018 *Denver Law Review* 87 110.

134 Humble and Altun 2020 *Journal of Internet Law* 12 15–16. The authors submit that individuals should be informed before the processing, during the processing and after the decision is made in order to provide complete transparency to the process.

135 Tschider 2018 *Denver Law Review* 87 139.

136 Yanisky-Ravid and Hallisey 2019 *Fordham Urban Law Journal* 428 473. The authors also propose that, based on this model, the data should be audited to ensure that the source, use and contents of the data have been conducted in a lawful manner.

137 Dastin https://www.reuters.com/article/us-amazon-com-jobs-automation-insight/amazon-scraps-secret-ai-recruiting-tool-that-showed-bias-against-women-idUSKCN1MK08G.

138 Potgieter *Social Media and Employment Law* 35. Excessive monitoring of employees will lead to a breakdown in trust and may lead to more damage in the workplace.

Some scholars have proposed that it must be disclosed to the individual that his or her personal data will become part of a dataset for the purposes of an AI system.[139] Lastly, regular updates or auditing of the AI system should ensure that it is constantly checked for bugs or ways in which the system could be improved.

[139] Humble and Altun 2020 *Journal of Internet Law* 12 15.

BURNOUT IN THE WORKPLACE

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SUMMARY

Burnout, defined as chronic workplace stress that has not been successfully managed, has reached epidemic proportions in many countries. The condition has a profound impact on the health and well-being of individuals suffering from it as well as on their families, the workplace, and the economy. Mental and physical exhaustion, cynicism, reduced accomplishment, and mental impairment have been identified as dimensions of burnout. Research indicated that workplace culture and psychosocial risk factors such as overworking, tight deadlines, and long hours contribute to burnout. Current South African legislation does not offer sufficient protection to employees regarding mental illness caused by burnout. Consequently, measures incorporated into European health and safety legislation to prevent burnout and to deal with it once it has occurred, as well as judgments handed down in Australia and the United Kingdom regarding measures that employers should have taken to comply with their duty of care in respect of the mental health of their employees, may provide valuable guidance to South Africa. The article concludes by recommending that burnout be recognised as a distinguishable disease in South Africa; that the Occupational Health and Safety Act 85 of 1993 be amended to require employers to assess psychosocial risks at their workplace and to address these risks; that a code on psychosocial safety in the workplace be adopted guiding employers to recognise the symptoms of burnout and how to support affected employees; that regular working hours be reduced to 40 hours; that a national code as well as an individual code for each workplace be adopted on the right to disconnect; that amendments to the Basic Conditions of Employment Act 75 of 1997 be aligned with an amended Unemployment Insurance Act 63 of 2001 to provide for extended sick leave for burnout; that the Compensation for Occupational Injuries and Diseases Act 130 of 1993 be amended to include burnout as a compensable disease, making provision for psychotherapy, rehabilitation, and reintegration of employees suffering from burnout in the workplace.

1 INTRODUCTION

Burnout in the workplace is a mental health issue that by all indications seems to be reaching epidemic proportions in many countries.[1] However, it is by no means a new phenomenon. During the second half of the nineteenth century, the condition has been described as nervous exhaustion associated with the demands of urban life called neurasthenia[2] or

[1] ILO "Workplace Stress: A Collective Challenge" https://www.ilo.org/wcmsp5/groups/public/---ed_protect (accessed 2022-01-31) 1–49 7.

[2] Maslach, Leiter and Schaufeli "Measuring Burnout" in Cartwright and Cooper (eds) *The Oxford Handbook of Organizational Well-Being* (2009) 86–108 87.

"Americanitis",[3] thought to be caused by industrialisation and the concomitant fast pace of living of American society.[4] The Japanese use the term "karoshi" to refer to the extreme form of burnout, namely the phenomenon of people working themselves to death.[5]

Freudenberger first used the term burnout in 1974 to describe a condition of total exhaustion (linked with other symptoms) as an occupationally specific phenomenon.[6] From 1976 to date, Christina Maslach (a social psychologist) together with colleagues have been publishing articles on the measurement of burnout.[7] Their earliest research on models for establishing burnout focused on employees in human services which models were later adapted to apply to all professions.[8]

Burnout has a profound impact on the health of workers, their future ability to work, and on the workplace since it decreases productivity.[9] It causes high staff turnover, loss of motivation, increased absenteeism, and impacts on the worker's family and, ultimately, the healthcare system.[10]

Data on burnout in different countries points to a high prevalence of this condition. For example, in a 2018 survey in the United Kingdom (UK) undertaken by the Virgin Group in which workers were asked to assess themselves, 51 per cent of those surveyed indicated that they suffered from burnout.[11] Furthermore, in a 2020 online survey, 76 per cent of American workers reported that they experience worker burnout.[12] A recent study conducted by McKinsey in the United States of America (USA), which compared the burnout rate for different sexes, indicated that more women than men suffered from burnout (41 per cent compared to 35 per cent) with the percentage of women who suffer from burnout rising steadily. In 2020, 32 per cent of women and in 2021, 42 per cent of women suffered from

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3 Mohammed "Workplace Burnout is Nothing New" (15 June 2019) https://daily.jstor.org/workplace-burnout-is-nothing-new/ (accessed 2022-01-31).

4 Schaufeli, Leiter and Maslach "Burnout: 35 Years of Research and Practice" 2009 14 *Career Development International* 204–220 208.

5 Kanai "Karoshi (Work to Death) in Japan" 2009 84 *J Bus Ethics* 209–216; McCurry "Japanese Woman Dies from Overwork after Logging 159 Hours of Overtime in a Month" (5 October 2017) https://www.theguardian.com/world/2017/oct/05/japanese-woman-dies-overwork-159-hours-overtime (accessed 2022-01-31).

6 Lastokova, Carder, Rasmussen, Sjoberg, De Groene, Sauni, Vedovo, Lasfarques, Svartengren, Varga, Colosio and Peclova "Burnout Syndrome as an Occupational Disease in the European Union: An Exploratory Study" 2018 56 *Industrial Health* 160–165 161.

7 Heinemann and Heinemann "Burnout Research: Emergence and Scientific Investigation of a Contested Diagnosis" 2017 7 *SAGE Open* 1–12.

8 Demerouti, Bakker, Peeters and Breevaart "New Directions in Burnout Research" 2021 *European Journal of Work and Organizational Psychology* 686–691 686.

9 Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 687.

10 *Ibid*.

11 Aumayr-Pintar, Cerf and Parent-Thirion "Burnout in the Workplace: A Review of Data and Policy Responses in the EU" (10 September 2018) https://www.eurofound.europa.eu/publications/report/2018/burnout-in-the-workplace-a-review-of-data-and-policy-responses-in-the-eu (accessed 2022-01-31).

12 Spring Health "16 Important Statistics about Employee Burnout" https://www.springhealth.com/16-statistics-employee-burnout/ (accessed 2022-01-31).

burnout according to the McKinsey study. The survey indicated further that a third of these women considered resigning.[13]

A study by Höglund *et al* in Sweden indicated that the highest prevalence of burnout was found amongst young women. Men between the ages of 30-39 years had the highest burnout rate of all males, while men and women between the ages of 60 and 69 had the lowest rate of burnout.[14] Although these figures cannot be a basis for comparison due to the different diagnostic tools used, it does indicate the alarming and growing incidence of burnout.

Considering burnout in different professions, a 2019 survey of global industries conducted by Szimiegera indicated that employees in the hospitality sector have the highest risk of burnout, followed by persons involved in manufacturing, healthcare, teaching, and social work.[15]

A 2020 study by the International Labour Organisation (ILO) found that the Covid-19 pandemic exacerbated burnout with workers having to work from home, especially for parents with young children who have to cope with their job and simultaneously have to care for their children. Moreover, competing work- and home-life priorities have blurred the boundaries between working time and rest time, resulting in employees always being on call.[16]

Despite these concerns, there is a lack of acknowledgement of burnout as a distinguishable mental disorder.[17] In this article, the terms psychological illness, disorder or disease, mental illness disorder, or disease, will be used interchangeably. In certain contexts, the term psychiatric injury or disease will be used.

This article argues that to prevent burnout and to provide remedies for employees suffering from burnout, it should be recognised as a distinguishable mental disease or disorder in South Africa. Section 2 of this article delves into the definition of burnout and discusses the most widely recognised model designed to measure burnout. Section 3 discusses the causes and effects of burnout, while section 4 deals with the right to disconnect. Burnout in academia as an example of burnout in a specific

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13 McKinsey & Co "Women in the Workplace 2021" https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2021.pdf (accessed 2022-01-31).

14 Höglund, Hakelind and Nordin "Severity and Prevalence of Various Types of Mental Ill-health in a General Adult Population: Age and Sex Differences" 2020 20 *BMC Psychiatry* 1–11.

15 Szimiegera "Industries with the Highest Employee Burnout Rate Worldwide in 2019" (8 November 2021) https://www.statista.com/statistics/1274617/industries-burnout-globally/ (accessed 2022-01-31). See also Kheswa "Factors and Effects of Work-Related Stress and Burnout on the Well-Being of Social Workers in the Eastern Cape Province, South Africa" 2019 45 *SA Journal of Industrial Psychology* 1661.

16 International Labour Organisation (ILO) *Managing Work-Related Psychosocial Risks During the COVID-19 Pandemic* (2020) https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/instructionalmaterial/wcms_748638.pdf 19–20; Jackson and Rothman "An Adapted Model of Burnout for Educators in South Africa" 2005 25 *South African Journal of Education* 100–108. See also Fu, Greco, Lennard and Dimotakis "Anxiety Responses to the Unfolding Covid-19 Crisis: Patterns of Change in the Experience of Prolonged Exposure to Stressors" 2021 106 *Journal of Applied Psychology* 48–61.

17 Heinemann and Heinemann 2017 *SAGE Open* 1–12.

sector is discussed in section 5. Section 6 deals with the protection of employees suffering from burnout as well as remedies available to victims in Europe, the UK, and Australia. Section 7 deals with the current (and in certain aspects inadequate) protection of and remedies for employees who suffer from burnout in South Africa. The conclusion and recommendations are contained in section 8.

2 DEFINITION AND MODEL FOR ASSESSING BURNOUT

There is no generally accepted definition of burnout. Maslach and Leiter, leading authorities on research regarding burnout, define the phenomenon as a psychological syndrome emerging as a prolonged response to chronic interpersonal stressors on the job. According to their model for measuring burnout, the Maslach Burnout Index (MBI), the three key dimensions of burnout are "overwhelming exhaustion, feelings of cynicism and detachment from the job as well as a sense of ineffectiveness and a lack of accomplishment."[18]

The authors explain the three dimensions in more detail as follows:

> "The exhaustion dimension is also described as wearing out, loss of energy, depletion, debilitation, and fatigue. The cynicism dimension was originally called depersonalization (given the nature of human services occupations), but was also described as negative or inappropriate attitudes towards clients, irritability, loss of idealism, and withdrawal. The inefficacy dimension was originally called reduced personal accomplishment, but was also described as reduced productivity or capability, low morale, and an inability to cope."[19]

Added to the cynicism dimension are factors such as the "inability to feel",[20] disillusionment, and a lack of compassion[21] (also known as compassion fatigue). Persons suffering from burnout have more recently reported a fourth dimension to the existing three, namely cognitive impairment[22] with symptoms such as slow thinking and decreased creativity, often for extended periods.[23]

Although there are other models to assess burnout, the MBI has been called the "almost universally accepted gold standard to measure burnout."[24]

The World Health Organisation (WHO) has listed burnout as an occupational phenomenon in the most recent International Classification of

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18 Maslach *et al* in Cartwright and Cooper *The Oxford Handbook of Organizational Well-Being* 86–108 90.

19 Maslach and Leiter "Understanding the Burnout Experience: Recent Research and its Implications for Psychiatry" 2016 15 *World Psychiatry* 103–111.

20 Tavella, Hadzi-Pavlovic and Parker "Burnout: Re-examining its Key Constructs" 2020 287 *Psychiatry Research* 1.

21 Schaufeli *et al* 2009 *Career Development International* 207.

22 Schaufeli, Desart and De Witte "Burn-out Assessment Tool (BAT) Development, Validity, Reliability" 2020 17 *Int J Environ Res Public Health* 9495.

23 Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 686.

24 Bria, Spânu, Băban and Dumitraşcu "The Factorial Validity of the Maslach Burnout Inventory − General Survey (MBI-GS) Across Occupational Groups and Countries" 2000 73 *Journal of Occupational and Organizational Psychology* 53−66.

Diseases (ICD-11), but the organisation does not recognise burnout as a disease. The WHO defines burnout as "a syndrome conceptualized as resulting from chronic workplace stress that has not been successfully managed",[25] and characterises burnout in terms of the same three dimensions identified by the MBI. The WHO further clarifies that burnout only relates to work-related stress, thereby indicating that employers may have a role in preventing burnout. Before a person can be diagnosed with burnout, factors not connected to the person's job will thus have to be ruled out.[26] The WHO, in a seemingly ambivalent manner, included burnout in their list of diseases as an occupational phenomenon yet simultaneously denied that it is a disease.

Authors such as Maslach and Leiter, Chirico, as well as Parker and Tavella argue that burnout should be recognised as a distinguishable disease because it is job-specific whereas depression and other mental illnesses are more general and context-free diseases.[27] The three dimensions of burnout of the MBI model will moreover not always manifest in people who suffer from other types of psychiatric illnesses.

2 1 Clinical burnout

Burnout does not happen suddenly, it is often a slow process with the worker feeling increasingly exhausted, responsible for a high workload, guilty about less time with the family, cutting out on all other activities, and eventually losing sight of the meaning of life entirely – all signs pointing to chronic burnout.[28] A question that has to be answered is how can the "tipping point" be diagnosed to distinguish when someone is suffering from burnout instead of only displaying symptoms of burnout?

Clinical psychologists regard burnout as "a mental disorder assessed in patients who apply for psychological treatment and no longer work because of their symptoms or experience of serious problems in functioning at work."[29] This definition of burnout is mostly referred to as "clinical burnout".[30]

The difference between the conceptualisation of burnout by clinical physicians and work- and organisational psychologists (such as Maslach) is that the former takes a biological view of the condition while the latter mainly focuses on psychosocial factors.[31]

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25 WHO "Burnout an 'Occupational Phenomenon': International Classification of Diseases" (28 May 2019) https://www.who.int/news/item/28-05-2019-burn-out-an-occupational-phenomenon-international-classification-of-diseases (accessed 2022-01-31) 9.

26 *Ibid*.

27 Maslach and Leiter 2016 *World Psychiatry* 103–111; Chirico "Burnout Syndrome and Depression are not the Same Thing" 2007 190 *The British Journal of Psychiatry* 81; Parker and Tavella "Is Burnout Simply a Stress Reaction?" 2022 *Australian and New Zealand Journal of Psychiatry*.

28 Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 688.

29 Van Dam "A Clinical Perspective on Burnout: Diagnosis, Classification, and Treatment of Clinical Burnout" 2021 30 *European Journal of Work and Organizational Psychology* 732–741.

30 Van Dam 2021 *European Journal of Work and Organizational Psychology* 1.

31 *Ibid*.

The Tenth Revision of the WHO's International Classification of Diseases (ICD-10) formulates criteria for the diagnosis of neurasthenia (the term is omitted from the ICD-11's list of diseases) which are still used for the clinical diagnosis of burnout. The criteria are physical and/or emotional exhaustion and at least two of the following symptoms: "dizziness, dyspepsia, muscular aches or pains, tension headaches, inability to relax, irritability, and sleep disturbance".[32] Clinical psychologists use these criteria in the Netherlands to diagnose burnout (*overspannenheid*)[33] with the requirement that symptoms must be work-related.[34]

Apart from the above symptoms, clinical burnout further manifests as cognitive impairment of executive functions, impacts problem solving and memory retention, and causes difficulties regarding attention and concentration and slower reaction time. A lack of ability to control emotions and behavioural problems such as excessive drinking may be further indicators of chronic burnout. While in the early stages of burnout a person may become hyperactive, a person in the final stages may exhibit a lack of motivation and adopt a passive attitude caused by feeling helpless about the situation.[35]

It is important to diagnose clinical burnout and to assess the degree of cognitive impairment in order to prescribe the necessary treatment for the person, to ultimately reintegrate them into the workplace,[36] and further to provide a basis for claiming from health insurance companies,[37] delictual damages from employers and workmen's compensation.

Research indicates that persons suffering from mild burnout will normally recover in a period of six to twelve weeks, while those suffering from clinical burnout may not be able to work for a year or longer and will often relapse.[38]

3 CAUSES AND EFFECTS OF BURNOUT

This section argues that an unsafe psychosocial workplace undoubtedly contributes to burnout.[39] Different aspects of an unsafe psychosocial workplace are discussed below.

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32 Schwarz "Why is Neurasthenia Important in Asian Cultures?" 2002 176 *West J Med* 257–258.

33 Schaufeli *et al* 2009 *Career Development International* 214.

34 Lastakova, Boersma and Brown "The Tired Hero and Her (Il)legitimation: Reworking Parsons to Analyse Experiences of Burnout within the Dutch Employment System and Lifeworld" 2020 265 *Social Science and Medicine* 113471.

35 Van Dam 2021 *European Journal of Work and Organizational Psychology* 5.

36 Gavelin, Domellöf, Åström, Nelson, Launder, Neely and Lampit "Cognitive Function in Clinical Burnout: A Systematic Review and Meta-analysis" 2021 *Work and Stress*.

37 Van Dam 2021 *European Journal of Work and Organizational Psychology* 2.

38 *Ibid*.

39 Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686–691 688.

3 1 Discrepancies between the expectations of employers and employees

Leiter and Maslach have identified six areas of work-life that provide a paradigm for the organisational context of burnout.[40] The authors found that if there is a discrepancy in the "psychological contract" between the employer and the employee (whether explicit or implicit), it may lead to burnout. This discrepancy leads to a lack of alignment between the expectations of employees regarding the job and the reality of the job itself. The discrepancy could exist regarding workload, control, rewards, community, fairness, and values.

Leiter and Maslach found that there is a strong correlation between workload and exhaustion. If workers do not have the necessary support to enable them to cope with the workload, it could eventually lead to burnout. The second area of work-life that may bear a correlation to burnout is control. If there is a role conflict and/or a lack of direction by management, the employee's lack of control over their workload may lead to exhaustion and ultimately burnout. Thirdly, a discrepancy between rewards such as financial rewards or recognition by superiors and colleagues, and the demands placed on the worker may cause feelings of inefficacy which is one of the dimensions of burnout.[41] Fourth, community (social support) encompasses both internal support by supervisors and colleagues and external support by family members. Where there is a lack of social support, there is a strong correlation between the demands of the job and exhaustion. In the fifth place, a lack of fairness may also contribute to burnout. The authors have found that employees are not only interested in the outcome of procedures, but also in the fairness of procedures for decision making: "A fair decision is one in which people have an opportunity to present their arguments and in which they are treated with respect and politeness."[42] Lastly, if a conflict arises between individual values and organisational values[43] it may drain energy, undermine efficacy, and contribute to employees feeling that their work is meaningless, which is another dimension of burnout, namely cynicism.[44] This could be the case where there is a discrepancy between an organisation's stated values and the reality of how the organisation is being managed. Employees may perceive this as "corporate hypocrisy" and may become disillusioned.[45]

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40 Leiter and Maslach "Six Areas of Worklife: A Model of the Organizational Context of Worklife" 1999 21 *Journal of Health and Human Services Administration* 472–489.

41 Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 478; Montero-Marin, Araya, Blasquez, Skapinakis, Vizcaino and Campayo "Understanding Burnout According to Individual Differences: Ongoing Explanatory Power Evaluation of Two Models for Measuring Burnout Types" 2012 12 *BMC Public Health*.

42 Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 481.

43 Schaufeli *et al* 2009 *Career Development International* 209.

44 Schaufeli *et al* 2009 *Career Development International* 209; Zamini, Zamini and Barzegary "The Relationship Between Organizational Culture and Job Burnout Among the Professors and Employees in the University of Tabriz" 2011 30 *Procedia – Social and Behavioral Sciences* 1964–1968.

45 *Ibid*.

Aumayr-Pintar identifies workload, as the main risk of burnout and further emphasises the lack of employee autonomy as a trigger for burnout.[46] Huhtala and Tolvanan further found that an organisation's low ethical culture could also cause burnout.[47]

3 2 Workplace culture

Kokt defines workplace culture as "the distinctive pattern of shared assumptions, values and norms that shape the socialisation activities, language, symbols, rites and ceremonies of a group of people."[48]

Four main types of organisational cultures have been identified: first, a rational culture, aimed at achieving the goals of the business, namely, to be competitive and productive; secondly, a hierarchical culture, with rigid rules; thirdly a group culture with considerable support from colleagues; and fourthly, a developmental culture which offers development opportunities and encourages creativity and risk-taking. It was found that a rational culture and a hierarchically structured workplace-based on power relationships pressurised employees which could lead to higher stress levels and ultimately burnout.[49] A workplace culture based on effective communication and some individual autonomy was shown to be less prone to lead to burnout.[50]

Apart from the four different workplace cultures discussed above, a workplace culture of encouraging workers to habitually work overtime (whether explicitly or not), to work late at night, or send emails in the early hours of the morning could contribute to burnout.[51] This could certainly be aligned with the "rational culture" of some organisations described above. If a culture of glorifying overwork and viewing it as a marker of success is embedded in a workplace, there is a danger that employees will not take annual leave and will not rest during weekends. Employees who are exhausted, sleep-deprived, and leading an unbalanced life will become the norm and be seen as something to aspire to, especially if this is the example of "the ideal worker" set by managers and other senior persons at the

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46 Aumayr-Pintar *et al* https://www.eurofound.europa.eu/publications/report/2018/burnout-in-the-workplace-a-review-of-data-and-policy-responses-in-the-eu.

47 Huhtala, Tolvanen, Mauno and Feldt "The Associations between Ethical Organizational Culture, Burnout, and Engagement: A Multilevel Study" 2015 30 *Journal of Business and Psychology* 399–414.

48 Kokt "Impact of Organisational Culture on Job Stress and Burnout in Graded Accommodation Establishments in the Free State province, South Africa" 2015 27 *International Journal of Contemporary Hospitality Management* 1198–1213 1200.

49 Belias and Versanis "Organizational Culture and Job Burnout*"* 2014 2 *International Journal of Research in Business Management* 43–61 57.

50 Belias and Varsanis 2014 *International Journal of Research in Business Management* 43−61 55.

51 Lufkin "Why Do We Buy into the Cult of Overwork" (10 May 2021) https://www.bbc.com/worklife/article/20210507 (accessed 2022-01-31); LaMere "A Culture of Overworking" (11 December 2019) https://reporter.rit.edu/leisure/culture-overworking (accessed 2022-01-31); Ansel "How the First in Last Out Ethic is Creating a Culture of Overwork" (12 July 2016) https://www.theguardian.com/sustainable-business/2016/jul/12/overworked-america-long-hours-productivity-balance (accessed 2022-01-31).

workplace. Serious physical, psychological, and social problems and eventually burnout are almost a certainty.

The effects of burnout include a heightened risk of heart attacks, psychosomatic illnesses, substance abuse, deteriorating family relationships, insomnia, and depression.[52] A heavy workload could lead to absenteeism (frequent periods of sick leave),[53] or presenteeism with employees suffering from burnout but still insisting to be at work.[54] This could lead to decreased productivity and an inability to cope, thus exacerbating the symptoms of burnout.[55]

It seems as if workload (long hours, tight deadlines), inefficient resources (support at work and home), and a lack of feedback and autonomy may be among the most important factors to play a role in burnout.[56]

External factors such as a downturn in the economy and increased competition because of globalisation undoubtedly also play a role.

3 3 The correlation between personality types and burnout

Five personality types have proved to have either a positive or negative correlation with burnout. These are first, neuroticism (anxiety, depression, self-consciousness, and affective instability); secondly, extraversion (enjoyment of social contact, experiencing positive emotions, taking the lead to initiate activities, being lively and energetic); thirdly, openness to experience (appreciation of beauty in objects, open to new ideas, intellectually curious and creative); fourthly, agreeableness (kindness, helpfulness, honesty, and genuineness, capacity to restrain aggression, sympathetic, and showing humility); and fifthly, conscientiousness (orderly and neat, ambitious, hard worker, reliable, self-disciplined and goal-driven).

Neuroticism has been shown to have a positive correlation with burnout.[57] The same can be said of conscientious employees[58] since people with these qualities are often perfectionists who drive themselves too hard.[59] The

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52 Belias and Varsanis 2014 *International Journal of Research in Business Management* 47.

53 ILO https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---safework/documents/instructionalmaterial/wcms_748638.pdf 14.

54 ILO https://www.ilo.org/wcmsp5/groups/public/---ed_protect 7.

55 Smuts and Smit "Excessive Stress and Eliminating Barriers to Decent Work" 2020 41 *ILJ* 779–804 791.

56 Demerouti *et al* 2021 *European Journal of Work and Organizational Psychology* 686−691 687.

57 Maylor *The Relationship between Big Five Personality Traits and Burnout* (doctoral thesis Walden University) 2018 40.

58 De Vine and Morgan "The Relationship Between Personality Facets and Burnout" 2020 46 *South African Journal of Industrial Psychology;* Magnano, Paolillo and Barrano "Relationships between Personality and Burn-Out: An Empirical Study with Helping Professions' Workers" 2015 1 *International Journal of Humanities and Social Science Research* 10–19 12.

59 Childs and Stoeber "Do You Want Me to be Perfect? Two Longitudinal Studies on Socially Prescribed Perfectionism, Stress and Burnout in the Workplace" 2012 26 *Work and Stress* 347–364; Philp, Egan and Kane "Perfectionism, Over Commitment to Work, and Burnout in

personality type of an employee may therefore be relevant in the context of civil claims against employers for a psychiatric injury. An employer may argue that it is not liable since it was not foreseeable that a neurotic employee would suffer burnout. Landman, referring to South African and UK judgments, points out that the "thin skull" rule has been interpreted to mean that a wrongdoer must take a victim as he finds him. The wrongdoer can thus not avoid liability by relying on a pre-existing weakness of the complainant.[60]

3 4 The impact of hours of work on employee burnout

It has long been recognised that extensive work hours may pose a health risk to employees. The first Convention of the ILO was the Hours of Work (Industry) Convention, 1919 (No 1). Several other conventions limiting hours of work, making provision for paid leave, and weekly rest periods have since been adopted.[61]

Research supported by the WHO and the ILO indicates that the risk of ischemic heart disease (where the heart receives insufficient blood and oxygen) and strokes are considerably higher for persons working more than 55 hours a week compared to persons working 35 to 40 hours a week.[62] In 2016, 488 million people globally worked more than 55 hours per week, which led to an estimated 745 194 deaths and the disablement of 23.3 million people due to ischemic heart disease and stroke.[63] There are two pathways leading from excessive work hours to disease. The first is physical: stress hormones are released which negatively affect the cardiovascular system causing structural lesions which could be fatal. The second pathway is behavioural patterns (which could also be fatal) following excessive work hours such as a lack of exercise, substance abuse, bad eating habits, and smoking.[64]

Why do people work such long hours? Apart from the most obvious reason that employers often expect output that can only be achieved by long work hours, some workers, earning small salaries, have to work the maximum (voluntary) overtime allowed by law to make ends meet.[65] It is

Employees Seeking Workplace Counselling" 2012 64 *Australian Journal of Psychology* 68–74 64; Tavella *et al* 2020 287(2020) *Psychiatry Research* 287 (2020) 3.

60 Landman and Ndou "Some Thoughts on Development of Claims for Pure Some Thoughts on Developments Regarding the Recovery of Damages for Pure Psychiatric or Psychological Injury Sustained in the Workplace" 2015 36 *ILJ* 2460–2473 2471.

61 See, for example, Hours of Work (Commerce and Offices) Convention, 1930 (No 30).

62 Pega, Nafradi, Momen, Ujita, Streicher and Pruss-Ustun "Global, Regional, and National Burdens of Ischemic Heart Disease and Stroke Attributable to Exposure to Long Working Hours for 194 Countries, 2000–2016: A Systematic Analysis from the WHO/ILO Joint Estimates of the Work-related Burden of Disease and Injury" 2021 154 *Environment International*.

63 *Ibid*.

64 *Ibid*.

65 93rd International Labour Conference Working Hours Around the World: Balancing Flexibility and Protection https://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_075524/lang--en/index.htm (accessed 2022-01-31).

ironic that those at the other end of the spectrum, earning high salaries and whose working hours are typically not monitored, often work extremely long hours too. The reason for this has been ascribed to stringent competition, a glorification of overwork sprouting from the protestant work ethic that emphasises the virtue of hard work, and also the words of high-flying achievers such as Elon Musk who said that "nobody ever changed the world on 40 hours a week".[66] Sadly overwork has become something to boast about to impress people.

In a 2019 Organisation for Economic Co-operation and Development (OECD) survey of work-life balance in different countries,[67] the average working hours for each country were indicated as well as the percentage of workers working "long hours", which was defined as more than 50 hours per week. The survey indicated that South Africans work among the longest hours in the world, but that productivity was low. A comparison between India and Germany provides an example of a country with long working hours and low productivity and a country with low average hours and high productivity respectively.[68] It is a small wonder that countries with low average hours and a low percentage of workers working long hours are at the top of the World Happiness Report.[69]

4 THE RIGHT TO DISCONNECT

The notion of being always available and "reachable", made possible by electronic communication, is exacerbated by the Covid-19 pandemic with employees working flexible hours from home. The line between work time and personal time has become more blurred than ever, which makes it difficult for employees to maintain a work-life balance.[70] One of the measures to counter this problem is to implement a "right to disconnect". Eurofound defines the right to disconnect as "a worker's right to be able to disengage from work and refrain from engaging in work-related electronic communications, such as emails or other messages, during non-work hours".[71]

66 Lufkin https://www.bbc.com/worklife/article/20210507.

67 OECD Better Life Index 2019 https://www.oecdbetterlifeindex.org/#/11111111111 (accessed 2022-01-31).

68 Time Analytics "Average Working Hours in 2021 | Countries | Cities |Trends | Professions" https://timeanalyticssoftware.com/average-working-hours-in-2021-countries-cities-trends-professions/ (accessed 2022-01-31).

69 World Population Review "Happiest Countries in the World" https://worldpopulationreview.com/country-rankings/happiest-countries-in-the-world (accessed 2022-01-31).

70 Waizenegger, McKenna, Cai and Benz "An Affordance Perspective of Team Collaboration and Enforced Working from Home during COVID-19" 2020 29 *European Journal of Information Systems* 429–442 430.

71 EurWork European Observatory of Working Life (1 December 2021) https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect (accessed 2022-01-31).

On 21 January 2021, the European Parliament adopted a resolution supporting the right to disconnect.[72] The resolution entails that employers may not penalise employees for disconnecting after hours.[73] The European Commission is now required to consider adopting a directive on the right to disconnect after working hours.[74]

European-based companies such as Volkswagen, BMW, and Puma practice self-regulation and have adopted measures to restrict emails to be sent to employees by managers after hours.[75] These firms installed software to put emails and official calls on hold after hours.[76] In this regard, Secunda points out that German employers are more willing to restrict hours than employers in, for example, the USA since in the USA there is a culture of glorifying continuous work while the German work culture places a premium on "productive, effective use of employee time".[77]

France took the lead in Europe in 2016 by adopting legislation (the El Khomri law) requiring employers to formulate a policy on the right to disconnect with the participation of their employees.[78] By 2021 Belgium, France, Italy, and Spain have adopted legislation regarding the right to disconnect.[79]

Instead of legislation, Ireland has adopted a Code of Practice on the Right to Disconnect.[80] The aim is for employers to develop a workplace culture that supports employees disconnecting after hours. Significantly, one of the aims is to "provide assistance to those employees who feel obligated to routinely work longer hours than those agreed in their terms and conditions of employment". It seems as if guidance or counselling would be offered to so-called workaholics.[81] Employees can refer an unresolved dispute about the right to disconnect in terms of the Code to the Work Relations Commission.[82]

The next section discusses burnout among academics as an example of burnout in a specific sector.

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72 European Parliament "Resolution of 21 January 2021 with Recommendations to the Commission on the Right to Disconnect" https://www.europarl.europa.eu/doceo/document/TA-9-2021-0021_EN.html (accessed 2022-01-31).

73 Article 26.

74 Eurofound "The Right to Disconnect" https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect (accessed 2022-01-31).

75 Secunda "The Employee Right to Disconnect" 2019 9 *Notre Dame Journal of International and Comparative Law* 1–39 29.

76 Hesselberth "Discourses on Disconnectivity and the Right to Disconnect" 2018 20 *New Media & Society* 1994–2010 1995.

77 Secunda 2018 *Notre Dame Journal of International and Comparative Law* 30.

78 Secunda 2018 *Notre Dame Journal of International and Comparative Law* 28.

79 Eurofound https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect.

80 Workplace Relations Commission (WRC) "Code of Practice for Employers and Employees on the Right to Disconnect" https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf (accessed 2022-01-31).

81 WRC https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf 3.

82 WRC https://www.workplacerelations.ie/en/what_you_should_know/codes_practice/code-of-practice-for-employers-and-employees-on-the-right-to-disconnect.pdf 10.

5 BURNOUT IN ACADEMIA AS AN EXAMPLE OF BURNOUT IN A SPECIFIC SECTOR

In a survey of 1 100 academics in the United States, it was found that the Covid-19 pandemic had a significantly negative impact on academics to such an extent that 55 per cent of those participating in the survey indicated that they have seriously considered making a career change or taking early retirement. This percentage is more than double compared to those who considered such steps in 2019. Almost 70 per cent of participants felt stressed and fatigued compared to the 32 per cent in 2019.[83] While 82 per cent of women indicated that their workload has increased, only 59 per cent of men indicated that this was the case, clearly showing that female academics in the workplace have been impacted disproportionately.[84]

In the South African context, Rothman and Barkhuizen found that academics suffer a significant risk of burnout if there is a lack of job resources concomitant to the person's workload. Further, poor relations with a supervisor, a lack of clarity of what is expected of the academic, little or no room for participating in decision making, low diversity of duties, and a lack of learning and training opportunities were conducive to burnout.[85] It was found that unresolved stressors, of which Covid-19 is an example, may lead to heightened anxiety and disengagement from work.[86]

Research involving South African academics indicated that exhaustion levels among academics are high for the age group 20-39, most likely caused by a heavy workload of undergraduate teaching which is not as rewarding as postgraduate teaching,[87] often reserved for senior academics. Undergraduate teaching could also be more stressful because of larger classes, more marking to be done than in the case of postgraduate classes, and more time spent addressing queries from students.[88] Academics aged 40-49 demonstrated higher levels of burnout due to increased responsibilities in the faculty.[89] Senior academics (60-69) were less prone to burnout because of their established status as professors through research outputs without experiencing the stress of having to work for career progression.[90]

Academics have pointed out that there is increased pressure to publish and that they have to fulfil more roles than was the case traditionally, namely

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83 Business Wire "Fidelity Investments and The Chronicle of Higher Education Study" (25 February 2021) https://www.businesswire.com/news/home/20210225005616/en/Fidelity-Investments-The-Chronicle-of-Higher-Education-Study (accessed 2022-01-31).

84 Business Wire https://www.businesswire.com/news/home/20210225005616/en/Fidelity-Investments-The-Chronicle-of-Higher-Education-Study.

85 Rothman, Barkhuizen and Van de Vijver "Burnout and Work Engagement of Academics in Higher Education Institutions in South Africa: Effects of Dispositional Optimism" 2014 30 *Stress Health* 322–333 326.

86 Fu *et al* 2021 *Journal of Applied Psychology* 48 48–50.

87 Rothman and Barkhuizen "Burnout and Work Engagement of Academics in Higher Education Institutions in South Africa" 2008 22 *SAJHE* 439–456 445.

88 Rothman and Barkhuizen 2008 *SAJHE* 439–456 451–452.

89 *Ibid*.

90 Rothman and Barkhuizen 2008 *SAJHE* 451

to obtain research grants from overseas;[91] establish and teach extracurricular courses; market the university; obtain extra funding;[92] and teach underprepared students.[93] All these demands can add up and lead to burnout.[94] Regarding the MBI, female academics experienced higher levels of exhaustion than male colleagues, while male academics seemed to be higher on a scale of depersonalisation or cynicism (detachment from students) than female colleagues.[95]

A study among academic physicians (attached to academic medical centres) indicated that there is a strong correlation between burnout and the percentage of time spent on the activity that they found most meaningful.[96] For persons spending 20 per cent or more of their time on activities that they found meaningful, the rate of burnout is 50 per cent less than for those who spent less than 20 per cent of their time on an activity that they found meaningful, be it teaching, consulting patients, conducting research or being involved in administrative tasks.[97] This will be different for each person, so this is a question of job fit. Not everyone finds meaning in the same tasks. Having said that, academics presumably do not enter the profession to be involved in administrative tasks which are becoming a progressively greater burden for academics. They would prefer to be involved in either research or lecturing or both and according to the results of the research above, could suffer from burnout if they do not spend at least 20 per cent of their time on their preferred activities.

The next section discusses research on the prevalence of burnout, the protection against burnout, and the remedies available to employees suffering from burnout in Europe, the UK, and Australia. The discussion of the position in Europe indicates a progressive acknowledgement of burnout as a distinguishable form of psychological harm. Case law in the UK and Australia further provides valuable insight into the psychosocial factors at workplaces that lead to burnout and the circumstances in which courts held employers liable for their employees' damages.

6 PROTECTION AGAINST AND REMEDIES FOR EMPLOYEES WHO SUFFER FROM BURNOUT IN EUROPE, THE UK AND AUSTRALIA

6 1 Europe

Data on working hours, average salary, and work-life balance were considered by the OECD to establish which European countries' workers run the highest risk of burnout. The "world happiness index" and the percentage

91 *Ibid*.

92 Rothman *et al* 2014 *Stress Health* 322–333 323.

93 Tewari and Ilesanmi "Teaching and Learning Interaction in South Africa's Higher Education: Some Weak Links" 2020 6 *Cogent Social Sciences*.

94 Rothman and Barkhuizen 2008 *SAJHE* 451.

95 Rothman and Barkhuizen 2008 *SAJHE* 442–443.

96 Shanafelt, West, Sloan, Novotny, Poland, Menaker, Rummans and Dyrbye "Career Fit and Burnout Among Academic Faculty" 2009 169 *Arch Intern Med* 990–995 992.

97 Shanafelt *et al* 2009 *Arch Intern Med* 994.

of employees reporting risk factors for mental health at the workplace were taken into account. The finding was that employees in Portugal, Greece, and Latvia were most at risk of burnout. Countries least at risk were Denmark, Germany, and Lithuania.[98] Research regarding burnout in certain large cities revealed that Tallinn (in Estonia), Oslo, Copenhagen, Barcelona, Amsterdam, and Frankfurt have the lowest rate of burnout while cities with the highest burnout rate are Tokyo, Mumbai, Istanbul, Los Angeles, and Buenos Aires.[99]

In Europe burnout is increasingly seen as a condition caused by psychosocial factors at the workplace.[100] Researchers found that a high workload, a low level of control, a lack of support at the workplace, and a discrepancy between effort and rewards contributed to burnout.[101] These findings confirm the results of the research by Maslach and Leiter discussed above.[102]

Council Directive 89/391/EEC deals with physical as well as mental health and safety at work.[103] To support mental health in workplaces, the European Commission published an e-guide to assist employers in managing stress and psychosocial risks.[104]

Nine countries in Europe, namely Denmark, Estonia, France, Hungary, Latvia, Netherlands, Portugal, Slovakia, and Sweden acknowledge burnout as an occupational disease, although the term is not explicitly used. Latvia is the only country that included burnout explicitly in a list of occupational diseases and the country further plans to adopt labour legislation to prescribe measures to prevent burnout in the workplace.[105] Denmark, France, Latvia, Portugal, and Sweden compensate persons who suffer from burnout in terms of their workmen's compensation schemes.[106]

Countries in Europe use different criteria to establish whether workers suffer from burnout. In Denmark, where the most claims were lodged, burnout syndrome will be recognised if a psychiatric diagnosis was made

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98 Business Money "End of year WFH Burnout -stressed out countries revealed in new study" (11 December 2020) https://www.business-money.com/announcements/end-of-year-wfh-burnout-stressed-out-countries-revealed-in-new-study/ (accessed 2022-01-31); SmallBusinessPrices.co.uk "The European Countries with the Highest Risk of Burnout" https://smallbusinessprices.co.uk/european-employee-burnout/ (accessed 2022-01-31).

99 Corporate Vision "Global Cities with the Lowest and Highest Levels of Workplace Burnout Revealed" (26 March 2020) https://www.corporatevision-news.com/global-cities-with-the-lowest-and-highest-levels-of-workplace-burnout-revealed/ (accessed 2022-01-31).

100 Lastokova *et al* 2018 *Ind Health* 160–165.

101 Lastokova *et al* 2018 *Ind Health* 161.

102 Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 472–489.

103 European Agency for Safety and Health at Work "Interpretative Document of the Implementation of Council Directive 89/391/EEC in relation to Mental Health in the Workplace" https://osha.europa.eu/en/legislation/guidelines/interpretative-document-implementation-council-directive-89391eec-relation (accessed 2022-01-31).

104 European Agency for Safety and Health at Work https://osha.europa.eu/en/tools-and-resources/e-guides/e-guide-managing-stress-and-psychosocial-risks.

105 Eurofound https://www.eurofound.europa.eu/observatories/eurwork/industrial-relations-dictionary/right-to-disconnect 9.

106 Lastokova *et al* 2018 *Ind Health* 162–163.

after exposure to, *inter alia*, working in a stressful environment, strict deadlines, and inadequate support from management.[107]

In the Netherlands, burnout is recognised as an occupational illness, and doctors are trained to diagnose and treat the condition. The term "overspanning" is used and the factors in the diagnosis of neurasthenia by the WHO in its ICD-10 list are applied for a diagnosis in terms of the "Continued Payment of Salary Act".[108] The Netherlands has an insurance-based health care system[109] in terms of which employees may be entitled to undergo psychotherapy; participate in reintegration programmes; and take sick leave (sometimes on full salary) paid by the employer for up to two years, as well as rehabilitation for a number of years. In exceptional cases, employees will be entitled to monetary compensation.[110]

6 2 The United Kingdom

The 2020 Labour Force Survey and the 2021 statistics on work-related stress, anxiety, and depression in the UK indicated that these conditions comprised 51 per cent of ill-health at workplaces. Half of the participants reported that the pandemic exacerbated their stress levels.[111] The above conditions caused 55 per cent of all days lost in the workplace due to ill-health. Workers in healthcare, education (teachers and other persons involved in education), and social care experienced the highest levels of stress. Workers who participated in the survey indicated that a high workload, rigid deadlines, a high level of responsibility, insufficient support from management, unclear employment roles, and a lack of efficient communication with co-workers contributed to burnout.[112]

In the UK, employers are responsible for the physical as well as mental safety of their employees in terms of the Health and Safety at Work Act 1974. They have a legal duty to conduct a workplace risk assessment and on the basis of this make changes to work practices to reduce the risk to employees' health.[113]

Employees in the UK may institute civil claims against their employers and may also claim compensation in terms of employer's liability insurance. In 1973 the separate compensation fund to which UK employers had to contribute was abolished[114] and compensation was from then on funded by taxes. However, employers are required to insure (with private insurers) against tort claims by employees for personal injury.[115] Many of these claims

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107 Lastokova *et al* 2018 *Ind Health* 163.

108 Lastakova *et al* 2020 *Social Science and Medicine* 2.

109 *Ibid*.

110 *Ibid*.

111 HSE "Work-related Stress, Anxiety or Depression Statistics in Great Britain" (16 December 2021) https://www.hse.gov.uk/statistics/causdis/stress.pdf (accessed 2022-01-31).

112 Labour Force Survey "Work-related Stress, Depression or Anxiety Statistics in Great Britain" (4 November 2020) https://www.hse.gov.uk/statistics/causdis/stress.pdf (accessed 2022-01-31).

113 UK Statutory Instruments: The Management of Health and Safety at Work Regulations 1999 No 3242.

114 S 94(1) of the Social Security Act 1973.

115 Employers Liability (Compulsory Insurance Act) 1969.

are settled out of court.[116] If an employee was successful in claiming against their employer as well as against the Compensation Fund, the State can claim back the amount paid by the Compensation Fund.[117] In terms of the Industrial Injuries Compensation Scheme, an employee must prove that the injury arose out of and in the course of employment.[118] Regarding diseases, a presumption that the injury or disease arose out of and in the course of employment will only be triggered if the illness can be linked to a particular occupation.[119] Stress-related illness is not included in the list of diseases. Employees suffering from mental illness will only be successful in their claim if the mental illness is related to a physical accident at work, or if the employee saw an accident that happened at work that had caused the mental injury. Lewis remarks that it is not surprising that workers instituting mental stress claims in terms of workmen's compensation find it almost impossible to claim.[120]

Two seminal UK judgments that dealt with civil claims against employers in so-called "work stress" cases are discussed below. These judgments provide insight into the circumstances in which courts would hold employers liable for the damages suffered by their employees as a result of burnout, although the term is not used. In the first case, *Walker v Northumberland County Council* (*Walker*),[121] a social worker who was responsible for an area fraught with child abuse complained for three years about an increasing workload but to no avail. He eventually suffered a breakdown with symptoms of "mental exhaustion, acute anxiety, headaches, sleeplessness, irritability, inability to cope with any form of stress …" – clearly a case of burnout. Returning to work after a period of sick leave, he found a large paperwork backlog, exacerbating his symptoms. After a second breakdown, he was dismissed based on permanent ill-health.

The court ordered his employer to pay damages for breach of its duty of care as the employer failed to take reasonable steps to protect the employee against foreseeable psychiatric harm.

The court remarked as follows on the role of the type of work in psychiatric harm:

> "[a]lthough sheer volume of work often imposes stress which can cause psychiatric damage to a normally robust personality, the character of the work can itself impose stresses capable of causing such psychiatric change, regardless of volume of work …"

Eight years later, in *Hatton v Sutherland* (*Hatton*),[122] the court likewise held that an employer would be in breach of the duty of care if it did not take reasonable steps to avoid foreseeable harm.

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116 Lewis "Employers' Liability and Workers' Compensation: England and Wales" in Oliphant and Wagner (eds) *Employers' Liability and Workers' Compensation: Tort and Insurance Law* (2012) 137–202 188.

117 Lewis in Oliphant and Wagner *Employers' Liability and Workers' Compensation* 173.

118 S 94(1) of the Social Security Contributions and Benefits Act 1992.

119 Lewis in Oliphant and Wagner *Employers' Liability and Workers' Compensation* 157.

120 Lewis in Oliphant and Wagner *Employers' Liability and Workers' Compensation* 160.

121 [1994] EWHC QB 2.

122 (2002) All ER 1.

The House of Lords approved the principles laid down in *Hatton* in the case of *Barber v Somerset Council* (*Barber*)[123] in which Mr Barber, one of the teachers in *Hatton*, appealed. The House of Lords allowed the appeal on the basis that the harm to Mr Barber was foreseeable even though he did not spell out the consequences that the heavy workload (which he did bring to his superiors' attention) would lead to a breakdown, as required by the Court of Appeal. The House of Lords importantly remarked that overworked senior employees do not all act in a similar way. Some may be reluctant to admit that they are overworked fearing the stigma of incompetency and due to professional pride. They may fear the impact on their colleagues who are also overworked, should they take leave.[124]

Although the term burnout was not used in *Walker* or *Hatton,* the mental harm of employees in these two cases clearly points to symptoms of burnout.

Significantly, these judgments require employers to be sensitive to indications of possible mental harm to their employees. This is the case even if the employees did not spell out the consequences of a heavy workload and further that not only the sheer volume of work but also the type of work could lead to mental harm.

6 3 Australia

Mental ill-health in Australia has been described as an epidemic and a catastrophe that costs employers and the country billions.[125] Australian workplaces are seen as contributing significantly to mental illness.

Factors that were identified as causing impaired mental health in workplaces include excessive workloads with unrealistic deadlines; long hours of work; high job demands with limited worker control; a discrepancy between work effort and reward; insecure employment; violence, bullying, and harassment at the workplace; and inequality and a lack of opportunity for employees to voice their opinions.[126]

A report by the Australian Health and Safety Institute indicated that 66 per cent of workers suffered from mental illness because they could not reach unrealistic deadlines. It further indicates that women are three times more likely to suffer from work stress than men, particularly in healthcare, social assistance sectors, teaching, and training. While there are over 20 official regulations for physical health and safety in place, there is none in place for mental injuries.[127] In terms of the Queensland Workers' Compensation and

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123 [2004] 2 All ER 385 64.

124 *Barber supra* par 67.

125 Carter and Stanford "Investing in Better Mental Health in Australian Workplaces" (13 May 2021) https://australiainstitute.org.au/report/investing-in-better-mental-health-in-australian-workplaces/ (accessed 2022-01-31) 6.

126 AIHS Carter and Stanford https://australiainstitute.org.au/report/investing-in-better-mental-health-in-australian-workplaces/ 8.

127 Australian Institute of Health and Safety "Rise in Workers Comp Claims Leads ACTU to Cal for Action on Mental Health Injuries" https://www.aihs.org.au/news-and-publications/news/rise-in-workers%E2%80%99-comp-claims-leads-actu-call-action-mental-health (accessed 2022-01-31).

Rehabilitation Act 2003, from 20 May 2021 post-traumatic stress disorder (PTSD) suffered by first responders such as police officers, ambulance personnel, fire and emergency services, child safety and corrective services, doctors, and nurses in emergency and trauma care[128] as well as other eligible employees[129] will, due to the nature of their work, be presumed to be work-related. This eases the evidentiary burden on these employees substantially.[130]

Each Australian jurisdiction has its own no-fault system of workers' compensation. Some jurisdictions require employers to insure against claims by employees for work-related injuries. In other jurisdictions, there is a central fund to which employers are required to contribute which will pay out for claims by injured employees. Most jurisdictions allow employees to also institute a civil claim against their employers for damages. Generally, employees may only claim amounts from their employers for which they were not compensated in terms of workers' compensation.[131]

In *Doulis v State of Victoria*,[132] a teacher who had to teach pupils with behavioural problems often requested the employer to diminish his teaching responsibilities in respect of the specific classes, to no avail. Doulis suffered a psychiatric injury and the court found that the employer breached its duty of care towards the teacher in that his breakdown was foreseeable. His classes could have been reduced; the school could have supported him.[133] The lack of these measures caused a mental injury. The court did not require the employee to refer to an external standard to establish whether the workload was excessive.

Likewise, in *Roussety v Castricum Brothers Pty Ltd* (*Rousetty*),[134] the employee on numerous occasions pointed out to the employer that his workload was too heavy. He collapsed at work after having worked through the night and went on sick leave. When he returned, he still had the same workload. He suffered a psychiatric injury in the form of major depression. The court held that the employer was in breach of its duty to take reasonable care to avoid foreseeable risk of psychiatric injury to the plaintiff and that the employer's duty would include lessening his workload, monitoring his hours after his return, appointing extra staff, allowing him to take sick leave and time off work if he has worked long hours.[135]

What these cases have in common is that the court applied the norm of whether a reasonable person would have foreseen that the specific employee would suffer psychiatric harm. If so, the employer had the duty to take certain practical measures to ensure that the employee would not be harmed. The measures that the court proposed that the employers could

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128 Employees who are required to be the first on a scenario of trauma to assist victims.

129 S 36EC of the Workers' Compensation and Rehabilitation Act 2003.

130 S 36ED of the Workers Compensation and Rehabilitation Act 2003.

131 Lunney "Employers' Liability and Workers' Compensation: Australia" in Oliphant and Wagner (eds) *Employers' Liability and Workers' Compensation* (2012).

132 [2014] VSC 395.

133 *Doulis supra* par 581.

134 [2016] VSC 466.

135 *Roussety supra* par 241.

have taken, could provide guidance to prevent and address burnout in South Africa.

7 PROTECTION FOR EMPLOYEES SUFFERING FROM BURNOUT IN SOUTH AFRICA

A number of research articles have been published in South Africa, dealing with burnout mainly among health care professionals,[136] teachers,[137] and academics.[138] The studies indicate that burnout is alarmingly high for workers in these sectors. Although companies have reported a significant increase in mental health issues,[139] and it has been reported that one out of four South African employees suffer from depression,[140] there are no general studies, statistics, or surveys that document burnout or work stress in South Africa's working population.

There are no specific standards for ensuring psychological health in South African workplaces. However, employers have the general duty to provide safe workplaces to employees in terms of the Constitution of the Republic of South Africa, 1996 (the Constitution),[141] the common law,[142] the Occupational Health and Safety Act (OHSA),[143] the Mine Health and Safety Act,[144] the Compensation for Occupational Injuries and Diseases Act (COIDA),[145] and the Basic Conditions of Employment Act (BCEA).[146] Although not explicitly stated, some sections of the Labour Relations Act (LRA)[147] and the Employment Equity Act (EEA)[148] protect employees suffering from burnout against adverse consequences in the workplace.[149] The discussion in the following subsections deals with protection against and

[136] Payne, Koen, Niehaus and Smit "Burnout and Job Satisfaction of Nursing Staff in a South African Acute Mental Health Setting" 2020 26 *South African Journal of Psychiatry* https://sajp.org.za/index.php/sajp/article/view/1454/1719; Msomi "South African Healthcare Workers Been Experiencing Burnout Long Before Covid-19 Pandemic" (20 January 2021) https://www.news24.com/health24/mental-health/mental-health-in-sa/sa-healthcare-workers-been-experiencing-burnout-long-before-covid-19-pandemic-20210318-2 (accessed 2022-01-31).

[137] Jackson and Rothmann 2005 25 *South African Journal of Education* 100–108.

[138] See, for example, Rothman *et al* 2014 *Stress Health* 322–333.

[139] Business Tech "South African Companies Report Big Increase in Mental Health Issues" (24 August 2021) https://businesstech.co.za/news/business/511288/south-african-companies-report-big-increase-in-mental-health-issues/ (accessed 2022-01-31).

[140] University of Stellenbosch Business School "One in Four Employees Suffer from Depression" (23 May 2021) https://www.usb.ac.za/usb_news/one-in-four-employees-suffer-from-depression/ (accessed 2022-01-31).

[141] The right to fair labour practices in s 23 of the Constitution.

[142] *Van Heerden v Pulp and Paper Industries Ltd* 1946 AD 385; Tshoose "Employer's Duty to Provide a Safe Working Environment: A South African Perspective" 2011 6 *Journal of International Commercial Law and Technology* 165–175 166.

[143] S 8 of Act 85 of 1993.

[144] S 2 of Act 29 of 1996.

[145] 130 of 1993.

[146] S 7 of Act 75 of 1997.

[147] 66 of 1995.

[148] 55 of 1998.

[149] Ss 6 and 60.

remedies for workplace psychological injuries or illnesses that could apply to victims of burnout and points out the shortcomings in these measures.

7 1 The Constitution

Section 9 (the equality clause) and section 23 (the right to fair labour practices) of the Constitution protect employees suffering from work-related psychiatric illness. The Labour Court in *Piliso v Old Mutual*[150] interpreted section 23 to encompass the right to a psychologically safe workplace.[151]

7 2 The common law

In *Media 24 v Grobler* (*Media 24*)[152] the Supreme Court of Appeal (SCA) emphasised that the common-law duty of employers to provide a safe workplace to employees (in this case against sexual harassment) is not only a duty to protect employees against physical harm, but also psychological harm.[153]

Employees who suffer from burnout could arguably bring a delictual claim based on either the direct or the vicarious liability of their employers. The requirements for a successful delictual claim based on an omission of the respondent were explained in *Minister of Justice and Constitutional Development v X*:

> "[w]here the conduct complained of manifests itself in an omission, the negligent conduct will be wrongful only if the defendant is under a legal duty to act positively to prevent the harm suffered by the plaintiff. The omission will be regarded as wrongful when the legal convictions of the community impose a legal duty, as opposed to a mere moral duty, to avoid harm to others through positive action."[154]

In light of the above, employees suffering from burnout could be successful in claiming damages on the ground that their employers had a legal duty to protect them from psychological harm caused by burnout. It may, however, be a costly and lengthy process for employees suffering from burnout to bring a civil claim for damages against their employers. They will further probably be barred from claiming against their employers by section 35 of COIDA,[155] which is discussed below. A claim for compensation in terms of COIDA does not require proof of fault, but the amount would be far less than the amount of damages awarded in a civil action.

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150 *Piliso v Old Mutual Life Assurance Company (SA) Limited* (C32/2005) [2006] ZALC 107 (5 December 2006).

151 *Piliso v Old Mutual Life Assurance Company (SA) Limited supra* par 90 and further.

152 *Media 24 Ltd v Grobler* 2005 (6) SA 328 (SCA).

153 *Media 24 Ltd v Grobler supra* par 65.

154 2015 (1) SA 25 (SCA) par 13. The legal duty in the South African law of delict should not be confused with the English duty of care. See Neethling and Potgieter "Foreseeability: Wrongfulness and Negligence of Omissions in Delict−The Debate Goes on *MTO Forestry (Pty) Ltd v Swart NO* 2017 5 SA 76 (SCA)" 2018 43 *Journal for Juridical Science* 145–161 147.

155 Landman and Ndou 2015 *ILJ* 2462.

While the court held the employer in *Media 24* directly liable for psychological harm in the form of PTSD of the employee, the court in *Mokone v Sahara Computers (Mokone)*[156] held the employer vicariously liable for the employee's psychiatric injury.[157] Even though the injury could not specifically be named, the complainant still succeeded with her claim. The court regarded it as sufficient that her injury required some form of psychiatric treatment.

It is also possible that an employee may rely on the implied duty of fair dealing as formulated in *Murray v Minister of Defence* (*Murray*)[158] to claim breach of contract. Overburdening an employee may for instance be seen as a breach of such a duty. However, the SCA in *South African Maritime Safety Authority v McKenzie* (*SAMSA*)[159] in effect overturned the decision in *Murray* by holding that there is no need for the common law to be developed to include an implied duty of fair dealing, as rights in terms of the LRA will be duplicated, at least for those employees included in the LRA.[160] In a more recent development, the Constitutional Court's decision in *National Union of Metalworkers of South Africa obo Nganezi v Dunlop Mixing and Technical Services (Pty) Limited*[161] could be interpreted to cast doubt on the correctness of the decision in *SAMSA,* since the court acknowledged the existence of an employer's general duty of fair dealing with employees.[162]

7 3 The Employment Equity Act

The EEA in section 6 prohibits discrimination on listed grounds and also on any other arbitrary ground. One of the listed grounds is disability. People with disabilities are defined in section 1 as "people who have a long term or recurring physical or mental impairment which substantially limits their prospects of entry into, or advancement in, employment". Mental impairment is defined in the Code of Good Practice on Employment of Persons with Disabilities (Disability Code)[163] as "a clinically recognised condition that affects a person's thought processes, judgment or emotions".[164] In terms of this definition, a person suffering from clinical or chronic burnout could be regarded as disabled. If an employer discriminates in any policy or practice against an employee on the ground of disability, the employee can institute a claim for damages based on unfair discrimination against the employer in terms of section 50 of the EEA.

Employers further have a duty to reasonably accommodate disabled employees as one of the designated groups in respect of affirmative

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156 *Mokone v Sahara Computers (Pty) Ltd* (2010) 31 ILJ 2827 (GNP). The judgment was confirmed on appeal in *Sahara Computers (Pty) Ltd v Mokone* (2014) 35 ILJ 2750 (GP).

157 See also *E v Ikwezi Municipality* [2016] 2 All SA 869 (ECG).

158 *Murray v Minister of Defence* 2009 (3) SA 130 (SCA); see Bosch "The Implied Term of Trust and Confidence in South African Labour Law" 2006 27 *ILJ* 28.

159 2010 (3) SA 601 (SCA).

160 *McKenzie supra* par 55.

161 2019 (5) SA 354 (CC).

162 *Dunlop supra* par 10.

163 Published in terms of s 54 of the EEA under GN 1085 in *GG* 39383 on 2015-11-09; Item 5.3.1(b).

164 Item 5.3.1(b) of the Disability Code.

action.[165] Reasonable accommodation in terms of section 1 means "any modification or adjustment to a job or to the working environment that will enable a person from a designated group to have access to, to participate or advance in employment". Jurisprudence in the UK and Australia regarding measures that the courts expect of employers in burnout cases, as well as social security measures in the Netherlands, can provide some guidance on what reasonable accommodation could mean in the context of burnout. It could include a reduced workload, reduced working hours, transfer of the employee to another department, provision of some form of assistance and support, allowing for time for psychotherapy and rehabilitation, placing an employee in a programme focused on reintegration in the workplace, and granting sick leave and unpaid leave if sick leave is exhausted.

Even if the burnout does not amount to a disability, employees could argue that the mental impairment brought about by burnout is an arbitrary ground (impairing their fundamental dignity comparable to a listed ground)[166] on which an employer may not rely to discriminate against them.

7 4 The Labour Relations Act

7 4 1 Automatically unfair dismissal

Section 187(1)(*e*) of the LRA provides that dismissal based on the listed grounds, or any other arbitrary ground will be regarded as automatically unfair. If burnout caused a disability, dismissal will be regarded as automatically unfair and arguably also in the case of a mental impairment not amounting to a disability, which could be seen as an arbitrary ground. In *New Way Motor and Diesel Engineering (Pty) Ltd v Marsland*,[167] for example, an employee was constructively dismissed on account of his depression. The Labour Appeal Court (LAC) found that this was an automatically unfair dismissal on an arbitrary ground since dismissal on the ground of a mental illness impaired his fundamental human dignity.[168]

An employee suffering from "reactive depression, a mental condition, which was triggered by stress in the workplace", successfully relied on the EEA and the LRA after he had been dismissed in *Jansen v Legal Aid South Africa* (*Jansen*).[169] Mr Jansen was dismissed for misconduct related to absence from work, insolence, and refusal to obey an instruction. Before his dismissal, the employee's psychiatrist reported to the employer that his mental condition was triggered by his job, that he showed signs of burnout, that he could not cope, and that he was close to a breakdown. Because of his mental condition, he avoided all possible stressors and therefore absented himself from work and disobeyed his employer's instruction to be at work. The psychiatrist recommended that he be granted sick leave,[170] but

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165 S 15(2)(*c*) of the EEA.

166 See *Naidoo v Parliament of the Republic of South Africa* [2020] 10 BLLR 1009 (LAC).

167 (JA 15/2007) [2009] ZALAC 27 (13 August 2009).

168 The LAC referred to the test in *Harksen v Lane NO* 1997 (11) BCLR 1489 (CC) as the source of this approach.

169 39 ILJ 2024 (LC) 2018.

170 *Jansen supra* par 29.

the employer refused. The court found that Jansen's mental condition was triggered by stress in the workplace and that his conduct was inextricably linked to his mental condition. Further, because the employer was aware of his mental condition, it had to initiate incapacity proceedings instead of misconduct proceedings.[171] The court found that although Mr Jansen's depression did not necessarily mean that he suffered from a disability, his dismissal was automatically unfair because the employer ignored his mental condition. The dismissal thus impaired his fundamental dignity. Jansen was reinstated with retrospective effect. The court further awarded compensation in terms of the EEA for discrimination in terms of the employer's practice and policy.[172]

For a fair dismissal of a person suffering from burnout on the basis of incapacity or illness, the employer will have to follow the requirements of item 10 of the Code of Good Practice on Dismissal in the Workplace.[173] In cases of permanent incapacity, the employer should consider alternative employment or adapting duties or work circumstances to accommodate the employee's disability.[174] Item 10(4) of the Code provides that "[p]articular consideration should be given to employees who are injured at work or who are incapacitated by work-related illness". In such a case, the duty of the employer to accommodate the employee is more onerous. The intrinsic characteristic of burnout is that it is caused by conditions in the workplace. Thus, in the case of burnout, an employer will always have a more onerous duty to accommodate the employee.

7 4 2 Constructive dismissal

Employees who suffer from burnout caused by a heavy workload, long hours, a lack of support from management, unrealistic deadlines, and so forth, could possibly terminate their employment on account of the employer having made continued employment intolerable in terms of section 186(e) of the LRA. In *National Health Laboratory Service v Yona* (*Yona*),[175] the employee (Ms Yona) suffered from severe depression and generalised anxiety disorder when her junior, without any prior consultation with her, was promoted to a position in which he would be Yona's superior. The appointment was moreover communicated to other staff members in a way that humiliated Ms Yona. She took sick leave on various occasions until her sick leave was exhausted and she had no further income. The human resource manager did not inform her that she could apply for extended sick leave due to speculation that the employer's underwriters (Alexander Forbes) would not approve. She subsequently resigned to access her funds from the provident fund. The court found that she was indeed constructively dismissed as the employer "failed dismally to accord fair and compassionate treatment to Ms Yona at the time of desperate need – when she was

171 *Jansen supra* par 43.

172 *Jansen supra* par 65.

173 Item 9 of the Code of Good Practice: Dismissal, Schedule 8 to the LRA.

174 Item 10 of the Code of Good Practice: Dismissal, Schedule 8 to the LRA.

175 (2015) 36 ILJ 2259 (LAC) par 41; see Tshoose "Constructive Dismissal Arising from Work-Related Stress: *National Health Laboratory Service v Yona & others*" 2017 42 *Journal for Juridical Science* 121–138.

suffering from a severe work-related mental illness and impecuniosity…" and that she was "subjected to a psychological and traumatic degradation of her human dignity".[176] This is clearly a case of burnout where a lack of procedural fairness as explained by Leiter and Maslach (see, section 3.1 above) led to burnout: "A fair decision is one in which people have an opportunity to present their arguments and in which they are treated with respect and politeness."[177]

Employees will have to prove that employment was objectively intolerable and that the employee had no other reasonable option but to terminate the relationship,[178] which could be difficult to prove. This could also result in the employee being without a job for a considerable time with no guarantee that their dismissal will be regarded as unfair.

7 5 The Basic Conditions of Employment Act

7 5 1 Regulation of working hours and leave in South Africa

The BCEA provides that employers must regulate working time under the OHSA[179] with due regard to the health and safety of employees, the Code of Good Practice on the Regulation of Working Time,[180] and the family responsibilities of employees. This provision applies to persons earning above R211 596.30 per annum[181] as well as senior managerial employees, although they are excluded from the regulation of working time in sections 8-18. These sections deal with maximum weekly hours, namely 45 hours, overtime, daily and weekly rest periods, etcetera. The goal of Schedule 1 of the BCEA, "[p]rocedures for progressive reduction of maximum working hours" is to eventually adopt a 40-hour working week.

Item 3 of the Code of Good Practice on the Arrangement of Working Time (Code on Working Time)[182] aligns working time with the health and safety of employees and provides that employers may be required to consider working schedules to comply with their duties to provide a safe and healthy workplace in terms of OHSA. Section 8 of OHSA in turn provides that employers shall provide and maintain a working environment that is safe and without risk to the health of employees. Employers are furthermore enjoined in section 8(2)(d) to conduct a risk assessment identifying hazards that may pose a risk to the health and safety of employees and eliminate such risks, train employees and give information on risks to their health and the means to control these risks. Clearly, the implication is that hours of work may have an impact on the health and safety of employees. In terms of the Code on

176 *Yona supra* par 42.

177 Leiter and Maslach 1999 *Journal of Health and Human Services Administration* 481.

178 *Jordaan v Commission for Conciliation Mediation and Arbitration* (2010) 31 *ILJ* 981 (LAC) 985.

179 s 7 of Act 85 of 1993.

180 Issued in terms of s 87(1)(*a*) of the BEA.

181 This is the current threshold amount which has been announced by the Minister of Labour in terms of the BCEA.

182 GN R1440 in *GG* 19453 of 1998-11-13.

Working Time, hazards must be pointed out to employees excluded from the regulation of working time in section 6 of the BCEA.

7 6 Health and safety legislation

Evidently, the legislator did not have the psychological safety of employees in mind when the OHSA was formulated. However, section 8(1) is phrased in general terms, which is broad enough to include psychological safety, including burnout, despite this not being explicitly included in the OHSA. Certain types of work could be declared as listed work in terms of section 11 of OHSA, requiring the employer to identify the hazards and evaluate the risks associated with such work. Employers have a more onerous duty to prevent the exposure of such employees to the hazards concerned.[183]

In this regard, the ILO pointed out that health and safety measures can prevent psychosocial hazards present in work organisation, work design, working conditions, and labour relations.[184]

COIDA applies to "employees", defined widely to cover most employees.[185] Employees may be entitled to benefits from the fund if they suffered an injury as a result of an accident or contracted a disease as a result of which they were disabled. "Accident" is defined as an accident arising out of and during the employee's employment and resulting in a personal injury, illness, or death of the employee. In the case of a disease, if the disease is listed in Schedule 3 of COIDA, there is a presumption that the disease arose out of and in the course of employment.[186] If the disease is not listed, the onus of proof is on the employee. No mental disease is listed in Schedule 3. Employees who are entitled to claim compensation in terms of COIDA are barred from claiming damages from their employer in terms of section 35.[187] Some categories of employees in the mining sector, as well as employees working for less than 12 months in South Africa in terms of section 23(3)(a), are excluded from claiming in terms of COIDA.[188] These employees are thus not barred by section 35 and can institute a civil claim against their employers.

COIDA, similar to the OHSA, was clearly formulated with only physical illness in mind. However, in *Odayar v Compensation Commissioner* (*Odayar*),[189] and *Urquhart v Compensation Commissioner* (*Urquhart*),[190] the High Court awarded compensation for PTSD caused by violent scenes that the employees had to witness in their respective jobs (a police officer and a press photographer). Even though *Odayar* and *Urquhart* dealt with PTSD

183 S 12 of the OHSA.

184 ILO "Psychosocial Risks and Work-related Stress" https://www.ilo.org/global/topics/safety-and-health-at-work/areasofwork/workplace-health-promotion-and-well-being/WCMS_108557/lang--en/index.htm (accessed 2022-01-31).

185 Persons involved in military service, the permanent Defence Force and police officers on service to defend the Republic are excluded.

186 S 66 of COIDA.

187 See *Jooste v Score Supermarket* 1999 (2) SA 1 (CC).

188 *Mankayi v AngloGold Ashanti Ltd* 2011 (3) SA 237 (CC).

189 2006 (6) SA 202 (N).

190 [2006] 2 All SA 80 (E).

and the term burnout was not used, these cases are illustrative of a form of burnout that is caused by the type of work a person does (and not so much by factors such as the volume of work) as the court elucidated in *Walker* in the UK. The court in *Odayar* held that the employee suffered a mental injury while the court in *Urquhart* regarded PTSD as a disease and ordered compensation on that basis.

Meryl du Plessis argued that psychological disorders should preferably be seen as occupational diseases (and not as injuries) in line with the ILO's list of occupational diseases which includes psychological mental disorders.[191]

In certain judgments in which an employer's negligence led to a psychological disorder, the courts did not agree with the employers that psychiatric harm to the employees arose out of employment and that they should thus claim compensation in terms of COIDA and not from their employer.[192] The court in *Media 24* remarked that it may well be that victims of sexual harassment who suffer from a psychiatric disorder arising out of their employment may claim in terms of COIDA, but the court did not have to decide the matter.[193] The SCA in *Churchill v Premier Mpumalanga*[194] found that the employee's psychiatric injury caused by her colleagues who participated in protest action did not arise out of her employment. Thus, the risk of her being injured in this way was not incidental to her employment. In a similar vein, the court in *MEC for Health v Free State v DN*[195] found that injuries suffered by a doctor who was raped while on night duty did not arise out of her employment, as rape cannot be seen as a risk incidental to her employment.

Could the risk of burnout be regarded as arising out of employment? In light of the definition of burnout, which is intrinsically caused by work stress, it cannot but be regarded as a risk incidental to the workplace. Employees covered by COIDA and suffering from burnout would most likely be entitled to claim in terms of COIDA, with the implication that in terms of section 35, they cannot then bring a civil claim against their employer. However, South African employees could claim increased compensation in terms of section 56 of COIDA if their employer's negligence caused their mental injury or disease. Thus, if burnout occurs as a result of a heavy workload, tight deadlines, and long hours, (as illustrated by the UK and Australian cases discussed above) and the employer negligently failed to address the situation, especially if the employee complained or there were other indications that the person was in danger of burnout such as frequent sick leave, the employee could be entitled to increased compensation, paid by the Compensation Fund.

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191 Du Plessis "Mental Stress Claims in South African Workers' Compensation" 2009 ILJ 1476–1494 1491.

192 *Ntsabo v Real Security* CC (2003) 4 ILJ 2341 (LC).

193 *Media 24 supra* par 77.

194 SASCA [2021] 16.

195 2015 (1) SA 182 (SCA).

8 CONCLUSION AND RECOMMENDATIONS

Burnout is a mental (psychological) disease that is reaching epidemic proportions in workplaces across the world. It has devastating consequences for the physical and psychological health of workers, their families, the workplace, and ultimately the economy of a country. South African employees who suffer from burnout are to a certain extent protected by existing laws, but there are shortcomings, mainly because South African legislation does not make explicit provision for the psychological safety of employees.

This article argues that burnout is a distinguishable disease as it is workplace-specific, and its dimensions distinguish it from other mental diseases. This is also acknowledged in a number of European countries. It is recommended that burnout should be defined in slightly different terms than the definition by the WHO as "a mental illness caused by chronic workplace stress characterised by overwhelming exhaustion, feelings of cynicism, a sense of ineffectiveness and at times mental impairment resulting in difficulties to cope at work". A diagnosis of clinical burnout may be required to establish partial or total disablement in terms of COIDA.

The article makes a number of recommendations below.

The OHSA should be amended to explicitly require employers to conduct risk assessments of psychosocial factors that could lead to harm such as overwork, long hours, tight deadlines, and so forth. It should also include a specific requirement to take measures to prevent employees from suffering psychological harm (including burnout). It should be recognised that employees in certain professions, for example, in health care, teaching, the police service, and emergency services run a high risk of burnout and that they may suffer from burnout even though their volume of work is not exceptionally high as pointed out in *Walker*. These professions could be declared as listed work in terms of section 11 of OHSA, which would require the employer to take extra measures to protect these employees against workplace hazards.

A code on psychosocial safety in the workplace, with information on the impact of workplace organisation and culture (such as a rigid hierarchical structure, no provision for input by employees, a mismatch between input and reward, and low ethical culture) should be developed to assist employers to restructure the workplace and avoid burnout of employees. This code should further guide employers to recognise symptoms of psychological diseases (including burnout) such as frequent sick leave and to make provision for employees to receive guidance on attaining a healthy work-life balance. However, if the root cause for burnout is overload, training on work-life balance and wellness centres at work will not prevent burnout. An employee should in these circumstances be supported or the workload should be decreased as pointed out by the court in *Rousetty* in Australia.

The BCEA, in coordination with the Unemployment Insurance Act,[196] should make specific provision for extended sick leave for employees

[196] 63 of 2001.

suffering from burnout to ensure sufficient time for recovery and rehabilitation.

To ensure a healthy work-life balance the BCEA should furthermore be amended to make provision for a 40-hour instead of a 45-hour workweek. A national code and codes for each workplace should be adopted to make provision for the right to disconnect.

COIDA should specifically make provision for compensation for psychological diseases, including burnout, in the list of compensable diseases. However, instead of (only) providing monetary compensation, the focus should be on providing psychotherapy and rehabilitation for burnout and a programme for gradually reintegrating the employee into the workplace. The Netherlands provides an example of such a system.

The example of the Queensland Workers' Compensation Act could be followed to relieve so-called "first responders" such as ambulance personnel, fire and emergency services, police officers, doctors, and nurses in emergency and trauma care of the evidential burden to prove that their PTSD or burnout arose out of their employment.

ACHIEVING DECENT WORK FOR DIGITAL PLATFORM WORKERS IN SOUTH AFRICA

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SUMMARY

Across the globe, digital platform workers lack access to basic workplace rights and protections. Lacking the ability to bargain collectively as a result of this novel, digitally managed market for work, many platform workers have jobs characterised by long and irregular hours, lack of representation, low remuneration, high stress levels, and little ability to negotiate wages or working conditions with their employers. This article questions the narrow definition of "employee" that limits the protection afforded to these workers. Workers have been largely incorrectly classified as independent contractors rather than as employees, a classification that has been challenged in courts around the world. This article explores possible strategies and offers suggestions to improve this situation to achieve decent work for such workers. The article concludes by suggesting that the solution to challenges associated with platform workers rests, among others, in social dialogue, legal solutions, new union strategies, and state intervention through the extension of existing legislation to platform workers.

1 INTRODUCTION

Customarily, the legal concepts of "employer", "employee", and "employment relationship" have been used to define the scope of labour law, differentiating between employees (subordinate and dependent workers) and independent contractors. The different forms of platform work and the different legal interpretations of employment relationships across national contexts make it difficult for regulators to determine where platform workers slot into established labour market concepts. In many instances, these workers are categorised as self-employed, which raises concerns that this legal designation would not match the factual reality of workers' relationship with, and dependence on, a given platform or client.[1] These platform workers are at risk of lacking both the flexibility of traditional autonomous work and the security of an employment relationship. In fact, the issue of worker

[1] DG IPOL "The Social Protection of Workers in the Platform Economy" (November 2017) https://www.europarl.europa.eu/RegData/etudes/STUD/2017/614184/IPOL_STU(2017)614184_EN.pdf (accessed 2021-04-12).

classification is vital because it is a fundamental determinant of a person's access to labour rights, benefits, and entitlements. In particular, classification opens entry to social protection. There is a need to manage the distribution of risks and costs related to the "new markets opened up by digital platforms". However, the challenge for policymakers lies in approaching the platform economy in such a way that the downsides can be tackled while pursuing the opportunities that this branch of the world economy opens up.

Digital platforms are now a crucial part of contemporary law; they permit us to arrange a ride, order food and access myriad other digital services. They achieve this by connecting clients or customers with workers who undertake these tasks or "gigs". The last decade has seen a global rise of "gig" or platform workers; an Uber is an obvious example. Digital work platforms have generated unprecedented opportunities for workers, enterprises, and society by releasing innovation on an enormous global scale. Yet, simultaneously, they have posed serious threats to decent work and fair competition.

The platform economy is growing fast with estimates that digital labour platforms worldwide now earn at least US$50bn per annum.[2] Examples include platforms operating in ride-hailing, food delivery, personal services, and digital content creation. There are estimated to be up to 40 million platform workers in the global South alone – some 1,5 per cent of the total workforce.[3] It is difficult to measure the size of the digital-platform labour force, but some estimates suggest it involves up to 60 million workers in the global South, concentrated in India, Pakistan, Bangladesh, and the Philippines, with a limited presence in sub-Saharan Africa.[4] In South Africa, it has been estimated that there are some 100 000 workers in web-based crowdwork and 35 000 in location-based platform work.[5] The current estimate of the size of the digital-platform labour market in South Africa is approximately 135 0000 workers or 1 per cent of those in employment.[6]

While platform work offers income and opportunities to many, there are also numerous instances of unfair work practices. Examples of issues encountered in research are low pay, wage theft, unreasonable working hours, discrimination, precarity, unfair dismissal, lack of agency, and unsafe working conditions.[7] In most places and sectors, workers cannot bargain collectively, and, because of their employment status, are not protected by

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2 Heeks "How Many Platform Workers Are There in the Global South?" (2019) https://ict4dblog.wordpress.com/2019/01/29/how-many-platform-workers-are-there-in-the-global-south/ (accessed 2021-03-30).

3 Heeks https://ict4dblog.wordpress.com/2019/01/29/how-many-platform-workers-are-there-in-the-global-south/.

4 Heeks *Decent Work and the Digital Gig Economy: A Developing Country Perspective on Employment Impacts and Standards in Online Outsourcing, Crowdwork, etc.* Paper 71 University of Manchester: Centre for Development Informatics (2017).

5 Fairwork "Fairwork South Africa Ratings 2020: Labour Standards in the Gig Economy" (2020) https://fair.work/wp-content/uploads/sites/97/2020/04/Fairwork-South-Africa2020-report.pdf (accessed 2021-04-18).

6 Naidoo *Innovation, Digital Platform Technologies and Employment: An Overview of Key Issues and Emerging Trends in South Africa. Future of Work(ers)* Working Paper No 9 University of the Witwatersrand: Southern Centre for Inequality Studies (2020) 21.

7 Wood, Graham, Lehdonvirta and Hjorth "Good Gig, Bad Big: Autonomy and Algorithmic Control in the Global Gig Economy" 2019 33 *Work, Employment and Society* 56–75.

relevant employment law. Problems faced by platform workers when it comes to recognition of their rights are broadly similar across the globe. In recent years, legal action regarding the misclassification of platform workers as "independent subcontractors" as opposed to "employees" has also become commonplace the world over.

2 WHO IS AN EMPLOYEE IN SOUTH AFRICA?

Ordinarily, the term "employee" means an individual who works part-time or full-time for another individual, organisation, or the State, and is paid for rendering a specific service to his or her employer – whether or not in terms of an oral or written contract of employment. It is worth noting that the Labour Relations Amendment Act (LRAA)[8] has deleted the term "contract of employment" from the definition of "dismissal" in section 186 of the Labour Relations Act (LRA).[9] Dismissal therefore currently means that "(*a*) an employer has terminated employment with or without notice".[10]

The employee also has recognised rights and responsibilities. It is important to define the term "employee" because much hinges on the distinction between employees and persons who are not employees. South African labour legislation applies only to employees, and only an employee can claim protection against unfair dismissal.

An employee is defined in South African labour law in the LRA as:

> (*a*) any person, excluding an independent contractor, who works for another person or the State and who receives, or is entitled to receive, any remuneration; and
> (*b*) in any manner assists in carrying on or conducting the business of an employer.[11]

The term "employee" is defined in similar terms in the Basic Conditions of Employment Act (BCEA),[12] the Skills Development Act (SDA),[13] and the Employment Equity Act (EEA).[14] This definition is significant as only those who meet the requirements of the definition of an employee are protected by the labour legislation. There are different definitions of "employee" in the Occupational Health and Safety Act (OHSA)[15] and the Unemployment Insurance Act (UIA).[16] It is, therefore, possible for a worker who is not regarded as an employee in terms of the LRA and the BCEA to be entitled to compensation in the event of an injury at work and to be entitled to unemployment insurance.

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8 Labour Relations Amendment Act 6 of 2014.
9 66 of 1995.
10 S 18(1)(*a*) of the LRA.
11 S 213 of the LRA.
12 S 1 of the Basic Conditions of Employment Act 75 of 1997.
13 S 1 of the Skills Development Act 97 of 1998.
14 S 1 of the Employment Equity Act 55 of 1998.
15 85 of 1993. S 1 of OHSA defines an employee as "any person who is employed by or works for an employer and who receives or is entitled to receive any remuneration or who works under the direction or supervision of an employer or any other person".
16 63 of 2001.

There are two parts to the definition of an employee in the LRA and the BCEA. Paragraph (*b*) might be sufficiently broad to include workers who otherwise might not be viewed as employees under paragraph (*a*).

In *Liberty Life Association of Africa v Niselow*,[17] the Labour Appeal Court (LAC), referring to part (*b)* of the definition, held as follows:

> "The latter part [of the definition] in particular may seem to extend the concept to employment far beyond what is commonly understood thereby. To adopt a literal interpretation though would clearly result in absurdity. I think that the history of the legislation which has culminated in the present statute, and the subject matter of the statute itself, lends support to construction which confines its operation to those who place their capacity to work at the disposal of others, which is the essence of employment. It is not necessary in this case to decide where the limits of the definition lie. It is sufficient to say that in my view the 'assistance' which is referred to in the definition contemplates that form of assistance, which is rendered by an employee, though the person he assists may not necessarily be his employer. In my view, it does not include the assistance of the kind rendered by independent contractors."

Significant groups of workers are either not viewed as employees, or are incapable of exercising their rights as workers, although they are afforded these rights by the labour legislation. It appears that it was these workers that the South African government had in mind when it proposed the adoption of a new presumption as to who qualifies as an employee. The presumption was adopted in 2002.[18]

In terms of this presumption, regardless of the form of the contract, a person is presumed to be an employee until the contrary is proven if any one or more of the following factors is present:

> "(*a*) the manner in which the person works is subject to the control or direction of another person;
> (*b*) the person's hours of work are subject to the control or direction of another person;
> (*c*) in the case of a person who works for an organisation, the person is a part of that organisation;
> (*d*) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
> (*e*) the person is economically dependent on the other person for whom that person works or renders services;
> (*f)* the person is provided with tools of trade or work equipment by the other person;
> (*g*) the person only works for or renders service to one person."[19]

However, the fact that this is only a presumption means it can be rebutted. Furthermore, the presumption applies only to persons earning below a

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17 (1996) 17 *ILJ* 673 (LAC) 683A–B. See also *Borcherds v CV Pearce & Sheward t/a Lubrite Distributors* (1991) 12 *ILJ* 383 (IC) where the Industrial Court held that the "assistance" should be rendered with some degree of regularity and there should be a legal obligation to render such "assistance".

18 See s 83A of the BCEA and s 200A of the LRA.

19 Van Niekerk, Smit, Christianson, McGregor, Van Eck *Law@Work* (2019) 63.

prescribed threshold amount determined by the Minister of Labour in terms of section 6(3) of the BCEA.[20]

More significantly, the presumption is not likely to alter the fact that there are still huge numbers of workers who are not regarded as employees and to whom labour legislation does not apply, and workers who are unable to exercise their rights as employees.[21]

Only natural persons can be employees. Any natural person can be an employee, but there are some statutory constraints.[22] Juristic persons, on the other hand, cannot be employees but can be independent contractors. The definition of "employee" expressly excludes "independent contractors" from its scope.[23] This makes it necessary to distinguish between the concept of an "employee" and that of an "independent contractor". This distinction is crucial as it has great significance and poses numerous challenges to South African labour law. The Code of Good Practice supports the following distinction between an employee and an independent contractor: an employee "makes over his or her capacity to produce to another", while an independent contractor is someone "whose commitment is the production of a given result".[24] The South African courts have developed several tests to distinguish between these two concepts.

The control test was developed in *Colonial Mutual Life Assurance Society v McDonald*[25] where the former Appellate Division had to consider whether an insurance agent was an employee. The court held:

> "[T]he contract between master and servant is one of letting and hiring of services (*locatio conductio operarum*) whereas the contract between the principal and contractor is the letting and hiring of some definite piece of work (*locatio conductio operis*)."[26]

Therefore, in terms of this test, the decisive difference between an employee and an independent contractor is that the principal has no legal right to prescribe how the independent contractor achieves the desired result. However, an employer may prescribe the methods that the employee uses and will have recourse against the employee if that method turns out to be inefficient or ineffective. The "control" test has been criticised by Grogan as inadequate if applied in isolation without consideration of the other tests.[27]

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20 The amount is determined from time to time by the Minister of Labour and is currently fixed at R205 433,30 per annum. The presumption has not been included in other labour legislation such as the EEA, the SDA, the UIA, OHSA or the Compensation for Occupational Injuries and Diseases Act 130 of 1993 (COIDA).

21 Theron, Godfrey and Visser *Keywords for a 21st Century Workplace* (2011) 21.

22 See s 43 of the BCEA which, e.g., prohibits the employment of children under the age of 15 years.

23 See Benjamin "An Accident of History: Who Is (and Who Should Be) an Employee Under South African Labour Law?" 2004 25 *Industrial Law Journal* 787, where Benjamin (at 789) states that the "terminology of contract is introduced through the exclusion of 'independent contractor'".

24 Item 34 of the "Code of Good Practice: Who Is an Employee?". This description was used in *Niselow v Liberty Life Association of Africa of Africa Ltd* (1998) 19 *ILJ* 752 (SCA).

25 1931 AD 412.

26 *Colonial Mutual v McDonald supra* 433. See also *R v AMCA Services* 1959 (4) SA 207 (A).

27 Grogan *Workplace Law* 11ed (2014) 18.

Disaffection with the control test led the courts to construct another test, known as the organisation test. Determining whether a person is an employee, or an independent contractor depends on whether he or she is part and parcel of the organisation. But this test too was dismissed as inadequate by the Appellate Division in *S v AMCA Services*[28] and *Smit v Workmen's Compensation Commissioner*[29] as being too vague to be of any use.[30]

The inadequacies of the control and organisation tests led the courts to devise a third test, namely the multiple or dominant impression test. This test, often regarded as the standard test used by South African courts, depends on various factors to determine whether a person is an employee or an independent contractor.[31] The test requires an appraisal of all the "relevant factors". Although it is impractical to put together a comprehensive list of relevant factors, the most important include the authority to supervise – that is, whether the employer has the authority to supervise the other individual;[32] the employer's authority to choose who will perform the work; the employee's responsibility to work for a certain period of hours; whether a salary is paid for time worked or for a specific outcome; whether the employer supplied the employee with the tools or equipment to perform the job; and whether the employer has the power to discipline.[33] This test was criticised from its inception by Mureinik,[34] who stated that the lack of a clear definition of an employee revealed that the labour statutes occupied "loose and ill-defined ground". According to Mureinik, the "dominant impression test" fails to say anything about the legal nature of the contract of employment and gives no assistance in difficult cases on the cusp between employment and self-employment (which he calls the "penumbral" cases).[35] To date, the dominant impression test has been applied mainly in the context of the Workmen's Compensation Act, which restricts compensation for injuries at work to employees.[36]

The Labour Court, in *Rumbles v Kwa-Bat Marketing*,[37] adopted the approach that a contractual relationship is not definitive as to whether a person is an employee as defined; the court must examine the true nature of the relationship between the parties. The issue of whether a person is an "employee" or an independent contractor was also examined by the Labour Appeal Court in *SABC v McKenzie*,[38] where some of the important attributes of the contract of employment and the contract of work were identified and distinguished. The "independent contractor" is bound to produce what is

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28 *R v AMCA Services Ltd* 1962 (4) SA 537 (A).

29 *Smit v Workmen's Compensation Commissioner* 1979 (1) SA 51 (A) 63.

30 The organisation test was rejected on the basis that it also raised more questions than it answered.

31 Basson, Christianson, Dekker, Garbers, Le Roux, Mischke and Strydom *Essential Labour Law* (2009) 27.

32 *Smit v WCC supra* 63.

33 Basson *et al Essential Labour Law* 27; Grogan *Workplace Law* 20.

34 Mureinik "The Contract of Service: An Easy Test for Hard Cases" 1980 97 *SALJ* 246 258.

35 *Ibid*.

36 Rycroft and Jordaan *A Guide to South African Labour Law* 2ed (1992) 41.

37 (2003) 24 *ILJ* 1587 (LC) par 19.

38 (1999) 1 BLLR 1 (LAC) Myburgh JP 590F–591F.

required in terms of his contract of work. He or she is not under the supervision or control of the employer and is also under no obligation to obey any orders of the employer about how the work is to be performed – the independent contractor is his or her own master. In addition, he or she is used by the employer to provide services to a person through a contract of service rather than through the common-law contract of employment.[39] To circumvent the duties of an employer, employers may transform employees into independent contractors or may contract out work previously done by employees.[40] In practice, the difference lies in the fact that an employee benefits from the protection of labour law while an independent contractor does not.

However, in *Niselow v Liberty Life Association of SA Ltd*,[41] the Supreme Court of Appeal accepted Brassey's construction[42] that an employee is a person who makes over his or her capacity to produce for another person, whereas an independent contractor is a person whose commitment is to produce a result.[43] The dominant impression test was also found to have shortcomings similar to those we see in other attempts to identify a defining attribute. At present, it is usual practice for employees, especially at the managerial level, to be identified by the outcomes to be achieved.[44] Furthermore, the statutory definition in both the LRA and the BCEA is silent on the point at which a person recruited into employment becomes an "employee".[45] In *Wyeth v SA (Pty) Ltd v Manqele*,[46] it was argued that the term "works for another person" is cast in the present tense in the definition of "employee", and that an applicant, therefore, becomes an employee only when he or she begins working for the employer.[47] Taking account of section 23 of the Constitution of the Republic of South Africa, 1996 (the Constitution), which affords "everyone" the right to fair labour practices, the Labour Appeal Court adopted a purposive approach and concluded that persons who had signed contracts of employment, but who had not yet commenced work, were "employees" for purposes of the LRA.[48]

In *Denel (Pty) Ltd v Gerber*,[49] the Labour Appeal Court considered the following facts. Denel had agreed with Multicare Holdings (Pty) Ltd that

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39 Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* 18–7. A person who provides services under a contract of work cannot be regarded as an employee save in special circumstances.

40 Du Toit, Godfrey, Cooper, Giles, Cohen, Conradie and Steenkamp *Labour Relations Law: A Comprehensive Guide* 77.

41 (1998) 19 *ILJ* 752 (SCA).

42 Brassey "The Nature of Employment" (1990) 11 *ILJ* 889.

43 *Niselow v Liberty Life supra* 753H.

44 Benjamin 2004 *ILJ* 794.

45 S 9 of the EEA provides that ss 6, 7 and 8 of the EEA (which incorporate the principal protections against unfair discrimination) apply to applicants for employment; see Le Roux "Economic Disputes and the New Unfair Labour Practice" (1997) *CLL* 91.

46 *Wyeth v SA (Pty) Ltd v Manqele* (2005) 6 BLLR 523 (LAC).

47 *Whitehead v Woolworths* (Pty) (1999) 8 BLLR 862 (LC); *Herbst v Elmar Motors* (1999) 20 *ILJ* 2465 (CCMA) 2468J–2469C.

48 In *Wyeth v Manqele supra* par 30, the Labour Appeal Court relied on *NEHAWU v University of Cape Town* (2003) 24 *ILJ* 95 (CC) and held that the: "LRA must therefore be purposefully construed in order to give effect to the Constitution".

49 *Denel (Pty) Ltd v Gerber* (2005) 9 BLLR 849 (LAC).

Multicare would provide certain human resources consultancy services to Denel. Multicare had one employee, Gerber, and Multicare regularly rendered invoices to Denel. Denel subsequently informed Gerber that her services had been terminated on the ground of redundancy. Gerber argued that she was an employee of Denel, while Denel claimed that it had validly terminated a commercial contract with Multicare, and that Gerber was not employed by Denel.

The court accepted that Gerber was a Denel employee "on the basis of the realities – on the basis of substance and not forms or labels".[50] Next, the court considered the position of persons who agree to render services through a separate legal entity in order to gain a more favourable tax dispensation. In many earlier decisions, the courts had held that such persons would be precluded from reclaiming employee status for purposes of protection against unfair dismissal.[51] Zondo JP put an end to this line of argument and held that an agreement for purposes of a better tax dispensation does not alter the realities of the relationship.[52] This notwithstanding, the court also held that, in the absence of reconciliation with the South African Revenue Services, the court had been approached with "dirty hands" and that this would be taken into account when crafting a remedy.[53] After defining who constitutes an employee, it is important to describe decent work.

3 DESCRIBING DECENT WORK

The International Labour Organisation (ILO) defines decent work as:

> "Decent work, the core mandate of the ILO, is defined as productive work for women and men in conditions of freedom, equity, security and human dignity. Decent work involves opportunities for work that is productive and delivers a fair income, provides security in the workplace and social protection for workers and their families, offers prospects for personal development and encourages interaction, gives people the freedom to express their concerns, and organise and participates in decisions affecting their lives and guarantees equal opportunities and equal treatment for all."[54]

Decent work consists of four inseparable, interrelated, and mutually supportive strategic objectives: employment, fundamental principles and rights at work, social protection (social security and occupational safety and

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50 *Denel v Gerber supra* par 22.

51 *CMS Support Services (Pty) Ltd v Briggs* (1997) 5 BLLR 533 (LAC); *Bezer v Cruizer International CC* (2003) 24 *ILJ* 1372 (LAC). In *Callanan v Tee-Kee Borehole Castings* (*Pty) Ltd* (1992) 13 *ILJ* 279 (IC) 1550D–E, the former Industrial Court held that the courts will be unwilling to assist employees who want to "have their cake and eat it". See also *Apsey v Babcock Engineering Contractors (Pty) Ltd* (1995) 16 *ILJ* (IC) 924D–F.

52 Van Niekerk ("Personal Service Companies and the Definition of 'Employee'" 2005 26 *Industrial Law Journal* 1904–1908) argues that parties should be entitled, for whatever perceived advantage, to decide and agree on their own status and designation even if this does exclude the employment relationship.

53 *Denel v Gerber supra* par 204–205.

54 See *Report of the Director General: Decent Work* 87th International Labour Conference 1999 https://www.ilo.org/public/english/standards/relm/ilc/ilc87/rep-i.htm (accessed 2021-04-23).

health) and social dialogue. Gender equality and non-discrimination are cross-cutting principles of decent work.

In the course of the digitalisation of the work process, the relevance of and need for the Decent Work Agenda have become even more significant amid widespread precarity in the world of work, the circumstances ranging from the financial turmoil and economic downturn of the last two decades to increasing unemployment, casualisation of work, lack of social protection, labour migration, challenges posed by the Fourth Industrial Revolution (4IR) and, most recently, the Covid-19 pandemic. These have challenged countries and social partners – worker and employer organisations – to adopt the Declaration on Social Justice (for fair globalisation) to strengthen the ILO's capacity to promote its decent work agenda and forge an effective response to globalisation and digitalisation of work.

Many aspects need to be addressed if the prevailing standard applied to platform workers in South Africa is to be satisfactory. In February 2015, the ILO held a "Tripartite Meeting of Experts on Non-Standard Forms of Employment", which hosted experts selected after consultation with governments, and the Employers' and the Workers' Groups of the Governing Body, to debate the obstacles to a decent work agenda that precarious forms of employment may present. The meeting mandated member states, employer organisations, and worker organisations to develop policy resolutions to address decent work deficits relating to non-precarious forms of employment so that all workers (regardless of their employment arrangement) could profit from decent work. Specifically, governments and their social partners were entreated to collaborate to: implement measures to address unsatisfactory working conditions; support effective labour market changes; promote equality and non-discrimination: ensure sufficient social security cover for all: promote safe and healthy workplaces; ensure freedom of association and collective bargaining rights; improve labour review; and address highly uncertain forms of employment that do not respect essential rights at work.[55]

In light of the definition of decent work, it is vital to examine the platform economy.

4 PLATFORM WORK IN SOUTH AFRICA

The world of work is going digital: an ever-growing number of start-ups are establishing online platforms and mobile "apps" to link consumers, firms, and workers for jobs that often last no longer than a few months – some less than a few days or even hours. What started as a tiny niche for digital "crowdwork" on platforms like UpWork and Amazon's Mechanical Turk has developed into a worldwide phenomenon.

Generally, there are three categories of actor involved in platform work: the client who requests a task; the worker who performs it; and the platform that provides the infrastructure for the transaction. These exchanges can be

[55] For further details, see ILO "Conclusions of the Meeting of Experts on Non-Standard Forms of Employment" (17 March 2015) http://www.ilo.org/gb/GBSessions/GB323/pol/WCMS_354090/lang-en/index.htm (accessed 2020-12-06).

done locally for tasks that require human contact, or anywhere in the world in the case of online tasks. Moreover, the platform economy can be captured through three main sectors: peer-to-peer transportation (such as Uber); on-demand household services (such as Task Rabbit); and on-demand professional tasks (such as Amazon Mechanical Turk (MTurk)).

Digital platform labour involves the outsourcing of work through internet-based platforms, either to a geographically dispersed crowd (crowdwork) or through location-based apps (location-based).[56] crowdwork involves advertising specific work tasks that are then performed by eligible workers who are quickest to respond to the advertisement or are contested by eligible workers.[57] An example of this type of labour platform is MTurk, where a range of work can be advertised – for example, filling out questionnaires, transcribing receipts, or labelling photographs. crowdwork is also associated with online freelancing, where work is given to specified individuals and could involve software development, data analytics, administrative support, or design and marketing.[58] Location-based apps are related to on-demand work that is geographically specific and are mainly associated with delivery services, transport, and household cleaning services. A common feature of the labour relations governing this type of work is that platform workers are considered independent contractors and are, therefore, not protected by many of the labour regulations covering employees.

Research, in general, underscores that platform workers are rather young (mainly under 30 years of age).[59] The potential to create job opportunities of high quality for young people in the labour market seems clear; in theory, it is up to the workers to decide the tasks they wish to perform and also when, where, and how to do them. In practice, this sense of flexibility and autonomy is very closely related to the nature of work, a platform's terms and conditions, and whether the work is the worker's main source of income. Reliance on platform earnings varies considerably across states and some workers can work even longer hours than regular employees to fulfil their financial commitments. In certain occupations, the variability and unpredictability of demand can create high levels of insecurity among workers. The European Agency for Safety and Health at Work (EU-OSHA) notes that the similarities between these groups and temporary and agency workers may mean they are exposed to the same psychosocial and physical

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56 Berg, Furrer, Harmon, Rani and Silberman "Digital Labour Platforms and the Future of Work: Towards Decent Work in the Online World" (2018-09-20) https://www.ilo.org/global/publications/books/WCMS_645337/lang--en/index.htm (accessed 2021-05-16).

57 Heeks *Digital Economy and Digital Labour Terminology: Making Sense of the "Gig Economy", "Online Labour", "Crowd Work", "Microwork", "Platform Labour", etc* Development Informatics Working Paper Series Paper 70, The University of Manchester Global Development Institute (2017) http://www.gdi.manchester.ac.uk/research/publications/di/ (accessed 2021-04-18).

58 *Ibid*.

59 See Eurofound Platform Work: Types and Implications for Work and Employment – Literature Review https://www.eurofound.europa.eu/publications/report/2018/employment-and-working-conditions-of-selected-types-of-platform-work (accessed 2021-06-17).

risks[60] – and studies have shown that these are significant. Such risks can be even higher for platform workers, in particular, because they are often younger and may have less experience or knowledge of how to manage and counteract them.

This synopsis of digital platform work has provided some insight into the scale and nature of this workforce. Nonetheless, there is still much we do not know. Statistics South Africa's current *Quarterly Labour Force Surveys* do not accurately represent platform economy workers. Although they are likely to be categorised as self-employed, there is no obvious distinction between platform workers and, for example, professional self-employed individuals or informal workers. Even in tax records, platform workers may be registered as provisional taxpayers, which means that the parent company of the digital platform may not be recorded. Reflecting on worker organisation and the regulation of digital platform work, coupled with concerns about the negative effect of digital and automation technologies on employment, raises important considerations on how new forms of work affect labour organisation and related protection, as well as the capacity to regulate these forms of work. To the extent that the digital platforms raise the demand for the services on offer (such as food delivery), they could be seen to impact job creation. There are, however, early indications that remuneration and the conditions of work may not meet the minimum standards laid out in domestic labour legislation or the decent work guidelines provided by the ILO. Digital platforms have changed the employment relationship and, as a consequence, have undermined worker rights. By categorising workers as independent contractors, enterprises circumvent the rights of workers that are embodied in more conventional employment contracts[61] notwithstanding that the worker is still subject to considerable control by the platform or parent enterprise and his or her performance is central to the enterprise's core business.[62]

In South Africa, this means that these independent contractors do not benefit from the labour rights in the LRA and BCEA. As a consequence, a major concern is that even if digital platforms become an increasing source of new job creation, they may not comply with the norms of "decent work". As discussed below, early evidence for South Africa suggests an uneven standard of employment across different types of digital platforms. Workers are managed through the online platform (or app), where they clock in by logging into the app and then become subject to an algorithmic assignment of duties to be performed at pre-arranged pay rates.[63] Some similarities can be seen in comparison with the regulation of work in the temporary employment sector in South Africa. As noted by Webster and Englert,[64]

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60 See EU-OSHA (European Agency for Safety and Health at Work) (2017), "Protecting Workers in the Online Platform Economy: An Overview of Regulatory and Policy Developments in the EU" (2017) Publications Office of the European Union, Luxembourg.

61 Webster "The Uberisation of Work: The Challenge of Regulating Platform Capitalism: A Commentary" 2020 34(4) *International Review of Applied Economics* 512–521.

62 Aloisi and De Stefano "Regulation and the Future of Work: The Employment Relationship as an Innovation Facilitator" 2020 159(1) *International Labour Review* 47–69.

63 Webster 2020 *International Review of Applied Economics* 512–521.

64 Webster and Englert (2019) "New Dawn or End of Labour? From South Africa's East Rand to Ekurhuleni" 2020 17(2) *Globalizations* 279–293.

when the LRA was introduced in 1995 to broaden labour rights to all workers in South Africa, employers took advantage of a legal lacuna to circumvent these new rights.

This took the form of externalising the employment of workers to third-party labour brokers, which makes workers employees of the labour broker and not of the firm at their place of work.[65] The collective organisation of workers is also challenged by the fragmentation of production, where workers in different parts of the production and distribution chain are divided according to skill levels and type of employment contract and conditions, thus ensuring that these different groups of workers fall under different bargaining councils.[66] In recent years, the LRAA has strengthened the LRA concerning part-time, temporary, and temporary employment service (TES) workers.

The introduction of section 198A of the LRA has ameliorated the position of TES employees in many ways. For example, should a low-earning employee be placed with a client for a period longer than three months, or should he or she no longer be substituted for an employee of the client who was temporarily absent, the worker will be considered an "employee" of the client. Among other things, this will entitle the employee to refer disputes with the client concerning unfair dismissal and unfair labour practices.[67]

The amendment aimed to extend employees' benefits to temporary and TES workers earning below a threshold amount, while limiting the length of these contracts to three months without the option of continual renewal.[68] There is some evidence to suggest that as a consequence of the amendment, more TES workers lost their jobs with labour brokers and moved to the non-TES sector.[69] Nonetheless, for the 20 per cent of TES workers who moved to the non-TES sector as a result of the 2014 amendment, it is estimated that they had a greater probability of receiving higher remuneration than workers who were not earmarked by the amendment (that is, those over the earnings threshold).[70] Accordingly, in this case, early evidence suggests that the regulation had its intended effect on a subset of TES workers, but some workers may have been displaced from formal employment.

Further work is required to understand the extent to which employers can circumvent this amendment and the ramifications for future labour market regulation. There are also challenges to worker organisations in the digital-platform era and to regulating digital platform labour.[71] It is noteworthy that certain apps are registered internationally and do not regard themselves as directly employing workers in the state in which they operate. For example,

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65 *Ibid*.

66 *Ibid*.

67 Ss 198A–D and s 187 of the LRA.

68 Cassim *The Impact of Employment Protection on the Temporary Employment Services Sector: Evidence from South Africa Using Data from Tax Records* UNU-WIDER Working Paper 79 (2020).

69 *Ibid*.

70 *Ibid*.

71 Webster and Forrest "Precarious Work: Experimenting with New Forms of Representation: South African Labour Responds" 2020 19(1/2) *International Journal of Labour Research* 5.

Uber South Africa is a technology company whose parent company, Uber, is registered in the Netherlands. In a recent South African case, Uber drivers filed a case against Uber South Africa in an attempt to be recognised as employees. The case was struck down because the court found that the case should have been brought against Uber BV (Netherlands).

In the USA in August 2020, however, a California court ruled in favour of Uber and Lyft drivers by finding that these companies should categorise their drivers as employees with benefits.[72] In addition, in the recent UK case, *Uber BV v Aslam*,[73] the UK Supreme Court held that Uber drivers are not self-employed or independent contractors as they have the status of "workers". In this light, it can be contended that the South African Labour Court should have adopted a broader approach. It could have explored ways of piercing the legal complexities associated with triangular relationships created by online platforms and placed less emphasis on the existence of a contract of employment by recognising an employment relationship.

While the South African Uber judgment is being contested by the two companies, it represents progress in efforts to have platform workers recognised as essential to the functioning of these technology enterprises.

A further concern relates to worker organisation, which is made difficult by the spatial separation of workers – particularly for those not engaged in place-based forms of digital platform work. Evidence has shown that place-based workers have engaged in a greater variety of strategies to improve their working conditions than is the case with crowdworkers.[74] Place-based platform workers can engage in strategies that affect their particular jurisdictions and the existing culture of industrial relations.[75] Webster and Englert[76] also note how, in the face of traditional trade unions that fail to represent precarious workers in South Africa, these workers are creating new types of organisation in the form of worker committees or councils at the plant level. In South Africa, a legal-aid NGO, the Casual Workers Advice Office, played an important role in the 2014 LRA amendment by offering TES workers assistance in accessing their new rights. There are examples of precarious (location-based) workers changing the nature of worker organisation and relying on different coalitions such as NGOs and broader worker associations.

It is now crucial to explore some attempts, suggestions, and probabilities that may address the precarious situation of platform workers.

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72 Allyn "California Judge Orders Uber and Lyft to Consider All Drivers Employees" NPR (10 August 2020) https://www.npr.org/2020/08/10/901099643/californiajudge-orders-uber-and-lyft-to-consider-all-drivers-employees (accessed 2021-04).

73 [2021] UKSC 5.

74 Johnston "Labour Geographies of the Platform Economy: Understanding Collective Organizing Strategies in the Context of Digitally Mediated Work" 2020 159(1) *International Labour Review* 25–45.

75 Naidoo "*Innovation, Digital Platform Technologies and Employment: An Overview of Key Issues and Emerging Trends in South Africa*" Future of Work(ers) SCIS Working Paper Number 9 Southern Centre for Inequality Studies, Wits University (2020).

76 *Ibid*.

5 SUGGESTIONS AND PROBABILITIES

Platforms draft their terms of service agreements unilaterally. These terms are largely not limited by labour protection legislation, and may entirely circumvent processes of social dialogue, thus allowing platforms to set all the working conditions for workers. In terms of ILO Conventions and Recommendations,[77] every worker enjoys universal labour rights, but the question arising is how these rights can be guaranteed to platform workers. Regulating digital labour platforms is complex and involves labour law, other laws, and policies relevant to decent work. Some of the challenges include applying universal labour rights (such as social protection and collective bargaining) to platform workers, ensuring fair competition, fair data use, improved data protection and algorithmic accountability, and reforming the taxation system insofar as it affects platform workers.

There have been attempts in South Africa to address the nature of work in the platform economy. For example, the Fairwork Project has highlighted the precarious nature of work in the gig economy, evidenced by its ratings for digital platforms such as Uber and OrderIn. Fairwork is a collaboration between the University of Cape Town (UCT), the University of the Western Cape (UWC), and the Universities of Oxford and Manchester. The project has evaluated 11 of the country's largest digital labour platforms against five principles of fairness: fair pay; fair conditions; fair contracts; fair management; and fair representation.

Fairwork interacts with workers and worker organisations to develop and continually shape its principles and aims to support workers in collectively asserting their rights. It also seeks to provide consumers with enough information so that they can make informed choices regarding the platforms with which they interact. They hope this will contribute to putting pressure on platforms to improve their working conditions and their scores. Fairwork also engages with policymakers and the government to advocate extending appropriate legal protections to all platform workers, irrespective of their legal classification.

In the words of Howson:[78]

> "Decent work and job creation are not mutually exclusive. This is why, by bringing workers and other stakeholders to the table, Fairwork is developing an enforceable code of basic workers' rights that are compatible with sustainable business models."

It is worth noting that Fairwork has been relatively successful in improving standards of living for platform workers. For example, after meeting with

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[77] The ILO Governing Body has identified eight Conventions covering subjects that are considered to be "fundamental" principles and rights at work: the Forced Labour Convention, the Abolition of Forced Labour Convention, the Freedom of Association and Protection of the Right to Organise Convention, the Right to Organise and Collective Bargaining Convention, the Equal Remuneration Convention, the Discrimination (Employment and Occupation) Convention, the Minimum Age Convention, and the Worst Forms of Child Labour Convention.

[78] Howson "Calls for Fair Pay and Fair Conditions in the Gig Economy" (2020-03-20) https://www.news.uct.ac.za/article/-2020-03-20-calls-for-fair-pay-and-fair-conditions-in-the-gig-economy (accessed 2021-04-22).

Fairwork, getTOD agreed to adopt a living-wage policy that ensures tradespeople do not earn below the living wage of R6 800 per month when working through the platform. It also has clearly defined grievance and disciplinary procedures and guarantees payment to workers.

In addition, NoSweat has created detailed health and safety guidelines to which clients must sign up. It pays workers above minimum wage (after costs) and has committed publicly to recognise and negotiate with a collective body of workers should one be formed. At the same time, SweepSouth scored well in that workers are paid above minimum wage (after costs), and they have introduced initiatives actively to improve conditions for workers, including providing death and disability insurance.

While we applaud the efforts of organisations such as Fairwork, among others, to improve the working circumstances of platform workers, South Africa can also learn from European countries that have introduced other solutions, including new forms of regulation. For example, in 2018, a collective bargaining agreement that allows cleaning workers to be recognised as employees in Denmark was concluded. The agreement, signed between a platform and a union, debunked many myths about platform work, starting from the flawed perception that, by its very nature, it was not compatible with existing forms of labour protection such as employment rights and collective bargaining.[79]

Further, examples of the extension of rights to platform workers are a judicial decision extending safety and health legal standards to platform workers in Brazil, and the "right to disconnect" and to obtain a "decent price" for gig work in France. In 2020, Buenos Aires included digital delivery platforms by modifying the definition of "delivery" in its Transit and Transportation Code, which had regulated the activity of urban couriers or home delivery of food substances since 2016. Also in 2020, the Argentine Ministry of Labour, Employment and Social Security presented a draft bill that places couriers under the protection of labour and social security.[80] Some Chilean platform companies have introduced forms of illness cover for riders unable to continue working. Examples include the creation of an "emergency fund" (equivalent to two weeks' average pay) to support workers infected with Covid-19 and who have been forced to quarantine. However, these positive solutions are fragmentary and not the norm.

Given that platforms also operate across multiple jurisdictions, international policy dialogue and coordination are essential. Social dialogue between platforms, governments, platform workers, and their representatives is likewise vital to ensure that the digital economy becomes a powerful driver for fair competition, decent work, and the advancement of social justice.

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[79] Countouris and De Stefano "Collective-Bargaining Rights for Platform Workers" (undated) https://www.socialeurope.eu/collective-bargaining-rights-for-platform-workers (accessed 2021-04-21).

[80] Fierro "Time to Deliver: Decent Work in Digital Platforms" (undated) https://voices.ilo.org/stories/time-to-deliver-decent-work-in-digital-labour-platforms (accessed 2021-04-21).

It should also be noted that the National Minimum Wage Act (NMWA)[81] potentially offers some measure of protection to persons rendering on-demand services on online platforms. The NMWA applies to "workers". The definition of this term does not exclude "independent contractors" (unlike the definitions in the BCEA, the LRA and the EEA). Section 1 of the NMWA defines a worker as "any person who works for another and who receives … any payment for that work whether in money or kind". Added to this, workers and employees who only work limited hours per day are also protected. Section 9A of the NMWA reads:

> "Daily wage payment–
>
> (1) An employee or a worker as defined in section 1 of the National Minimum Wage Act, 2018, who works for less than four hours on any day must be paid for four hours of work on that day.
>
> (2) This section applies to employees or workers who earn less than the earnings threshold set by the Minister in terms of section 6(3)."[82]

6 CONCLUSION

This article has examined challenges facing the decent work agenda resulting from the rise of platform work in South Africa. It provides a backdrop to the South African platform economy, underscoring the fundamental issues of unemployment, inequality, and poverty – in particular for those who find themselves working in the platform economy such as young people and women, the majority of whom are Africans. There are some indications of increasing casualisation of work in South Africa, mirrored by the scale of the informal economy and the rising trend of workers being employed in the temporary employment sector and as platform labour.

Jobs are concentrated in the services sector, while the share of employment in the primary and manufacturing sectors has declined. There is still much to learn about the impact on the South African labour market of the 4IR, which is characterised by innovation, automation, robotics, and digitalisation. Early studies suggest that there is a positive connection between firm-level innovation and employment growth. This includes process innovation, which is related to productivity-enhancing production technologies such as automation.

The evidence from other countries suggests that automation technologies will have an uneven effect on labour displacement and earnings across industries and jobs. The COVID-19 pandemic is also likely to accelerate the use of digital technologies while, at the same time, the related economic decline has already had an uneven negative effect on the labour market. The existing labour force survey data in South Africa does not allow for a better understanding of the types of workers included in these jobs, their earnings, and the quality of their employment.

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81 9 of 2018.

82 See s 5(2) of the NMWA and s 9A of the BCEA.

More refined categories for self-employed workers are needed in order to identify platform workers. The capacity to measure the size of this workforce and the nature of its work will offer greater insight into the need for labour regulation in the digital platform economy. There are many routes for future study in the South African context. First, the literature on the vulnerability of jobs to automation needs to address the issue of which types of automation are economically viable, not only which are technically possible.

As noted by Aloisi and De Stefano,[83] the scale of recent technological change may empower capital over labour in ways that make the organisation of workers more onerous in general and exert downward pressure on the value of work that remains available. There are also areas of the economy in which innovation can assist to incentivise growth and decent work creation.

More study is required on the firm- and sectoral-level employment effects of an investment in innovation. The existing national innovation surveys need to be scaled up to cover a wider range of sectors and to be conducted more regularly. There is also much we do not yet know about the size and nature of platform work in South Africa owing to a paucity of data. A study on the categories of workers in this sector, their reasons for engaging in platform work, earnings, working conditions, and capacity to organise would provide a valuable understanding of this rising section of the labour market. In addition, another path of study relates to the regulation of platform-based labour markets. As earlier underscored in this article, labour regulation needs to be better adapted to mirror the underlying exchange in the employment relationship between the platform and the worker, which some labour law scholars, jurists, and organisations (such as the ILO) have already started to examine.[84]

It is worth noting that although trade unions have traditionally been the chief defenders of workers' rights, there is scant evidence that trade unions in South Africa are currently succeeding in adapting their approaches to the digital epoch. In the present circumstances, platform workers are unlikely to be successful if seeking security through trade unions. Their best chance of improving working conditions will be through government intervention and law reform. As in the case of TES employees, fixed-term employees and part-time employees, policymakers will at some stage have to address issues that emerge during the 4IR. State power rather than the power of collective bargaining may yet prove to be the best way to improve the conditions of workers involved in new forms of work. Broadening the scope of application of national minimum wage legislation to cover all "workers" may yet open the door of opportunity for digital workers to secure improved conditions of service.

Without strengthening labour regulations and institutions, platforms workers will not benefit from basic labour rights afforded workers. Decent work for platform workers will remain an illusion if these workers are not treated as employees and if the government continues not to use its power to improve the conditions of these workers.

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83 Aloisi and De Stefano 2020 *International Labour Review* 47–69.

84 ILO *Work for a Brighter Future – Global Commission on the Future of Work* (Geneva 2019). See Aloisi and De Stefano 2020 *International Labour Review* 47–69.

AN ANALYSIS OF THE APPLICATION OF S 4A OF THE WILLS ACT 7 OF 1953 WITH REGARD TO MUSLIMS MARRIED WITHIN THE SOUTH AFRICAN CONTEXT

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SUMMARY

South African Muslims constitute a religious minority group who have been living in South Africa for almost four centuries. These persons are required in terms of their religion to ensure that their estates devolve in terms of Islamic law. One of the ways of doing this would be where a testator or testatrix drafts and executes a will stating that his or her estate must devolve in terms of the Islamic law of succession upon his or her demise and that an Islamic institution should draft an Islamic Distribution Certificate stating who his or her beneficiaries are in terms of Islamic law. This type of will could be referred to as an Islamic will. The said will must however conform to the provisions found in the Wills Act 7 of 1953 (Wills Act) in order to be deemed a valid will within the South African context. Section 4A of the Wills Act states that "[a]ny person who attests and signs a will as a witness … and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will." This article looks at the application of s 4A of the Wills Act 7 of 1953 concerning Muslims married within the South African context. The scenario that is considered in this article is where Ahmad Guru (Ahmad) executes an Islamic will on 8 August 2019, with Yusuf Tuan (Yusuf) and Amina Guru (Amina) being the only witnesses thereof. Ahmad died on 9 September 2019 leaving behind a net estate of R900,000.00, a son, Omar Guru (Omar), and a daughter, Sara Guru (Sara), as his only relatives. The Islamic Distribution provides that Omar should inherit 2/3 of R900,000.00 = R600,000.00 and Sara should inherit 1/3 of R900,000.00 = R300,000.00. One of the witnesses of the Islamic will, Amina, is also the spouse of one of the beneficiaries, Omar, as provided in terms of the Islamic Distribution Certificate. This article looks at three instances of how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic Will and Islamic Distribution Certificate) in the event where he was, at the time of the execution of the will, (1) married to Amina in terms of Islamic law only; (2) married to Amina in terms of Islamic law as well as civil law; and (3) married to Amina in terms of civil law but divorced Amina in terms of Islamic law. The article concludes with an overall analysis of the findings and makes a recommendation as to the way forward.

1 INTRODUCTION

South African Muslims constitute a religious minority group who have been living in South Africa for almost four centuries.[1] These persons are required in terms of their religion to ensure that their estates devolve in terms of Islamic law.[2] One of the ways of doing this would be where a testator or testatrix drafts and executes a will stating that his or her estate must devolve in terms of the Islamic law of succession upon his or her demise and that the Muslim Judicial Council (South Africa) should draft an Islamic Distribution Certificate stating who his or her beneficiaries are in terms of Islamic law.[3] This type of will could be referred to as an Islamic will.[4] The said will must, however, conform to provisions of the Wills Act 7 of 1953 (Wills Act) in order to be deemed a valid will within the South African context.[5] Section 4A of the Wills Act states that

> "[a]ny person who attests and signs a will as a witness … and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will."[6]

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1 The first recorded Muslim arrived in South Africa in 1654. See Mahida *History of Muslims in South Africa: A Chronology* (1993) 1.

2 It should be noted that Muslims believe that the Qur'an is the word of Allah (God Almighty). See Khan *The Noble Qur'an: English Translation of the Meanings and Commentary* 1404H (4) 13, where it states that "[t]hese are the limits (set by) Allah (or ordainments as regards laws of inheritance), and whosoever obeys Allah and His Messenger (Muhammad PBUH) will be admitted to Gardens under which rivers flow (in Paradise), to abide therein, and that will be the great success"; and 4(14), where it states that "[w]hosoever disobeys Allah and His Messenger (Muhammad PBUH), and transgresses His limits, He will cast him into the Fire, to abide therein; and he shall have a disgraceful torment." The number in brackets refers to the chapter number of the Qur'an. The number outside the brackets refers to the verse in the chapter.

3 See *Moosa NO v Minister of Justice and Correctional Services* 2018 (5) SA 13 (CC) par 6 where an Islamic Distribution Certificate was referred to. The court stated that "[s]ince then the deceased lived with both his wives and some of their children in their family home until his death in 2014. He prepared a will three years earlier in which he referred to both marriages. Its terms direct his estate to be distributed under Islamic law. The Muslim Judicial Council certified that this required the estate to be divided in 1/16 shares to each of his wives, 7/52 to each of his sons and 7/104 to his daughters."

4 See Abduroaf "A Constitutional Analysis of an Islamic Will within the South African Context" 2019 52(2) *De Jure Law Journal* 257 266 http://www.dejure.up.ac.za/index.php/volumes/2019/articles-vol-52/abduroaf-m for a discussion on the constitutionality of an Islamic will within the South African context.

5 See s 2 of the Wills Act 7 of 1953 (Wills Act) where it states the "[f]ormalities required in the execution of a will – (1) Subject to the provisions of s 3 *bis* - (a) no will executed on or after the first day of January, 1954, shall be valid unless - (i) the will is signed at the end thereof by the testator or by some other person in his presence and by his direction; and (ii) such signature is made by the testator or by such other person or is acknowledged by the testator and, if made by such other person, also by such other person, in the presence of two or more competent witnesses present at the same time; and (iii) such witnesses attest and sign the will in the presence of the testator and of each other and, if the will is signed by such other person, in the presence also of such other person; and (iv) if the will consists of more than one page, each page other than the page on which it ends, is also signed by the testator or by such other person anywhere on the page …"

6 See s 4A of the Wills Act where it states that "[c]ompetency of persons involved in execution of will – (1) Any person who attests and signs a will as a witness, or who signs a will in the presence and by direction of the testator, or who writes out the will or any part thereof in his own handwriting, and the person who is the spouse of such person at the time of the execution of the will, shall be disqualified from receiving any benefit from that will …"

It should be noted there are a few exceptions in this regard.[7] This article focuses on the application of s 4A of the Wills Act concerning Muslims married within the South African context. The scenario that is looked at in this article is where Ahmad Guru (Ahmad) executes an Islamic will on 8 August 2019, with Yusuf Tuan (Yusuf) and Amina Guru (Amina) being the only witnesses thereof. Ahmad died on 9 September 2019 and left behind a net estate of R900,000.00, a son (Omar Guru (Omar)) and a daughter (Sara Guru (Sara)) as his only relatives. The Islamic Distribution provides that the Omar should inherit 2/3 of R900,000.00 = R600,000.00 and the Sara should inherit 1/3 of R900,000.00 = R300,000.00.[8] One of the witnesses of the Islamic will, Amina, is also the spouse of one of the beneficiaries, Omar, as provided in terms of the Islamic Distribution Certificate. This article looks at three instances. The first instance looks at how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic will and Islamic Distribution Certificate) in the event where he was married to Amina in terms of Islamic law only at the time of the execution of the will. It is noted that the Islamic marriage was concluded on 1 January 2019. The second instance looks at how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic will and Islamic Distribution Certificate) in the event where he was married to Amina in terms of Islamic law as well as civil law at the time of the execution of the will. The Islamic marriage was concluded on 1 January 2019 and the civil marriage was concluded in terms of the Marriage Act 25 of 1961, on 2 February 2019. The third instance looks at how section 4A of the Wills Act would impact the right of Omar to inherit the R600,000.00 (based on the Islamic will and Islamic Distribution Certificate) in the event where he married Amina in terms of Islamic law as well as civil law but divorced Amina in terms

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7 The exceptions relevant to this article are looked at in sections II and III of this article. The exceptions are found in the following provisions. See s 4A of the Wills Act 7 of 1953 where it states: "(2) Notwithstanding the provisions of subsection (1) - (a) a court may declare a person or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will; (b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession; (c) a person or his spouse who attested and signed a will as a witness shall not be thus disqualified from receiving a benefit from that will if the will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the will concerned. (3) For the purposes of subsections (1), and (2)(*a*) and (*c*), the nomination in a will of a person as executor, trustee or guardian shall be regarded as a benefit to be received by such person from that will."

8 The net estate refers to the estate left behind by a deceased minus liabilities. See, with regard to the distribution of the net estate in terms of Islamic law, Khan *The Noble Qur'an – English Translation of the Meanings and Commentary* 1404H (4) 11 where it states that "Allah commands you as regards your children's (inheritance); to the male, a portion equal to that of two females …" This raises the issue of discrimination against the daughter. A further discussion on this issue is however beyond the scope of this article. See Abduroaf 2019 *De Jure Law Journal* 257 266 for a discussion on the constitutionality of an Islamic will within the South African context. The issue of the discrimination against the daughter was specifically looked at in this article.

of Islamic law. The Islamic marriage was concluded on 1 January 2019, the civil marriage in terms of the Marriage 25 of 1961 on 2 February 2019, and the Islamic divorce took place on 3 March 2019. The article concludes with an overall analysis of the findings and makes a recommendation as to a way forward in this regard.

2 THE APPLICATION OF S 4A OF THE WILLS ACT WHERE OMAR IS MARRIED IN TERMS OF ISLAMIC LAW ONLY

This section of the article looks at the application of s 4A of the Wills Act in the instance where Omar and Amina are married in terms of Islamic law only on 1 January 2019 when Ahmad executed his will on 8 August 2019.[9] It could be argued that Omar should not inherit the R600,000.00 (based on the Islamic will and the Islamic Distribution Certificate) as he was the spouse of one of the witnesses (Amina) albeit in terms of Islamic law at the time when the will was executed, and should therefore be disqualified from inheriting the R600,000.00, based on the application of s 4A of the Wills Act. It could also be argued that s 4A of the Wills Act should not apply to Omar as his Islamic marriage should not be recognised for purposes of this section, as this section only applies to civil marriages. This type of an argument was made by one of the respondents in 2018 in the case of *Moosa NO v Minister of Justice and Correctional Services* (*Moosa*),[10] where it was argued that section 2C(1) of the Wills Act applies to civil marriages only and not to Islamic marriages.[11] It was argued in *Moosa* that a spouse married in terms of Islamic law only should not be regarded as a spouse for purposes of section 2C(1) of the Wills Act 7 of 1953.[12] The Constitutional Court, however, held

> "[t]he non-recognition of the third applicant's right [spouse married in terms of Islamic law only] to be treated as a 'surviving spouse' infringes her right to dignity in a most fundamental way, and is a further ground for declaring section 2C(1) constitutionally invalid."[13]

The Constitutional Court held

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9 See fn 6 above.

10 2018 (5) SA 13 (CC).

11 See s 2C of the Wills Act where it states that the "[s]urviving spouse and descendants of certain persons entitled to benefits in terms of will – (1) If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. (2) If a descendant of the testator …"

12 See *Moosa supra* par 9 where it is stated that "[t]he third respondent [Registrar of Deeds, Cape Town] approved the registration for the second applicant [married in terms of civil law and Islamic law]. But he declined to do so for the third applicant [married in term of Islamic law only] because he believed that the benefits renounced by the deceased's descendants born of his marriage to the third applicant vest in the children of those descendants, and not the third applicant, as section 2C(2) envisages. The rationale underpinning his view was that the term "surviving spouse" in section 2C(1) should be interpreted strictly to cover spouses recognised formally under this country's laws."

13 *Moosa supra* par 16.

> "[t]he non-recognition of her right to be treated as a 'surviving spouse' for the purposes of the Wills Act, and its concomitant denial of her right to inherit from her deceased husband's will, strikes at the very heart of her marriage of fifty years, her position in her family and her standing in her community. It tells her that her marriage was, and is, not worthy of legal protection. Its effect is to stigmatise her marriage, diminish her self-worth and increase her feeling of vulnerability as a Muslim woman. Furthermore, as the WLC correctly submitted, this vulnerability is compounded because there is currently no legislation that recognises Muslim marriages or regulates their consequences."[14]

It could be argued that the Constitutional Court pronounced on the constitutionality of section 2C(1) of the Wills Act only, and that section 4A of the same Act thus remains unaffected. Omar could argue that the Islamic will of his father, Ahmad, is not subject to section 4A of the Wills Act and that he is thus entitled to inherit the R600,000.00 based on the will as well as the Islamic Distribution Certificate. There has been no challenge made to the constitutionality of section 4A of the Wills Act (not recognising the Islamic marriage) based on discriminatory grounds, at the time when the Islamic will was executed by Ahmad on 8 August 2019. The position, to date, remains the same.[15] It could be argued that the non-recognition of the Islamic marriage is discrimination based on marital status, which is prohibited in terms of the South African Constitution.[16] It is interesting to note that if a

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[14] *Ibid*.

[15] It should be noted that the Western Cape Division of the High Court, Cape Town, on 31 August 2018 held that "5. In the event that legislation as contemplated in par 1 [legislation recognising marriages concluded in terms of Islamic law] above is not enacted within 24 months from the date of this order [date of the order was 30 August 2018] or such later date as contemplated in par 4 above, and until such time as the coming into force thereafter of such contemplated legislation, the following order shall come into effect: 5.1 It is declared that a union, validly concluded as a marriage in terms of Sharia law and which subsists at the time this order becomes operative, may (even after its dissolution in terms of Sharia law) be dissolved in accordance with the Divorce Act 70 of 1979 and all the provisions of that Act shall be applicable, provided that the provisions of s 7(3) shall apply to such a union regardless of when it was concluded …" See *Women's Legal Centre Trust v President of the Republic of South Africa*, *Faro v Bignham N.O.*, *Esau v Esau* (22481/2014, 4466/2013, 13877/2015) 2018 (6) SA 598 (WCC) par 252. It should be noted that Omar concluded his will during the 2-year period and not during the period where the interim relief would have come into effect. It should also be noted that the High Court judgment was taken on appeal to the Supreme Court of Appeal (SCA). The SCA granted interim relief and held that "1.8 Pending the coming into force of legislation or amendments to existing legislation referred to in par 1.7, it is declared that a union, validly concluded as a marriage in terms of Sharia law and subsisting at the date of this order, or, which has been terminated in terms of Sharia law, but in respect of which legal proceedings have been instituted and which proceedings have not been finally determined as at the date of this order, may be dissolved in accordance with the Divorce Act as follows: (a) all the provisions of the Divorce Act shall be applicable save that all Muslim marriages shall be treated as if they are out of community of property, except where there are agreements to the contrary, and (b) the provisions of s 7(3) of Divorce Act shall apply to such a union regardless of when it was concluded …" See *President of the RSA v Women's Legal Centre Trust; Minister of Justice and Constitutional Development v Faro; and Minister of Justice and Constitutional Development v Esau* (612/19) 2021 (2) SA 381 (SCA) par 51. The judgment was handed down on 18 December 2020, and it does not shed much certainty as to how the Islamic marriage should be seen in the light of s 4A of the Wills Act. It is submitted that the SCA judgment does not impact s 4A of the Wills Act as far as the Islamic marriage is concerned. A further discussion on this issue is beyond the scope of this article.

[16] See s 9(3) of the Constitution of the Republic of South Africa, 1996 where it states that "(3) The state may not unfairly discriminate directly or indirectly against anyone on one or more

court of law finds that section 4A of the Wills Act should recognise marriages concluded in terms of Islamic law, spouses of these marriages should be disqualified based on the section, and this disqualification would be the first instance where the recognition of an Islamic marriage led to the limitation of rights.[17]

It should be noted that a court may however (in the above instance) declare Omar to be competent to receive the R600,000.00 if it is satisfied that he did not defraud or unduly influence Ahmad in the execution of the will, or if Omar can prove that he is entitled to inherit from Ahmad's will in terms of the South African law of intestate succession. These options are available in terms of section 4A(2) of the Wills Act. The benefit in the latter instance in terms of the will must not exceed what he would have been entitled to in terms of the South African law of intestate succession.[18] Omar would have been entitled to R450,000.00 in terms of South African law of intestate succession.[19] It would be more favourable to Omar to prove to a

grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth. (4). No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination. (5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."

17 In all other cases the recognition of the Islamic marriage leads to the entitlement of some sought. See, for example, *Moosa* par 21 where it is stated: "The following order is made: 1. The declaration of constitutional invalidity of s 2C(1) of the Wills Act … by the High Court of South Africa, Western Cape Division, Cape Town, is confirmed. 2. S 2C(1) of the Wills Act … is to be read as including the following underlined words: 'If any descendants of a testator, excluding a minor or a mentally ill descendant, who, together with the surviving spouse of the testator, is entitled to a benefit in terms of a will renounces his right to receive such benefit, such benefit shall vest in the surviving spouse. For the purposes of this sub-section, a 'surviving spouse' includes every husband and wife of a monogamous and polygamous Muslim marriage solemnised under the religion of Islam.' 3. The declaration of invalidity operates retrospectively with effect from 27 April 1994 except that it does not invalidate any transfer of ownership that was finalised prior to the date of this order of any property pursuant to the application of s 2C(1) of the Wills Act … unless it is established that, when the transfer was effected, the transferee was on notice that the property in question was subject to a legal challenge on the grounds upon which the applicant brought the present application."

18 The exceptions relevant to this article are looked at in s II and s III of this article. The exceptions are found in the following provisions. See s 4A of the Wills Act where it states that "(2) Notwithstanding the provisions of subsection (1) – (a) a court may declare a person, or his spouse referred to in subsection (1) to be competent to receive a benefit from a will if the court is satisfied that that person or his spouse did not defraud or unduly influence the testator in the execution of the will; (b) a person or his spouse who in terms of the law relating to intestate succession would have been entitled to inherit from the testator if that testator has died intestate shall not be thus disqualified to receive a benefit from that will: Provided that the value of the benefit which the person concerned or his spouse receives, shall not exceed the value of the share to which that person or his spouse would have been entitled in terms of the law relating to intestate succession; (c) a person or his spouse who attested and signed a will as a witness shall not be thus disqualified from receiving a benefit from that will if the will concerned has been attested and signed by at least two other competent witnesses who will not receive any benefit from the will concerned. (3) For the purposes of subsections (1), and (2)(*a*) and (*c*), the nomination in a will of a person as executor, trustee or guardian shall be regarded as a benefit to be received by such person from that will."

19 See s 1 of the Intestate Succession Act 81 of 1987 where it states: "1. Intestate succession - (1) If after the commencement of this Act a person (deceased) dies intestate, either wholly or in part, and … (b) is survived by a descendant, but not by a spouse, such descendant

court that he did not defraud or unduly influence Ahmad in the execution of the will as the R600,000.00 is more favourable than the R450,000.00. It can clearly be seen that Omar inherits a less favourable share in terms of the South African law of intestate succession as the R600,000.00 that he would be entitled to in terms of the Islamic Distribution Certificate is more than the R450,000.00 that he would be entitled to inherit in terms of the Intestate Succession Act 81 of 1987. It can also be seen that children inherit equal shares in terms of the Intestate Succession Act whereas the son inherits a more favourable share than a daughter in terms of the Islamic law of intestate (compulsory) succession based on the Islamic Distribution Certificate. This situation raises the question of discrimination based on sex and/or gender, which is prohibited in terms of South African law.[20] A further discussion of this issue is beyond the scope of this article. It is, however, submitted that in the absence of a court ruling concerning the constitutionality of section 4A of the Wills Act (not recognising marriages concluded in terms of Islamic law) that the marriage between Omar and Amina should not be affected by section 4A of the Wills Act. This would also ensure the application of Islamic law as was the wishes of Ahmad in his last will and testament and also give effect to his right to freedom of religion and to apply the Islamic law of succession to the distribution of his estate upon his demise.[21]

3 THE APPLICATION OF S 4A OF THE WILLS ACT WHERE OMAR IS MARRIED IN TERMS OF ISLAMIC LAW AND CIVIL LAW

This section of the article looks at the application of section 4A of the Wills Act in the instance where Omar and Amina married in terms of Islamic law and civil law when the will was executed on 8 August 2019.[22] Section 4A of the Wills Act would most certainly impact Omar's right to inherit the R600,000.00 (based on the Islamic will and the Islamic Distribution Certificate) as he is the spouse of one of the witnesses (Amina) in terms of

shall inherit the intestate estate …" In this instance, it should be noted that Ahmad left behind a net estate of R900,000.00 and a son and a daughter as his only relatives. His son and daughter would thus inherit equal shares of the net estate in this instance.

20 The Islamic law of intestate succession could also be referred to as the Islamic law of compulsory succession as intestate succession beneficiaries cannot be disinherited by a testator or testatrix through a will. The issue of the son inheriting double the share of a daughter raises the question of discrimination based on sex which is prohibited in terms of South African law. See fn 16 above. For a further discussion on this issue, see Abduroaf 2019 *De Jure Law Journal* 257 266. For a discussion on the rationale behind why a son inherits double the share of a daughter in terms of the Islamic law of intestate (compulsory) succession, see Abduroaf "An Analysis of the Rationale Behind the Distribution of Shares in terms of the Islamic Law of Intestate Succession" 2020 53 *De Jure Law Journal* 115 122 http://www.dejure.up.ac.za/index.php/ volumes/2020/volume-53-2020/abduroaf-m-2020.

21 See s 31 of the Constitution where it states that "(1) Persons belonging to a cultural, religious or linguistic community may not be denied the right, with other members of that community - (a) to enjoy their culture, practise their religion and use their language; and (b) to form, join and maintain cultural, religious and linguistic associations and other organs of civil society. (2) The rights in subsection (1) may not be exercised in a manner inconsistent with any provision of the Bill of Rights."

22 See fn 6 above.

civil law. It is noted that the civil marriage concluded in terms of the Marriage Act 25 of 1961 on 2 February 2019 would be recognised and not the Islamic marriage concluded on 1 January 2019. The fact that Omar is also married to Amina in terms of Islamic law on 1 January 2019 should have no impact on the application of section 4A of the Wills Act. There is, however, nothing preventing Omar from invoking section 4A(2) of the Wills Act, as discussed in Part II above. Omar could then either inherit R600,000.00 if he is successful in satisfying a court that he did not defraud or unduly influence Ahmad in the execution of the will, or he could inherit R450,000.00 if he can can prove that he is entitled to inherit from Ahmad's will in terms of the South African law of intestate succession.

4 THE APPLICATION OF S 4A OF THE WILLS ACT WHERE OMAR IS MARRIED IN TERMS OF ISLAMIC LAW AND CIVIL LAW BUT DIVORCED IN TERMS OF ISLAMIC LAW

This section of the article looks at the application of section 4A of the Wills Act in the instance where Omar and Amina married in terms of Islamic law and civil law but divorced in terms of Islamic law on 3 March 2019.[23] It should be noted that section 5A of the Divorce Act 70 of 1979 requires that if a couple is subject to a religious marriage as well as a civil marriage, that the religious marriage should be dissolved before instituting proceedings to dissolve the civil marriage.[24] It should be noted that the Islamic divorce was finalised on 3 June 2019 and that Ahmad executed his will on 8 August 2019.[25] It could be argued that Omar should not inherit as even though the Islamic marriage has been finally dissolved, but that the civil marriage, concluded in terms of civil law, is still intact. This type of situation seems quite unfair to persons who are married in terms of both religious law as well as civil law. Both Omar and Amina were essentially barred from instituting proceedings to execute the civil divorce due to the religious marriage. It is not certain what the outcome of such a challenge would be based on discriminatory grounds. A further discussion on this issue is, however, beyond the scope of this article.

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23 *Ibid*.

24 See s 5 A of the Divorce Act 70 of 1979 where it states that "[i]f it appears to a court in divorce proceedings that despite the granting of a decree of divorce by the court the spouses or either one of them will, by reason of the prescripts of their religion or the religion of either one of them, not be free to remarry unless the marriage is also dissolved in accordance with such prescripts or unless a barrier to the remarriage of the spouse concerned is removed, the court may refuse to grant a decree of divorce unless the court is satisfied that the spouse within whose power it is to have the marriage so dissolved or the said barrier so removed, has taken all the necessary steps to have the marriage so dissolved or the barrier to the remarriage of the other spouse removed or the court may make any other order that it finds just."

25 It should be noted that a revocable Islamic divorce issued by a husband is finalised after three months or three cycles of clean (non-menstruating periods) by the divorced wife. In the scenario at hand three months were used for the calculation. A further discussion on this issue is beyond the scope of this article. See Abduroaf "An Analysis of the Consequences of an Islamic Divorce in Light of the *Faro v Bingham and Others* Judgment" 2019 19(9) *Without Prejudice* 31–32 https://www.withoutprejudice.co.za/free/article/6701/view for a discussion on divorce and its application.

5 CONCLUSION

This article has looked at the application of section 4A of the Wills Act concerning Muslim marriages within the South African context. The findings show that the situation is quite complicated and that several scenarios could play out. It is suggested that parties married in terms of Islamic law alone, or both Islamic law as well as civil law should not sign as testamentary witnesses of a will if they are potential beneficiaries of that will, or spouses of potential beneficiaries of that will.

THE AGENCY PROBLEM IN TRADE UNIONS: A CASE FOR ENFORCING TRADE UNION LEADERSHIP ACCOUNTABILITY IN NAMIBIA'S LABOUR LAWS

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SUMMARY

Namibia's public and private sectors have encountered substantial industrial or strike action. This article highlights the agency problem that arises between trade union leaders or bargaining agents and the employees or the workers they represent during collective bargaining. The agency problem is a conflict of interest inherent in any relationship where one party is expected to act in another's best interests. How to ensure that the agent acts solely in the interest of the principal is a challenge. The agency problem can occur in companies, non-governmental organisations, professional institutions, governmental bodies or trade unions. Namibian labour laws provide for freedom of association, which includes the freedom to form and join trade unions, and also entrenches fundamental labour rights and protections, and regulates collective labour relations among others. However, the legal framework is silent as to what happens if union leaders or representatives act in bad faith and sign collective agreements that are not in the best interest of their members. This contribution argues that trade union representatives should be held accountable for failing to deliver on their mandates. Compromised trade union leadership or political intrigue in unionism needs to be addressed to minimise the agency problem in industrial action in future. Labour law practitioners should explore effective strategies to address this conundrum and ensure that the best interests of workers are upheld by trade union leaders. Trade unions must be transformative socio-economic movements to remain relevant and sustainable in Namibia or elsewhere. This can be achieved through law reform and by integrating the principles of the law of agency in labour laws to enforce trade union leadership accountability.

1 INTRODUCTION

A trade union is an expression of the common interest of the working class and should contribute to radical or revolutionary social change.[1] In great parts of the contemporary world, trade unions have consistently been on the defensive, suffering a decline in membership, public status and effectiveness in achieving their core objectives.[2] In Africa, trade unionism cannot be studied successfully in isolation from its association with national politics.[3] Thus, the present discourse on the potential of trade unionism evokes efforts to reinvigorate and reformulate the defining agency relationship,[4] especially between trade union leaders (representatives or shop stewards) and the workers (members or employees). The question of leadership in unions and broader worker movements is crucial to understanding how and why workers engage in collective action but is relatively poorly explored.[5] Leadership entails the exercise of influence over others in order to complete a task or reach a goal. Leadership is a crucial factor in the process of worker mobilisation as "the whole process of collectivisation is heavily dependent on the actions of small numbers of leaders or activists".[6]

Namibia's public and private sectors have encountered substantial industrial or strike action. This article highlights the agency problem that arises between trade union leaders or bargaining agents and the union members or workers (the principals) they represent. The agency problem is a conflict of interest inherent in any relationship where one party is expected to act in another's best interests. How to ensure that the agent acts solely in the interest of the principal is a challenge. The agency problem can occur in private companies, joint ventures, non-governmental organisations (NGOs), professional institutions and governmental bodies. This challenge is also present between trade union leaders and union members. Namibian law provides for freedom of association, which includes the freedom to form and join trade unions;[7] it also entrenches fundamental labour rights and protections, and regulates collective labour relations, among other matters.[8] The law, however, does not cater well for leaders' accountability in cases where they sign collective agreements in bad faith or fail to deliver on their

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1 Budeli "Trade Unionism and Politics in Africa: The South African Experience" 2012 45(3) *Comparative and International Law Journal of Southern Africa* 454; McIlroy "Marxism and the Trade Unions: The Bureaucracy Versus the Rank and File Debate Revisited" 2014 42(4) *Critique Journal of Socialist Theory* 497.

2 Hyman "How Can Trade Unions Act Strategically?" 2007 13(2) *Transfer 2/07* 193.

3 Budeli 2012 *CILSA* 454.

4 Fairbrother "Rethinking Trade Unionism: Union Renewal as Transition" 2015 26(4) *Economic and Labour Relations Review* 561.

5 Alexander "Leadership and Collective Action in the Egyptian Trade Unions" 2010 24(2) *Work, Employment and Society* 242–243; Kelly *Rethinking Industrial Relations* (1998); Barker, Johnson and Lavalette (eds) *Leadership and Social Movements* (2001).

6 Alexander 2010 *WES 242*.

7 Art 21 of the Namibian Constitution of 1990.

8 Labour Act 11 of 2007.

mandates. This article argues that trade union representatives or leaders should be held accountable for failing to deliver on their mandates through the rules of the law of agency and such obligations should be embedded in our labour laws.

2 THE ESSENCE AND MANDATES OF TRADE UNIONS

Workers, individually, are too weak and incapable to have their demands met at their workplaces, hence the need for a union to take advantage of the power that comes with unity and collectivism.[9] Namibia, despite its small population of just over two million people, has almost 40 trade unions split into three federations.[10] Jauch explains further:

> "The largest trade union federation is the National Union of Namibian Workers (NUNW), which represents an estimated 60 000–70 000 workers. The NUNW played a key role during Namibia's liberation struggle and continues to be affiliated to the South-West Africa People's Organisation (SWAPO), which is the ruling party since independence."[11]

Namibia's second trade union federation is the Trade Union Congress of Namibia (TUCNA), which represents an estimated 40 000 to 50 000 workers; it was formed in 2002 by unions that rejected the NUNW's party-political link.[12] The third trade union federation, the Namibia National Labour Organisation (NANLO), is much smaller, with just a few thousand members. It emerged in 2014 following the dismissal of the former NUNW general secretary, who then established a new federation. Jauch further points out:

> "These three union federations differ substantially in terms of their historical backgrounds, as the NUNW was always closely linked with SWAPO, while TUCNA represents most of those unions which want to operate independently from political parties. NANLO is essentially a break-away from the NUNW and is currently not linked to a political party. In ideological terms, the three federations are fairly similar beyond the question of the union-party linkage.

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9 Chidzambwa *An Exploratory Study of the Effectiveness of the Namibia Public Workers Union (NAPWU) as a Collective Bargaining Unit for Workers in the Civil Service: A Case Study of the Namibian Broadcasting Corporation (NBC)* (Masters thesis, University of Namibia) 2015. For a similar discussion on South Africa, see also Buhlungu, Brookes, and Wood "Trade Unions and Democracy in South Africa: Union Organizational Challenges and Solidarities in a Time of Transformation" 2008 46(3) *British Journal of Employment Relations* 439.

10 Jauch "Namibia's Labour Movement: Prospects and Challenges for 2017 and Beyond" (January 2017) https://www.pambazuka.org/democracy-governance/namibia%E2%80%99s-labour-movement-prospects-and-challenges-2017-and-beyond (accessed 2021-04-25).

11 *Ibid.*

12 Jauch *Trade Unions in Namibia: Defining a New Role?* (2004); Nemakonde "South African Trade Unionism at a Crossroads: The Case of the Congress of South African Trade Unions" 2018 5(1–2) *African Journal of Democracy and Governance* 137.

> They focus predominantly on 'bread and butter' issues and generally operate within a social-democratic framework. At present, none of them advocates for a more radical break with the existing socio-economic order."[13]

The issue of trade unions and politics has been central in the history of the Namibian labour movement.

Overall, Namibia's trade unions are characterised by a lack of ideological clarity, and statements by various union leaders point to ideological contradictions.[14] Sentiments of radical nationalism and liberation have been combined with an acceptance of neoliberalism as the ideology of the "free market" multilateral business environment. As trade union leaders entered company boards as part of a poorly defined union investment strategy, their views and interests have increasingly converged with those of government and business.[15] Also, some trade union leaders are now occupying management positions in the public and private sectors, which contradicts the principle of worker control within unions. These developments point to a lack of clarity regarding the working-class base of the labour movement, and confusion as to whose interests it is meant to serve.[16]

According to Parker, a trade union can be described as an organisation of employees whose principal object is the regulation of relations between its members, on the one hand, and their employers or employers' associations of which the employers are members, on the other hand.[17] The treatment of trade unions in Namibian labour legislation is discussed later in the article. The essence of trade unions is the need for employees to present a united and collective front in their dealings with employers, which often have economic power. The purpose of a trade union is to secure suitable working conditions and remuneration for its individual members.[18]

Employers have always wielded enormous economic power over their employees, not to mention the tremendous economic and political power that modern governments have over their employees.[19] As a result, employees have found it necessary, or imperative, to bind together into employees' organisations aimed at safeguarding and promoting their interests in the face of the vast economic power that private employers possess and exercise over employees, as well as the overwhelming economic and political power that governments bring to bear upon their own

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13 Jauch https://www.pambazuka.org/democracy-governance/namibia%E2%80%99s-labour-movement-prospects-and-challenges-2017-and-beyond.

14 *Ibid.*

15 *Ibid.*

16 *Ibid.*

17 Parker *Labour Law in Namibia* (2012) 242; Munson "The Trade Union as an Organization" 1965 88(5) *Monthly Labor Review* 497.

18 *Ibid.*

19 Parker *Labour Law in Namibia* 141.

employees.[20] The provenance of free and lawful organisation of employees into trade unions lies in statute in Namibia, as is the case in most countries. The objectives of labour dispute resolution are speed, accessibility and legitimacy (which derive from representivity in the dispute resolution body, certainty and expertise).[21] The *raison d'être* for trade unions is fairly obvious: to act on behalf of the employees of an organisation. Labour dispute resolution bodies, including trade unions, have an important role to play in maintaining an appropriate balance between the rights and interests of employees and employers while maintaining relatively healthy industrial relations with minimal resort to self-help.[22]

Thus, if the trade union leadership is politically or otherwise affiliated, the trade union will hardly retain its independent existence, structure and organisation. The probability of this occurring is high where trade union leaders are members of the ruling party that is the government of the day. Union leaders or representatives may therefore be compromised as, based on their affiliation, they may not always be fully willing to disagree with employers during industrial action. In Namibia, the trend is that trade union leaders often end up in high positions in government after their trade union jobs, and in some instances, such leaders are well-known affiliates of the ruling party. As a consequence, the workers will often be at the periphery of the agency relationship in trade unionism, instead of at its heart. Importing the obligations and principles of the law of agency into the trade union context can assist to repair this relationship and place the workers at its heart. This would be in line with the principles of good faith, equity, and economic and social justice.

3 AGENCY IN GENERAL AND AGENCY LAW

The agency problem is a conflict of interest inherent in any relationship where one party is expected to act in another's best interests. In corporate governance, finance, company or contract law, the agency problem usually refers to a conflict of interest between a company's management or directors and the company's stockholders or shareholders. Adam Smith, in his 1776 treatise *The Wealth of Nations*, pointed out the fundamental challenge underlying all corporate governance affairs, which is that "the directors of companies, being managers of other people's money, cannot be expected to watch over it with the same vigilance with which they watch over their own".[23] This is the agency problem. Simply put, whenever the owner of wealth (the principal) contracts with someone else (the agent) to manage his

[20] *Ibid.*

[21] Roux and Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 120.

[22] *Ibid.*

[23] Tricker *Corporate Governance: Principles, Policies and Practices* 3ed (2015).

or her affairs, the agency dilemma arises. How to ensure that the agent acts solely in the interest of the principal is a challenge.

The demands for transparency, accountability, reporting, audit, independent directors, and other requirements of company law, labour legislation or even the Constitution, and the demands of the corporate governance codes are, *inter alia*, all responses to the agency dilemma. The agency problem is not limited to relations between investors in listed companies and their agents. The agency problem can occur in private companies, joint ventures, NGOs, professional institutions, trade unions and governmental bodies. Wherever there is a separation between the members and the governing body appointed to protect their interests and deliver the required outcomes, the agency problem will arise, and corporate governance issues occur. The members could be the shareholders in a company, a professional institution or a trade union. Essentially, in agency situations, the parties have asymmetrical access to information, the directors know far more about the corporate situation than do the shareholders who must trust them. This situation is also present between trade union leaders and their members.

The term "agency" is used in a variety of contexts.[24] In legal contexts, the word "agent" is commonly used with respect to a person whose activities are concerned with the formation, variation or termination of contractual obligations, and "agency" has a corresponding meaning.[25] According to Havenga *et al*, one way the expression is used is to refer to an agreement in terms of which one party undertakes to perform a task or commission on behalf of another.[26] Havenga *et al* further pointed out that

> "in this context agency indicates that the parties conclude a contract from which reciprocal rights and obligations flow. This contract is known as a contract of mandate and is governed by the law of contracts in general and by the rules applicable to contracts of mandate in particular."[27]

"Agency" also occurs where one person (the agent) concludes a juristic act on behalf of another (the principal). The juristic act is an act that creates, alters, or extinguishes legal relationships through the expression of the will of one or more persons.[28] Used in this sense, "agency" combines the principles of mandate and representation.

The concept of agency or representation therefore arises whenever one person, the agent or representative, concludes a juristic act for or on behalf of another, who is called the principal, with the result that a legal tie arises

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24 Havenga, Hurter, Schulze, Havenga, Kelbrick, Manamela, Manamela, and Stoop *General Principles of Commercial Law* 7ed (2013) 295.

25 Kerr *The Law of Agency* 3ed (1991) 3; *Gowan v Bowern* 1924 AD 550 569.

26 Kerr *The Law of Agency 3*.

27 *Ibid.*

28 *Ibid.*

between the principal and a third party or third parties.[29] Any rights acquired, and duties assumed by the agent are for the principal and not for the agent. Agency therefore comprises the totality of juristic relationships that arise between these three parties.

Agency serves various needs in every society. First, the interests of those who have no capacity to act can be protected. Secondly, agency makes it possible for juristic acts to be performed on behalf of persons who are absent, and thirdly, it also allows for the use of specialised services of specific agents.[30] However, for a person to perform an act of representation, authority is a requirement and must be given. The duties or obligations of the agent include: the duty to follow instructions; the duty to exercise care and diligence; the duty of good faith; and the duty to account properly. These obligations are briefly discussed below, under the lens of trade unionism or collective labour law as branches of labour law.

3 1 The duty to follow instructions

The duty to follow instructions entails that the conduct of the agent should fall within the parameters of the agency agreement. The agent is bound to act in accordance with the principal's instructions.[31] Should the agent not follow these instructions to the best of her or his ability, the principal has a right of recourse against the agent. This obligation and right of recourse is not visible in the labour legislation nor between trade union leaders and the represented workers.

Since agency is a form of service, it is clear that agents are bound to do what they have been instructed to do.[32] This obligation should be well defined in the agency of trade unions, as should the consequences that follow from failure to do as instructed. Striking employees are often unhappy with the outcome of their industrial action because the trade union leadership did not deliver as instructed.

3 2 The duty to exercise care and diligence

The agent must use such care, skill and diligence as reasonably required for the due performance of his or her mandate. In the course of time, the law has implied into every contract of agency an undertaking by the agent that he will act with the care and diligence of the ordinary prudent man when he engages upon his principal's business.[33]

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29 Havenga *et al General Principles of Commercial Law* 299.
30 *Ibid.*
31 Havenga *et al General Principles of Commercial Law* 304.
32 *Bloom's Woollens (Pty) Ltd v Taylor* 1962 (2) SA 532 (A) par 538.
33 *Sakala v Wamambo* 1991 (4) SA 144 (ZHC) 147C/D–148B/C.

This obligation is the very reason for agency, although it may vary from case to case. In *S v Heller*,[34] the court posited that the principal bargains for the exercise of the disinterested skill, diligence and zeal of the agent. So, within trade union agency, as in many agency contracts, the *naturalia* include that the agent must perform his or her functions faithfully, honestly, and with care and diligence, and to account to his or her principal for his actions.

3 3 The duty of good faith

It is settled in law that the agent occupies a position of trust and confidence in relation to the principal. This fiduciary relationship requires the agent to conduct those affairs of the principal to which the authority extends, and in the best interests of the principal, and not for his or her own benefit.[35]

The fiduciary nature of an agent's relationship with the principal and of an employee with the employer came before the Supreme Court of Appeal in the cases of *Ganes v Telecom Namibia Ltd*[36] and *Phillips v Fieldstone Africa (Pty) Ltd*.[37] The court stressed that an agent was obliged not to work against the principal's interests, nor place himself in a position where his interests conflicted with that of the principal.

Owing to apparent political pressure or affiliation and weak bargaining position, trade union leaders' duty of good faith has been compromised. They may not necessarily derive secret profits, but trade union leaders are directly and indirectly in conflict of interest with workers' best interests. Therefore, Namibia's labour laws must firmly borrow this fundamental principle of agency if trade unions are to deliver on their mandates and retain public confidence. No agent (or trade union representative or leader) may place himself in any position where his or her interest and his or her duty conflict.[38] Whenever, a union leader fraudulently compromises these principles, a number of remedies should be available to affected employees.

3 4 The duty to account properly

An agent is also obliged to account for everything in good faith.[39] The relevant pillar of this duty is that the agent provides information when necessary. An agent must give the principal full and accurate information of what he or she has done in carrying out the mandate and full and accurate

34 1971 (2) SA 29 (A) par 44 C.

35 Havenga *et al General Principles of Commercial Law* 304; Swiatkowski "The Concept of Interest Representation During Industrial Disputes" 1993 3 *Tilburg FLRev* 239.

36 2004 (3) SA 615 (SCA).

37 2004 (3) SA 465 (SCA).

38 *Transvaal Cold Storage Co Ltd v Palmer* 1904 TS 4 par 33.

39 Kerr *The Law of Agency* 153; *David Trust v Aegis Insurance Co Ltd* 2000 (3) SA 289 (SCA).

information of the contract concluded.[40] Failure to disclose critical information often results in surprising or confusing industrial action outcomes. Therefore, agents must at all times be able to account properly for all matters concerning the agency, including in labour relations and disputes.

4 NAMIBIAN LABOUR LAWS AND TRADE UNIONISM

4 1 The Namibian Constitution and Labour Act of 2007

The Namibian Constitution provides for freedom of association.[41] The inalienable right of workers to withdraw their labour legitimately and the employers' right, in similar fashion, to lock out employees, is sacrosanct to the Constitution and is therefore given practical expression in the labour laws.[42]

Article 21(1)(*e*) of the Namibian Constitution (which is in accord with Namibia's international obligations and commitments under the International Labour Organisation (ILO)'s Freedom of Association and Protection of the Right to Organise Convention (ILO Convention),[43] and the International Covenant on Civil and Political Rights (ICCPR)) guarantees an employee's right to form and join a trade union of her or his choice. The Namibian Constitution, in a way, also supports the right to strike. Article 21(1)(*f*) of the Constitution protects employees from being imposed with a penal sanction solely for partaking in a strike.

In addition, Namibia is the first country expressly to include a right to administrative justice in its Constitution.[44] Article 18 reads as follows:

> "Administrative bodies and administrative officials shall act fairly and reasonably and comply with the requirements imposed upon such bodies and officials by common law and any relevant legislation, and persons aggrieved by the exercise of such acts and decisions shall have the right to seek redress before a Competent court or Tribunal."

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40 Kerr *The Law of Agency* 155.

41 Art 21 of the Constitution of Namibia; UN General Assembly *Universal Declaration of Human Rights* (10 December 1948) 217 A (III); and International Labour Organization (ILO) *Constitution of the International Labour Organisation* (*ILO*) (1 April 1919); Jenks "International Protection of Trade Union Protection" 1957 87(1) *Heinonline* 14–19; Albertyn "Freedom of Association" 1991 2 *South African Human Rights Yearbook* 305.

42 Gurirab "A Season Rich in Industrial Actions" (October 2012) https://www.namibian.com.na/index.php?id=100930&page=archive-read (accessed 2021-06-2).

43 ILO *Freedom of Association and Protection of the Right to Organise Convention* C87 (1948) Adopted: 09/07/1948.

44 Burns and Beukes *Administrative Law Under the 1996 Constitution* 3ed (2006) 201.

This article imposes a positive duty on the public administration to comply with the requirements of fairness, legality, and reasonableness in its actions.[45] Failure to do so grants an aggrieved person the right to seek redress before a court or tribunal.[46]

4 2 The Labour Act 11 of 2007 and strikes

In labour relations, there are widely accepted acts that parties to industrial disputes of interest may resort to: employees may strike, and employers may resort to a lockout. A strike in labour or employment relations is a joint action of a group of employees, whereby they withdraw their labour partially or totally, with the aim of inducing the employer to accept their joint demands.[47] A "strike" is similarly also defined in the 2007 Labour Act.[48] For the purposes of the Act, a strike is industrial action taken by employees as parties to an industrial dispute of interest.

The Act grants employees the right to take industrial action in the form of a strike, and it puts down requirements to make such industrial action lawful.[49] The courts have also recognised striking as an essential ingredient of the negotiation process, and the strike weapon is an integral part of collective bargaining.[50] The ILO Convention does not clearly provide for the right of employees to strike.[51] However, the right to strike is an essential element of collective bargaining.

The 2007 Labour Act seeks to regulate, *inter alia*, the registration of trade unions and employers' organisations, collective labour relations, and the systematic prevention and resolution of labour disputes.[52] Strikes in recent years, mostly in the public sector, have cast doubt on the effectiveness of the Labour Act, and trade unions, in this area.

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45 *Ibid.*

46 *Kauesa v Minister of Home Affairs* 1995 (1) SA 51 (NmHC).

47 Parker *Labour Law in Namibia* 223.

48 According to s 1, "strike" means a total or partial stoppage, disruption or retardation of work by employees if the stoppage, disruption or retardation is to compel their employer, another employer or an employers' organisation to which the employer belongs, to accept, modify or abandon any demand that may form the subject matter of a dispute. See also s 213 of South Africa's Labour Relations Act 66 of 1995; s 2 of Swaziland's Industrial Relations Act 1 of 2000.

49 Chapter 7 of the Labour Act 11 of 2007 or specifically s 74(1)(*a*) of the Labour Act provides that "every party to a dispute of interest has the right to strike".

50 *Smit v Standard Bank Namibia Limited* 1994 NR 366 (LC); *Barlows Manufacturing Co Ltd v Metals & Allied Workers Union* (1990) 11 *ILJ* 35 (T); *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A); *Crofter Harris Tweed Co v Veitch* [1942] AC 435 par 463.

51 Bellace "The ILO and the Right to Strike" 2014 153(1) *International Labour Review* 29–70.

52 Preamble to the Labour Act 11 of 2007.

Parker notes three fundamental points with regard to a strike.[53] First, an employee's right to take industrial action in the form of a strike is statutory. Secondly, the remedy of a strike is not open to a single employee acting alone and on his own behalf to back a demand for improved working conditions for himself. Thirdly, the strike action must be for a specific purpose, namely, as a tool for inducing an employer to accede to proposals of employees where such demands or proposals are the subject of an industrial dispute between the employer and the employees.[54] A strike is therefore an indispensable tool and economic instrument used as a last resort to propel parties to an industrial dispute to come to some agreement at the negotiation table. Given the significance of a strike, the relationship between employees and their trade union representatives should not be undermined. Trade union leaders should be held accountable in events where they compromise in the negotiation process, as this will often have a negative impact on the lives of workers.

4 3 Trade unions

In terms of the 2007 Labour Act, a "trade union" is defined as an association of employees whose principal purpose is to regulate relations between employees and employers.[55] Chapter 6 of the Labour Act establishes the legal framework for the formation and registration of trade unions, and other matters connected with, or incidental to, trade union rights and activities. According to the 2007 Labour Act, certain notable rights accrue to a trade union upon registration.[56]

The right to join or form trade unions is a genus of the wider human right to freedom of association, which is recognised in international human rights laws. By virtue of article 144 of the Constitution, international law forms part of Namibian law. Article 22(1) of the ICCPR provides that everyone shall have the right to freedom of association with others, and the right to form and join trade unions for the protection of his interests.[57] State parties (including Namibia) are expected to domesticate and comply with these provisions. Article 21(1)(e) of the Namibian Constitution, which is in accord with Namibia's international obligations and commitments under the ILO Convention and the ICCPR, also guarantees an employee's right to form and join a trade union of her or his choice.[58] At international, regional and

53 Parker *Labour Law in Namibia* 113.

54 *Ibid.*

55 S 1 of the Labour Act 11 of 2007.

56 S 59 of the Labour Act 11 of 2007.

57 Namibia ratified the ICCPR in 1996; see also ILO *Freedom of Association and Protection of the Right to Organise Convention* C87 (1948) Adopted: 09/07/1948.

58 If the Labour Commissioner refuses to register a trade union, he or she must give notice of such decision and the reasons for it. See *Frank v Chairperson of the Immigration Selection*

national levels, the right to form trade unions is recognised as a fundamental right. It can therefore be argued that trade unions are essential agents in society, and when they fail to uphold the core obligations of agency, they violate international, constitutional and labour laws.

In addition, the Labour Act of 2007 provides that a trade union must draft a constitution as its guiding document. The elements of the constitution of a trade union are set out in the Act.[59] The constitution of a trade union must declare the objects of the union and clearly prescribe the functions of its office-bearers and officials. A trade union whose sole object is to gain and maintain political power is not really a trade union for the purpose of the Act.[60] Although trade unions may vigorously and openly support a political party, the politicisation of trade unions perhaps makes it difficult to hold trade union leaders accountable. Of course, trade unions continue to play an important role in African politics and elsewhere. But there is a need to strengthen the agency component in trade unionism if trade unions are to remain relevant in Namibia and other parts of the world.

5 COLLECTIVE BARGAINING

According to Grogan, collective bargaining takes place when one or more employers engage with one or more employee collectives in an attempt to reach agreement on issues of mutual concern.[61] There is a substantial difference between consultation and bargaining.[62] Grogan points out:

> "By collective bargaining we mean those social structures whereby employers bargain with the representatives of their employees about the terms and conditions of employment, about rules governing the working environment and about procedure that should govern the relations between the union and employer. Such bargaining is called collective bargaining because on the workers' side the representative acts on behalf of a group of workers."[63]

Collective bargaining is a fundamental philosophy, and is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes.[64] The recognition and inclusion of trade unions for the purpose of collective bargaining is a statutory innovation.[65]

Board 1999 NR 257 (HC) and *Katofa v Administrator-General for South-West Africa* 1985 (4) SA 211 (SWA).

59 S 53 of the Labour Act 11 of 2007.

60 Parker *Labour Law in Namibia* 248.

61 Grogan *Workplace Law* 10ed (2009) 312.

62 *Metal & Allied Workers Union v Hart Ltd* (1985) 6 *ILJ* 478 (IC) par 493H–I.

63 *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd* (1991) 12 *ILJ* 1221 (A) par 1237A–B.

64 *NUM v East Rand Gold & Uranium Co Ltd supra* par 1236J–1237A.

65 Parker *Labour Law in Namibia* 261.

However, it needs to entrench the fundamental principles of the law of agency, as trade unions are also often exclusive bargaining agents.

The question that often crops up during collective bargaining is whether it is practicable or fair to an employer that some of its own employees (who by virtue of their managerial position in the enterprise represent the employer during collective bargaining with a trade union) should be members of that trade union.[66] Managers, in most cases, belong to the management component of the organisation.[67] Nothing prevents an employee who is a manager of an organisation from forming or joining a trade union.[68] However, it may be unconscionable for an employee to be placed under undue pressure to disclose the employer's confidential information or to be made a member of the negotiating team representing the trade union in negotiations with the employer where it is part of the employee's duties to negotiate on behalf of, or assist, the employer in negotiations with the same trade union.[69] The Industrial Court in the case of *Keshwar v SANCA* observed that an employee may not participate in those union activities that could make it impossible or extremely difficult to perform the tasks entrusted to him by his master.[70] This discussion also shows the agency dilemma in trade unions from the employer's perspective. Trade unionism or strike law, as it is currently, is prone to conflicts of interest. Therefore, it is recommended that labour legislation be revised to close these gaps and prevent potential conflicts of interest in the bargaining units from both the employee and employer perspectives.

Upon registration, trade unions acquire certain statutory rights. Those rights, and rights attaching to a trade union as the exclusive bargaining agent, are inherently collective rights and cannot attach to individual members of the trade union.[71] The basis of collective bargaining is the desire that employers and employees should bargain freely with minimum state interference to promote industrial peace and tranquillity. Although state intervention is in the form of legislation, it is conducive to sound employment or labour relations. Therefore, the machinery of collective bargaining has the effect of replacing the arrangement whereby remuneration and other terms and conditions of service of employees are negotiated between the employer and its employees individually.[72]

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66 Parker *Labour Law in Namibia* 244.

67 Blunt *Organisational Theory and Behaviour: An African Perspective* (1983).

68 *Keshwar v SANCA* 1991 12 *ILJ* 816 (IC).

69 *Keshwar v SANCA supra* at 818H.

70 *Ibid*.

71 *Mutual & Federal Insurance Co v Bank, Insurance, Finance & Assurance Workers Union* (1996) 17 *ILJ* 241 (A).

72 Parker *Labour Law in Namibia* 259.

The desired result of collective bargaining is the making of a collective agreement. A collective agreement is defined in the Labour Act as a written agreement concerning the terms and conditions of employment, or any other matter of mutual interest, concluded by (a) registered trade union(s) and an employer(s) or registered employers' organisation.[73]

Having access to adequate, correct and relevant information is one of the hallmarks of genuine collective bargaining as it leads to both the employer and trade union in question understanding each other's position and circumstances.[74] It is an unfair labour practice for an employer to fail to disclose to a registered trade union any relevant information that is reasonably required to enable the trade union to consult and bargain collectively in respect of any labour matter.[75] Wording in legislation implies that the important duty to disclose information only lies between the employer and the trade union. However, it is equally, or even more, important that this duty extends and is emphasised in the relationship between trade union leaders and the workers they represent.

It is also an unfair labour practice for the parties to bargain in bad faith. The element of good faith is essential not only in the law of agency but also in the labour legislation or laws of most countries. The element of good faith is a vital one and has been discussed above in the context of the obligations of agents in agency law. Goldstone JA (as he then was) stated in the case of *National Union of Mineworkers v East Rand Gold & Uranium Co Ltd*[76] that "the very stuff of collective bargaining is the duty to bargain in good faith". Good faith "does not compel a party to agree to each and every proposal, neither does it require a party to make a concession anyhow".[77] Therefore, if an impasse is reached owing to bad faith on the part of the trade union representatives, direct negotiation with individual employees would be fair, just and equitable.

6 NAMIBIA'S INDUSTRIAL ACTION IN CONTEXT

According to the Olsonian theory of collective action, unions are encompassing organisations whose members are subsumed into a general mass, which leads to problems of representivity and ultimately of maintaining

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73 S 1 of the Labour Act 11 of 2007.

74 Parker *Labour Law in Namibia* 264.

75 S 50(1)(*d*) subject to s 50(2)–(7) of the Labour Act 11 of 2007; s 16(3) of South Africa's Labour Relations Act 66 of 1995; and s 181 of United Kingdom's Trade Unions and Labour Relations (Consolidation) Act of 1992.

76 (1991) 12 *ILJ* 1221 (A) par 123.

77 *Namdeb Diamond Corporation (Pty) Ltd v Mineworkers Union of Namibia NLLP* 2002 (2) 188 NLC par 198.

mobilisation.[78] In a study conducted by Chidzambwa,[79] the findings revealed that the majority of NAPWU members believe that their union has little or no influence at all when it comes to the working conditions of its members. The respondents feel insecure, as management can act as it deems fit and encounters no resistance from the union; the widely held opinion of NAPWU members at NBC was that there is poor accountability of the union to its members – to the extent that some members felt that their union was conniving with management against them.[80] Despite the above-mentioned problems, NAPWU (through its shop stewards) has assisted its members in the area of legal aid by supporting them in cases of conflicts among employees, or other individual problems faced with their immediate supervisors.[81] The outcome of the research indicated that NAPWU should consider adopting "servicing"[82] and "organising"[83] models of union representation and to let these two complement each other. This would prevent the "us-and-them" relationship currently prevailing between the union and its members and affecting the collectivism approach.

Namibia has seen a quite-marked increase in strikes and industrial action in the country generally.[84] At times, it appeared that the successive strikes were copycats or that the success of one group fed into the actions of others. What was also remarkable was that most of the strikes have been in the public sector.[85] The strikes have often revealed the huge gap between the remuneration of executive management, particularly at state-owned enterprises, and those at the bottom of the pile.

The print media in Namibia has consistently reported that the leaders of the workers, in the run-up to the congress of the ruling party (South West Africa People's Organisation [SWAPO]), locked themselves up in smoked-filled rooms plotting and horse trading on who should or should not be their ruler rather than being concerned with the welfare of their members.[86] It appears that trade union leaders have long sold their souls for silver coins to politicians and an assortment of dubious moneymen. In other words, being a trade union leader or representative is now an opportunity for career

78 Wood "Solidarity, Representativity and Accountability: The Origins, State and Implications of Shopfloor Democracy Within the Congress of South African Trade Unions" 2003 45(3) *The Journal of Industrial Relations* 326.

79 Chidzambwa *An Exploratory Study of the Effectiveness of the Namibia Public Workers Union (NAPWU) as a Collective Bargaining Unit for Workers in the Civil Service* 2015 A thesis submitted in partial fulfilment of the requirements for the Master of Public Administration at the University of Namibia 33.

80 *Ibid.*

81 *Ibid.*

82 The ability to deliver services for employees in improving work and working conditions.

83 The term used to encapsulate those factors that give a union the capacity to represent its members by virtue of its healthy state as an organisation.

84 Gurirab "A Season Rich in Industrial Actions" The Namibian 09 October 2012.

85 *Ibid.*

86 *Ibid.*

development or self-enrichment. The bosses of the unions sit on boards as shareholders of companies and toast with their newfound friends while the constituents of the unionists eke out a living in squalor.[87]

What then are the contributing factors that lead to strikes? According to Jauch who is a labour researcher and educator based in Windhoek, there are several factors that lead to strikes, though they may differ from case to case.[88] In some instances, they seem to be caused by hard-line attitudes during negotiations or a breakdown of trust in management. The NAMDEB strike also points to deep-rooted tensions between the company management and its workforce; thus, a relatively small dispute escalated into a drawn-out strike for almost a month causing financial losses to workers and the company alike.[89] The poor state of labour relations was also shown by the fact that political intervention had to be used to settle the strike.

In other cases, companies have refused to provide trade unions with essential information required for collective bargaining, thus setting the stage for confrontational negotiations. Perhaps the most important factor leading to strikes is the enormous level of inequality experienced at the workplace and in society in general.[90] Such inequalities have to be seen as socially unjust and seem to have been a key factor in the recent strike at Rossing Uranium.[91] In addition, various role players from labour movements, employers' organisations and government have expressed concerns and offered explanations that "trade unions are becoming unreasonable". Some observe that the challenges faced by NAPWU and National Union of Namibian Workers are the same though, and although both unions believe that unity is the way forward, they fail to unite because of political differences.[92]

In 2018, there were also many major strikes in Namibia. Among them were one organised by teachers, one by the national broadcaster (Namibia Broadcasting Corporation) and another by the University of Namibia; like any other prior to them, they displayed that in Namibia's trade unionism, there was an agency problem between the representatives (the bargaining agents) and the workers or employees (the principal). In terms of the Act, a trade union is a juristic person, and a member, office-bearer or official of a registered trade union is not personally liable for any liability or obligation

87 *Ibid.*

88 Jauch "Namibia's Strike Wave" (October 2011) https://www.thevillager.com.na/articles/414/namibias-strike-wave/ (accessed 2021-06-02).

89 *Ibid.*

90 *Ibid.*

91 *Ibid.*

92 Smith "Namibia's Peace and Stability Are Under Threat, Unless Striking Socio-Economic Inequalities in the Country Are Addressed" (2019) https://www.namibian.com.na/index.php?id=63312&page=archive-read (accessed 2019-04-30).

incurred in good faith by the union only because of being a member, office-bearer or official. What about the aspect of bad faith? What if union leaders and authorised representatives sign collective agreements that are not in the best interest of their members? Legislation is silent on these issues. The rising number of labour disputes in Namibia is a wake-up call for government to revise labour laws governing the role and powers accorded to trade unions and employers, and dispute resolution policies in line with the latest economic developments in the country and international standards to ensure fairness and equity.

7 CONCLUSIONS AND RECOMMENDATIONS

This article has explored the relationship between trade union leaders or representatives and employees or workers from the perspective of the law of agency. The article has argued for integration of the general principles of agency law into labour laws to ensure trade union leaders' accountability, which will in turn minimise the agency dilemma in trade unions. Trade unions should be genuine representatives (the agents) of workers (the principals) and must in the performance of their duties be guided by the best interests of the workers and the essential element of good faith. Factors such as compromised leadership, patronage, lack of good governance principles and political intrigue in unionism need to be addressed. Otherwise, the agency problem will persist and compromise industrial action in future. Therefore, labour law practitioners should solemnly scrutinise this conundrum with a view to ensuring that the best interests of workers or union members are upheld by trade union leaders, above anything else. Trade unions must be transformative and progressive movements if they are to remain relevant and sustainable in Namibia. This can be achieved by introducing and integrating the principles of the law of agency in labour laws to enforce union accountability.

In addition, the successful struggle of the working class for decent wages, good working conditions and working hours, and for the right to organise and strike is a monumental and towering achievement of the last century. In order to retain the success and significance of trade unions in Namibia and elsewhere, the legislature, civil society and legal practitioners need critically to assess the agency problem in trade unions and make appropriate recommendations for reform. Reforms should deal specifically with the agency relationship between trade union leaders or representatives and the workers or employees they represent. This reinforcement is likely to restore public confidence in trade union functions and help them remain relevant to their mandates. Further research is recommended on this subject matter. Below are some useful suggestions on how to address these issues:

- Introduce stricter controls in collective bargaining and re-examine the system of collective labour law with a view to eliminating dysfunctional barriers.
- Enact a Trade Unions Act or similar legislation aimed at ensuring that trade unions continue to play a role in promoting and safeguarding workers' economic and social interests rather than abdicating that duty in exchange for bribes and related favours from employers.[93]
- Autonomous public sector bargaining councils could be introduced.[94]
- Avoid trade union pluralism[95] and try conglomerate unions in order to recompose the modalities of participation in decision-making in trade unions.[96]
- Form a new type of social movement unionism in which workers' interests are at the heart of negotiations, dispute settlement or during collective bargaining.
- In Namibia, as in South Africa,[97] extreme social inequality and political affiliation (especially of the union leaders) plays the biggest part in fueling the tensions that are manifested in disorderly labour disputes.[98] Ironically, it is argued that if trade unions were to disengage from political parties and concentrate on the advancement of their members, rather than a political agenda, the trustworthiness of the Namibian labour movement would improve while it simultaneously lobbied government to pursue healthier policies on labour matters, especially collective bargaining.
- Despite their relationships with political parties, trade unions must remain autonomous.[99] Legislative reforms could also reflect a worker-led collective bargaining approach or model.
- Moving beyond a traditional trade-union-centred approach, some suggest that for trade unionism to sustain its relevance within the

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93 Du Toit and Ronnie "The Necessary Evolution of Strike Law" in Roux and Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 195–218.

94 Godfrey and Bamu "The State of Centralised Bargaining and Possible Future Trends" in Roux and Rycroft *Reinventing Labour Law: Reflecting on the First 15 Years of the Labour Relations Act and Future Challenges* (2012) 242.

95 Lamptey and Parku "An Exploratory Study of Trade Union Pluralism in Ghana" 2018 42(1) *African Journal of Employee Relations* 4312.

96 Thomas "Conglomerate Unions and Transformations of Union Democracy" 2017 55(3) *British Journal of Industrial Relations* 648.

97 Roux and Rycroft *Reinventing Labour Law* (2012) 120.

98 Uys and Holtzhausen "Factors That Have an Impact on the Future of Trade Unions in South Africa" 2016 13 *Journal of Contemporary Management* 1164.

99 Budeli 2012 *CILSA* 454; Yihong "Labour in Defiance: The Emergence of Autonomous Collective Bargaining in Southern China" 2016 11(2) *Journal of Comparative Law* 331.

present globalised liberal political culture, its revolutionary outlook must give way to a new business orientation.[100]

- Members of trade unions must be careful in the nomination of candidates who wish to be elected as office-bearers.
- Further research must explore and identify strategies that can be implemented by trade unions to enhance healthier and stronger solidarity with the workers.

There can be no single, pragmatic and final answer to the dilemmas posed by the relationship between union leadership (representatives or shop stewards) and employees or workers for they are shaped in different countries by different historical and national circumstances.

[100] Ajayi and Tongo "Liberal Democracy, Trade Unionism and Sustainable Development in Nigeria" 2007 2(2–3) *African Journal of Business and Economic Research* 90.

NOTES / AANTEKENINGE

SHOULD MAGISTRATES TAKE DOWN CONFESSIONS?

1 Introduction

Section 217(1) of the Criminal Procedure Act 51 of 1977 (the Act) sets forth the requirements for the admissibility of a confession made by any person in relation to the commission of an offence. Section 217(1)(*a*) provides that where a confession is made to a peace officer who is not a magistrate or a justice of the peace, such a confession must be confirmed or reduced to writing in the presence of a magistrate. Pursuant to section 217(1)(*b*), where a confession has been made to a magistrate or has been confirmed and reduced to writing in the presence of a magistrate, it is deemed to be admissible in evidence upon mere production (ss (*b*)(i)); and presumed, unless the contrary is proved, that the accused made the confession freely and voluntarily, while she or he was in her or his sound and sober senses, and without having been unduly influenced in making it (ss (*b*)(ii)).

In *S v Zuma* (1995 (1) SACR 568 (CC)), the Constitutional Court found that section 217(1)(*b*)(ii) of the Act violated the right to a fair trial as embodied in section 25(3) of the Constitution of the Republic of South Africa, 1996 (the Constitution). It is a longstanding principle of both English and South African law of evidence that the state bore the burden of proving that any confession on which it wished to rely was freely and voluntarily made. Section 217(1)(*b*)(ii) of the Act placed on the accused the burden of proving on a balance of probabilities that a confession made to or recorded by a magistrate was not free and voluntary. This section, therefore, created a legal burden of rebuttal on the accused – a so-called "reverse onus".

The court held that the common law rule requiring the state to prove that a confession was made freely and voluntarily, was integral and inherent in the right to remain silent after arrest, the right not to be compelled to make a confession, and the right not to be a compellable witness against oneself. These rights are the necessary reinforcement of the principle that the prosecution must prove the guilt of the accused beyond reasonable doubt. Reversing the burden of proof seriously compromises and undermines these rights. The court thus declared that section 217(1)(*b*)(ii) of the Act violated the provisions of the Constitution of the Republic of South Africa, 200 of 1993 (the interim Constitution) and was invalid.

In the authors' view, with the Constitutional Court's decision in *Zuma*, the principal *rationale* for sections 217(1)(*a*) and (*b*) of the Act seems to have fallen away. After all, the main reason to specifically provide for a confession made to or reduced to writing by a magistrate would be to ease the process

of admissibility of such a confession without the need to test its admissibility at a trial-within-a-trial. After *Zuma* – whether a confession was made to or reduced to writing by a magistrate or not – if the accused contests the admissibility of the confession, the presiding magistrate must hold a trial-within-a-trial in which the state bears the *onus* of proving the admissibility of the confession on a balance of probabilities.

This raises a possibility that did not exist prior *to Zuma*, namely that a magistrate to whom a confession was made or who reduced it to writing can be called as a witness by the state in a trial-within-a-trial. The authors question whether it is conducive to central tenets of the judicial function – independence and impartiality – for magistrates to take confessions at all, and thus be required to testify in any matter in which accused persons challenge confessions taken down by magistrates.

At the outset, the authors note that they do not address the situation in which the same magistrate who took down an accused's confession also presides over that accused's criminal trial, because as far as they are aware, this does not arise in practice. The authors believe that it would be grossly irregular for a magistrate to preside over a criminal trial when she or he has previously taken down a confession from the same accused (*S v Sibeko* 1990 (1) SACR 206 (T)). Moreover, it is trite that magistrates are not competent to give evidence in cases over which they preside or have presided (Schwikkard and Van der Merwe *Principles of Evidence* (2016) 453).

2 The principles of independence and impartiality

As Olivier points out, prior to 1994 judicial independence was neither constitutionally nor legislatively protected or guaranteed (Olivier "The Magistracy" in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 349). At present, however, judicial independence is a core value of our constitutional dispensation. Section 165(2) of the Constitution guarantees the independence of all courts, including magistrates' courts. The independence of magistrates in particular also resonates in section 174(7) of the Constitution, which mandates the enactment of legislation to ensure that the appointment, promotion, transfer, and dismissal of magistrates take place "without favour or prejudice".

In *De Lange v Smuts NO* (1998 7 BCLR 779 (CC)) Ackermann J found it instructive to refer to the views of the Canadian Supreme Court regarding section 11(*d*) of the Canadian Charter of Rights and Freedoms (Canadian Charter), which guarantees a person who is charged with an offence the right to be presumed innocent until proven guilty according to law, in a fair and public hearing by an independent and impartial tribunal (*De Lange v Smuts NO supra* par 69). Ackermann J cited with approval Dickson CJC's summary of the essence of judicial independence in *The Queen v Beauregard* [1986] 2 SCR 56, 69:

> "Historically, the generally accepted core of the principle of judicial independence has been the complete liberty of individual judges to hear and decide the cases that come before them: no outsider – be it government, pressure group, individual or even another judge – should interfere in fact, or

> attempt to interfere, with the way in which a judge conducts his or her case and makes his or her decision. This core continues to be central to the principle of judicial independence."

According to the Constitutional Court in *Van Rooyen v The State* (2002 (5) SA 246 (CC) par 19), this requires judicial officers to act independently and impartially in cases that come before them, and at the institutional level, it requires structures to protect the courts and judicial officers against external interference.

In the leading decision on judicial independence under section 11(*d*) of the Canadian Charter, the Supreme Court of Canada in *Valente v The Queen* ([1985] 2 SCR 673) identified three essential conditions of judicial independence. The first is the security of tenure, which embodies the requirement that the decision-maker be removable only for just cause, "secure against interference by the executive or other appointing authority." The second is a basic degree of financial security, free from "arbitrary interference by the executive in a manner that could affect judicial independence". The third is institutional independence with respect to matters that relate directly to the exercise of the tribunal's judicial function, as well as judicial control over the administrative decisions that bear directly and immediately on the exercise of the judicial function. It is this third essential condition that the authors believe is violated by requiring magistrates to take down confessions.

In *Valente*, the court also drew the fundamental distinction between the concepts of "independence" and "impartiality" as follows (685):

> "Although there is obviously a close relationship between independence and impartiality, they are nevertheless separate and distinct values or requirements. Impartiality refers to a state of mind or attitude of the tribunal in relation to the issues and the parties in a particular case. The word 'impartial' […] connotes absence of bias, actual or perceived. The word 'independent' […] reflects or embodies the traditional constitutional value of judicial independence. As such, it connotes not merely a state of mind or attitude in the actual exercise of judicial functions, but status or relationship to others, particularly to the executive branch of government, that rests on objective conditions or guarantees."

Hlophe ADJP in *Freedom of Expression Institute v President, Ordinary Court Martial* (1999 (2) SA 471 (C)) remarked that it is clear from the wording of section 34 of the Constitution that independence and impartiality are also essential requirements of courts in South Africa. O'Regan J, in *De Lange v Smuts NO* (*supra* par 159), pointed out that the courts in which judicial officers hold office must exhibit institutional independence. This involves independence in the relationship between the courts and other arms of government.

It, therefore, follows that the appropriate test is whether the tribunal "from the objective standpoint of a reasonable and informed person will be perceived as enjoying the essential conditions of independence" (*R v Généreux* ([1991] 1 SCR 259, 287). It is indubitable that the appearance or perception of independence plays a significant role in evaluating whether courts are, in fact, sufficiently independent (*In the Matter of Minister of Police*

and Vowana (Case No: 884/2014 (EC) par 16). The reasons for this were clarified in *Valente* (689):

> "Both independence and impartiality are fundamental not only to the capacity to do justice in a particular case but also to individual and public confidence in the administration of justice. Without that confidence the system cannot command the respect and acceptance that are essential to its effective operation. It is, therefore, important that a tribunal should be perceived as independent, as well as impartial, and that the test for independence should include that perception."

The Constitutional Court in *Van Rooyen v The State* (*supra* par 32) also pointed out that the jurisprudence of the European Court of Human Rights supports the principle that appearances must be considered when evaluating the independence of courts.

The perception of judicial independence has been described as a "fundamental jurisprudential principle" (*In the Matter of Minister of Police and Vowana supra* par 16):

> "The requirement of judicial officers to not only be independent but also be seen to be independent is one of the foundational prescripts of our law and one of the very important aspects of the rule of law ..."

Pursuant to section 165 of the Constitution, judicial officers are accountable to all persons to whom the Constitution applies. Citizens are entitled "to assume with confidence that the law is applied without fear, favour or prejudice and the constitutional principle of legality is painstakingly observed" (par 18). The Bangalore Principles of Judicial Conduct provide that (www.undoc.org>judicialgroup (accessed 2021-06-01)):

> "[A] Judge shall exercise the judicial function independently [...] free of any extraneous influences, inducements, pressures, threats or interference [...] from any quarter or for any reason [...] Impartiality is essential to the proper discharge of judicial office [...] A Judge shall ensure his or her conduct is above reproach in the view of a reasonable observer [...] The behaviour and conduct of a Judge must reaffirm the people's faith in the integrity of the judiciary."

In considering issues of appearances or perceptions of independence and impartiality, it should be noted that the test is an objective one. This test, which was formulated in Canadian jurisprudence and quoted with approval by the Constitutional Court in *Van Rooyen*, asks: "What would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude?"

It is especially the appearance of a lack of independence that taints the act of magistrates taking down confessions, because, as is argued below, this raises the possibility that magistrates can be called by the state to give evidence on behalf of the state at trials-within-trials in which accused persons contest the admissibility confessions taken down by magistrates. This might create the perception of a close relationship between the magistracy and the National Prosecuting Authority, calling into question the impartiality of the magistracy.

3 Is taking down a confession a judicial act?

Hoexter points out that South African jurisprudence identifies the normal or core function of the judicial office to hear and determine matters in court (Hoexter "Non-judicial Functions and Activities" in Hoexter and Olivier (eds) *The Judiciary in South Africa* (2014) 288). Put simply: "The main job of judges is to decide court cases" (Mr Justice Howie "Judicial Independence" 2003 118 *SALJ* 680). Thus, non-judicial activities should be regarded as any extra-curial activities that are not directly related to this core function.

The *Oxford English Dictionary* (https://www-oed-com.uplib.idm.oclc.org) defines "extrajudicial" as:

> "Lying outside the proceedings in court; forming no part of the case before the court. Of an opinion, confession, etc.: Not delivered from the bench, not made in court, informal."

In *NSPCA v Minister of Agriculture, Forestry and Fisheries* (2013 (5) SA 571 (CC)) Zondo J, giving judgment for the court, suggested that to determine whether the performance of a function by a member of the judiciary offends against the separation of powers, the following questions should be asked:

(i) Is the function complained of a non-judicial function? If so,

(ii) Is the performance of the function expressly provided for in the Constitution? If not,

(iii) Is the non-judicial function closely connected with the core function of the judiciary? If not,

(iv) Is there any compelling reason why the function should be performed by a member of the judiciary?

"In the absence of such justification", the Constitutional Court held that (par 38):

> "[T]he separation of powers is offended and the relevant statutory provision, or the performance of such a function by a member of the Judiciary, is inconsistent with the Constitution and must be declared unconstitutional."

Applying this test to the act of taking down a confession, the outcome is as follows:

(i) *Is the function of taking down a confession a non-judicial act?* According to the dictionary definition, taking down a confession clearly constitutes an "extrajudicial" act. Moreover, practically, there is nothing "judicial" about taking down a confession. The admissibility of a confession does not hinge on it being made specifically to a peace officer or a justice or a magistrate. A confession can be made to anyone and anyone can record a confession. Thus, taking down a confession is clearly a non-judicial function.

(ii) *Is the performance of the function of taking down a confession provided for in the Constitution?* The taking down of confessions by magistrates is not provided for in the Constitution and is in fact only indirectly provided for in section 217(1)(*a*) of the Act.

(iii) *Is taking down a confession closely connected with the core function of the judiciary?* Taking down a confession is clearly not connected

with the core judicial function, because any person can take down a confession, and judges are not called upon to take confessions at all.

(iv) *Is there a compelling reason why the function of taking down a confession should be performed by a member of the judiciary?* As is demonstrated below, the so-called "compelling reason" for the proviso to section 217(1) of the Act (i.e., sections 217(1)(*a*) and (*b*)), namely to act as a technical safeguarding provision to protect arrested persons against abusive police behaviour, is a red herring. In fact, these subsections do not seem to provide any appreciable protection to accused persons.

Thus, the authors believe that the taking down of confessions by magistrates is inconsistent with the Constitution.

4 What is the purpose of the proviso to section 217(1) of the Act?

What is the purpose of the proviso to section 217(1) of the Act, which has no counterpart in English law and was introduced into South African law by the Criminal Procedure and Evidence Act 31 of 1917 (Zeffert and Paizes *The South African Law of Evidence* (2017) 539)? The primary purpose of section 217(1)(a) seems to act as a

> "[t]echnical safeguarding provision to protect arrested persons against abusive police behaviour and to try to minimise the incidence of falsely induced confessions" (Bellengère, Theophilopoulos & Palmer (eds) *The Law of Evidence in South Africa: Basic Principles* (2013) 376).

Thus, so the argument goes, the accused should derive some sense of protection from the fact that she is brought before an impartial official who would not unduly influence her into making a confession, and so ensure that the confession is freely and voluntarily made.

Although this might be a laudable aim in the abstract, the proviso to section 217 of the Act has in fact not achieved its ostensible purpose. First, as Lansdown and Campbell point out, the confirmation of a confession before a magistrate has had the effect of dropping a veil between the treatment of the accused by his custodians, and the resulting confession (Lansdown and Campbell *South African Criminal Law and Procedure* Vol v (1982) 874). This gives a somewhat suspect statement an "aura of respectability and admissibility" (*S v Majosi* 1964 (1) SA 68 (N) 71).

Secondly, a confession has been deemed properly confirmed in terms of section 217(1)(*a*) of the Act in circumstances where the justice who confirmed the confession was the investigating police officer or member of the same police unit (Zeffertt and Paizes *The Law of Evidence in South Africa* (2017) 539). Although the courts have criticised this practice, there is nothing to prevent to police from using it. In *S v Latha* (1994 (1) SACR 447 (A)) the Appellate Division did indicate that it frowned on the practice, but the court viewed as a "redeeming feature" the fact that the police had not foreseen at the outset that the appellants were going to make full confessions and had, as soon as this became evident, warned them and gave them the opportunity to proceed before a magistrate.

Zeffertt and Paizes conclude that the proviso has thus "failed in its aim of protecting accused persons and has become a technical bar to the admission of highly relevant and reliable evidence" (Zeffertt and Paizes *supra* 539). The South African Law Commission in its discussion paper on the simplification of criminal procedure reached the same conclusion (The South African Law Commission Discussion Paper 96 Project 73 *Simplification of Criminal Procedure* 80). The Commission stated:

> "6.79 The distinction that has been made between admissions and confessions owes its origin to early judicial reaction to the exclusion of 'confessions' made to police officers. There is no rational reason for different treatment being given to various self-incriminatory statements (or conduct), irrespective of whether they are made to the police. In each case the evidence is only relevant because it is incriminatory, and should be admissible on common grounds.
> 6.80 The reduction of a confession to writing in the presence of a magistrate does not appear to have had any significant advantages for the accused." (footnotes omitted.)

The Commission also stated that the distinction between admissions and confessions may hamper effective police investigations in that a genuine failure to recognise a statement as a confession may lead to it being excluded as evidence if it is not reduced to writing in the presence of a magistrate. The distinction would also appear to inhibit investigating officers from recording confessions themselves (Discussion Paper 96 80–81).

The Commission advocated for a return to the common-law position in terms of which the sole inquiry is whether the accused's statement was freely and voluntarily made in the absence of undue influence, because this is where the real protection afforded by section 217 lies.

Another measure of protection afforded the accused is the procedure that our courts follow at a trial-with-a-trial to determine the admissibility of self-incriminatory statements. The procedure is designed to cater to the accused's right to a fair trial and to ensure that questions of admissibility and guilt are distinguished from each other and decided separately (*S v K* 1999 (2) SACR 388 (C) 390). It is trite that, as a general matter, an accused's evidence during a trial-within-a-trial may not be held against her in determining her guilt. This is achieved by ensuring that at a trial-within-a-trial the accused can go into the witness box and testify on the question of the voluntariness of the confession without being exposed to general cross-examination on the issue of guilt (see, for example, *S v De Vries* 1989 (2) SA 228 (A)).

If section 217(1)(*a*) has failed in its purpose to protect the accused, all it seems to have achieved is to saddle magistrates with an unnecessary "extrajudicial" or administrative burden. The South African Law Commission has recommended the abolition of sections 217(1)(*a*) and (*b*) (Discussion Paper 96 83 *et seq*.).

5 The magistrates' courts struggle for independence

In the pre-democratic era, it was common for magistrates to perform administrative functions in addition to their judicial ones. This was because

magistrates were essentially civil servants, and administrative work was the rule rather than the exception (Hoexter "Non-judicial Functions and Activities" 288 292). It is in this *milieu* that sections 217(1)(*a*) and (*b*) of the Act came into being, which indirectly empowered magistrates to take down confessions.

However, even prior to 1994, criticism had been directed at this "vesting of judicial and administrative functions in one person" (Hahlo and Kahn *The Union of South Africa: The Development of its Laws and Constitution* (1960) 274). Constitutional democracy demands a more rigorous and thoughtful approach to the separation of powers and judicial independence.

Even so, in *Van Rooyen v The State* (*supra*) Chaskalson CJ acknowledged that magistrates continued to exercise a number of administrative functions, at the risk of them becoming answerable to the executive to the detriment of the separation of powers (par 79 n78 and 232). The court was, however, quick to point out that there might be reasons why it remained necessary for magistrates to exercise administrative functions, and why this was not "inconsistent with the evolving process of securing institutional independence at all levels of the court system" (par 233).

The court in *Van Rooyen* also stated that magistrates' courts were independent overall, but not all courts needed to be held to "the most rigorous and elaborate conditions of judicial independence" (par 21–27).

Moreover, the court made much of superior courts' powers of judicial review as a buttress against interference by the executive. In other words, it was acceptable for magistrates' courts to have a lesser degree of independence than the High Court and the Constitutional Court, because the superior courts could always be called upon to "remedy undue influence and abuse of power" by the executive branch over magistrates' courts (see Franco and Powell "The meaning of Institutional Independence in *Van Rooyen v The State*" 2004 *SALJ* 572). This seems a rather feeble foundation upon which to continue to tolerate the *status quo*. Also, the argument that the lack of capacity and fear of administrative disruption might lead to a continued degree of subservience of the magistracy to the executive is equally unconvincing (Hoexter "Non-judicial Functions and Activities" 299).

The call from the magistracy for a unified judicial system that places magistrates under the same governance umbrella as that for judges (see Olivier "The Magistracy" in Hoexter and Olivier *The Judiciary in South Africa* 350), will require increased independence for the lower courts. That is because judges are not expected to perform the same kinds of administrative functions as magistrates. They enjoy, on the whole, a greater degree of independence. For example, it would be beyond the pale to expect judges to take down confessions, which is clearly a non-judicial act.

6 Conclusion

The discussion above raises the question of whether the public perception of the independence of magistrates is tarnished by the fact that magistrates can be called by the state to testify for the state at a trial-within-a-trial at which the admissibility of a confession is contested. One can make a

plausible argument that magistrates' testimony at a trial-within-a-trial violates the institutional independence and impartiality of magistrates, because it might create the impression that magistrates routinely act in furtherance of the state's objectives at criminal trials, and, consequently, that there is not sufficient independence between the magistracy and the National Prosecuting Authority.

It would seem that the purpose of section 217(1)(*a*) was to shield the accused against abusive police practices, although, as has been argued, it has failed in this purpose. Even so, the requirement that a confession made to a peace officer must be confirmed before or taken down by a magistrate saddles every magistrate tasked with taking down a confession with a duty to act as a check against the police unduly influencing accused persons or inducing them into making false confessions.

This, in the authors' view, misplaces a duty that should, first and foremost, rest on the police. From the time of the formulation of the so-called "Judges' Rules" in England in the early twentieth century, there has been a consistent practice of laying down guidelines for the interaction between the police and suspects which, from approximately the 1960s, moved unwaveringly in the direction of recognising the legitimacy of police questioning. In this country Judges' Rules were drawn up in 1931 as a code of conduct to guide the police in their interaction with suspects and accused persons. These rules are, however, purely administrative directives without any force of law, and they have largely fallen into disuse and serve no meaningful purpose.

In the United Kingdom, section 66 of the Police and Criminal Evidence Act of 1984 authorises the Secretary of State to issue codes of practice in connection with, *inter alia*, the detention, treatment, questioning, and identification of persons by police officers. The failure to abide by any such code will not render the individual police officer criminally or civilly liable, but evidence obtained in breach of the code may be inadmissible.

In the view of the South African Law Commission, the introduction of similar codes of practice in South Africa would go a long way toward regulating the interaction between suspects and the police and reducing the objection to police questioning suspects (Discussion Paper 96 78). The South African Police Service has compiled a *Policy on the Prevention of Torture and The Treatment of Persons in Custody of the South African Police Service* (07/01/2013). This policy, in the form of instructions, constitutes a detailed code of conduct and provides a clear and comprehensive set of rules of procedure regarding police questioning. Until such time as this policy is incorporated into National Orders and Instructions issued by the Commissioner of Police (which, as far as could be determined, has not yet occurred), it is the responsibility of every station commissioner and other commander to ensure members under their command at all times adhere thereto.

The South African Law Commission has recommended that the policy should be incorporated in regulations made by the Minister of Safety and Security in terms of section 24 of the South African Police Service Act 68 of 1995, which would allow for broader participation in their formulation and amendment. The policy should ensure constitutional compliance by police officers in their dealings with suspects and accused persons.

In short, it is first and foremost the obligation of the South African Police Service to ensure that police officers abide by its policy and instructions regarding the treatment of people in custody. It should not be incumbent on the magistracy to act as a "watchdog" over police practices by being required to engage in the extrajudicial act of taking down confessions first made to police officers.

Not only does the proviso to section 217 not aid the accused, but it might also lead to an erosion of the perception of the independence and impartiality of the magistracy. When magistrates are routinely called by the state to testify on behalf of the state at trials-within-trials, this might create the appearance of a cosy relationship between the magistracy and the executive, to the apparent detriment of the doctrine of separation of powers. It also does not bode well for the judicial independence of magistrates if they routinely have to take the witness box in trials-within-trials and be subject to cross-examination by the accused's attorney. Moreover, in such cases, the presiding magistrate would sit in judgment of the testifying magistrate, and might ultimately be called upon to make a finding regarding the credibility of the testifying magistrate.

With the enactment of the Constitution, there is generally "less anxiety over whether accused persons are afforded sufficient protection against unfair practices by the police" (Zeffertt and Paizes *Evidence* 537). That is because the right to a fair trial is now placed at the centre of our criminal justice system. Our courts have developed and articulated several rules and principles to ensure that confessions are obtained in a manner that does not render the trial unfair or is otherwise detrimental to the administration of justice.

For these reasons, the authors argue that magistrates should no longer be required to take down confessions. The mere fact that magistrates can be called by the state to give testimony about the circumstances under which confessions were made, could create the public perception that magistrates routinely assist the state in furthering its case. The public image of the magistracy might also be seriously impugned if magistrates – in fulfilling an extrajudicial function – are regularly subject to cross-examination by the accused at a trial-within-a-trial, and by the presiding magistrate sitting in judgment over the testifying magistrate.

Moreover, in accordance with the test formulated by Zondo J in the *NSPCA* case, the act of taking down a confession clearly constitutes a non-judicial act, which is neither provided for in the Constitution nor is it closely related to the core function of the judiciary. There is also no compelling reason why the function of taking down a confession should be performed by a member of the judiciary. As such, the separation of powers is offended by the performance of such a function by magistrates, and, in our view, is therefore unconstitutional.

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CASES / VONNISSE

AN ANALYSIS OF THE COMMON PURPOSE DOCTRINE AND RAPE IN SOUTH AFRICA WITH SPECIAL FOCUS ON

Tshabalala v The State [2019] ZACC 48

1 Introduction

The common purpose doctrine, a deviation from the principle of individual criminal responsibility, has its roots in English law and was first introduced into South African law through section 78 of the Native Territories Penal Code Act 24 of 1886:

> "If several persons form a common intention to prosecute any unlawful purpose, and to assist each other therein, each of them is party to every offence committed by any one of them in the prosecution of such common purpose, the commission of which offence was, or ought to have been, known to be a probable consequence of the prosecution of such common purpose."

The doctrine later gained recognition in the common law in the 1923 case of *R v Garnsworthy*, in which the court held as follows:

> "Where two or more persons combine in an undertaking for an illegal purpose, each one of them is liable for anything done by the other or others of the combination, the furtherance of their object, if what was done was what they knew or ought to have known, would be a probable result of their endeavouring to achieve their object." (*R v Garnsworthy* 1923 WLD 17 19)

This definition of the doctrine lay the foundation for the modern-day definition, which holds, as stated by Kemp *et al*, that

> "where two or more people associate together in order to commit a crime, each of them [co-perpetrators] will be liable for the criminal conduct of the other that falls within the scope of their common purpose." (Kemp, Walker, Palmer, Baqwa, Gevers, Leslie, and Steynberg *Criminal Law in South Africa* 2ed (2012) 234)

Thus, reference to the words "ought to have known" and "probable", as used in *R v Garnsworthy* (*supra* 19), which adopted a more objective approach to culpability, have been removed and the courts have developed the doctrine to require intention to commit the unlawful act, whether direct, indirect, or in the form of *dolus eventualis*. Consequently, the scope of the common purpose extends to those criminal consequences that each accused

subjectively foresaw occurring while pursuing their common purpose (Kemp *et al Criminal Law in South Africa* 235). As held in *S v Malinga*,

> "[n]ow the liability of a *socius criminis* is not vicarious but is based on his *mens rea.* The test is whether he foresaw (not merely ought to have foreseen) the possibility that his *socius* would commit the act in question in the prosecution of their common purpose." (*S v Malinga* 1963 (1) SA 692 (A) 694F–G)

Snyman points out that "the conduct of each of them in the execution of that purpose is imputed to the others" (Snyman *Criminal Law* 4ed (2002) 261). As such, it is not necessary to determine precisely which member of the common purpose committed the act in question (Burchell *Principles of Criminal Law* 5ed (2016) 477). Therefore, the causal *nexus* between the conduct of an accused and the criminal consequence is replaced by the principle of imputation provided that the accused formed a prior agreement to commit the crime or actively associated with the conduct of the fellow perpetrators in the group. Therefore, liability based on common purpose will arise in two instances: first, from a prior agreement to commit the crime in terms of which the accused does not need to be present at the scene of the crime, nor have participated in the commission of the crime (Snyman *Criminal Law* 6ed (2014) 260–261); and secondly, through active association. Active association (a wider concept than prior agreement) is evidenced by an accused's positive conduct (at the time of the commission of the crime) to demonstrate such accused's intention of associating with the crime (Kemp *et al Criminal Law in South Africa* 236). Therefore, *mens rea* can never be imputed in terms of the doctrine and each individual accused must possess the necessary intention.

2 The legal framework of rape and common purpose in South Africa

2 1 The definition of rape

Section 3 of the Criminal Law (Sexual Offences and Related Matters) Amendment Act (32 of 2007) provides that any person who unlawfully and intentionally commits an act of sexual penetration with a complainant, without the consent of such complainant, is guilty of the offence of rape. The intention of the accused must, thus, be unlawfully to cause sexual penetration.

2 2 Case law

Although the common purpose doctrine has been the subject of much debate and criticism, its constitutionality was confirmed by the Constitutional Court in *Thebus v S* (2003 (6) SA 505 (CC)):

> "The common purpose does not amount to an arbitrary deprivation of freedom. The doctrine is rationally connected to the legitimate objective of limiting and controlling joint criminal enterprise. It serves vital purposes in our criminal justice system. Absent the rule of common purpose, all but actual perpetrators of a crime and their accomplices will be beyond the reach of our criminal justice system, despite their unlawful and intentional participation in

> the commission of the crime. Such an outcome would not accord with the considerable societal distaste for crimes by common design. Group, organised or collaborative misdeeds strike more harshly at the fabric of society and the rights of victims than crimes perpetrated by individuals … In practice, joint criminal conduct often poses peculiar difficulties of proof of the result of the conduct of each accused, a problem which hardly arises in the case of an individual accused person. Thus, there is no objection to this norm of culpability even though it bypasses the requirement of causation." (*Thebus v S supra* par 40)

The Appellate Division, in *S v Mgedezi* ([1989] 2 All SA 13 (A)), clarified the special requirements for common purpose by active association as follows:

> "In the first place, he must have been present at the scene where the violence was being committed. Secondly, he must have been aware of the assault on the inmates of [the] room … Thirdly, he must have intended to make common cause with those who were actually perpetrating the assault. Fourthly, he must have manifested his sharing of a common purpose with the perpetrators of the assault by himself performing some act of association with the conduct of the others. Fifthly, he must have had the requisite *mens rea*." (*S v Mgedezi supra* par 67)

With regard to the requirement of an act of association on the part of the accused, there is no closed list of the forms of conduct that will be considered sufficient for a positive act of association (Kemp *et al Criminal Law in South Africa* 236). In *S v Safatsa* (1988 (1) SA 868 (A)), also known as the *Sharpeville Six* case, a mob murdered the deputy mayor of the town council of Lekoa by stoning him, dragging him into the street and setting him alight after pouring petrol over him. The court found accused number 4 guilty through active association based on her repeatedly shouting, "*hy skiet op ons, laat ons hom doodmaak* (he is shooting at us, let's kill him)" (*S v Safatsa supra* 892) and then slapping a woman in the face who was protesting the deceased being set alight. Therefore, merely giving moral support to the actual perpetrator has been deemed sufficient by the courts to constitute a positive act of association (Kemp *et al Criminal Law in South Africa* 236).

In *S v Gaseb* (2001 (1) SACR 438 (NSC)), the Namibian Supreme Court referred with approval to Snyman's assertion that

> "the common purpose doctrine cannot be applied to crimes that can be committed only through the instrumentality of a person's own body or part thereof, and not through the instrumentality of another." (*S v Gaseb supra* 452A–B)

The court went on to hold that an accused who has assisted in a gang rape has to decide whether or not to become a perpetrator who will also penetrate the victim (*S v Gaseb supra* 457H–I). Therefore, if an accused merely assists the actual perpetrator by restraining the woman, but without himself having penetrated her, he can only be an accomplice to the rape and not a co-perpetrator. This view was confirmed by the Supreme Court of Appeal in *S v Kimberley* (2005 2 SACR 663 (SCA)), in which it was held that

> "a woman who assists a man to rape another woman or who makes it possible for him to do so, cannot be held to have committed the act of rape." (*S v Kimberley supra* par 12)

In *Phetoe v S* (2018 (1) SACR 593 (SCA)), the Supreme Court of Appeal held that "for criminal liability as an accomplice to be established, there must have been some form of conduct on the part of the appellant that facilitated or assisted or encouraged the commission of the rape" (*Phetoe v S supra* 15). Therefore, the Supreme Court of Appeal went on to hold that the appellant's conduct of laughing and doing nothing to prevent the rapes was not sufficient conduct to justify a conviction as an accomplice to the rape (*Phetoe v S supra* 16) and that "to convict the appellant on the basis of his mere presence is to subvert the principles of participation and liability as an accomplice in our criminal law" (*Phetoe v S supra* 15).

However, the distinction between co-perpetrators and accomplices can become confused because in most cases it is difficult to find that the accused assisted or furthered the commission of the crime without possessing the requisite intention to commit the crime. Kemp *et al* states that one of the few instances in which an accused will become an accomplice, instead of a co-perpetrator, is where the assistance that is rendered during the commission of a crime (such as rape) can only be committed personally (Kemp *et al Criminal Law in South Africa* 249).

In *S v Moses* ([2010] ZANCHC 48), however, the court disagreed with the views expressed in *Gaseb* (*supra*) by stating that

> "the definition for a perpetrator for robbery and rape is the same, whatever means is employed to commit the crime. The distinction is artificial and more perceived than real. The doctrine of common purpose ought to apply to rape cases, and I make the positive statement that it does apply to them." (*S v Moses supra* 21)

Therefore, it is submitted that the personal nature of rape will not negate the blameworthiness of an accused in his or her foresight of the possibility of rape being committed as part of a group's common design.

In *S v Majosi* ([1991] ZASCA 120), the second appellant, together with the four other appellants, robbed a supermarket. One of the appellants decided to bring a firearm. The second appellant merely kept watch outside the supermarket and the other four entered the supermarket and, in the commission of the crime, one of the appellants shot and killed an employee. The second appellant fled and shared in the proceeds of the robbery. The second appellant, who was neither present at the scene of the crime nor handled the firearm, was convicted of murder owing to the fact that "the five appellants hatched the plan and formed the common purpose to rob" (*S v Majosi supra* 8) and they borrowed a firearm that was to be used "in the furtherance of that common purpose should the need arise to do so" (*S v Majosi supra* 9). The second appellant had subjectively foreseen the possibility that the firearm would be used to shoot and kill someone during the commission of the robbery and he had reconciled himself with that possibility.

It therefore needs to be asked how the doctrine can apply to the crime of murder (in which an accused was not present at the crime scene nor handled the weapon used to commit the crime) but not apply to the crime of rape; in both situations, the accused have not personally committed the crime but have subjective foresight of the possibility that the harm may

ensue and nevertheless reconcile themselves and, consequently, actively associate themselves with such harm.

2 3 S v Tshabalala

The constitutional court decision of *S v Tshabalala* ((2019) ZACC 48) is the latest landmark decision regarding the common purpose doctrine that involves the crime of rape. The case is discussed below.

2 3 1 In the High Court

(i) Facts

On 23 November 1999, seven accused stood arraigned for eight charges of common-law rape; various counts of housebreaking with intent to rob and robbery with aggravating circumstances; unlawful possession of a firearm and ammunition in contravention of the Firearms Control Act of 1969; malicious damage to property; assault with intent to do grievous bodily harm and rape (*Tshabalala v The State supra* 5).

On 26 January 2000, judgment was handed down on all seven accused. The convictions of all the accused persons arose from the events that took place during the night of 20 September and in the early morning of 21 September 1999 at Umthambeka section in Thembisa. During the said night, a group of youths went on a rampage, broke into various houses and upon entering each house, they demanded identity documents, cash and covered the victims using blankets. Thereafter, they raped the female victims (*Tshabalala v The State supra* 6).

The victims were robbed of money and other belongings, and the male victims were assaulted, stabbed and sustained injuries in the process. Mr Shabalala (accused number four) and Mr Ntuli (accused number six) were identified at the scene of the violence by witnesses whom the High Court found to be credible. Mr Shabalala was identified in household number eight where an attempted rape took place and was further identified at an outside toilet. Similarly, Mr Ntuli was identified at two locations – household number two and household number six.

(ii) Judgment in the High Court

Mr Shabalala and Mr Ntuli pleaded not guilty to all the charges. However, they were convicted on eight counts of rape based on the doctrine of common purpose. They were sentenced to life imprisonment on the common-law rape offences and additional years of imprisonment on the other counts. The court concluded that the effective term of imprisonment was one of life imprisonment. In determining that the doctrine applied to common-law rape, the High Court evaluated the evidence and found that the group acted as a whole, moving from one home to another at different times, and that the violence was committed in a systematic pattern. In support of its finding, the court held that the fact that blankets were placed over the other members of the homes when the women and children were raped, and that

some members of the group were posted outside as guards, inexorably pointed to one conclusion, that the attacks were not spontaneous but were planned. The High Court reasoned that a common purpose must have been formed before the attacks began and the rapes were executed pursuant to a prior agreement in furtherance of a common purpose (*Tshabalala v The State supra* 10).

Both accused applied for leave to appeal against their convictions and sentences. Both applications for leave to appeal against convictions and sentences to the full bench were dismissed on 15 May 2000. The two accused also petitioned the Supreme Court of Appeal during August 2009 but their application was dismissed. Their Supreme Court of Appeal application was spurred on by a co-accused who appealed his conviction and sentence and was successful (see case of *Phetoe v S* discussed above*)*.

2 3 2 Constitutional Court

The applicants brought an application for leave to appeal on the merits of the case. One of the main issues that the Constitutional Court had to determine was whether an accused can be convicted of common-law rape on the basis of common purpose. This case note focuses on this issue only, given its context.

(i) Applicants' argument

The applicants contended that the doctrine does not apply to the common-law crime of rape because this crime, as defined, required the unlawful insertion of the male genitalia into the female genitalia (*Masiya v Director of Public Prosecution Centre for Applied Legal Studies and Another as Amici Curiae* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827)*.* On the applicants' submissions, it is simply impossible for the doctrine to apply, as by definition, the causal element cannot be imputed to a co-perpetrator. This is referred to as the "instrumentality argument". To support their argument, the applicants relied on Snyman's definition, which suggested that if X rapes a woman while his friend Z assists him by restraining the woman but without himself having intercourse with her, Z is an accomplice to the rape, as opposed to a co-perpetrator. Possible further examples of crimes that cannot be committed through the instrumentality of another are perjury, bigamy and driving a vehicle under the influence of liquor (Snyman *Criminal Law* (2014) 261). This was the main argument delivered on behalf of the applicants.

(ii) Respondent's argument

The respondent contended that there was prior agreement on the part of the group, and that a common purpose must have been formed before the attacks commenced. The respondent submitted that Snyman's views are fallacious when a prior agreement has been proved because the conduct of each accused in the execution of that purpose is imputed to the other. To support this argument, the respondent relied on a case dealing with murder by common purpose and the remarks of Theron J that

> "[t]he operation of the doctrine does not require each participant to know or foresee in detail the exact way in which the unlawful results are brought about. The State is not required to prove the causal connection between the acts of each participant and the consequence, for example, murder." (*Jacobs v S* [2019] ZACC 4 par 70)

In support of this proposition, it relied on the International Criminal Court where, in article 25(3)(a) and (d) of its Statute (Rome Statute of International Criminal Court (1998)) dealing with individual criminal responsibility and common purpose, it provides as follows:

> "In accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person–
>
> (a) commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
>
> ...
>
> (d) in any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either–
>
> (i) be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or
>
> (ii) be made in the knowledge of the intention of the group to commit the crime."

The respondent submitted that the above principles apply with equal force to the doctrine where participation in the common purpose has been proved through prior agreement or conspiracy (*Tshabalala v The State supra* 41).

(iii) The majority Judgment in the Constitutional Court

The court held that the actions of the perpetrators were cavalier and callous towards the victims and perpetuated gender-based violence (*Tshabalala v The State supra* 52). The court further directed that the Snyman approach on which the applicants based their argument was flawed, as it promoted discrimination. In addition, the instrumentality argument was rejected as it sought to exonerate from liability other categories of accused person who may not have committed the deed itself but who contributed towards the commission of the crime by encouraging persons who failed to exclude themselves from the actions of the perpetrators. The instrumentality argument was found to be obsolete as its foundation is embedded in a system of patriarchy where women are treated as mere chattels (*Tshabalala v The State supra* 54). To allow accused persons in similar positions to the applicants and other co-perpetrators to escape liability on the basis of common purpose is unsound, unprincipled and irrational (*Tshabalala v The State supra* 53). With respect to the doctrine of common purpose, it extends to crimes of murder, common assault or assault with intent to do grievous bodily harm and, therefore, it is irrational and arbitrary to make a distinction when a genital organ is used to perpetuate the rape. The constitutional values of equality, dignity, protection of bodily and psychological integrity, and not to be treated in a cruel, inhumane and degrading way should be

afforded to the victims of sexual assault (*Tshabalala v The State supra* 60). In conclusion, the doctrine of common purpose applies to the common-law crime of rape and the applicants were rightly convicted by the High Court (*Tshabalala v The State supra* 66).

(iv) Was it a correct judgment?

Studies show that approximately one out of five South African men have admitted to participating in a gang rape either by penetrating the victim or assisting in the commission of the crime (Jewkes "Gender Inequitable Masculinity and Sexual Entitlement in Rape Perpetration South Africa: Findings of a Cross-Sectional Study" 2011 6(12) *PLoS ONE*). As Vogelman and Lewis point out, "gangs seem to be the exclusive domain of the young males, with women as peripheral yet crucial 'components' of this youth culture" (Vogelman *"*Illusion der Stärke: Jugenbanden, vergewaltigung und kultuur der gewalt in Südafrika*"* 1993 2 *Der Überblick* 39–42). Rape is among the most serious crimes that a person can commit. It is a profound invasion of a victim's privacy and bodily integrity and a drastic infringement of their dignity. It is deeply damaging for the victim, both emotionally and psychologically. Rape is not only a radically anti-social act, but it carries with it the risk of transmission of disease that can be life threatening. More than 25 years into our constitutional democracy, which is underpinned by the Bill of Rights, we are still plagued by the scourge of rape and the abuse of women and children on a daily basis. In order to curb this pandemic, concerted efforts by courts and law enforcement agencies are required. The Constitutional Court has previously recognised that the crime of rape involves the breach of the right to bodily integrity and security of the person, and has recognised the right to be protected from degradation and abuse (*Masiya v Director of Public Prosecutions Pretoria* (*The State*) [2007] ZACC 9 25). Furthermore, judges should adapt the common law to reflect the changing social, moral and economic fabric of the country (*Carmichele v Minister of Safety and Security (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) 36). To continue on the path that the definition of rape is a crime purely about sex is misguided, and the court confirming this will assist in ending the perpetuation of patriarchy and rape culture in our society.

At this juncture, it would be interesting to consider the position regarding the common purpose rule and rape in Germany.

3 Comparative analysis of the German doctrine of common purpose

The concept of common purpose as a separate category of individual criminal responsibility does not exist under German criminal law (Reed and Bohlander *Participation in Crime: Domestic and Comparative Perspectives* (2013) 335). Instead, the German Criminal Code (*Strafgesetzbuch – StGB*) divides the parties to a crime into two distinct groups, namely, principals and accessories. In terms of section 25(2) of the *StGB*, if more than one person commits the offence jointly, each shall be liable as a principal (co-perpetrators). This principle of co-perpetration is referred to as

Mittäterschaft. Co-perpetrators commit an offence jointly based on a common plan (*gemeinsamer Tatplan*), which can extend to a tacit common understanding or can be spontaneous (Hamdorf "The Concept of a Joint Criminal Enterprise and Domestic Modes of Liability for Parties to a Crime" 2007 5(1) *Journal of International Criminal Justice* 212). In addition to the common plan, German courts and scholars require the common plan's cooperatively shared execution (*arbeitsteilige Tatausfuhrung*) (Du Bois-Pedain "Participation in Crime" Legal Studies Research Paper Series 2019 6 *University of Cambridge* 17) in terms of which each co-perpetrator must make a significant, but not necessarily causal, contribution towards the common unlawful goal and its attainment (Krebs *Joint Criminal Enterprise in English and German Law* (doctoral thesis, The University of Oxford) 2015 181).

Previously, two distinct doctrines were applied to distinguish between principals and accessories, namely, the formal-objective theory (which states that one can only be classified as a principal where the person fully or partially perpetrated the crime) and the strictly subjective theory (which holds that the distinction between principals and accessories is determined by the accused's will and motives) (Hamdorf 2007 *Journal of International Criminal Justice* 210) – in other words, whether or not the accused wanted the offence as his or her own (*animus auctoris*) (Bohlander *Principles of German Criminal Law* (*Studies in International and Comparative Criminal Law*) (2009) 162).

Currently, the German doctrine is influenced by Claus Roxin's "control over" theory (*Tatherrschaftslehre*), which includes an amalgamation of the objective and subjective theories. According to Roxin:

> "a person is a perpetrator if he controls the course of events; one who, in contrast, merely stimulates in someone else the decision to act or helps him to do so, but leaves the execution of the attributable act to the other person' is an accomplice. A co-perpetrator under German law is not required to have participated in the *actus reus* of the offence if they have exercised some degree of functional control over the commission of the offence." (Roxin "Crimes as Part of Organised Power Structures" 2011 9 *Journal of International Criminal Justice* 196)

Therefore, German law dispenses with the requirement of personal fulfilment of all the elements of the specific offence and acknowledges that they can be carried out with the help of a coerced human instrument or in cooperation with another perpetrator (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* (doctoral thesis, The University of Oxford) 2010 139). The distinguishing feature between co-perpetrators and accessories is therefore the *control of the act* (Bohlander *Principles of German Criminal Law* 161–162). As long as the accused offers a contribution that has an impact on how the common plan is shaped or enforced, and he also influences the actual mode of commission, then he will be classified as a joint principal (Bohlander *Principles of German Criminal Law* 162). Thus, the Federal Court of Justice (*Bundesgerichtshof – BGH*), Germany's highest court of civil and criminal jurisdiction, now decides whether the accused possesses *animus auctoris* based on the scope of their objective influence and control over the offence as demonstrated by the evidence, and makes its determination of who is a principal by inferring the

necessary *mens rea* from the objective evidence (Bohlander *Principles of German Criminal Law* 163). Each of the participants must view their actions as furthering those of the others and not merely to assist or help another in the execution of that other's plan (Bohlander *Principles of German Criminal Law* 163). Even a small cooperation in the preparation stage may lead to liability as a co-perpetrator if it is carried out with the will of a perpetrator (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 151).

In terms of section 25(2) of the *StGB*, the co-perpetrators' individual contributions are added up, and the resulting crime is, in full, attributed to each participant insofar as their criminal intent overlaps (Krebs *Joint Criminal Enterprise in English and German Law* 184). Therefore, when determining the liability of joint principals, "the factual contributions by each of them to the commission of the offence are attributed to all others without the need to establish the commission of a full offence as such by one of them" (Bohlander *Principles of German Criminal Law* (*Studies in International and Comparative Criminal Law*) (2009) 163). The main principle of the *Mittäterschaft,* as discussed above, is the attribution of blameworthiness to all the participants of the common plan as long as their actions have contributed to the furtherance of the commission of offence (Bohlander *Principles of German Criminal Law* (*Studies in International and Comparative Criminal Law*) 163). In this regard, German law, like South African law, does not insist on a contribution by each of the co-perpetrators to the *actus reus* of the offence but it is sufficient that he or she played a role in the planning, preparation, or completion of the resultant crime. Therefore, "what is essential is mutual consent over the joint realisation of the act at the time or even before the beginning of the act" (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 153). This agreement does not need to be explicit but can also take place by implication. Deviations from the common plan that are within the range of the acts with which one must normally reckon do not count as falling outside the common plan and this will be established through foresight of the deviant course of action (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 154). Furthermore, a deviation from the original common plan during the joint executing action can also be introduced into the agreement by a mutual understanding (Jain *Theorising the Doctrine of Joint Criminal Enterprise in International Criminal Law* 154).

In *BGH 1 StR 93/02 (2002),* the Federal Court of Justice pointed out that the decisive factor in determining the responsibility of the participants to a crime is determined by their indifference to the conduct carried out by other participants – in other words, a conscious disregard of the consequences of unlawful conduct:

> "edoch werden Handlungen eines anderen Tatbeteiligten, mit denen nach den Umständen des Falles gerechnet werden muss, vom Willen des Mittäters umfasst, auch wenn er sie sich nicht besonders vorgestellt hat; ebenso ist er für jede Ausführungsart einer von ihm gebilligten Straftat verantwortlich, wenn ihm die Handlungsweise seines Tatgenossen gleichgültig ist (however, actions of another party involved, which must be expected in the circumstances of the case, are covered by the will of the accomplice, even if he has not specifically imagined them; Likewise, he is responsible for every

> type of execution of a crime he has approved if he is indifferent to the conduct of his comrade)."

Section 77(2) of the *StGB*, which deals with rape, conveys the seriousness of rape committed in a group as it states that "an especially serious case typically occurs if the offence is committed jointly by more than one person".

Considering this, German law advocates for the prosecution of co-perpetrators despite them not being 'directly' involved in the crime if they contributed to the furtherance of the commission of the crime and where they have accepted the crime through their indifference and, thus, associated themselves with the conduct of their co-perpetrators. In this way, "joint perpetration is a doctrine of mutual agency/act-attribution" (Ambos, Duff, Roberts, Weigend and Heinze *Core Concepts in Criminal Law and Criminal Justice, Volume 1: Anglo-German Dialogues* (2020) 115). Given the evolution of the common purpose doctrine as depicted above in German law, South Africa can now follow suit with its landmark judgment of *Tshabalala*, as the case is progressive and in line with foreign law. It has correctly been stated that "looking through the eyes of foreign law enables us better to understand our own, so looking through the eyes of foreign disciplines should similarly help us better to understand our own discipline" (Michaels "The Functional Method of Comparative Law" in Reimann and Zimmermann (eds) *The Oxford Handbook of Comparative Law* (2008) 339 342). Therefore, co-perpetrators should correctly be responsible for the execution of the crime of rape that they have approved where they are indifferent to the conduct of their co-perpetrator.

4 Conclusion

This note seeks to provide the reader with a background to the common purpose doctrine and, thereafter, to analyse the groundbreaking Constitutional Court decision in *Tshabalala*. The judgment is discussed in conjunction with a comparison to German law. The judgment can be hailed as a triumph for South Africans and, more especially, the unfortunate victims of crimes of rape and sexual assault, in that, as discussed earlier, the inconsistent instrumentality approach has been rejected. The approach inhibited the State's ability to prevent and combat gender-based violence in accordance with constitutional and international obligations (*Tshabalala v The State supra* 43). It has correctly been stated that "a theory of participation in crime must engage with the social reality of participatory conduct, in that it must capture the social significance and reflect the social meaning of the various contributory acts" (Ambos *et al Core Concepts in Criminal Law and Criminal Justice* 122). Therefore, the extension of the common purpose doctrine to the crime of rape serves a legitimate societal function in that rape constitutes a "humiliating, degrading and brutal invasion of the privacy, the dignity and the person of the victim" (*S v Chapman* 1997 (2) SACR 3 (SCA) 5). Rape is considered a serious crime and it has been acknowledged by the Constitutional Court that is a significant societal scourge (*Thebus v S* 2003 (6) SA 505 (CC) 34). Therefore, the inclusion of rape in the common-purpose doctrine is in line with section 39(2) of the Constitution, which holds that the common law must be adapted so that it develops in line with the objective normative value system found in the

Constitution. The Constitutional Court correctly emphasised that the object and purpose of the doctrine is to remove an unfair result that offends the legal convictions of the community by eliminating the element of causation from criminal liability and instead imputing the *actus reus* that constituted the rape to all co-perpetrators. The constitutional values pertaining to dignity, privacy, and integrity must be afforded to all victims of such crimes. The judgment has proved that the South African judiciary is committed to developing and implementing progressive and vigorous legal principles that champion the fight against gender-based violence.

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